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Deliverable D.T1.3.1 IPRs Guidelines

**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**

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Chapter I

Intellectual Property Rights on Intangible Cultural Heritage

1. Introduction

Intellectual property rights (IPRs) are legal rights that provide monopoly powers over intellectual activities that have a tangible expression or output in the industrial, scientific, literary and artistic fields. IPRs include copyright and related rights, patents, confidential information (trade secrets), industrial designs (sometimes known as ‘design patents’), individual or collective trade marks and certification marks, geographical indications (GIs), protected designation of origin (PDO), traditional specialty guaranteed (TSG) and database rights.

Clearly IPRs are relevant to intangible cultural heritage (ICH). ICH practice and transmission is grounded on intellectual activity, such as ideas, skills, knowledge and know-how, which is expressed in tangible outputs. Thus, IPRs may be associated with tangible outputs or expressions of ICH practice, such as traditional musical performances recorded on video, traditionally-made products, or descriptions of traditional medicines or healing processes. IPRs associated to ICH include those that don’t require any individualization, that don’t require novelty in the subject-matter to be protected, that don’t impose its physical fixation save for those documenting the heritage at stake, that don’t pose any local conditions, that don’t expire overtime (or may be renewed) and therefore don’t require recentness. These IPRs are mainly collective or certification trademarks and GIs.

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 the following. 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. 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. 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.

IPRs whose functions include certifying the adoption of a traditional production method, rather than any link with a certain territory, include the following. 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. 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.

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 help 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 the communities. Several international cases on the adoption of IPRs as ICH safeguarding measures already exist. These cases relate also to elements inscribed in the UNESCO Lists of the intangible cultural heritage of humanities.

IPRs on Alpine Food Heritage already exist as will be highlighted in the attachment 1 to the document called “Guidelines for Community rights and ICH intellectual property”. These IPRs constitute a relevant safeguarding and protective measure of the heritage at stake, preventing and reducing the risk of its illegal exploitation and favouring its sustainable commercialisation and development. This adoption of IPRs on Alpine Food Heritage is in line with the UNESCO Convention on the safeguarding of intangible cultural heritage.

Yet, adoption of IPRs on ICH presents not only opportunities but also challenges, which will be examined in the aforementioned Guidelines for Community rights and ICH intellectual property. Thus, the development of a safeguarding plan with a comprehensive IP heritage strategy for the Alpine area is necessary, as will be highlighted in the aforementioned Guidelines. 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 comprehensively framed will integrate intangible heritage management with the sustainable social and economic development of Alpine Food Heritage.

In this framework, the following pages will examine intellectual property rights relevant to protect community-held traditional knowledge (chapter I) and several related international case studies presented as best practices (chapter II). These two chapters shall be read together with the aforementioned Guidelines for Community rights and ICH intellectual property. These Guidelines provide relevant target groups with an analysis of the importance of adopting IPRs as strategic measures fostering sustainable development of Alpine Food Heritage (chapter I), and with recommendations for a sustainable strategy of IPRs adoption on Alpine Food Heritage (chapter II).

2. Conventional IPRs

Intellectual property rights (IPRs) are legal rights that provide monopoly powers over intellectual activities that have a tangible expression or output in the industrial, scientific, literary and artistic fields. Conventional IPRs include copyright and related rights, patents, confidential information (trade secrets), industrial designs (sometimes known as ‘design patents’), individual or collective trade marks and certification marks, geographical indications (GIs), protected designation of origin (PDO), traditional specialty guaranteed (TSG) and database rights.

In addition to conventional IPRs protection, unfair competition actions also offer additional remedies against infringement of IPRs. Unfair competition involves deceptive, dishonest or fraudulent behaviour in trade and is prohibited by law. Unfair competition encompasses a variety of doctrines which offer a range of causes of actions, usually arising from a tortious act. These include, inter alia, actions against misappropriation of another trader’s name, trade dress or trade secrets, misleading or deceptive conduct and the publication of false and defamatory representations. From the trader’s perspective, unfair competition law seeks to safeguard the investment that traders put into their businesses including the time, effort and finances spent on developing unique brands and products. Furthermore, the law also seeks to protect the goodwill that traders build with consumers over time through their brand and serves as a deterrent against appropriation by others, particularly competitors. From the consumer’s perspective, the law wants to encourage, and allow, consumers to rely on a trader’s name and reputation in order to distinguish between competing goods or services. Moreover, by providing additional avenues for the protection of intellectual property, this incentivises businesses to improve, and as a result of increased competition in the market, consumers are presented with more and better options.

Conventional IPRs aim to reward creators by giving them a limited monopoly over the commercial exploitation of their intellectual works (patrimonial rights) and by ensuring they are acknowledged as creators of the works (moral rights). Furthermore, IPRs aim to promote creation and innovation so as to contribute to the economic and social development of society as a whole. These rights are usually recognized in the first instance as relating, and therefore granted, to individual creators or companies that own their intellectual works. Nevertheless, patrimonial IPRs can then be circulated through licensing or assignment to companies or other individuals.

IPRs are proprietary rights. A creator or inventor has proprietary rights over his intellectual creations just as a house owner has proprietary rights over his property. But unlike proprietary rights over tangible property, IPRs do not provide rights over the physical objects or works themselves, instead IPRs protect the intellectual creativity behind them. Thus, artists may sell their paintings or books but still retain ownership of copyright in their artistic creations, such as the right to sell copies of the works to others. Likewise, the purchaser of a product comprised of a patented invention does not have the right to manufacture and re-sell similar products himself. If he does so, he is infringing the patent.

In addition, just as a house owner may sell or rent his property so that his proprietary rights over the property circulate, an IPR owner can also assign or license his proprietary rights over his intellectual creations. In fact, IPRs are circulated in a similar manner through assignment or license agreements corresponding to sale or rental contracts for tangible assets, respectively. Particularly in relation to license agreements, these can grant permission to a third-party licensee to use the protected intellectual creation, in whole or in part, for the whole or part of the territories for which the IPRs have been granted. A licence may be exclusive or non-exclusive. In return for use of the intellectual creation, the licensee is required to pay a royalty to the proprietor.

When intellectual property is used by those without permission, IPRs are infringed. For example, this can occur when a third party publishes a copyrighted book, exploits a patent or uses a trade mark without having the right to do so. In these situations, the rights owner can take legal action against the infringers, by suing them in court. This is called enforcement of IPRs. A successful action in court can result in infringers being prevented from continuing their infringement, or paying damages (compensation).

As IPRs are territorial they only provide protection in the country in which they are registered and are therefore typically enforced country by country. There is no international instrument (law, agreement, treaty, etc.) protecting intellectual property of all kinds in every single country. Countries make their own laws about intellectual property protection at the national level, usually regulating copyright, trade marks, industrial designs, patents and other fields of intellectual property through separate legal frameworks. IPRs are usually granted to protect intellectual creations within the country (and sometimes the region) where they are granted.

There are nonetheless a number of international instruments that set minimum standards for national laws and regulate some aspects of IPRs protection internationally. Therefore, substantive international private law is far advanced in terms of international harmonization. In addition, intergovernmental organizations, composed of member States, also serve to centralize all or part of the administrative procedures necessary for the granting of certain IPRs. Yet those procedures typically only give rise to a portfolio of national or regional IPRs enforceable as territorial rights.

Among the international treaties harmonizing substantive IPRs are the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994, 1869 UNTS 299, and the Anti-Counterfeiting Trade Agreement (ACTA) of 15 November 2010 (see text

in Proposal for a Council Decision on the conclusion of the Agreement on 24 June 2011, COM(2011) 380 final). These treaties strongly emphasize the need to effectively enforce IPRs. However, misappropriation typically occurs in countries other than the State of origin of the intellectual creations and is therefore of a transnational nature. Even though enforcement of IPRs across national borders is crucial for their protection, the foregoing international IPRs instruments focus purely on domestic issues, ignoring transnational disputes.

Different kinds of rights are granted or recognized to protect different kinds of intellectual creations.

3. Continued. Copyright and neighbouring rights

Copyright is regulated at the international level by the Berne Convention for the Protection of Literary and Artistic Works ('Berne Convention'), the Universal Copyright Convention (UCC) and the TRIPS Agreement. Generally, copyright is territorially limited because copyright protection depends on the copyright laws of each State jurisdiction since an 'international copyright' doesn't exist. Although, copyright owners in the contracting member States of the Berne Convention and the UCC do possess additional rights in foreign jurisdictions. For example, practitioners or authors of works, such as copyrighted songs, originating in a country that has acceded to the Berne Convention, are likewise entitled to protection against copyright infringement of their works in a foreign jurisdiction that is also a member of the Berne Union.

The rights of authors in their literary and artistic works are protected through copyright (Art. 1 of the Berne Convention). This includes every production in the literary, scientific and artistic domains, and in whatever mode or form of expression (Art. 2 of the Berne Convention). Moreover, countries generally give the same copyright protection to works that are created in their own and other countries because of the various international agreements.

In order to be protected by copyright, intellectual creations must be expressed and communicated to the public, by audio or video recordings, through paper or in any other fixed format. It cannot be confined to the level of mere ideas. In addition, creative works have to be original. Copyright gives creators of original literary, artistic and scientific works the right to control or prevent use of their works by others including the public display, copying, distribution, translation and adaptation of such works. Copyright is an exclusive right held by authors and encompasses economic rights, namely all rights with an economic value associated therewith such as, inter alia, the right to publication, reproduction, distribution, and broadcasting. The duration of copyright lasts for the life of the author plus 50 years (70 years in Italy). All or part of these rights can be transferred to individuals and bodies such as publishers, editors and broadcasters (Art. 7 of the Berne Convention). Copyright also includes moral rights in civil law countries. These rights are held by the author and cannot be transferred (Art. 6bis of the Berne Convention). Moral rights consist of the right to claim authorship of a work and the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, a work which would be prejudicial to the author's honour or reputation.

Copyright covers a wide range of works including individual works that are never published as well as works created for mass communication. Copyright subsists in a work so no registration is required to possess copyright rights. Although, in order to easily prove the unauthorized use of a work, registration is required as evidence of the existence of the copyright in some jurisdictions. In other systems, a work can be voluntarily registered (for free or a minimal fee), which provides a verifiable record of the date and content of a work.

Related rights (or neighboring rights) can be claimed by those who assist authors or creators to communicate their message and to disseminate their works to the public, such as performing artists, audio-visual producers and broadcasting organizations. As such, performances may be protected by copyright law in this way. For example, those who document intellectual creations through audio-visual or documentary means, amongst others, hold the copyright over that documentation and can therefore control its distribution and use, unless they have assigned such right to someone else. The relevant legal instruments include the WIPO Performances and Phonograms Treaty (1996) and the Beijing Treaty on Audiovisual Performances (2012), as well as the Berne Convention (1886) which provides a mechanism for the international protection of unpublished and anonymous works, including traditional cultural expressions.

Whilst it may be possible for individuals to manage their own copyrights and related rights, in practice there are difficulties associated with copyright management, particularly in relation to certain types of use. For example, in the context of mass and/or international use, authors cannot practically negotiate licenses and remuneration with each broadcasting organisation that wishes to use their work. In the same way, a broadcasting organisation cannot practically contact every author to seek permission for the use of each copyrighted work. These difficulties prompted the establishment of a collective management system soon after the enactment of the first national copyright laws. In this system, collective management organisations (CMOs) act in the interests, and on behalf, of copyright owners by monitoring the use of their works, negotiating and granting licenses, and collecting and distributing remuneration. In this way, CMOs promote the formation of links between right holders and users, thereby facilitating the exploitation of works. CMOs can also participate in outreach and awareness-raising activities, and assist in the enforcement of rights by helping right holders commence legal action in response to alleged infringements.

CMOs typically manage the right of public performance, the right of broadcasting, mechanical reproduction rights in relation to musical works, performing rights in relation to dramatic works, the right of reprographic reproduction of literary and musical works, and related rights. For example, in order to perform an opera, this generally requires consent from the relevant CMO. These organisations are particularly prominent in the field of musical and literary works because of the increased practical difficulties involved in the management of these types of rights, given that they can involve a large number of dispersed users. In relation to musical works, collective management involves documentation, licensing and distribution, which are said to form the foundations for the enforcement of rights of broadcasting and public performance. By contrast, in relation to dramatic works, CMOs generally act as agents representing the authors, who often personally participate in licensing negotiations themselves.

All copyright owners, including authors, writers, musicians and performers, can become members of, and thereby mandate, a CMO to act on their behalf by providing the CMO with personal information and declaring that they have created the relevant works. Works that are declared by the members of a CMO become known as the 'national' or 'local' repertoire.

4. Continued. Patents, industrial designs

At the international level, the Paris Convention for the Protection of Industrial Property (Paris Convention) of 20 March 1883, and as last amended on 28 September 1979, regulates patents. In relation to the EU, patents are regulated by the Convention on the Grant of European Patents (EPC) of 5 October 1973.

Provided that they are new, involve an inventive step and are susceptible of industrial application, patents may be granted for inventions in any field of technology (Art. 52 of the EPC). An

invention shall be considered new if it does not form part of the state of the art (Art. 54(1) of the EPC). The state of the art comprises everything made available to the public by any means before the filing date of the patent application, including through written or oral description, or by use. Having regard to the state of the art, if it is not obvious to a person skilled in the art then an invention shall be considered to involve an inventive step (Art. 56 of the EPC). If an invention can be made or used in any kind of industry including agriculture, it shall be considered susceptible of industrial application (Art. 57 of the EPC). Furthermore, the subject-matter of a patent could be both a product or a process for manufacturing or using a product (Art. 63 of the EPC). In the case of patents of processes, the protection is extended to products which result from such processes.

Whilst an entire process can be new, sometimes it may still be considered as lacking an inventive step. This can occur, for instance, when a process involves a series of consistent and efficient operations but the operations are already known (as clearly indicated by research on the internet and on patent-related data bases). In this case, the entire process will be perceived as an obvious sum of operations already known to the public, therefore lacking the requisite inventive step. Despite this, it may still be possible to patent just a single phase within the process. To this purpose, it would be necessary to evaluate if the single phase uses variations or methods that are not the standard. In such instance, the single phrase could be characterised as original, specific and proprietary of the technology, and therefore inventive.

Patents can thus only be granted in respect to inventions containing new subject matter, that is, subject matter not already disclosed or made public either by written or oral means, or through use in public. In most countries, patents are only granted if the invention has never been disclosed or used anywhere in the world. The meaning of 'disclosure' is quite broad in this context and in most jurisdictions it involves sharing information with another person who is free to disclose the subject matter to others. Therefore, traditional knowledge that has already been disclosed to the public, for example, in academic texts or databases, cannot be patented despite the community in which the traditional knowledge originates wishing it to be kept secret. If the traditional knowledge has not been disclosed, the bearers of that knowledge may patent it themselves. Given that disclosure is one of the core rationales of the patent system, patenting this traditional knowledge will therefore require disclosure of the secret traditional knowledge. If the holders do not wish to disclose their secret traditional knowledge, the law of confidentiality or trade secrets can assist in protecting it against disclosure. Alternatively, bearers of traditional knowledge can oppose a rival patent application by revealing sufficient information to the patent office which shows that the invention being claimed is not new. This can be achieved through defensive protection which simply involves preventing another patent being filed and does not require the traditional knowledge holders to file their own patent. For example, a patent application was made in the United States for the use of turmeric in wound healing by administering a given amount of turmeric powder to the wound. The patent applicants had acknowledged the known use of turmeric in traditional medicine for the treatment of various sprains and inflammatory conditions. The patent application was examined, and subsequently granted, because at the time of application the claimed invention was considered novel on the basis of the information then available to the examining authority. However, given that this method of wound healing had already been described in ancient Sanskrit texts and other documentation, the patent was later challenged and revoked.

Patent registration confers exclusive rights on the proprietor. The proprietor is therefore entitled to prevent all third parties from using and commercially exploiting the patented invention in the territory of registration without consent, and to patent the same invention in any territory including territories where the patent is not registered and therefore not protected. The duration of patent protection is 20 years from the filing date of the application and is not renewable. Instead, in

exchange for protection for the duration of the patent, patent owners provide detailed information relating to the industrial process or product in the patent application. This renders such information available to third parties, even competitors, which entail risks that should be carefully examined when designing the claims and scope of a patent application.

A patent is an official (government-issued) document giving inventors (or their successor in title) the right to prevent unauthorized exploitation (e.g. manufacture, use, sale, importation) of their invention. The protection conferred by the patent is limited in time (as discussed above), and only relates to a specific country or region. If patentees wish to market their inventions or wish to prevent others marketing their inventions, patent applications will usually need to be made in each relevant country or region. Applications can be made for either a national or European patent. In terms of national patents, every nation has a designated office responsible for the registration of IPRs (in Italy it is the UIBM in Rome). The national registration of a patent does entail limited costs. In addition, whilst national patent registration in one State prevents third parties from patenting the same invention in any other State, the patent would only be protected in the specific State in which registration was granted. National patents would not guarantee any protection against its use, exploitation or manufacture by third parties abroad.

The competent authority overseeing regional patents such as the European patent is the European Patent Office (EPO) in Munich, The Hague and Berlin. There are multiple advantages to this patent including a single application in one language covering some or all of the 28 EU Member States and other States that are part of the EPC including Switzerland for instance, and the payment of one set of fees. Despite the perceived extensive coverage of a European patent, it does not create a unified registration (as is the case under the European Union trade mark system). Rather, a European patent registration through the EPO merely creates a bundle of national rights that can be centrally administered by the EPO. National laws still remain key to dealing with any legal relationship arising out of a European patent.

Discussions continue to be made regarding a Unitary Patent, which will be a “European patent with unitary effect”. Under this system, a request can be made to give unitary effect to a European patent granted by the EPO under the rules and procedures of the EPC. A Unitary Patent would have effect in all territories of EU member States participating in the Unitary Patent scheme (operating in a similar manner to the EU trade mark system). After grant of the European patent – but no later than one month after patent registration is published in the European Patent Bulletin – the patentee would have the new option to file a request for unitary effect with the EPO in order to obtain a Unitary Patent.

There are a variety of costs associated with the different stages of the patent process. The documentation required for a patent application, including a description, claims, drawings and an abstract, must be prepared by a patent attorney specialising in the field of the invention. In addition, costs may arise in relation to opposition proceedings. An opposition to a patent registration can be filed within nine months from the date of publication, if (a) the subject-matter of the patent is not patentable, (b) the patent does not disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art, or (c) the subject-matter of the patent extends beyond the content of the application as filed (Arts. 99 and 100 of the EPC). The opposition is then examined by the competent office in which the patent application was filed and the opposing parties are invited to file observations, as often as necessary, on communications received from the other parties or issued by itself (Art. 101 EPC). Each party to an opposition proceeding is to bear its own costs unless the competent office orders a different apportionment of costs for reasons of equity (Art. 104 of the EPC). Moreover, renewal fees are required to be paid for the patent application. Calculated from the application filing date, these renewal fees are due in the third year and each subsequent year (Art. 86 EPC).

Notwithstanding the fees, some countries grant tax relief in relation to patents. For instance, in Italy, under the Italian law no. 190 of 23 December 2014 on the Patent Box regime, together with the tax authority guidance (or Circolare) no. 11/E of 7 April 2016, companies incorporated under Italian law or having their permanent establishment in Italy may receive tax relief on 50% of the income generated from patents applied for or registered in Italy. In order to obtain the tax benefit, for example, it would be sufficient to demonstrate that the patent application was filed by the end of a given year. This would allow the applicant to benefit from the Patent Box regime for income generated in that same given year.

The external appearance of independently created functional items that are new or original are protected by industrial design law. 'New' generally means that no identical or very similar designs have been made 'available to the public' (e.g. sold or displayed) before the registration or priority date. 'Original', on the other hand, means that the design must be different from known designs or combinations of known design features, although this difference does not have to be substantial. In some cases, design rights automatically subsist at creation, whilst in other cases they require registration. The duration of design protection is at least 10 years, and confers exclusive rights on the owner of the design to prevent unauthorized third parties from reproducing, selling or importing articles which embody the same or similar designs.

5. Continued. Know-how, trade secrets and databases

Know-how and trade secrets are IPRs regulated by Art. 39 of the TRIPS Agreement at the international level and by Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure at the EU level. Know-how is an unpatented asset consisting of practical knowledge derived from experience. Know-how and other confidential information are considered trade secrets if they: (a) are secret in the sense that, as a body of knowledge or as discrete information regarding the precise configuration and assembly of its component parts, they are not generally known among, or readily accessible to, persons within the circles that normally deal with information of the relevant kind, (b) have commercial value because they are secret, and (c) have been subject to reasonable steps to keep them secret, under the circumstances, by the person lawfully in control of the information (Art. 39 TRIPS Agreement; Art. 2(1) Directive (EU) 2016/943). Know-how and other trade secrets are protected through the concrete activities and measures undertaken by the holder of the information to maintain and guarantee their secrecy rather than through any registration process. By successfully preserving the secrecy of the know-how and other trade secrets, the holder of such information will have an economic advantage against his competitors. Measures to maintain the secrecy of know-how can include labelling the information as confidential or proprietary in order to mark it as confidential. In this way, those who gain access to information marked in such a manner must keep the information a secret because they are aware of its status. Non-disclosure agreements ('NDA') can also be signed by all parties to a contact dealing with secret information. Furthermore, distribution can be restricted through, for example, the use of coloured paper to make copying more difficult, or the documentation can indicate that it is not to be copied, printed or forwarded. Other measures to maintain secrecy include the use of keys and passwords to protect data against outside accessed or encryption of data on mobile devices. Moreover, access to locations where secret information is kept can be restricted.

Know-how may enjoy the benefits of tax relief in some countries. For instance, in Italy, under the abovementioned Italian law no. 190 of 23 December 2014 on the Patent Box regime, together with the tax authority guidance (or Circolare) no. 11/E of 7 April 2016, companies incorporated under Italian law or have their permanent establishment in Italy, who can prove their trade secrets to the Italian

revenue agency, receive tax relief on 50% of the income generated from the relevant patent. Again, however, these companies must demonstrate that the information: (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question, (b) has commercial value because it is secret, and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. Information subject to potential protection includes technical information such as technical documentation, unpublished prototypes and non-patentable inventions, formulas, instructions, coded procedures, designs of plans and processes for product processing. It also includes commercial information such as customer data, marketing and sales concepts, business plans, business practices and strategies, internal cost structures, pricing information, supplier data, and ideas for product names, and administrative information such as documentation concerning the quality certification UNI EN ISO 9001, and information and procedures relevant to the company's internal administration. Moreover, the information has to be subject to adequate measures to keep it secret including through the use of passwords, closed archives containing documents, confidentiality clauses, contractual clauses that make the will of the information holder to keep the information secret known to employees, indication of secrecy on documents, document distribution restrictions, internal monitoring, internal circulars, and protocols for maintaining secrecy.

In addition, a new category of IPRs has been introduced to protect databases in certain legal systems. In the EU, for instance, Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases defines a database as a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means (Art. 1(2) Directive 96/9/EC). Protection of databases covers the selection or arrangement of the contents of the database rather than the specific content of the database itself (Art. 3 Directive 96/9/EC) and prevents the extraction and/or re-utilisation of the whole or substantial part of the database (Art. 7(1) Directive 96/9/EC). The duration of database rights is 15 years from the date the database is created.

6. Continued. Individual, collective, certification trade marks

At the international level, trade marks are regulated by the Paris Convention, as last amended on 28 September 1979, and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks (Madrid Protocol) adopted in Madrid on 27 June 1989, as amended on 3 October 2006 and 12 November 2007. At the EU level, they are regulated by Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark.

An individual trade mark is any sign that distinguishes the goods or services of one undertaking from those of other undertakings (Art. 4 (a) Regulation (EU) 2017/1001). Signs can consist of a wide range of expressions including words, designs, letters, numerals, colours, the shape or packaging of goods, or sounds. Furthermore, these signs must be capable of being represented in a manner which enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietor (Art. 4 (b) Regulation (EU) 2017/1001).

If a trade mark is devoid of any distinctive character it will be denied registration (Art. 7 (1)(b) Regulation (EU) 2017/1001). Therefore, a sign typically cannot serve, in trade, to designate the kind (e.g. 'apple' for apples), quality, quantity, intended purpose, value, geographical origin or the time of production of the goods or rendering of the services, or other characteristics of the goods or services in order to be a valid trade mark (Art. 7 (1) (c) Regulation (EU) 2017/1001). Marks are generally denied

registration only if 'they are devoid of any distinctive character' or if 'they are contrary to morality or public order and, in particular, of such a nature as to deceive the public'. Marks that are refused registration for non-distinctiveness include those that simply describe the goods, e.g. 'pen' for pens. Those marks that better indicate the origin of the goods are distinctive and may be registered, e.g. 'apple' for computers. Marks that wrongly imply that goods or services originate from a specific group or area, or are made in a specific way, when they are not may be refused registration for being deceptive trade marks. Registration of trade marks can be by individuals or companies for a specific country or region, and for specific goods and services. As a condition for registration most countries require the use of a trade mark in the course of trade. Unless trade mark owners have registered (or started using) their own mark first, they cannot prevent other people using confusingly similar marks for similar goods or services in that territory.

Trade mark registration confers on the proprietor exclusive rights therein. The registered trade mark owner is entitled to prevent all third parties who do not have consent from using, in the course of trade and in the same territory, any identical or similar sign in relation to identical or similar goods or services if there exists a likelihood of confusion on the part of the public between the signs (Art. 8 Regulation (EU) 2017/1001).

The duration of trade mark protection is 10 years from the date of filing the application. It can then be renewed every 10 years without any time limitation.

A trade mark can either be registered nationally, in the EU or internationally. Typically, the administrative office responsible for the registration of IPRs is the competent authority responsible for national trade mark registration. For example, in Italy it is the Ufficio Italiano Brevetti e Marchi (UIBM) in Rome. The cost of national registration is usually limited. However, national trade mark registration only provides protection in the country of registration, and does not have value and would not guarantee any prior right or protection against identical or similar marks registered or used by third parties abroad.

The competent authority responsible for EU trade marks is the European Union Intellectual Property Office ('EUIPO') in Alicante, Spain. In the case of a EU trade mark, through a single registration it is protected in all 28 EU member States. Furthermore, protection will automatically extend to all new member States. The EU trade mark system creates a unified IPR as opposed to a bundle of national IP rights, as is the case for European patents. Unitary EU trade marks, like national trade marks, can then be licensed to third parties for some or all of the registered goods or services and for the whole or part of the territory of registration (Art. 25 Regulation (EU) 2017/1001). A licence may be exclusive or non-exclusive. A licensee is required to pay royalties to the trade mark owner in return for use of the trade mark.

EU trade mark registration costs are not particularly high. However, they are higher than those associated with the registration of a national trade mark. Whilst a EU trade mark does not have to be actively used in all 28 EU countries it must be used in more than one member State. Given the unitary nature of the EU trade mark system there are risks associated with EU marks. A EU trade mark will be declared invalid throughout the EU if the trade mark is found to be invalid in any single EU member State because, for example, third parties have prior rights which allow for the commencement of opposition or invalidity proceedings. In addition, there is a greater risk of opposition against a EU mark given that the trade mark application is visible to other traders in all 28 countries. In fact, an opposition may be filed by proprietors of earlier IPRs, as well as licensees authorised by the proprietors of those rights, against a trade mark application that is identical or similar within three months from the date of publication (Art. 46 Regulation (EU) 2017/1001). The opposition is examined by a competent authority, namely a national trade mark office, the EUIPO or the International Bureau of the World

Intellectual Property Organization (WIPO), depending on the territory in which the trade mark application was filed. The trade mark office then invites the relevant parties to file observations, as often as necessary, on communications submitted by the other parties or by itself (Art. 47 (1) Regulation (EU) 2017/1001).

The competent authority responsible for international trade marks is WIPO in Geneva. The Madrid system, which is a centrally administered system for obtaining a bundle of trade mark rights in separate jurisdictions, governs international trade mark registrations. Whilst registration through the Madrid system creates a bundle of national rights through a single international registration that is administered centrally by WIPO's International Bureau, it does not create a unified IPR like the EU trade mark system. Moreover, an international registration is based on, and presupposes, a prior registration of either a national or EU trade mark, which is subsequently extended to States selected in the single WIPO application. The advantages of international registration are that a proprietor can apply for trade mark protection in multiple territories through a single application in one language by selecting single EU or extra EU States (e.g. Switzerland) and by paying only one set of fees. In addition, unlike the EU trade mark system, if an international trade mark is found to be invalid in one State this does not render it invalid in all other States in which it is registered. Given the simple yet broad reach of an international registration, it generally does cost more than national and EU trade marks. Before filing a trade mark application, in order to ensure that the registration offices will not prevent the registration of the trade mark due to the existence of prior rights or conflicting marks, prior research amongst the trade mark registers, business identifiers and domain names is strongly recommended, and this is typically conducted by specialised trade mark attorneys. Costs may also arise in the event of trade mark oppositions. As previously mentioned in relation to EU trade marks, the more countries in which a trade mark is applied for, the higher the risk of opposition.

Collective and certification marks can also be registered in some jurisdictions and this is usually done within the trade mark registration system. 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 discussed in relation 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.

The use of collective 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. 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.

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.

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.

7. Continued. GIs, PDO, TSG

GIs and IPRs are terms given to different signs according to national and international norms. They play a similar role to appellations of origin (AOs) in that both GIs and AOs highlight a qualitative link between the relevant product and its place of origin. Although, the key difference is that the link with the place of origin is stronger for AOs. AOs require that the quality or characteristics of the product result exclusively from their geographical origin meaning that the raw materials must be sourced from, and production or processing must occur in, the place of origin. On the other hand, it is sufficient if a single criterion is attributable to geographical origin for GIs. This means that the production of the raw

materials and the development or processing of a GI's product do not necessarily have to both take place entirely in the same defined geographical area. For simplicity, GIs and AOs will be referred to collectively as GIs, except where indicated differently. GIs can typically only be applied to food products or wines and spirits, but new systems are developing to protect non-agricultural goods as well.

The legal instruments and the protections available for GIs vary considerably from country to country. In some countries a *sui generis* system provides for the registration of GIs, for example in Kenya, Nigeria, South Africa, Egypt, Mexico, Peru, Cuba, India, Pakistan, Mauritius and Sri Lanka. The most advanced *sui generis* system is that of the EU, where GIs are regulated by the EU Regulation No 1151/2012 of the European Parliament and of the Council of 21 November 2012 on quality schemes for agricultural products and foodstuffs (QS Regulation). As per the QS Regulation, registration of EU GIs in the registry kept by the European Commission and publication of the registration in the EU Official Journal gives rise to a unitary IPR, the effects of which cover the entire EU territory under Article 118(2) of the Treaty on the Functioning of the European Union (TFEU). The regulation of this unitary EU IPR is determined exclusively by the QS Regulation because the GI system that it establishes is exhaustive in nature and therefore overrides any national rules on domestic GIs provided for by the EU member States. The exhaustive nature of the QS Regulation distinguishes it from other EU Regulations on unitary EU IPRs such as the EU Trade Mark Regulation amending the Community Trade Mark Regulation, the Regulation on Community Designs and the Regulation on Community Plant Variety Rights. These regulations provide interested parties with a choice to register at the EU level according to the EU regulations or at a national level on the basis of domestic legislation in force in the member States. By contrast, interested parties are only allowed to register GIs at the EU level, based on the QS Regulation, and are no longer able to register a national GI in a single member State.

The QS Regulation provides for expansive protection of EU GIs. It does so firstly by establishing that protected names under the EU GIs system cannot become generic and therefore will not be invalidated on that basis. Secondly, the regulation derogates from the priority principle by allowing the coexistence of an earlier trade mark with the relevant GIs, save when registration may mislead consumers. Thirdly, by defining the infringement of EU GIs very broadly, it offers protection akin to the protection afforded to reputed trade marks.

The QS Regulation applies to agricultural products and foodstuffs. Whilst agricultural products or foodstuffs is not specifically defined, Art. 2(1) of the QS Regulation stipulates that the regulation covers agricultural products intended for human consumption, in addition to other agricultural products and foodstuffs listed in Annex I. Non-food products that are registered include, for example, Native Shetland Wool PDO, Foin de Crau PDO, and Bergamotto di Reggio Calabria – Olio Essenziale PDO. Essential oils are also listed. Currently this category includes the registered Greek Oil Mastichelaio Chiou PDO, which is also part of the UNESCO Intangible Cultural Heritage, Bergamotto di Reggio Calabria – Olio Essenziale PDO, Bulgarsko rozovo maslo PGI and Huile essentielle de lavande de Haute-Provence/ Essence de lavande de Haute-Provence PDO. In 2015, the European Parliament adopted a resolution on the possible extension of EU GIs to non-agricultural products. Doing so will align the EU with national systems that do extend GIs to non-agricultural products.

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 transborder, 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. Firstly, 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.

Given that the legal instruments governing, and the protection available for, GIs at a national level varies considerably from State to State, harmonization of domestic legislation on GIs globally has become necessary. As such, firstly, the Madrid Agreement for the Repression of False or Deceptive Indications of Source (1891) and the Paris Convention prohibited the use of false or deceptive indications of origin. They international agreements, however, did not specify what amounts to a 'non-deceptive' indication of origin.

Secondly, a registration system for specific types of GIs was established through a string of agreements on GIs between EU and non-EU countries (in the 1960s and 1970s), the Stresa Convention and the Lisbon Agreement on the Protection of Appellation of Origin (1958). This system implies that all States parties recognise and enforce the GIs listed on the registry in their respective territories according to the legislation of the country of origin. Therefore a country of origin approach was adopted, according to which the legislation of the country of origin applies in all States parties. The territoriality approach, which provides for each country to recognise and enforce the relevant GI according to its proper legislation, was thus rejected.

Thirdly, within the World Trade Organization (WTO) framework, the TRIPS Agreement defines GIs as signs capable of identifying goods as originating from a specific place and of attributing them specific qualities, reputation and other characteristics. In addition, the TRIPS Agreement offers protection against misleading the public as to the origin of goods as per its rules on unfair competition as well as those rules in which States parties are to refuse or invalidate misleading trade marks as to

origin. Furthermore, the TRIPS Agreement establishes additional and absolute protection for GIs related to wines and spirits, independent of whether the public is misled. Since the TRIPS Agreement does not establish a GI register, it is thus still based on the territoriality approach, rather than on the country of origin approach. Negotiations within the WTO framework on establishing a GI register and extending the level of protection currently granted to wine and spirit GIs to other GIs have come to a stand-still.

Fourthly, in the last decade, the country of origin approach has been adopted by a second generation of bilateral and multilateral agreements on GIs. Some of these address specific matters, such as those on wine and spirits. Others are based on the mutual recognition of specific GIs with a phasing out of other GIs such as those concluded by the European Union with Switzerland (2011) and Georgia (2012). Furthermore, the Economic Partnership Agreements, Stabilisation and Association Agreement, and Free Trade Agreements (FTAs) also include GIs. Currently, the US and the EU are negotiating the Transatlantic Trade and Investment Partnership (TTIP), which has several issues, one being the demands of the EU for recognition and protection of EU GIs by the US.

Finally, the Geneva Act of the Lisbon Agreement, which adopts the country of origin approach like the Lisbon Agreement, was concluded in 2015. It significantly raises the standards of protection for GIs. The Lisbon Agreement has 28 State parties to date, covers approximately 900 registered AOs, applies to all categories of products and is based on registration at the request of a State party, and serves to prevent AOs from becoming generic and protects them against usurpation and imitation. The Geneva Act extends the scope of the Lisbon Agreement to include GIs.

Whilst these treaties increase the level of protection available for GIs, they only partially harmonise GIs regulation and protection internationally, with countries across the globe still divided on these matters. Countries against GIs, such as the US and Australia, purport that GIs create exclusive rights to access markets, and by granting protection to related products that do not necessarily originate entirely from the GIs-denominated region create trade barriers affecting competition. According to this view, GI protection thus has become an unjustified, anti-competitive subsidy which has the potential to confuse or deceive consumers as to the origin of products. In response to this criticism, countries with sui generis GI systems emphasize that GIs create economic benefits, since they guarantee the quality, content and reputation of products and services by identifying their true origin. Thus, GIs are an important tool for economic development, provided that they coherently identify a product's geographical origin.

8. Some conventional IPRs are insufficient to protect traditional knowledge

Intellectual property rights are clearly relevant to ICH, because its practice and transmission is grounded on intellectual activity, such as ideas, skills, knowledge and know-how, which is expressed in tangible outputs. Intellectual property rights instruments use other terminology, namely 'traditional knowledge (TK)' and 'traditional cultural expressions (TCEs)' (whether associated with genetic resources (GR) or not). According with the definition provided in the context of the WIPO IGC, Traditional Cultural Expression consists in any tangible and intangible forms in which the traditional culture and knowledge is expressed. TCE includes, among others: verbal expression such as folk tales, signs and words; musical expression like folk songs; expressions by actions such as folk dances and rituals; tangible expressions such as textiles, paintings, architectural forms, crafts or musical instruments. The traditional method used in the creation of these TCE are called Traditional Knowledge (TK). Thus, the term TK is used in two ways: as a general term referring to both TK and TCEs, or to distinguish between TK and TCEs since TK is a traditional process whereas TCEs is a traditional product. When the term 'TK' is used in the narrower sense, it refers to the 'knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations'. Under this approach, TK corresponds to two of the five domains of ICH, namely 'knowledge about nature and the universe' and 'traditional craftsmanship'. When the term TK is used in the general sense, it also covers those domains corresponding to TCEs. Hereinafter, therefore, the term TK will be adopted as a synonymous of ICH.

Thus, IPRs may be associated with tangible outputs or expressions of ICH practice, such as traditional musical performances recorded on video, traditionally-made products, or descriptions of

traditional medicines or healing processes. This association helps to safeguard ICH, in particular by preventing it from being misappropriated or misrepresented. IPRs on ICH can also help control access to and use of documentation about it.

Conventional IPRs, however, seem to be in conflict with ICH. Firstly, certain conventional IPRs are not applicable to ICH due to many of its peculiarities.

IPRs have some common characteristics, namely, certain conventional IPRs require the identification of the author or co-authors of the intellectual work in order to be protected (individualisation) pose a novelty requirement (originality) and require a geographical link with the physical space where the intellectual work was created (localisation). Moreover, conventional IPRs are only concerned with creations that will be reproduced in numerous series and in physical form (fixity) and are usually limited in time and scope such that once the protection expires the creations 'fall' into what is called the 'public domain' (recentness). The public domain consists of works that have no legal restrictions on their use and exploitation by the public owing to the fact that their term of protection has expired or due to their inability to meet the IP requirements in the relevant jurisdiction. Material in the public domain is freely available for use, copy and distribution by others, without charge and without the need for consent. The public domain, however, should not be confused with 'publicly available'. Use of 'publicly available' traditional knowledge that is not in the public domain may still require prior informed consent from the holders as well as agreement on benefit-sharing provisions.

By contrast, since cultural manifestations are often expressed in a collective way and are considered by the practitioners themselves as belonging to a whole community (collectiveness), a single owner of ICH often cannot be ascertained. Furthermore, the requirement of novelty does not apply to most of the manifestations of ICH that are based on the transmission of practices and knowledge from generation to generation (traditional). ICH also do not require any geographical link with the physical space where the intellectual work was created but, on the contrary, are typically universal in nature (universality). Moreover, ICH is typically transmitted verbally or orally throughout the years and is not always incorporated into a physical form (non-fixity), and is not limited in time (perpetuity).

In addition, the costs associated with the registration and enforcement of IPRs may discourage traditional holders of ICH from commencing the relevant legal procedures necessary to acquire IPRs, as will be discussed in the following chapter.

For example, with regard to copyright, TK often fails to meet the basic copyright requirements of individualisation, originality, recentness and fixity. In terms of individualisation, for instance, whilst copyright law is flexible in defining 'authorship', as evidenced by its protection of works that originate from an individual or a group of co-authors and "common law jurisdictions have even fictionalized the idea by introducing the 'work for hire' doctrine, whereby an employer is considered the author of the merged contributions of employees", there are limits to its applicability in the context of TK. Cultural creations that have been produced by entire communities collectively, rather than collaboratively by a group of specific co-authors, cannot be covered by copyright. As these traditional expressions, knowledge and works have been communally developed over long periods of time, there are real difficulties in identifying the work's authors. Furthermore, such works are often not original because they draw upon pre-existing customs, traditions and beliefs and have been passed down from generation to generation. In addition, verbal expressions, folk music and dance do not have a definite form, and have instead been communicated throughout time using imitation and memorisation. In this way, traditional cultural expressions are often unable to receive copyright protection and therefore fall into the public domain.

Copyright can protect derivative works, namely contemporary variants of cultural traditions made by a single author or a group of well identified co-authors, and communicated to the public as

fixed in a definitive form. This is important because the traditional cultural expressions most at risk today are precisely those contemporary variants of ancient musical, choreographic, graphic and other traditions. These derivative works in fact are typically more accessible and attractive than the original traditional performance. Yet, the irony is that copyright protection does not require the authors of derivative works to belong to the community of traditional bearers of the practice.

Furthermore, whilst Art. 15.4 of the Berne Convention, as previously mentioned, provides a mechanism for the international protection of unpublished and anonymous works, which may include traditional cultural expressions, this article is optional. Thus, most countries have not incorporated it into their domestic legislation. In addition, whilst protection for such works persists for at least 50 years after the author's death, this can only occur if the intellectual work is "lawfully made available to the public". Moreover, the Convention establishes that the rights are exercised by "a competent authority" on behalf of the author, rather than by a community. The scope of this article is further restricted by Art. 7.3 of the same Convention, according to which states are not required to protect anonymous works when it is reasonable to presume the author has been dead for 50 years.

With regard to know-how, traditional food recipes, for instance, held by a specific family member of a community can be protected as a trade secret in theory. Yet, in practice, traditional food and foodways are not usually protectable as trade secrets because they do not meet the requirement as to whether their holders have made reasonable efforts to maintain their secrecy.

27. Some conventional IPRs may reinforce ICH misappropriations

Misappropriations of intangible cultural heritage consists 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. These misappropriations and the necessity to adopt in-court enforcement strategy arise in particular when IPRs are associated to infringers damaging communities. Thus, for instance to third parties not belonging to the community, patents have been granted over alleged inventions based entirely on TK, or trademarks of the shape of products corresponding to a tradition have been registered, or copyrights on non-creative intellectual creations entirely based on intangible cultural heritage have been recognised. The communities seeking to protect their heritage may then become deprived of both their past history and present identity, and can even be prevented from producing their traditional goods, without any sort of benefit sharing established in their favour. The third party in question may in fact enforce his IPR against community members in infringement proceeding. In these cases, the community at stake shall defend before the competent courts. Even in cases where infringement proceedings are not started by the IPR owner, to obtain the revocation of the IPR at stake an in-court enforcement strategy may be needed, namely communities shall act before the competent courts. Patents may also be revoked (or not granted in the first place) if it can be demonstrated that traditional knowledge (eventually published), constitutes prior art, thereby destroying the patent's novelty and inventive step, which are patentability requirements. Novelty is the requirement that the "invention...does not form part of the state of the art" (Art. 54 EPC) and inventive step is the condition that "an invention...having regard to the state of the art... is not obvious to a person skilled in the art" (Art. 56 EPC). Similarly, a trade mark application may be refused in cases of offensive marks or trade marks that are against good morals and public order, or marks that have been registered in malafede. Furthermore, it is possible to fight copyright

claims over folklore under the condition that the same expression of folklore existed prior to the claim for protection.

The granting of patents over traditional knowledge related, for instance, to medicines has originated misappropriations in many countries. In March 2010, for example, the EPO withdrew a patent application by American multinational company Natreon Inc in respect of an Indian wonder plant, Ashwagandha (*Withania somnifera*), used in the treatment of a range of illnesses, including stress-related conditions. The withdrawal of the application was based on India's documentary proof confirming that medicinal formulations using Ashwagandha had been used in India as far back as the 12th century. The failure of the patent application in Europe did not, however, affect the granting of the patent in the US because of the territorial nature of patents.

In another case, Societe d'Assistance Technique pour Produits Nestle S.A. (Nestle) applied for a patent in 1983 for a process for producing vegetable juice through fermentation, similar to a process used to make kimchi, in 15 countries including South Korea. Nestle's patent application was denied in South Korea because the application was similar to kimchi, which is a traditional culinary product in South Korea, inscribed in the UNESCO Representative List in 2013 as "Kimjang, making and sharing kimchi in the Republic of Korea." Despite its inscription, except for the patent application refusal in South Korea, Nestle's patent applications were approved in all the other 14 countries. For example, in the US, "preparation of a flavored solid vegetable and vegetable juice utilizing hydrolysed protein" was filed on 4 October 1983 and patented by 25 December, 1984 before the United States Patent and Trademark Office (USPTO). This may have been attributable to the fact that in 1983 no official references were available to prevent Nestle from patenting its kimchi process. Therefore, in 2007, the Korean Traditional Knowledge Portal, operated by the Korean Intellectual Property Office, was launched and included information on traditional as well as local foods. Furthermore, in 2009, the Korean Government, the Korea Food Research Institute (KFRI) and the Korea Agency of Digital Opportunity and Promotion and the Korea Institute of Science and Technology launched the Korea Traditional Food Portal, precisely to make available information on traditional Korean food and foodways to the public, whilst also promoting and defending traditional Korean food traditions from misappropriations.

Trademarks could also reinforce misappropriations of TK. Having produced chocolate in the shape of bunnies since the early 1950s and marketed in Austria since 1994, in 2000 Lindt became the proprietor of a European Community three-dimensional trade mark consisting of a gold-coloured chocolate bunny in a sitting position, wearing a red ribbon with a bell attached, marked with the words 'Lindt Goldhase' in brown lettering. After registering the trade mark in question, Lindt initiated legal proceedings against certain Austrian manufacturers who were allegedly manufacturing products so similar to the Lindt bunny that there was a likelihood of confusion. However, one of those manufacturers raised a counterclaim and sought a declaration of invalidity of the Lindt trade mark. The Austrian manufacturer argued that Lindt was acting in bad faith within the meaning of Article 51(1)(b) of Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community trade mark when it filed its application for registration of the three-dimensional Community mark in question. In particular, the manufacturer argued that Lindt knew that a tradition, dating back to at least 1930, existed in both Austria and Germany of marketing chocolate bunnies, commonly called Osterhasen (Easter bunnies), in a shape and colour very similar to the one represented by the Lindt three-dimensional mark. The Austrian Supreme Court stayed the proceedings pending before it and referred three preliminary questions relating to the interpretation of Article 51(1)(b) of Council Regulation (EC) 40/94 to the European Court of Justice (ECJ). In response to those questions, the ECJ asserted that "in order to determine whether the applicant is acting in bad faith within the meaning of [this] Article...the national court must take into consideration all the relevant factors specific to the particular case which

pertained at the time of filing the application for registration of the sign as a Community trade mark, in particular: the fact that the applicant knows or must know that a third party is using, in at least one Member State, an identical or similar sign for an identical or similar product capable of being confused with the sign for which registration is sought; the applicant's intention to prevent that third party from continuing to use such a sign; and the degree of legal protection enjoyed by the third party's sign and by the sign for which registration is sought." The ECJ deferred to the national court, as usual, the decision regarding whether, in the actual case before them, the trade mark in question was registered in bad faith by Lindt. In May 2004, Lindt also filed an application for a Community trade mark, which was a three-dimensional sign, consisting of the shape of a rabbit with a red ribbon and which is red, gold and brown, without the words 'Lindt Goldhase' in brown lettering. In October 2005, the application was rejected by a EUIPO (formerly the Office for Harmonization in the Internal Market (OHIM)) examiner on the basis that the sign at issue was devoid of any distinctive character. Furthermore, the mark for which registration was sought did not acquire distinctive character through use, because the evidence related only to Germany. In November 2005, Lindt filed an appeal with the OHIM against the examiner's decision. In June 2008, the Fourth Board of Appeal dismissed the appeal, finding that none of the elements which constituted the mark for which registration was sought, considered separately or as a whole, could give it a distinctive character in relation to the goods concerned. The Board further found that chocolates shaped as rabbits are common, especially during Easter. Consequently, the applied-for mark was deemed to be devoid of any distinctive character throughout the EU. In August 2008, Lindt lodged another appeal at the General Court Registry against the OHIM's decision of 11 June 2008. The European General Court found that the combination of the shape, the colours and the pleated ribbon with a small bell are not sufficiently different from those basic shapes commonly used for wrappers of chocolate and chocolate products, and specifically chocolate rabbits. Therefore, the relevant public is unlikely to perceive and remember these characteristics to be indicators of commercial origin. The General Court further found that the gold-coloured wrapping in the shape of a sitting rabbit with a pleated red ribbon and a small bell is not substantially different from wrapping commonly used in trade for goods of the sort at issue thus it naturally comes to mind as a typical form of wrapper for those goods. The Court further rejected the Lindt's argument that the chocolate Easter bunny is largely unknown outside Germany and therefore has an inherent distinctive character in other member States. The Court added that it is common knowledge that chocolate rabbits, which are often sold at Easter, are not unknown outside Germany. Lindt again appealed the General Court's judgment but the ECJ dismissed the appeal in its judgment of 24 May 2012, upholding the General Court's findings. Regarding Lindt's argument that the existence of trade mark registrations in 15 member States supports the distinctive character of the mark, the ECJ added that whilst existing registrations in member States are a factor which may be taken into account in connection with the registration of a Community trade mark, a Community trade mark application must be assessed on the basis of the relevant EU rules, and as such the OHIM is under no obligation to follow the assessment of the competent national authorities or to register the mark at issue as a Community trade mark on the basis of national registrations. Whilst Lindt did not see much success in the registration of this mark for the Courts have deemed it to be devoid of any distinctive character in the EU, Lindt still has a EU Community trade mark that differs from the one refused by the ECJ case in so far as it has Lindt writing on its side which makes it distinctive. In Austria, the decision of the Oberste Gerichtshof (Austrian Supreme Court of Justice) in "GoldhaseVII" on 28 February 2012 forbade Lindt's competitor Hauswirth to sell similar looking golden Easter bunnies. The final decision in this Austrian case was made before the ECJ's judgment of 24 May 2012, and could have been a contributing for the judgment in favour of Lindt. On the other hand, after the ECJ's judgment, the German Bundesgerichtshof (Federal Court of Justice) decided in March 2013 that golden Easter bunnies produced by Lindt's competitor Riegelein could be sold in Germany.

10. Sui generis IPRs

Certain countries have introduced so called “sui generis IPRs systems” as a means to compensate for the insufficiency of some conventional IPRs in protecting TK and the potential of IPRs to facilitate misappropriations, and to better protect TK in a general sense and recognize communal proprietary rights in traditional cultural expressions and traditional knowledge. Sui generis systems are based on legislative amendments to conventional IPRs so to allow their extension to TK.

Sui generis IPRs systems are quite divergent at the national level. Some States adopt defensive protection of TK, which aim to stop TK rights from being misappropriated by third parties who acquire IPRs over inventions or intellectual creations derived from TK, rather than granting IPRs over the subject matter of TK in a general sense. Defensive strategies include the use of documented TK to preclude or invalidate patents that illegitimately claim pre-existing TK as inventions. Other defensive strategies consist of amending the trade marks legislation to prevent deceptive marketing or the use of terms that are insulting to specific groups of people, or the public in general. In India, for instance, whilst positive *sui generis* IP protection for TK has not been developed at the national level, protection for some food, drink and crafts is provided through collective IPRs such as geographical indications and collective trade marks. In addition, India provides defensive protection through the Traditional Knowledge Digital Library (TKDL) developed by India’s Council of Scientific and Industrial Research (CSIR) and the Department of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy, which is a searchable database containing 30-million-pages of TK translated from several languages such as Hindi, Sanskrit, Arabic, Persian, Urdu and Tamil into English, Japanese, French, German and Spanish. This database is now available to the USPTO and EPO so as to preclude or invalidate patents that illegitimately claim as inventions pre-existing Indian TK available in the database. In the Republic of Korea, the aforementioned national internet portals relating to food and foodways play an important role in protecting Korean communities against the patenting of traditional Korean foods and recipes, by demonstrating a lack of novelty. In New Zealand, the Trade Marks Act provides the Commissioner of Trade Marks with a power to refuse to trade mark registration if the Commissioner considers, on reasonable grounds, that the use or registration of the mark is likely to offend a significant section of the community, including the indigenous Māori people of New Zealand. Article 136(g) of Decision 486 of the Commission of the Andean Community provides that “signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their culture or practice, except where the application is filed by the community itself or with its express consent”. This Decision was applied in refusing registration of the trade mark TAIRONA in Colombia because it refers to an indigenous culture that inhabited Colombian territory. Only representatives of the culture or persons with the authorization of those representatives would be entitled to request consent to use the expression as a distinctive sign and, in this particular case, as a trade mark. In 1999, ‘the Snuneymuxw First Nation of Canada used the Trademarks Act to protect images of ten petroglyphs (ancient rock paintings) from unauthorized reproduction and commodification on commercial items such as T-shirts, jewellery and postcards and the sale of such goods by registering the images as trade marks. This is because petroglyphs have special religious significance to the members of the First Nation and therefore unauthorized used was considered to be contrary to the cultural interests of the community. An education campaign was then subsequently launched to explain the significance of the petroglyphs to the Snuneymuxw First Nation, local merchants and commercial artisans prevented using the petroglyph images.

Other States adopt positive protection of TK, which grants IPRs over TK and TCEs. Protection of TK and TCEs in this manner not only allows rights holders to prevent unauthorized or inappropriate uses by third parties but also enables the originating communities themselves to actively exploit the TK and TCEs, for example, by commercializing their own handicraft enterprises for the betterment of their communities. In Brazil, the State has passed *sui generis* legislation that recognizes the right of the indigenous and local communities to decide on the use of their TK related to the genetic heritage of the country, to prevent its illicit use and exploitation. This legislation gives these communities the right of acknowledgement of the origin of their TK, to prevent unauthorized use and dissemination of such TK, and to receive economic benefits from its use by third parties. Moreover, design legislation has been amended to allow for the protection of traditional cultural expressions through industrial design rights. This provides for the protection of tangible manifestations of traditional cultural expressions such as textiles including fabrics, costumes, garments or carpets and other tangible expressions of culture such as carvings, sculptures, pottery, woodwork, metalware, jewellery, basket weaving and other forms of handicrafts. In Kazakhstan, industrial design protection has been granted to the outward appearance of the national costume, head dresses (*sakyele*), carpets (*tuskiiz*), decorations of saddles and women's bracelets (*blezik*).

At the international level, regional agreements encourage some countries to adopt national legislation on intellectual property relating to TK and TCEs. For instance, the African Regional Intellectual Property Organisation's Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, which is not currently in force, calls for measures to protect expressions of folklore against all acts of misappropriation, misuse and unlawful exploitation outside their traditional or customary context through adequate and effective legal and practical measures, including equitable remuneration for use involving a gainful intent (Section 19.1-3). This Protocol also includes a mechanism that requires the relevant community's free and prior informed consent in relation to certain uses of expressions of folklore that hold particular cultural or spiritual value or significance (Section 19.2).

Outside of the intellectual property domain, under the framework established by the UN Convention on Biological Diversity (CBD), the Convention recognizes some community rights over TK associated with genetic resources (GR) and the need for the community to enjoy benefits from its commercial exploitation (Art. 8.j). In addition, the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization to the CBD, adopted on 29 October 2010, sets out guidelines for the fair and equitable sharing of benefits arising out of the utilization of TK and GR. Article 16 of the Protocol provides that the applicable law in respect of TK associated with GR is the law of the country of origin. It stipulates that each State party shall adopt measures to ensure that TK associated with GR located within its jurisdiction has been accessed in accordance with prior informed consent and on mutually agreed terms as established by the law of the country of origin. Moreover, Article 16 also requires that each State party adopts measures to address situations of non-compliance with the *lex originis* and cooperates with the competent authorities in the country of origin of the TK in cases of an alleged violation of the law of that country.

Within the intellectual property field itself, on the other hand, there presently is no universal instrument establishing a *sui-generis* system of international intellectual property protection of TK and TCEs, and no minimum standards have been set. Although, since the 1950s, WIPO and UNESCO have cooperated with the adoption of the Universal Copyright Convention in 1952. Subsequently, in 1976 they adopted the Tunis Model Law extending copyright protection to folklore. In 1978, however, UNESCO and WIPO formally agreed that the former would examine folklore from an interdisciplinary standpoint and WIPO would explore its protection through intellectual property. In 1982, the "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and

Other Prejudicial Actions were published by WIPO and UNESCO to “provide protection against illicit exploitation and other prejudicial actions by requiring authorisation from the relevant communities for utilisations of their traditional cultural expressions, including publication, reproduction, public recitation and performance, that are made with gainful intent and are outside their traditional or customary context” (Sect. 3). In 1984, a draft treaty on the protection of expressions of folklore was prepared but it was never formally adopted by either organization because industrialized States declined to grant protection to community-based cultural expressions, accusing the draft treaty to leave unsolved many questions such as which State’s authority will be competent to authorize the utilization of folklore expressions, what should happen in case of cross-border situations where one State party has acceded to the treaty and another State party has not and how can regional cooperation be organized in relation to shared expressions of folklore. Following the failure to treaty to gain traction, each organization continued its own activities based on the division of labour set out in 1978, save for the 1997 World Forum held by both organisations in Phuket and a series of Regional Consultations on the Protection of Expressions of Folklore.

UNESCO adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore (the 1989 Recommendation), which was the first international instrument to provide a framework for safeguarding ICH. The 1989 Recommendation adopted a primarily cultural approach of an interdisciplinary nature towards safeguarding ICH, addressing issues relating to the definition, identification, conservation, preservation, protection and utilization of folklore. Intellectual property was included among the measures to “protect” folklore. In fact, the 1989 Recommendation states that “in so far as folklore constitutes manifestations of intellectual creativity whether it be individual or collective, it deserves to be protected in a manner inspired by the protection provided for intellectual productions. Such protection of folklore has become indispensable as a means of promoting further development, maintenance and dissemination of those expressions, - both within and outside the country, without prejudice to related legitimate interests” (Sect. F). Yet, the same section also invites State parties to also adopt other actions, namely those in the UNESCO frameworks, to safeguard folklore, by stating that “leaving aside the ‘intellectual property aspects’ of the protection of expressions of folklore, there are various categories of rights which are already protected and should continue’ to enjoy protection in the future in folklore documentation centers and archives. To this end, Member States should: (a) regarding the ‘intellectual property’ aspects call the attention of relevant authorities - to the important work of UNESCO and WIPO in relation to intellectual property, while recognizing that this work relates to only one aspect of folklore protection and that the need for separate action in a range of areas to safeguard folklore is urgent.”

In 1998, WIPO began exploring *sui generis* IPRs systems, based on legislative amendments to conventional IPRs to protect TK in a general sense and to recognize communal proprietary rights in TCEs and TK. In 2000, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore was established by WIPO for this purpose. Although the Committee adopted two sets of draft provisions for protecting TK and TCEs in 2014, this work has stalled and a standard-setting instrument has not yet been adopted.

In 1999, on the 10th anniversary of the adoption of the 1989 UNESCO Recommendation, States felt that this text treated the bearers of ICH largely as passive informants rather than as prime movers in any safeguarding actions by serving the interests of scientific experts and researchers too strongly. States then decided to draft a new convention on the safeguarding of ICH. The failure of WIPO to adopt a standard-setting instrument for the protection of TK and TCEs catalysed negotiations of the UNESCO ICH Convention. In fact, when States decided to draft a new convention on safeguarding ICH, there remained three options: (1) a treaty using a *sui generis* intellectual property rights-based approach to protection. This would address the special character and requirements of ICH (and its bearers), (2) a

treaty taking a broadly cultural approach, but with some *sui generis* intellectual property rights where gaps in protection were identified, and (3) a treaty taking a cultural approach that employs the mechanisms of the 1972 World Heritage Convention, but is adapted to meet the needs of ICH and the communities that create and maintain it. The third option was chosen by the UNESCO General Conference in 2001, while the *sui generis* intellectual property rights approach towards ICH protection was left to WIPO.

11. Conventional IPRs capable of protecting ICH

Besides and in the absence of *sui generis* IPRs systems, certain conventional IPRs have indeed been adopted to protect traditional products. In particular, those IPRs that don't require any individualization, that don't require novelty in the subject-matter to be protected, that don't impose its physical fixation save for those documenting the heritage at stake, that don't pose any local conditions, that don't expire overtime (or may be renewed) and therefore don't require recentness. These conventional IPRs are mainly collective or certification trademarks and GIs.

Typically, traditional products are strictly linked to a territory and a production receipt. Conventional IPRs whose functions include certifying the link between a product and its territory as well as a production method, include the following. 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. 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. 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.

Collective trademarks were adopted in Italy at the end of the Nineties, when the introduction of the EU regulations concerning sanitary self-control (HACCP) were perceived as capable of compromising the existence of some typical food products, that involved traditional production processes consisting in methods that were suspected not to entirely in compliance with the new regulations. Public Administration conducted, therefore, a census of the existing traditional products and published a list in 2000 and updated every year of more than 3,500 products. The manufacturing, preservation and ripening methods of these products are homogeneously deep-rooted in the territory and followed for at least 25 years.

Yet, only a small percentage of these products could have aspired to PDO or PGI protection, because of "the scarce fame of the product, its particular features, the limited economic size of the production, the non bright market perspectives and, last but not least, the motivation level of the producers". To protect the products at stake in cases when the requirements for the PDO/PGI registration were not met, geographical collective trademarks were and are being registered to protect an important number of traditional products, by producers' associations with the support of the local Chamber of Commerce or by the Chamber of Commerce itself. In order to ensure greater transparency, the Chambers of Commerce have advised to establish a separation between control and ownership of the mark, so that control functions are typically assigned to a third and independent body, according to the international rule UNI EN 45011. Clearly, producers are conscious that the protection level of collective trademarks is not the same as the one obtained with a GIs as already mentioned in the section related to GIs.

For as already mentioned in the GIs section, both GIs and collective trademarks registrations have certain limits. Registering these IPRs is not like registering patents. The former registration 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 or collective trademarks regulation. Thus, if secret methods of production are revealed as part of a GI specification or collective trademarks regulation, they are exposed to use and exploitation by anyone.

Finally, 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. In terms of individual registration, the rules on the use of the sign are governed not by collective norms or regulations, but rather through clauses in license agreements, the agreements of which are not published. Unlike collective trademarks, the proprietor of an individual trade mark may also freely decide who may become a licensee and under which conditions (Art. 9 and Art. 25 Regulation (EU) 2017/1001). Thus, individual trademarks are more flexible than collective trademarks even if owned by collective entities, yet are far less transparent. 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.

Conventional IPRs whose functions include certifying the adoption of a traditional production method, rather than any link with a certain territory, include the following. 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. 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.

Among the examples of adoption of the abovementioned IPRs to protect traditional products, are the following. Protection through GIs occurred for the following traditional products: Talavera De Puebla pottery and Olinalá handicrafts from Mexico, Jablonec jewellery, glass and crystal from the Czech Republic, Madeira embroidery from Portugal, Kargopol clay toys and Filimonov toys in the Russian Federation, Modranská Majolika hand-painted pottery from Modra in Slovakia, Lamphun Brocade Thai Silk from Thailand, and Mysore silk and Banaras brocades and sarees in India. Protection through collective trademarks occurred for the traditional products of the indigenous people represented by the Sámi community. The duodji collective trade mark that was registered in 1989. The Sámi duodji mark can only be affixed to handicrafts produced by the Sámi, the indigenous people from the northern regions of Norway, Sweden, Finland and Russia. Use of the collective mark has proved useful to ensure that Sámi handicrafts made by Sámi can be distinguished in the marketplace from those made by person not part of the Sámi community.¹ Entitlement to use the mark is limited to Sámi individuals who fulfil certain criteria of community membership. Protection through individual trademarks registered by collective entities occurred for the traditional product of the Colombian coffee, for which *Federacion Nacional de Cafeteros de Colombia* registered Café de Colombia.

The following chapter will analysis other IPRs adopted to protect ICH elements inscribed in the UNESCO Lists. Adoption of IPRs on ICH, however, presents not only opportunities but also challenges, which will be examined in the last chapter.

Chapter II

Best Practices of IPRs on UNESCO intangible cultural heritage

12. IPRs adopted by elements inscribed in the UNESCO List

Among the various ICH elements inscribed in the UNESCO Lists adopting IPRs as safeguarded measures mentioned in the respective nomination files are: Dikopelo folk music of Bakgatla ba Kgafela in Kgatleng District (Botswana), Sega tambour of Rodrigues Island (Republic of Mauritius) and Međimurska popevka, a folksong from Međimurje (Croatia) that adopt copyright; Indonesian Batik (Indonesia) which registers a certification trademark; traditional violin craftsmanship in Cremona (Italy) that utilizes a collective trademark; Weaving of Mosi (fine ramie) in the Hansan region (South Korea), traditional craftsmanship of Çini-making (Turkey), know-how of cultivating mastic on the island of Chios (Greece) and Argan, practices and know-how concerning the argan tree (Morocco) which register GIs; Al Sadu, traditional weaving skills in the United Arab Emirates (United Arab Emirates) which registers “intellectual property rights”. Some of these elements and their IPRs strategy to ensure sustainable development of the relevant communities will be examined below as reflecting best practices.

13. Copyright: Dikopelo folk music of Bakgatla ba Kgafela in Kgatleng District (Botswana)

The ICH element “Dikopelo folk music of Bakgatla ba Kgafela in Kgatleng District” was inscribed in 2017 on the UNESCO List of Intangible Cultural Heritage in Need of Urgent Safeguarding by Botswana. This element concerns the practice of Dikopelo, an art of song and dance without the accompaniment of musical instruments, that is a tradition of the Bakgatla ba Kgafela community and continues to be prevalent across the Kgatleng District. The typical choreography of Dikopelo is known as ‘go rekthema’ and refers to the movement of the performers taking three slow steps to the right and then turning to take a further three slow steps to the left. Most commonly, performances include a warm up song with a slow pattern of go rekthema, followed by additional choreography that includes various steps, styles and dance patterns, such as stamping one’s feet and using hand gestures to direct the position of the choir. These choirs will sing and dance to the lyrics, often carrying out dance motions and styles that are unique to the particular choir. Furthermore, the inclusion of the choir extends beyond providing musical accompaniment, and the practice of Dikopelo is especially important in terms of social cohesion and the strengthening of community ties, as people from a certain region will join forces and come together to participate. The performers will rehearse throughout the year in order to prepare for competitions between other practising choirs, with such contests taking place at festivals during the Christmas and New Year period. It is common for a choir to study the cultural values of their opponents and use such findings against the rival choir during the competition.

Practiced by both men and women, Dikopelo is mostly dominated by Elders who pass on their skills and knowledge regarding the element to minors, mostly through instruction and observation. In addition to entertaining the community, the element is a powerful communication tool, conveying important messages through song. Such messages may concern the social and cultural notions of the community or the contemporary issues plaguing society, such as HIV and AIDS, the recession, substance abuse and corruption. Furthermore, vivid and expressive illustrations of the history, origins and development of the community are transmitted through the traditional performances, often alongside proclamations of spiritual pride and attachment to past and present leaders. Thus, the practice of Dikopelo educates members of the community by bringing the audience’s attention to recent concerns and incidents of importance.

As emphasised by Botswana in the nomination file for the element, Dikopelo folk music of Bakgatla ba Kgaela in Kgatleng District is in great need of urgent safeguarding. In recent years, the element has experienced reductions in terms of both its viability and frequency, with Dikopelo no longer being practiced in such a widespread region and performances occurring at fewer activities. Instead, the traditional practice is being replaced by contemporary music, thereby hindering the transmission of the element to the younger generations and threatening its existence as a persisting art form. Furthermore, the need to safeguard Dikopelo is illustrated by the loss of communal ownership and the spirit of unity, which originally accompanied the practice. Rather, Dikopelo is now dominated by individual modern artists from various backgrounds, who possess no sense of community attachment to the cultural practice. As a result of this conflict between individualisation and communality, misunderstandings regarding copyrights and other intellectual property rights (IPRs) belonging to the performers have arisen. In this way, traditional practitioners who hold IPRs as individuals believe that such rights are communal and should protect the community as a whole, whilst modern artists who draw upon the works of traditional practitioners and claim intellectual property rights see them as merely individual rights.

In particular, discussions to nominate the element for inscription on the UNESCO List of Intangible Cultural Heritage in Need of Urgent Safeguarding initially arose from complaints regarding the infringement of associated IPRs. In fact, the nomination file for the element states that the threats faced by the Dikopelo folk music of Bakgatla ba Kgaela include “non-documentation, lack of visibility, lack of knowledge on intellectual property rights, distortion, non-legal recognition, inadequate publicity and lack of international exposure.”

In 2008, Thibe Nyepetsi, a master Dikopelo practitioner, first brought awareness to the issue of instrumental composers using the material of traditional musicians without their consent, and thereby infringing their IPRs. As a result of this concern, in February 2012, the Phuthadikobo Museum organised a meeting of Dikopelo choirs with the specific objective of empowering performers in relation to copyright matters. This was subsequently followed by a further meeting in April 2012, hosted by the Baikopanyi Choirs Association and the Copyright Society of Botswana, to educate Dikopelo practitioners on the copyrights and neighbouring rights which they possess. Thus, in order to address such threats and ensure the viability of the element, a safeguarding plan was established by Dikopelo practitioners during multiple consultations led by the Kgatleng District ICH Committee and the Baikopanyi Choirs Association between December 2010 and February 2011. In regards to the application of IPRs for the safeguarding of the element, it was expressed in the nomination file that there is a need to update those who practice Dikopelo on the relevant laws, regulations and policies. As stated in the nomination file:

“there are several laws, policies and regulations that affect the enactment and transmission of the element. However, practitioners of Dikopelo are not well versed in these laws even though they affect their practice. The major law that affects the practice of Dikopelo is the Copyright and Neighbouring Rights Act, which regulates the use of rights holders' works. Three workshops are planned under the proposed Safeguarding Plan to capacitate Dikopelo practitioners on their rights relating to copyright and neighbouring rights issues. There shall be one such workshop in 2018, 2019 and 2020. The workshops will be conducted by the Copyright Society of Botswana (COSBOTS) in association with Kgatleng Performing Arts Commune. Over and above these proposed workshops, there shall be sensitisation campaigns on copyright in the above mentioned years, which shall be led by the Baikopanyi Choirs Association.”

As conveyed in the nomination file for the element, the relevant law governing copyright protections in Botswana is the *Copyright and Neighbouring Rights Act 2000*. The Act protects literary and artistic works that are considered original intellectual creations in the literary or artistic domain

(Section 3(1)). These works include books, articles, computer programmes, speeches, and dramatic, musical and choreographic works (Section 3(2)). Under the Act a work is protected “by the sole fact of its creation and irrespective of its mode or form of expression, as well as its content, quality and purpose” (Section 6(1)). A work can receive copyright protection under Section 35 of the Act, if it was created, published, recorded, performed, fixed, broadcast or erected in Botswana; or the author, producer or creator of the work is a national of or habitually resides in Botswana; or Botswana, by virtue of and in accordance with an international convention or agreement, has an obligation to grant such protection to a creator or right owner in relation to their work. If a literary or artistic work receives copyright protection under Section 35, the author or owner will have economic rights that give them the exclusive right to carry out or to authorise numerous acts in relation to the work, such as its reproduction, translation, public performance, and broadcasting (Section 7). Under Section 8, the author of a work also possesses moral rights that are independent of the existence of any economic rights. These rights include the right of paternity, namely to have or not to have the author’s name indicated prominently on the copies of and in connection with any public use of their work, and the right of integrity, whereby they can object to any distortion, mutilation or other modification of their work which prejudices their honour or reputation.

The duration of both economic and moral rights for works created by individuals is the lifetime of the author plus fifty years after their death (Section 10(1)). This differs in relation to collective works, which are “created by two or more persons at the initiative and under the direction of another, with the understanding that it will be disclosed by the latter person under his or its own name and that the identity of the contributing persons will not be indicated” (Section 2). Economic and moral rights in relation to these works exist for fifty years from either the date on which the work was made, first made available to the public or first published, depending upon which date is the latest (Section 10(3)).

Choirs in the Kgatleng District assert that Dikopelo folk music has been produced collectively and therefore any intellectual property rights should be held by the group as a whole. This notion of collective ownership is common in Africa, given the close identification of groups with their traditional practices. As the collective nature of Dikopelo folk music does not fall under the narrow collective work provision of the *Copyright and Neighbouring Rights Act 2000*, these choirs cannot be collectively granted copyright over their works. Instead, copyright has been recognised in relation to derivative works and contemporary adaptations created by traditional practitioners and modern instrumental musicians who compose songs that have evolved from traditional folkloric forms of Dikopelo music. These songs constitute derivative works, as they are an adaptation, arrangement or similar alteration of a pre-existing work, which has been altered in a way in which the elements of the pre-existing work and the new elements introduced by the musician merge together to create a new work.

To address the current gap in the legislation, users of Dikopelo folk music, namely traditional practitioners and modern instrumental musicians, sometimes reward communities through contractual agreements. However, this form of protection is considered insufficient in the face of rapid technological development. In addition, the Companies and Intellectual Property Authority (CIPA) in Botswana has expressed an intention to review the Act, thereby introducing a sui generis IPR system to provide such groups with copyright protection. In Botswana, the *Copyright and Neighbouring Rights Act 2000* mandates the establishment of the Copyright Society of Botswana (COSBOTS) as a non-profit CMO responsible for negotiating and granting licences with copyright owners, setting rates for royalties, and collecting and distributing royalties (Section 36A). COSBOTS exercises these functions in relation to the right to diffuse or play local and foreign music by individuals and businesses, and the right to publicly display or use other protected works, such as sculptures, paintings and applied art. The role played by COSBOTS in the nomination of the Dikopelo folk music element and in its

Safeguarding Plan outlined above evidences the outreach and awareness-raising functions played by some CMOs.

14. Cont: Sega tambour of Rodrigues Island (Republic of Mauritius)

The ICH element “Sega Tambour of Rodrigues Island” was inscribed in 2017 on the Representative List of the Intangible Cultural Heritage of Humanity by the Republic of Mauritius. Rodrigues is an outer island of the Republic of Mauritius located in the Indian Ocean. Prior to receiving autonomy on 10 December 2002, the island was identified as the tenth District of Mauritius and is now under the governance of the Rodrigues Regional Assembly. Rodrigues is an island of volcanic origin and is surrounded by coral reefs and small uninhabited islands. The traditional performing art of the island is Sega Tambour.

The practice of Sega Tambour of Rodrigues Island originates from the early slaves brought to the Rodrigues Island region in the Republic of Mauritius. This performance art has survived the passing of generations and the traditional songs, dances and instruments continue to be practiced by people of all origins, ages and genders within Rodrigues. According to ethnomusicologist Brigitte de Rosiers, the name, ‘Sega’ is derived from the Swahili expression ‘tchega’ which refers to the dance movement of swinging one’s skirt or frock. Indeed, the practice is characterized by the outfits of female dancers which involves a large skirt that is held and shaken by the performers. In regards to the distinctiveness of Sega Tambour Rodrig, de Rosiers states that “Rodrigues Island is different from its neighbours as it has the conserved supremacy of the tambour and especially that of Sega Tambour of Rodrigues Island (Sega barre et Sega coupe) danced at all ages and on all occasions where the body is possessed by the rhythm, bringing one in trance that is evocative of mother Africa.”

Sega Tambour of Rodrigues Island involves four main instruments to create its unique sound, namely the *Tambour* (Drum), the *Triyang* (a triangular iron rod), *Bwat* (2 tin cans) and the *Mayos* (two pieces of wood). The tambour is the key instrument in the ensemble and is constructed by stretching goat skin over a wooden circle, which the player slaps his/her bare hands against to create a resonating sound. This distinctive instrument is tuned by heating it over an open fire, made from dried banana leaves, and this tuning via heating takes place multiple times throughout the performance. To accompany the instruments, traditionally a choir consisting of female singers and led by the *Mareshal* (the principal female singer), intertwines the musical beats with song. In normal circumstances, the mareshal will signal the tambour player to commence the music by shouting “*sizone*”. The music will start, sweeping up the group and the audience in the rhythm of the beat. In regards to the movement element of the performance, couples will accompany the music with dance. Dancers will often change partners throughout the Sega Tambour of Rodrigues Island, sometimes including an element of playful competitiveness over a certain partner. The performance becomes a perfect blend of theatre, dance and music.

In addition, as the songs are often spontaneously composed, it is possible to incorporate elements of the particular circumstances into the performance, thereby allowing Sega Tambour of Rodrigues Island to be the means by which conflicts can be resolved, information can be communicated and people can be brought together. Indeed, if conflict was present within the society, traditionally it would be formally resolved via the means of Sega Tambour performance. For example, the musical lyrics could be used to illustrate misunderstandings between individuals and provide the means by which a response could be formulated without resorting to violent confrontations.

Sega Tambour is enjoyed by all, professionals and amateurs alike, and has become a symbol associated with the Rodriguan identity itself. Sega Tambour reflects oral traditions and expressions, performing arts, social practices/rituals/festive events, knowledge and practices concerning nature

and the universe, and traditional craftsmanship. The element preset multiple characters typical of ICH, such as the musical skills and knowledge possessed by the local musicians, social role of Sega Tambour as a means to resolve conflict and maintain social order, know-how of making and using the instruments, of the dances, of the making of clothes in terms of stitching, transmission of the knowledge over generations and the intentional involvement and engagement of the youth.

A number of past, current and future measures have been recognized as necessary to safeguard the Sega Tambour. With particular regard to intellectual property rights associated with the element, the nomination files list the following. First, by facilitating the protection afforded by conventional copyright to individual artists belonging to the community, for instance in case of adaptations or of derivative works based on the traditional knowledge. Thus, the State of Mauritius provides and will continue to provide funding to the Sega Tambour artists who participate in national and regional performances and will monitor the intellectual property rights associated with such performances, including copyright. This will be implemented through the Mauritius Rights Management Society (MRMS), a collective management organisation which will provide assistance with the management of intellectual property rights that arise in relation to the production of CDs and DVDs, as well as the promotion of such artists via television and radio. Second, by opening the discussions to adapt the copyright law of Mauritius so that copyright could be applied to creations of such artists that may lack the respective conventional requirements. Thus, the State of Mauritius will organize a future endeavour to provide assistance in regards to the intellectual property rights of the Rodriguan artists, including the establishment of a specialised section of the MRMS dedicated to fulfilling the needs of such artists and ensuring the protection of the artists' intellectual property rights by reviewing legal loopholes which may raise copyright concerns.

15. Copyright and certification trademark: Indonesian Batik

The ICH element "Indonesian Batik" was inscribed in 2009 on the UNESCO Representative List of Intangible Cultural Heritage of Humanity by Indonesia. The culture of batik is rich within Indonesia and spreads wide across the country, prominent within 18 different provinces, including Java and Jambi. Arising from the Japanese word '*ambatik*' (a cloth with dots or spots), batik are hand-dyed cotton and silk garments that play a key cultural role within the lives of the Indonesian people. The batik community involves hundreds of thousands of people including craftspersons, fabric dyers, tool manufacturers, pattern designers, informed experts, interested groups and institutions, museums, modern designs, artists, teachers and collectors. Further, batik garments are commonly worn to important events such as weddings and used to cover deceased family members during periods of grieving. Batik even plays a key role in traditional Indonesian rituals such as the ceremonial casting of royal batik into a volcano. The batik garments used in the aforementioned scenarios would be carefully designed/chosen and possess the patterns and motifs appropriate for the specific situation. Thus, a batik is an artistic work of cultural symbolism, each telling a unique story. It is unsurprising therefore that batik garments are prized possessions and passed down the generations as family heirlooms.

Batik is an important aspect of the traditional and daily dress of many Indonesian communities and therefore is a crucial part of their cultural identity. To illustrate, from 1972 batik shirts have been common dress in Indonesia and the country's local governments have ordered that batik bearing local patterns were to be worn by officials. Furthermore, as aforementioned, certain patterns and symbols illustrated on the batiks are used to reflect certain important life events. For example, as stated in the Nomination File, "there are traditions of using batik with certain patterns on certain occasions during the life of a person. For example, there are batiks of certain patterns to be worn during the *mitoni* ceremony for ladies in the 7th month of their first pregnancy, batik cloth slings used to carry babies (motifs of *naga*—*serpents*, symbols of fertility, or characters from *wayang* puppetry), batiks for the

tedhak siten ceremony where a baby touches the ground for the first time, placing its feet on a batik cloth belonging to its family, batiks for couples in marriage ceremonies (*sidomukti* or *wahyu temurun* patterns), for the parents of brides and bridegrooms (*truntum* pattern) and for shrouds for covering corpses (*semen* or calligraphy patterns)."

Finally, the traditional handicraft domain is represented in the element as the creation of batik involves intricate handiwork. Briefly, a batik is created by designing a pattern of dots and lines, using the means of a copper pen-like instrument (*canthing tulis*) or copper stamp (*canthing cap*) to apply hot wax on cloth. The cloth is then dyed by hand and the wax removed by boiling and scraping it away. This process is repeated as many times as required in order to apply the number of colours desired. To make a hand-stamped batik, the process can take up to several days whilst hand-drawn batiks require no less than one month and the process to completion may extend to one year. Originally, prior to creating the batik, the craftspersons would fast and pray, and then commence making the garment, singing traditional songs.

Thus, batik plays a crucial role in the traditional cultural identity of Indonesia. However, upon turning to consider the place of batik within the modern fashion world, it appears that Indonesian contemporary trends of design have been increasingly promoting the traditional form of dress and continue to incorporate the garments into modern fashions. It has been said that the leap in batik popularity has been due to the widely publicised feud between Indonesia and Malaysia over the batik, with each claiming to be the rightful originating nation. In order to demonstrate Indonesia's devotion to batik, the country's government proudly promotes the fabric by seeking fashion designers to adapt the batik into modern designs and styles and calling upon civil servants and members of the public to adopt it into their everyday dress. As a result, batik has now been said to be "a staple in upscale malls and galleries in Jakarta" and a number of Indonesian offices implement "Batik Fridays". Obin, a leading Indonesian fashion designer who specialises in traditional batik textiles and technique, states that the batik "is so important that the world finally recognize and acknowledge batik as an Indonesian heritage... It is part of our soul."

In light of the aforementioned values represented by batik and in addition to the foreign claims to the batik, it is not surprising that Indonesia has passionately sought IP protections in order to safeguard their interest in the traditional garment. Indeed, the Nomination File for inscription to the 2009 UNESCO Representative List of the Intangible Cultural Heritage of Humanity specifically made reference to the need for adopting IP rights to safeguard the batik. In regards to safeguarding measures required to combat the problem of "unauthorized copying of batik designs," the Nomination File dictates that the "Pekalongan Batik Museum Institute established an office to advise and assist batik community members regarding intellectual property rights." Additionally, concerning respect for customary practices, it was acknowledged in the Nomination File that "many traditional batik designs have existed for several centuries, while new batik designs continue to evolve" and thereby stated that the "Indonesian batik community resolves, should batik be inscribed by UNESCO, to respect intellectual property rights over batik design and regarding mixtures of traditional dye."

Thus, sui generis IP rights have been adapted to protect the ICH element of Indonesian batik. Recognising the passing of traditional values and attitudes attached to batik through the generations, the nation's government deems the garments to be a traditional art form, and has established legislation to protect their UNESCO ICH element. As extracted below, *Law of the Republic of Indonesia No. 19/2002 on Copyright* aims to prevent the misuse of Indonesian traditional culture. Article 12(1)(i) of Law No. 19/2002 stipulates that works protected "in the field of science, arts and literature" include "batik art" and, by the operation of Article 29(1)(d), the copyright for batik arts is to be valid for the life of the creator and an additional fifty years after his or her death. Data reports convey that

applications to copyright batik motifs and patterns have increased since 2007, with approximately 300 designs copyrighted in Indonesia.

In addition to copyright, the Indonesian Department of Industry introduced the “Batimark” through its Ministerial Decree No. 74/M IND/PER/9/2007. “Under the Indonesian Ministerial Decree, only batik manufacturers who already sell their products under a registered trademark can obtain a “Batikmark” certification. The manufacturer’s products also must pass a series of tests conducted by the National Standardization Agency (Badan Standardisasi Nasional). Products that pass their tests are considered to conform to the “Indonesian National Standard” (Standar Nasional Indonesia). The manufacturer receives a certification upon passing the tests. If the manufacturer is eligible, they can then file a written request, attached with its company profile, to the head of the Yogyakarta Grand Handicraft and Batik House (Balai Besar Kerajinan dan Batik). Yogyakarta Grand Handicraft and Batik House is an institution authorized by the Ministerial Decree to perform additional tests on the batik-patterned textile. The Batik Institution will then perform tests in their laboratories. The aim of the tests is to assure that the textile meets the certification standards of the batik-patterned textile. The qualifications include reviewing: the materials applied to the textile, the pattern, the dyeing technique, and the textile quality. If the batik-patterned textiles pass the tests then the manufacturer will be eligible to obtain a numbered “Batikmark” certification. This certification is valid for three years and can be renewed. The certification is in the form of a label printed “Batik Indonesia” that is placed in every single product of batik-patterned textile that has been certified. This label has been copyrighted too in the Indonesian Copyright Office.

Thus, a “Batikmark” trademark certification from the Indonesian government guarantees that the product has certain traits that make it different from other batik-patterns. It assures the uniqueness of the textile, the pattern, the dyeing technique, and the textile quality. These traits establish the identity of the product and distinguish them from other batik-patterned textiles. Thus, a trademark provides protection for consumers from confusion as to the source and quality of a manufactured object.” The Batimark is a combination of a collective and certification mark.

16. Collective trademarks: Traditional violin craftsmanship in Cremona (Italy)

The ICH element “Traditional violin craftsmanship in Cremona” was inscribed in 2012 on the Representative List of the Intangible Cultural Heritage of Humanity by Italy. The highly renowned process of Cremonese violin craftsmanship concerns a traditional method of fashioning and restoring string instruments such as violins, violas, cellos and contrabasses. This process is long, complex and highly demanding whereby violin-makers are required to attend a specialised school and work under within a close teacher-pupil relationship, prior to progressing to an apprentice position at a local workshop where they may master and perfect their violin-making techniques. Each year, a violin-maker will construct three to six instruments, by hand, using more than 70 pieces of wood to shape and mould a unique piece that accords with the individual acoustic responses and requirements. Thus, each instrument is specialised and unlike any other.

Violin-makers avoid using semi-industrial or industrial materials when constructing the instrument, instead carefully selecting a specific wood that is naturally well-seasoned. Thus, a high degree of creativity is required in order to be a competent craftsperson and the practice requires such violin-makers to possess the capacity to be able to adapt general rules and apply personal knowledge to each individual piece. In light of such intricacies, it is of little wonder that the Cremonese violin-makers are certain that the evolution of such craftsmanship requires the sharing of their unique knowledge, in particular with the musicians so that a better understanding of the required need may be ascertained. Antonio Stradivari, the famous violin-maker, was a native from this city; his profound knowledge of

materials such as timber and varnish was not least due to the craftsmanship expertise that had been passed on over generations.

In sum, Cremona violin-makers must undergo many years of training to perfect their skill, garnering unique sensitivities and experience of the practice, in order to construct an instrument that is perfect in regards to both sound and appearance, using high quality materials, and ensuring great care and diligence is exercised throughout the entire process. This process is today highly promoted by several associations since traditional means of violin-making is deemed essential to the identity of Cremona itself, as well as its citizens, and is crucial in the promotion of social and cultural practices, rituals and events of the region.

The Cremona Chamber of Commerce, along with the Consortium of Violinmakers “Antonio Stradivari” Cremona and ‘Associazione Liutaria Italiana’, and several other craftsmen associations supported by the Regional Chamber of Commerce and Regione Lombardia, strongly sought to attain a trademark for the identification of Cremonese instruments. Such a trademark was desired in order to signify the quality of the esteemed stringed instruments and allow international recognition for their unique standard of excellence. Thus, the initial and fundamental step towards the protection and safeguard of the Cremonese instruments was to attain the Cremona Liuteria trademark, the objectives of which included the recognition and guarantee the unique craftsmanship and the instrument's origin; supervision and protection of the craft itself; an increase in market transparency; greater customer certainty and satisfaction as individuals can be sure that the purchase is of a guaranteed instrument, with permanent verification of its origin and manufacturer.

In 2001 therefore a collective word/figurative trademark “Cremona Liuteria” was registered by the “Consorzio Liutai ‘Antonio Stradivari’ Cremona” for the territory of Italy firstly and then extended to 34 other countries. These countries are Denmark, Finland, Great Britain, Japan, South Korea, Norway, Sweden, Albania, Armenia, Austria, Bosnia and Herzegovina, Bulgaria, Benelux, Switzerland, China, Cuba, Czech Republic, Germany, Egypt, Spain, France, Croatia, Hungary, Liechtenstein, Monaco, Montenegro, Macedonia, Poland, Portugal, Romania, Serbia, Russia, Slovenia and Slovakia. It was registered for the Nice classes 15 (Musical instruments, namely violins, violas, violoncellos, double basses, viola d'amore, viola da gamba, plucked string instruments namely guitars, harps), 16 (Artists's material, scores, printed matter) and 41 (Musical education, lute makers education, organisation and direction of shows, concerts, meetings and other cultural events, museums, organisation of musical contests, clubs, publishing of books).

The trademark consists in a sign and in a regulation for its use, which includes three documents. First, the “rules for the use of the ‘Cremona Liuteria’ collective trademark”. Second, its attachment A representing graphically the sign just mentioned. Third, its attachment B on “Instrument Making Regulations for ‘Cremona Liuteria’ Trademark Instruments”.

The sign consists in a stylized drawing of a violin bow which the final part is a violin winding; the first part of the bow is characterized by the words “CREMONA” and “LIUTERIA” in black block letters, longitudinal to the violin bow, respectively inside and outside the bow. The claimed colors are dark red and black.

The regulation for the use of the sign includes 24 articles. Art. 1 indicates that “the use the trademark is intended to raise awareness of the Consortium of Violin Makers ‘Antonio Stradivari Cremona’. The Trademark provides a visible and immediate guarantee to users, traders, customers and musicians that the instruments comply to the Instrument Making Rules”.

Article 2 stipulates that “the Consortium will license the Trademark to applying artisan firms (hereafter Licensee) who undertake to use it in accordance with the present Rules. 2.2 The requirements to become Licensees of the Trademark are as follows: a) carry on a business as a violin maker, in any form, in the Cremona province, without having under way bankruptcy and any other insolvency proceedings, or having gone into bankruptcy or having been disqualified or incapacitated or having been in recent years the subject of protest, except where the grounds for the protest have

been justified; b) be registered in the Artisan's Register kept by the Provincial Commission for Artisans (CPA) of Cremona (at the Chamber of Commerce in Cremona) as a violin maker, specializing in the construction of the following musical instruments: violins, violas, cellos, basses, viola d'amore, viola da gamba, plucked instruments, harps and guitars (hereafter Instruments); c) to have worked as a professional violin maker in the province of Cremona for at least 5 years and be registered with the CPA as a violin maker; or to have received the diploma from the Institute of Higher Education "Antonio Stradivari" in Cremona; or to have been employed for at least 5 years by a luthier who practices his trade in the province of Cremona; d) build Trademark Instruments according to the Instrument Making Regulations that are attached to the present Rules and form an integral part of them (attachment B)".

Articles 3 indicates that the license to use the trademark is not exclusive and is subject to the payment of royalties, the costs of which are determined by the Board of the Consortium. Art. 7 stipulates that "The Licensee may use the Trademark by itself or together with his own brands" and that "the Licensee shall brand a number of instruments with the Trademark that does not exceed the number of certificates received by the Consortium pursuant to Article 8".

According to Art. 8 "the Consortium may consign each year to the Licensee the following number of certificates bearing the SIAE mark: 15 Certificates to the owner of the artisan firm and/or to the associate who has the requisites as owner, and in the name of the owner or associate; 15 Certificates issued to the owner of the artisan firm and in the name of the coadjutant who takes part in the construction of instruments; 10 Certificates issued to the owner and in the name of each full-time employee; 5 Certificates issued to the owner and in the name of each part-time employee. Each certificate bears the Trademark and the year of issue together with a progression number. Each certificate shall be completed by the Consortium with information regarding the maker, the workshop and the issue date. The costs relating to the issuance of Certificates shall be borne by the Licensees. The Consortium reserves the right to retain a copy of the Certificate issued, duly completed and signed along with photographs of the instrument made in order to set up a special database of all the instruments made in accordance with the present Rules for the Use of the Trademark". Art. 9 establishes that all other "instruments made by the Licensee that do not meet the requirements stated in the Instrument Making Regulations must be communicated to the Consortium and must be identifiable".

Thus, these rules of the regulation pose percentages of violins that can be sold in the relevant specialised markets of violin-players. Outside these percentages, violins can be manufactured by the same violin makers without following the strict requirements of the regulation, thus for instance not entirely by hands. On the one hand this flexibility is necessary since the violins manufactured according to the collective trademark regulation requirements are very expensive and are sold in reduced numbers, while other violins manufactured according to softer requirements are cheaper and better sold. Thus, the flexibility at stake renders the practice economically sustainable for violin-makers. On the other hand, however, the same flexibility originates a lack of trust by specialised consumers, the violin players, who are confused on the quality of the violins at stake because at the end these violins complying with the requirements or not are manufactured by the same violin-makers. Policy makers and the community are aware of this situation, and therefore are working on their collective trademark, with the final aim of eventually changing its relevant regulation.

Articles 11 and 12 concern the monitoring of the use of the trademark and eventual sanctions associated. In particular Art. 11 states that the Board of Directors of the Consortium "shall establish a Control Committee to monitor the proper use of the Trademark; this entity will check whether the rules contained in the Instrument Making Regulations and the present Rules are respected, particularly in regard to construction technique, origin and quality of the Instruments". In addition, "the Control Committee shall appoint, among the master violin makers who have held the Trademark license for at least two years, four inspectors who shall perform the inspections at the licensees' workshops as well as on the documentation filed in the Consortium". The composition of this Committee, the way to

appoint inspectors and to perform inspections are regulated in Art. 10. Art. 11 then indicates that when a licensee who does not comply with the provisions of the Rules and the attached Instrument Making Regulations in making an instrument on which the Trademark is attached, he is subject to disciplinary sanctions, which will be applied by the Control Committee or the Board of Directors. "Disciplinary sanctions are as follows: verbal warning to be carried out the Control Committee, written warning; fine from €100 to €1,000; temporary suspension of the trademark license for up to twelve months; revocation of the license to use the trademark". The Board of Directors may even decide to commence court or arbitration proceedings (Art. 14).

The "Instrument Making Regulations for 'Cremona Liuteria' Trademark Instruments" consists of a part 1 on a "brief history" of the "Cremonese violin making", according to which

"main actor in the historical evolution of the violin. Cremonese violin making began its course with Andrea Amati in the mid-16th century and continued for three centuries, marking a unique evolutionary process. What followed, in these three hundred years, was an interweaving of families composed of violin makers for several generations, from father to son, from son to grandson and great-grandson who, after the Amatis, bore names such as Bergonzi, Guarneri and Stradivari: dynasties of violin makers with luthiers of varying fame, but indistinctly linked to a classical construction tradition.

Their fame made it way throughout Europe: owing a violin from one of their workshop was for the principal European courts and the most famous musicians not only a sign of distinction but a guarantee of the excellent quality of the instrument.

The instruments from this period are now considered the reference models in the history of the violin, fundamental in the training of many violin makers and a source of inexhaustible inspiration for contemporary violin making.

After the great splendour, a decline was almost inevitable: in Cremona the downturn began at the end of the 18th century and continued on through the entire 19th century, even though important violin makers worked in the city in that latter century who are still highly regarded.

The true silence began at the start of the 20th century, interrupted by the founding of the "Stradivari Hall" first and the "Stradivari Museum" subsequently. This silence lingered on through the first half of the century: it was only in the 1960s that the Violin Making School, founded in 1938, finally became active.

In that same period Cremona laid the foundation for its collection of historic instruments: the Tourism Board purchased the 1715 Stradivari - renamed "Il Cremonese" and donated it to the City of Cremona.

From that period onwards, with a constant crescendo, Cremonese violin making has resumed its stride: new masters been trained and workshops have been opened as same by tradition. New international relationships are being formed, and exhibits and competitions in the city have enjoyed ever greater success.

Today, Cremona, with its almost 150 workshops, has returned to be reference point for violin making in the world".

The "Instrument Making Regulations for 'Cremona Liuteria' Trademark Instruments" consists of a part 2 on a "definition of the sector", with a brief introduction of the characters of the instruments with the trademark associated, according to which these "are representative of excellence in the artistic and traditional artisan trades in that they are made entirely by hand, with the exception of

parts such as the strings, fingerboard, purfling, etc. that are identified in the Regulations to which every licensee of the "Cremona Liuteria Trademark" must abide.

The artistic and traditional artisan trade, in the sphere of violin making, stands out for the originality and personality expressed by master violin maker in creating his instruments. These instruments respect and revive a technical and formal tradition that has been consolidated over time and can be traced back to a particular historical and cultural context that produced the likes of the Amatis, the Guarneris and the Stradivaris".

Part 2 of "Instrument Making Regulations for 'Cremona Liuteria' Trademark Instruments" indicates then several requirements of manufacturing of the violins, related to the components, construction method, construction phases – construction, varnish and set up, and certification. Those are very technical requirements, according to which, in synthesis, instruments must: be made without the use of the equipment or techniques used for large-scale industrial production; be varnished without the use of spray paints, regardless of whether they are pressurized; be made and finished in the maker's workshop without the use of industrial semi-finished products except for the following accessory parts: bridge, fingerboard, upper and lower nuts, chin rest, sound post and purflings; be made from the following materials: spruce, maple, ebony, willow, poplar, rosewood, mahogany, cedar and/or other types of wood that are traditionally used to make the instruments; be made using the traditional Cremona craft techniques and subsequent developments.

The collective trademark 'Cremona Liuteria' is a good example on how to apply conventional IPRs to ICH. In addition, as will be mentioned in the last chapter this trademark is suitable to protect the element at stake not only in Italy but also in all other 34 countries of registration. Yet, as will be recalled at the following chapter too, the trademark regulation at stake has some weaknesses too, that are currently risking damaging its community. In fact, it establishes strict requirements that the violin-makers shall follow to manufacture the violins to be sold in the relevant specialised markets of violin players. Yet, the same regulation imposes the respect of these requirements just for a low percentage of the entire number of violins that shall be manufactured by the violin-makers. For the rest, violins can be manufactured without following the regulation by the same violin-makers. On the one hand this flexibility is necessary since the violins manufactured according to the collective trademark regulation requirements are very expensive and are sold in reduced numbers, while other violins manufactured according to softer requirements are cheaper and better sold. Thus, the flexibility at stake renders the practice sustainable for violin-makers. On the other hand, however, the same flexibility originates a lack of trust by specialised consumers, the violin players, who are perceiving a low quality of the violins that despite being manufactured in Cremona by the same violin-makers, don't comply with the requirements posed by the trademark regulation.

Policy makers and the community itself are aware of this situation. Recently, in fact, they found an occasion to solve it in the 2018 grant of the Italian Ministry of Cultural Heritage and Activities and Tourism (hereinafter: the "Grant"), which, for the first time since the Italian ratification of the Convention, aims at financing intangible cultural heritage. The Grant aims at providing funding to develop safeguarding plans, which will help fulfilling the duty of Italian's public authorities to implement the UNESCO Convention for the Safeguarding of Intangible Heritage. In this framework, policy makers and the community decided to implement a capacity building and several other measures in their safeguarding plan, precisely to help violin-makers working on their collective trademark, with the final aim of eventually changing its relevant regulation, to increase the percentage of violins that shall be manufactured according to the rules for the use of the trademark.

Another eventual change in the trademark regulation concern the requirements that the supply of material necessary to manufacture the violins shall occur in Italy. This requirements interest also

the possible adoption of other IPRs to better protect the element. In fact, the safeguarding plan aforementioned includes GIs or PDOs as a good option in this respect, subject however to the adoption by the EU legislator of the European Parliament proposal to extend GIs and PDOs to non-agricultural products. Yet, should the community wish to adopt a PDO, it shall follow the strict requirement that all construction phases are perpetrated in the relevant location of the community, since PDO requires the entire production to be located in the area of origin.

17. Cont.: ‘Beer culture in Belgium’ (Belgium)

The ICH element, “Beer culture in Belgium,” was inscribed on the Representative List of the Intangible Cultural Heritage of Humanity by Belgium in 2016. The process of developing the nomination file for “Beer culture in Belgium” was a long one. Many Belgian breweries (especially the larger ones) belong to the “Union of Belgian Brewers” (UBB), which first started exploring the possibility of an ICH nomination, and approached the Ministry of the German speaking Community in Belgium. Other organizations of brewers were also involved in preparing the file. Eight meetings were held in 2013 so that practitioners and other bearers of the element (brewers, zythologists, orbeer experts; teachers; specialized journalists; and NGOs) were informed about the UNESCO Convention of 2003. “Belgian beer culture” was already included in the Flemish- and French-speaking Community inventories. The file was further discussed, refined, and approved in two large general meetings in Brussels, where brewers, representatives of tasters and amateurs, and NGOs, representing teachers, professors and specialized journalists, were present. Because Belgium is a federal state, the relevant Ministries of all three Communities in Belgium (German, Flemish, and French) had to confirm their support for the submission of the file before it could be submitted to the UNESCO Secretariat of the Convention by Belgium’s German-speaking community.

This element relates then to the art of making beer. In particular, use of different ingredients and processes has created a wide variety of brewing methods in Belgium. About 1,500 types of beer are produced in almost 200 breweries today, using four different fermentation methods. Non-alcoholic beer is also produced. Furthermore, there are certain regions known for particular varieties. Lambic beer, for instance, can only be brewed in winter in Brussels and the neighbouring Pajottenland due to the presence of wild yeasts [*Brettanomyces bruxellensis*](#) and [*Brettanomyces lambicus*](#) in the air. Old brown beers are brewed throughout western Flanders. The knowledge and skills necessary to make and use the beer are transmitted orally in breweries, by master brewers who run classes in breweries, specialized university courses that target those involved in the field and hospitality in general, public training programmes for entrepreneurs, and in small test breweries for amateur brewers.

Beer is an essential part of daily and festive life in Belgium today. Although beer brewing declined during the first half of the 20th century, by the mid-1970s, increased appreciation for the work of craft brewing, new flavours, and the value of old practices, such as secondary fermentation, revitalized the tradition. This led to increased consumption and enjoyment of local and craft beers in the country. Thousands of people –men and women, professionals and amateurs –now participate in producing and promoting Belgian beers; many hundreds of thousands enjoy drinking them. There are many local and specialized associations of beer lovers. Beer is often paired with a specific meal; it can also be used for cooking, including in the creation of products like beer-washed cheese. The ‘Brotherhood of the Order of Sikaru’ in Namur promotes the proper service of beer in restaurants (temperature, proper glass, foam head, etc.). Beer culture contributes to a sense of local identity, history, communal living, enjoyment, and prosperity through promotion of local products and the environment.

The 'Beer Culture' nomination file focuses on the production and appreciation of craft and specialty beers. Craft beer production is characterized by small-scale production (10-20,000 liters per year) in small, privately-owned breweries that usually have a strong link with local clients and bars. The breweries generally manage the brewing process from beginning to end, using local brewing methods and recipes. The quality and flavour of the beers may slightly differ from season to season because brewers use locally-harvested ingredients and modify existing recipes according to availability of ingredients and environmental conditions. Craft beer brewers, who meet often to share opinions and experiences, generally keep the details of their brewing recipes secret.

Belgium has a strong tradition of specialty monastic beer brewing. Cistercian Trappist communities make or harvest and sell a wide range of food and drink products, including beer, to support their charitable activities. Trappist beers are produced in breweries controlled by Cistercian monks and recognized by the International Trappist organization. Different types of Trappist beers are produced, though all of them are top-fermented. Not all the Trappist beers would be considered craft beer: the Trappist monasteries Westmalle and Chimay each produce more than 15 million litres per year, for example. Other Trappist breweries, such as Westvleteren and Achelse Kluis, have a smaller output. Trappist beers are not really a type of beer, so it does not matter so much what ingredients they use or how they make the beer, although Trappist breweries try hard to work using sustainable methods, and to improve the local economy.

Among the protecting measures, it is relevant to note that there are no legal rules limiting the choice of beer ingredients or brewing methods. In contrast, the legal rules since 1992 allow small breweries to operate under advantageous tax conditions and benefit breweries providing them subsidies for equipment investments. In addition, various types of craft beers have been recognized as a regional or provincial heritage, such as 'old red-brown' (west and east Flanders), 'old krieks' or 'lambics' (Brussels, Walloon Brabant, and Flemish Brabant). The government also supports certain museums specialized in beer and their role in safeguarding this tradition.

Among the protecting measures enter IPRs. There are several IPRs associated with this element, even though its nomination file only references that Wallonia has developed a 'Local Bistrot' (*Bistrot du Terroir*) label and that Zythos vzw is studying the possibility of developing a label for cafes which serve beer according to best practices. Particularly relevant are "Authentic Trappist Product" and "Certified Belgian Abbey Beer," both related to traditional practices of beer brewing in monasteries.

With regard to the Authentic Trappist Product trademark, the International Trappist Association has registered the collective trademark "Authentic Trappist Product" with both the Benelux Office for Intellectual Property and the European Union Intellectual Property Office. The collective trademark "Authentic Trappist Product" was registered with the European Union Intellectual Property Office for class 32 (Beers; mineral and aerated waters and other non-alcoholic drinks; fruit drinks and fruit juices; syrups and other preparations for making beverages) and also for class 29 (Meat, fish, poultry and game; meat extracts; preserved, dried and cooked fruits and vegetables; jellies, jams, fruit sauces; eggs, milk and milk products; edible oils and fats), since it is also used for other authentic Trappist products apart from Beer.

The strictly-controlled trademark may only be used for products if they satisfy several conditions, among which that they are manufactured in, or in the vicinity of, the monastery; the monastic community is engaged in the management of all the resources necessary for the business; and the business income largely sustains the needs of the monastic community and social work/charities. At the moment, only six Belgian breweries are entitled to use the Trappist trademark for their beer: Orval Abbey, Achel Abbey, Westmalle Abbey, Scourmont-Lez-Chimay Abbey, Rochefort Abbey and Westvleteren Abbey.

The “Certified Belgian Abbey Beer” was registered by the UBB as a collective trademark in order to ensure that beers sold as “Abbey Beers” have some sort of connection to an abbey. It is a certification trademark registered with the Benelux Office for Intellectual Property for class 32 (*Beers*). Only members of the UBB that have signed a written agreement with the UBB may use the trademark. Not all small craft breweries belong to the UBB. In addition, in order to use the trademark, products have to satisfy certain conditions. Beers that were already present on the market when the trademark was registered must have a connection with an abbey (whether or not that abbey still exists). Furthermore, royalties have to be paid, which can be used to help finance the Abbey’s charitable activities, along with other cultural activities/works that contribute to the cultural preservation of the abbey and those allied with the abbey (or to other defined organizations if the abbey no longer exists). Any marketing activity can be checked by the abbey or the other defined organization. With regard to beers that were not present before the registration of the trademark, the requirements are even stricter. The beer must be brewed in an existing non-Trappist abbey (or an existing abbey that licenses a brewery to brew the beer under its responsibility, and that commercializes the beer itself). If the beer is brewed by an independent brewery, it must have acquired the license for the use of the name of the beer from an existing abbey (or it must have a juridical tie by means of a contract). Royalties have to be paid to the abbey/order to support their charitable activities, and the beer has to be based on an historical background (the abbey must have had a history of brewing). Any marketing activity can be checked by the abbey. All these requirements of use demonstrate that the trademark supports the work of the abbeys or associated charities in return for allowing the use of their name.

However, in contrast to Trappist beers, the use of the Abbey trademark does not require the beers to be made in an Abbey or by monastic communities. Today, no Belgian ‘Abbey’ beers (apart from those made in the brewery in Val-Dieu Abbey in Aubel) are actually brewed in abbeys and none are made by or under the control of monastic communities. Thus, the trademark could be seen as deceptive and misleading and producers using it could be seized before courts for anti-competitive behavior. This is precisely what happened with regard to the ‘Leffe’ beer.

This beer was originally produced in the Abbey of Leffe from 1240 until the French closed down monasteries and other religious institutions in that region in 1796. The brewery in the Abbey continued to operate until 1809 under secular control. In the early 1950s, Lootvoet Brewery, although not located in or near the Abbey of Leffe, began making another ‘Leffe’ beer. It received permission to do so from a different Leffe monastery established in the early 20th century, which was thereafter under the control of several different religious groups. The Lootvoet Brewery changed hands and location three times, first taken over by Artois, then by Interbrew, and finally, by Anheuser Busch INbev, the world’s largest beer group. When Anheuser-Busch acquired the rights to Leffe beer in 2008, it began brewing the beer using automated methods at the AB InBev Stella Artois industrial brewery in Leuven, Belgium. Leffe beer is a ‘Certified Belgian Abbey Beer’ and uses the logo on its bottles. The Leffe monastery does benefit financially from allowing the use of its name for the beer, and monks have thus not been involved in Leffe beer making since 1794 (when the Abbaye de Leffe was destroyed during the French Revolution). Leffe beer today is not even the same as the craft beer produced by the small-scale Lootvoet brewery in the 1950s. The Leffe website, however, celebrates the “rich character and deep roots of this exceptional abbey beer.” It claims that “the tradition of the Leffe beer [...] can be traced back to 1240” and makes reference to “passing on our know-how from generation to generation for almost eight centuries.”

In 2016, a class action suit was brought against Anheuser Busch INbev in Miami federal court by Henry Vazquez, a consumer of Leffe beer, who alleged that Anheuser’s deceptive packaging caused him to overpay for Anheuser Busch products such as Leffe Blonde and Leffe Brune. He claimed that Leffe beer marketing did not explain that the beer was mass-produced in a facility that also produces

Stella Artois. Instead, it deceived customers into believing that it was brewed in small quantities in an abbey under the supervision of monks, thereby justifying a higher price than other Anheuser Busch products (such as Stella Artois). Other beer drinkers also complained more generally that the taste of Abbey beers (such as Leffe or Maredsous) deteriorates when small scale craft brewers are taken over by larger brewers who wish to standardize production and reduce costs, and use the abbey name simply for marketing purposes.

In his class action suit, Vazquez sought compensatory and punitive damages, and a formal declaration that Leffe is not made in an abbey or by monks. Specifically, the relevant claims of consumers before the court included the following: “a finding and declaration that the Defendant’s alleged ‘Abbey’ Beer Products are not made in an abbey or by monks, as represented by Defendant AB; an order requiring Defendant to be financially responsible for notifying all Class Members about the false representations made regarding the alleged ‘Abbey’ Beer Products; an award to Plaintiff and Class Members of compensatory damages, punitive damages, and statutory penalties; an award to Plaintiff of the Defendant’s profits for selling the alleged Abbey Beer as actual Abbey Beer; an award of attorneys’ fees [...]; an award of costs, as allowed by law; an award of prejudgment and post judgment interest, as provided by law; an award of attorneys’ fees to Plaintiff’s counsel for the common benefit conferred upon the class based on a percentage of the total recovery; and such other and further relief as the Court deems appropriate under the circumstances.” Anheuser-Busch fought Vazquez’s motion for Class certification, saying that there was no way to identify Class Members (as many were unlikely to have kept receipts documenting their purchase of the beer). The beer company also argued that the label “abbey ale” was not misleading because it did not identify the origin of the product, only the type of beer.

Anheuser-Busch then filed a motion to dismiss the abbey beer class action lawsuit for lack of subject matter jurisdiction. In September of 2016, Vazquez dropped his claims for monetary damages, instead, only seeking injunctive relief. Anheuser-Busch then argued that the Leffe class action lawsuit never met the \$5 million amount-in-controversy requirement necessary under the Class Action Fairness Act, and therefore, the federal court did not have jurisdiction over the case. Consequently, on October 3, 2016, all parties agreed to dismiss the case, and the court entered a “Voluntary Dismissal by Stipulation of Parties by Henry Vazquez,” closing the case on October 4, 2016.

18. Individual trademark: ‘Mediterranean Diet’ (Italy)

The ICH element “Mediterranean Diet” was first inscribed in 2010 on the Representative List of the Intangible Heritage of Humanity by Spain, Greece, Italy and Morocco. In 2013, the nomination was extended to Cyprus, Croatia, and Portugal. This multinational nomination covers the communities of the Mediterranean basin in general, but specifically names ‘seven emblematic communities: Agros (Cyprus), Brač and Hvar (Croatia), Soria (Spain), Koroni/Coroni (Greece), Cilento (Italy), Chefchaouen (Morocco), Tavira (Portugal)’.

The idea of a Mediterranean Diet was first proposed by researchers (including the American Ancel Keys) who worked on a public health study of heart disease conducted in seven different countries, starting in the 1950s. The study concluded that traditional Mediterranean diets, protective against heart disease, ‘had olive oil as their principal component of fat, were high in cereal products, legumes, fruit and vegetables, moderate in fish and low in dairy and meat products. Moderate amounts of wine were taken with meals’. This idea was echoed in the 2010 nomination file, which stated “The Mediterranean diet is characterized by a nutritional model that has remained constant over time and space, consisting mainly of olive oil, cereals, fresh or dried fruit and vegetables, a

moderate amount of fish, dairy and meat, and many condiments and spices, all accompanied by wine or infusions, always respecting beliefs of each community.”

Today, the web portal of the Mediterranean Diet (a project of the University of Rome Sapienza Unitelma, supported by the Italian Ministry of Agriculture and Forestry), which was set up to promote the UNESCO inscription for EXPO, explains that the core foods in what they call the ‘UNESCO Mediterranean Diet’ are ‘bread, pasta, vegetables, legumes, fresh and dried fruit, as well as white meat, fish, dairy products, eggs, olive oil and wine’. The notion that dairy consumption is low in the diet has been lost. Specific foods are not mentioned in the 2013 nomination file at all. The element is described as follows in the 2013 file:

“The Mediterranean Diet – derived from the Greek word *díaita*, way of life – is the set of skills, knowledge, rituals, symbols and traditions, ranging from the landscape to the table, which in the Mediterranean basin concerns the crops, harvesting, picking, fishing, animal husbandry, conservation, processing, cooking, and particularly sharing and consuming the cuisine. It is at the table that the spoken word plays a major role in describing, transmitting, enjoying and celebrating the element”. In addition it is mentioned that this element includes “the craftsmanship and production of ancestral domestic objects linked to the Mediterranean Diet and still present in everyday objects, such as receptacles for the transport, preservation and consumption of food, including ceramic plates and glasses, among others”. Also, the Mediterranean Diet includes “the cultural spaces, festivals and celebrations associated with it [such as] the Rose Festival in Agros, the St. Prosper Festival in Brač and Hvar, the romerías, fiestas or patronales in Soria, the panigiria in Koroni/Coroni, the sagre in Cilento, the moussem in Chefchaouen or the santos populares in Tavira; [as well as the family, and the cultural spaces of markets]”

The element is included in several different kinds of inventories at the national level, not always with the same name. Some examples are given below (full details in the nomination file online). In Croatia it is inscribed in Mediterranean Diet of the Croatian Adriatic on the Register of Cultural Goods of the Republic of Croatia, a public book maintained by the Ministry of Culture. Preparation of Starograjski paprenjok, the traditional cake of the island of Hvar (Z 3909) and the preparation of Soparnik – the traditional chard cake (Z 3325) also included on this register. In Cyprus the element is inscribed in the Agros products (rose water, charcuterie, hazelnuts) in the Cyprus Gourmet Charter, prepared by the Ministry of Agriculture, Natural Resources and the Environment. The Mediterranean Diet is also included in the Archives of Oral Tradition of the Scientific Research Centre of Cyprus, which preserve the material collected over the years by researchers through interviews with individuals and groups and field trips to rural communities. In addition, the Mediterranean Diet is included in the National Inventory of Intangible Cultural Heritage of Cyprus, recently created by experts at the Centre for Scientific Research of Cyprus from the Centre’s Archives of Oral History according to Article 12^a of the UNESCO Convention 2003. In Morocco a section specific to the Mediterranean Diet in the General Inventory of the Ethnographic Museum of the Qasba, Chefchaouen includes the Diète de Chefchaouen. In Spain it was created a specific inventory of the Mediterranean Diet (Inventory 01/09/2009) by the Archives of the Municipality of Soria. The inventory includes sections for: oral traditions; social practices, rituals and festivities; knowledge and know-how related to nature and the universe; traditional techniques.

The Mediterranean Diet Foundation (MDF), an NGO that is now accredited under the UNESCO Intangible Heritage Convention, coordinated the nomination process for the file in 2010 on behalf of the four countries that initially proposed the file; three other countries have now joined the file. The MDF is a cultural foundation originally established by a union of large Catalan food companies and cooperatives selling products like fruit and vegetables, yoghurt, sparkling wine and desserts, in order to “promote research on the [Mediterranean Diet] in relation to its healthy, historical, cultural,

culinary, agricultural and environmentally friendly aspects". Officials from the Catalan government, and the Ministry of Agriculture in Spain, sit on the board of the MDF. Academic research supporting the idea of a healthy Mediterranean Diet, building on the work of Ancel Keys in the 1960s and 1970s, is promoted by the MDF.

This element was criticised, as already mentioned, by a letter sent to the UNESCO Secretariat for its raising concerns over over-commercialization. However, at that time a formal procedure to dealing with correspondence from civil society was absent; the necessary mechanism was introduced only in 2012. Thus, the letter was disregarded and the element was inscribed on the Representative List in 2010. Yet, the elements kept being criticized as being "too vaguely defined [...] to have any genuine safeguarding effects". In fact, "Despite the commonalities between them, the inclusion of vastly different culinary traditions (such as the Moroccan, Spanish, Italian, Greek, Cypriot, Croatian, and Portuguese) under the same Mare Nostrum umbrella, indeed, at least raises the concern that these distinct cultures will be thrown into a melting pot, and thus be at risk of cultural dilution and caricaturization." It was also argued that the process of inscribing an ICH element like the Mediterranean Diet on the Representative List is less about ensuring that communities practice and transmit their ICH, and more about constructing and commodifying it as intangible heritage on the global stage, framing food products from the region as 'traditional' and 'authentic' for commercial and political purposes. The MDF's role is described as 'heritage entrepreneurship', supporting a 'public-private partnership of experts appropriating cultural elements to be used in both the global and local economic, scientific and political market'. This view is supported by those who emphasise that commercialisation of products and food tourism relating to the Diet may affect the safeguarding of ICH and the promotion and protection of cultural diversity, whether positively or negatively it is difficult to say. Perhaps to address initial criticisms that it was promoting food products, the file focuses strongly on 'social, traditional and agricultural practices' rather than 'a simple list of foods'. The 2010 file was originally signed by various Ministries of Agriculture, now the file is signed by the UNESCO ambassadors of the countries proposing the nomination, and community organisations mentioned in the file include museums and archives. This was easier in terms of getting the file signed by representatives of the countries, and also (perhaps as a side effect) took the focus away from promotion of food products towards promotion of culture associated with food.

Among the protecting measures enter IPRs too. An EU trademark was registered in 2015 with a denominative part "we are what we eat MedDiet Mediterranean Diet" as an individual trademark by several public and private collective entities of many countries: Unione Italiana delle Camere di commercio, Industria, Artigianato e Agricoltura; Centro Servizi Promozionali per le Imprese – Azienda Speciale della Camera di Commercio di Cagliari; Associazione Nazionale Città dell'Olio; Fundación Dieta Mediterránea (MDF, abovementioned); La Chambre de Commerce et d'Industrie de Tunis; Cultural Foundation "The Routes of the Olive Tree"; Messinian Chamber Of Commerce & Industry; Forum delle Camere di Commercio dell'Adriatico e dello Ionio; Asociación Española de Municipios del Olivo; Association Of The Mediterranean Chambers Of Commerce And Industry; Confederation of Egyptian European Business Associations; Institut National de la Recherche Agronomique de Tunisie /Economie Rurale – INRAT; Chamber of Commerce, Industry and Agriculture of Beirut and Mount Lebanon.

The trademark was registered by collective entities of countries that didn't yet nominate the element. The countries that didn't nominate the element as of yet, however, are party to the "Mediterranean Sea Basin Programme" which "is part of the new European Neighbourhood Policy (ENP)" that "aims at reinforcing cooperation between the European Union (EU) and partner countries regions placed along the shores of the Mediterranean Sea with regards to the promotion and certification of foods, practices and restaurants through the "Med Diet Quality Label" [see MedDiet, Partnership, last updated 18 November 2015, available at: med-diet.eu/P42A0C467S872/Partnership.htm. [accessed 4 September 2016].

The trademark was registered for classes 35, 41 and 43, covering a wide range of products and services in the fields of commercial advertising, education including competitions, and food and drink

(including restaurants and providing information about restaurants). Through this trademark the owners want to increase awareness of the traditional Mediterranean Diet, especially among young people, as an integral part of the healthy Mediterranean lifestyle and as a means to promote common economic development, prosperity and solidarity among the Mediterranean countries. These countries have started a Mediterranean Diet project which involves consumers, restaurants, schools and institutions. The owners of the Mediterranean Diet trademark have, for example, licensed its use by certain restaurants, which must use olive oil, preferably extra virgin, as the main source of added fat; use seasonal and local products; whose menu must consist of dishes made with traditional Mediterranean recipes and/or is in line with the Mediterranean diet; and which are transparent on food information. More than 300 restaurants have already obtained such a license. There is also a MedDiet Restaurant App which aims to highlight those restaurants close to the consumer. There has been an educational training program that has involved about 5000 Students in Italy, Spain, Greece, Lebanon, Egypt and Tunisia and consisted inter alia of the creation of school gardens, school menu planning and laboratories of “Mediterranean Diet taste”. In order to inform the general public, info points have been established in ten countries to share and promote knowledge about the Mediterranean Diet.

The use of the trademark is accorded also to non-members of the respective associations owning it, on a discretionary basis of the respective licensor, for a variety of projects following different rules laid down in the relevant license agreement. This flexibility in the use of trademark, as mentioned, characterizes individual rather than collective brands, for which the licensor is free to grant licenses for the use of the label to non-members of its respective association, and to deny licenses to its own members, if necessary, for his own personal reasons and logics.

19. GIs, PDO, TSG: Traditional agricultural practice of cultivating the ‘vite ad alberello’ (head-trained bush vines) of the community of Pantelleria (Italy)

The ICH element ‘traditional agricultural practice of cultivating the ‘vite ad alberello’ (head-trained bush vines) of the community of Pantelleria’ was inscribed on the UNESCO Representative List in 2014. Pantelleria is a small volcanic island near Sicily, characterised by semi-arid, windy conditions with a high degree of soil erosion. The Island lies at the heart of the Mediterranean Sea, at 70 Km from Tunisia and 85 Km from Italy. Due to its central position, ever since ancient times, the Island has been a crossroads on shipping routes between Africa and Europe. The Island was governed first by the Phoenicians, then by Punics, Romans and finally by the Arabs who gave the Island the name of “Daughter of the wind” (Bent el-ariah). The constant blowing of the wind, together with the scarcity of rain, has enforced the nominated agricultural practice onto the community of Pantelleria. This lack of precipitations is another feature of the Island, where the average annual rainfall does not exceed 350mm. The element is widespread basically all over the Island, particularly in the characteristic terracings. On an Island of almost 83 km² about 3,000 hectares are cultivated following this original agricultural practice.

The hardy Zibibbo variety of grape is grown on the island; vines are planted in holes and pruned so that the fruit hangs very low to get heat from the soil. The element, introduced by Phoenicians, represents a traditional agriculture practice that has always been realized with the sole human activity. Despite the hard sacrifice of local men and the meagre revenue from the grape trade, the fact that the element is very much alive today shows how deeply it is perceived as an integral part of the identity of the Island, both from a cultural and an environmental point of view. In Pantelleria the grape is cultivated in accordance with a technique consisting of three phases. The first phase is the preparation of the ground (in local dialect “lenzatura”) that is the levelling of the soil and above all digging out a hollow in the ground in which the vine will be planted. The main particularity of this practice is that the vine grows in this hollow (“conca”), emerging above ground level only for few centimetres. The

hollow is the cradle of the plant which looks like a very little bush. The second phase consists of the special pruning of the plant: the main stem of the vine is pruned following the timings of the seasons to produce 6 branches, thus forming a bush with a radial arrangement. During this phase, vine-growers must constantly reshape the hollow (“pizzicatura”) to ensure that the plant is growing in the right microclimate. The third phase consists in the harvesting of wine grapes which must be done completely by hand by young and old during a ritual event starting at the end of July.

The vineyards and fields for donkeys are terraced or surrounded by dry stone walls made from the stones removed from the fields. Social practices such as equal inheritance and fragmented land ownership reduce intensive cultivation and insure farmers against crop failure. Tourist and non-resident accommodation increased by 75% after the 1960s, bringing income to the island but creating new environmental problems and reducing the emphasis on agriculture. About half of all the vineyards were abandoned between 1982-2010. The use of motor-cultivators damaged the soil, as did some pesticides and fertilisers (*Galt 1979, Tudisca et al 2013*). Economists say innovation in wine production processes is needed to make traditional cultivation economically viable (*Tudisca 2011*). The use of a crawler tractor is proposed for soil preparation because it is more efficient than donkeys and more environmentally friendly than motor-cultivators.

The knowledge and skills related to the element are learned by living on Pantelleria and observing the vine-growers and the farmers. The dialect of Pantelleria is fundamental to be able to understand the instructions and the names of the tools: the three phases characterizing the nominated agricultural practice have their specific denomination (“lenzatura”, “pizzicatura”, “tagghiari”). The use of local dialect reinforces the inextricable link between element and community. At the same time, the knowledge of Moon phases is especially important because the two pruning phases take place with a waxing Moon, according to the old traditional belief that as the Moon waxes the vegetation grows too. Also for this reason, the element concerns nature and the universe.

The correct learning of all the phases of the procedure is fundamental; the digging of the hollow, the planting of the vine pruning and trimming of the bush and branches and the maintenance of the hollow itself are all of equal importance. For understanding this practice it's not necessary of a specific master or degree: it needs to be born and grew up in Pantelleria. Those cultural components, together with great enthusiasm and deep dedication, are key elements in preserving and delivering that knowledge to future generations.

This element is a fundamental example of sustainable agriculture still practiced using traditional methods. The low walls built with local stones, the hills of Pantelleria and the characteristic terracing made of “dry-stone” with the vineyards gardens, their orderly rows of bush vines are characteristic features, results of the constant repetition of this practice. Through the terraces they have created, inhabitants and vine-growers shaped the landscape in the centuries allowing the cultivation of vine also on the roughest grounds and preserving it from geological instability. This sustainable agricultural practice also slows down desertification and soil impoverishment. Moreover, the geomorphologic conditions of Pantelleria and its climatic conditions have averted the mechanization of procedures, thus preserving the relationship between vine-growers, plants and territory, so often lost in modern agriculture. In fact, the vine-grower is often aided by a horse or by a Pantelleria donkey, an autochthonous breed well-suited to climbing the inaccessible steep slopes of this rugged island.

In addition, the practice plays a relevant role in the dialogue among the different communities of Mediterranean in the conservation of environment and landscape, influencing reciprocally the way of cultivating and preserving the land. In fact, the practice has represented a strong link between different territories and communities over the centuries. Despite cultural and religious differences among the populations that inhabited the Island (Muslims and Catholics), this practice acted like a

bond among cultures, as it was introduced by Phoenicians and then carried on by Romans and Arabs. Still today different peoples of Mediterranean basin maintain similar agricultural practices in various areas.

In 2009, the Town Council of Pantelleria developed a “Strategy Document for a re-launch of the agriculture of Pantelleria”. They proposed the ICH element be nominated to the UNESCO Representative List. It was inscribed in 2014. The ICH nomination focused on the planting and pruning tradition, linked to use of terraces and donkeys for ploughing the soil. Emphasis was placed not just on its role ‘in the conservation of environment and landscape’ on Pantelleria, but also as ‘a bond among cultures’ of the Mediterranean because of similar practices elsewhere.

A number of initiatives have been undertaken as safeguarding measures. With regard to measure to educate and foster the transmission of the practice, school programmes in Pantelleria are using a documentary made by the local community supported by the Sicilian Region. Also, at the State Middle School “Dante Alighieri” of Pantelleria a course on this traditional agriculture practice will be annually organized for the pupils. An opportunity for the transmission of the knowledge - not only for vine-growers but also for everyone (local and not local people) - is the several rituals and festivals (“*sagre*”) organized between July and September by the local community every year for sharing this social practice.

With regard to measures to promote and raise awareness of the element, on July 26 the community celebrates the first grape harvest of the vine that marks the beginning of the harvest throughout the island. Events on the Island such as “Calici di stelle”, “Zibibbo d’oro”, “Festa di Sant’Anna” and “Festival of Zibibbo”. The island has set up an ‘Adopting an albarello’ project for diaspora communities. The Barbacane Castle living museum has been established. Italian agricultural ministry and EU funding was sought for research and documentation. Seminars were organised on Pantelleria, Malta and Linosa by the IRVV (Regional Institute for Vines and Wine) project “The protection of the environment in the Mediterranean islands through the valorisation of vine farming” (2010). Documentation about diffusion of the practice in the Mediterranean Basin, by CUEIM-Sapienza University of Rome; Mediterranean Conference on “heroic” viticulture.

With regard to measures to protect and preserve the element, the Decree of the President of Italian Republic 11.08.1978, modified in 2011, par.4, restricts vine cultivation in Pantelleria to “ad alberello”. In 2011, the Ministry of Agriculture inscribed the element in the National Catalogue of Rural Landscape and Agricultural Practice. Rural development funding was used to renovate abandoned terraces.

Among the protecting measures enter IPRs. Despite the fact that the IP protection of Pantelleria wines has a long tradition, the nomination file doesn’t mention intellectual property rights among the safeguarding measures of the element. The geographical indications Pantelleria, Moscato di Pantelleria and Passito de Pantelleria have been registered as Italian Controlled Designations of Origin (*denominazione di origine controllata – DOC*) since 1971. The existing national geographical identification systems concerning the categories of grapevine products of the EU member states were harmonised by the Regulation (EU) No 606/2009 into an EU system as part of the Common Agricultural Policy of the EU. Thus, the indications Moscato di Pantelleria/Pantelleria/Passito di Pantelleria have been registered with the European Union under the File number PDO-IT-A0792 as a wine with a protected designation of origin (PDO)/*Denominazione di Origine Protetta* (DOP) since 2004 and are protected by Art. 107 of the Regulation (EU) No 1308/2013.

Despite the aforementioned exclusive nature of the EU PDO, according to Arts. 112, 113 of Regulation (EU) No 1308/2013 and Arts. 26, 28 of the Italian Law n. 238 dated 12.12.2016 the traditional term (*menzione tradizionale*) DOC may still be used. In fact, on “traditional terms” the Art.

112 of the Regulation (EU) No 1308/2013 specifies that “a ‘traditional term’ means a term traditionally used in Member States for the products referred to in Article 92(1) to designate: a) that the product has a protected designation of origin or a protected geographical indication under Union or national law; or b) that the production or ageing method or the quality, colour, type of place, or a particular event linked to the history of the product with a protected designation of origin or a protected geographical indication”. Thus, according to the “*Disciplinare di Produzione dei vini a Denominazione di Origine Contrallata ‘Pantelleria’*”, last amended on 07.03.2014, in the labelling of the wine the term “*Denominazione di Origine Contrallata*” (DOC) may therefore be used instead of the term “*Denominazione di Origine Protetta*” (DOP).

In addition, Art. 113 of the Regulation (EU) No 1308/2013 establishes common EU “protection” rules for traditional terms, indicating that 1. A protected traditional term may only be used for a product which has been produced in conformity with the definition provided for in Article 112. Traditional terms shall be protected against unlawful use. 2. Traditional terms shall be protected, only in the language and for the categories of grape vine products claimed in the application, against: a) any misuse of the protected term, including where it is accompanied by an expression such as “style”, “type”, “method”, “as produced in”, “imitation”, “flavour”, “like” or similar; b) any other false or misleading indication as to the nature, characteristics or essential qualities of the product, placed on the inner or outer packaging, advertising material or documents relating to it; c) any other practice likely to mislead the consumer, in particular to give the impression that the wine qualifies for the protected traditional term. 3. Traditional terms shall not become generic in the Union”.

The PDO specification dates back to decree of 1971 and has been amended several times, namely in 1992, 2000, 2011 (twice), 2013 and finally 2014. It comprises 10 articles. Art. 1 mentions that the traditional term DOP “Pantelleria” can be used exclusively for wines that follow the requirements established in the specification, and that enter into the following typologies “Moscato di Pantelleria; - Passito di Pantelleria; - Pantelleria-Moscato spumante; - Pantelleria-Moscato dorato; - Pantelleria-Moscato liquoroso; - Pantelleria- Passito liquoroso; - Pantelleria-Zibibbo dolce; - Pantelleria- Bianco, anche Frizzante”.

Art. 2 specifies that “these wines shall be obtained exclusively from grapes of the Zibibbo variety, save for the “Pantelleria-Bianco, anche Frizzante”, for which a minimum 85% Zibibbo variety is required, but additional grape varieties can be used provided that they are suitable for the area. The following articles are very detailed in requiring for each of the abovementioned wines typology that the wine is produced on Pantelleria, the bottling too, save in limited cases for which it traditionally took place elsewhere, in which cases however it is established that it shall occur in the Sicily Region and it shall be authorized by competent authorities under specific procedures. The vinification, drying and alcoholisation of liqueur wines must be carried out on the island of Pantelleria, the gasification processes must be carried out within the territory of the Sicily region. The specification restricts yield and density of planting on Pantelleria. The grapes ‘can be protected’ from weather conditions using the traditional method, but a specific method of pruning is not required in the specification. The terraces are not mentioned as essential to the specification. The government is working to help include the traditional method in the specification.

Art. 10 establishes that the public entity Istituto Regionale Vini e Oli, based in Palermo (Sicily Region) is the competent authority which is determined by the Ministry of Agricultural, Food and Forestry Policies, under art. 13 of the decree n. 61/2010, as the competent authority to carry out the necessary controls to certify compliance with the DOC/PDO specification. To this purpose, this authority works on the basis of a plan and a methodology that is in line with the EU requirements, that is approved by the Italian Ministry and that is published in the Italian Official Journal and attached to the specification. In addition, a private entity, *Consorzio Volontario per la Tutela e la Valorizzazione dei*

vini a d.o.c. dell'Isola di Pantelleria (Consortium for the Protection of the Pantelleria DOC wines) was established in 1997. Five companies belonging to the consortium produce 65% of the wines. A considerable number of other Pantelleria producers already participate in the Consortium for the Protection of the Pantelleria DOC wines and have thus shown an interest in a collaborative work for the island's wine. Since 2002, the Consortium has certified compliance with the DOC/PDO specification too.

The protected designations of origin for the Pantelleria wine may be used by any operator marketing a wine which has been produced in conformity with the corresponding product specification. Although companies producing wine on the Island use the same PDO and many belong to the Consortium, they have not yet registered a common individual or collective trademark. At the moment, every producer still uses his own brand. This may confuse consumers. A collective trademark for Pantelleria wine and liquors, might help to raise awareness for the uniqueness of the Pantelleria wine and might therefore prove to be an economic advantage for the future of winegrowing on the island and, indeed, the whole community. It would also be a chance to promote certain features of the wine, its tradition and its close connection to the local community, as well as environmental, ecological and social values. Since there is also a PGI for the "*Cappero di Pantelleria*" (the Pantelleria caper) it might even be possible to register a common trademark for all agricultural products from Pantelleria whose producers subscribe to certain traditional values and ethics of production. For instance, the aforementioned Trappist collective trademark is not limited to beer, but is also available for other products with connection to certain monasteries.

20. Cont.: "Know-how of cultivating mastic on the island of Chios" (Greece)

The ICH element "know-how of cultivating mastic on the island of Chios" was inscribed in 2014 on the Representative List by Greece. The island of Chios is situated in the NE of the Aegean Sea, at 3.5 km from the coast of Asia Minor. Its history is intimately related to that of mastiha, the product of the shrub *pistacia lentiscus*. Although shrubs of the same genus grow throughout the island and everywhere in the Mediterranean, mastiha is extracted only in the 24 Mastihohoria in the south of Chios, with a mild and dry climate. All efforts to produce mastiha in the north of Chios, as well as elsewhere – in Greece or abroad –, have failed, due to the geological, soil and micro-climatic conditions there, as well as due to the know-how of the community of the producers in question. In the south of Chios, the shrub *pistacia lentiscus* grows, from which an aromatic resin called mastiha is extracted, which has been renowned since the middle ages for its numerous properties and uses. The production of mastiha, an ancestral practice unaltered over time, influences the daily life of the 24 Mastihohoria where the product is exclusively extracted.

The cultivation of mastiha on Chios, from the Genoese and then Ottoman conquests, was subject to central control even though the growers enjoyed certain independent privileges. Chios today has nearly 2,000 growers of mastiha, who live in the 24 Mastihohoria (mastic-growing villages): Aghios Gheorghios, Armolia, Vavyloi, Vessa, Vouno, Elata, Exo Didyma, Tholopotami, Thymiana, Kalamoti, Kallimasia, Katarrakti, Koini, Lithi, Mesa Didyma, Mesta, Mirmingi, Nenita, Neohori, Olympoi, Pagida, Patrika, Pyrgi and Flatsia. Traditional cultivation of mastiha is a family occupation, in which men and women of all ages participate on equal terms, transmitting their know-how down the ages. The growers are organised in 20 Primary Co-operatives (per village), whose elected representatives from the Chios Mastic Growers' Association, founded in 1938 and having its main objective as "the protection of Chios mastiha through its systematic organisation, processing and collective supply". It organises the agricultural life of its members, handles legal questions on the protection of mastiha, supports research on the shrub, promotes new products and thus encourages young growers, the number of whom has considerably increased since 2000.

The culture of mastiha is a family occupation that requires laborious care throughout the year. The agricultural work begins in December-January, with the natural fertilisation of the lentiscus and pruning the branches. From mid-June, the ground around the trunk is swept, levelled and cleaned, so that the mastiha can easily be recovered. Between July and September, "kentos" ("embroidery" using a "kentitiri", a pointed iron tool) is performed. An incision is made in the skin of the bark and main branches. Once the mastiha has solidified, the first harvest takes place after 15 August, starting with the largest pieces. The mastiha is washed, often with seawater, placed in wooden boxes and kept in a cool place. It is carefully cleaned by women, often elderly, working in small groups. Then it is delivered to the Chios Mastic Growers' Association, which gathers the entire production, processes it and promotes mastiha and its numerous derivatives internationally.

The culture of mastiha, which is much more than traditional know-how, represents a comprehensive social event, around which networks of alliances and mutual help have been established. Traditions and legends survive in the vernacular language, such as the one about the tree that shed tears when seeing the martyr Saint Isidore. Those from this culture see it as part of their identity, which drives their feeling of belonging to the community. Men and women of all ages participate on equal terms in the various stages of the culture of mastiha. The tasks are divided for practical reasons: men take care of the natural fertilisation and pruning of the shrubs and prepare the ground around the lentiscus, before the incision. In the past, small women and children extracted the white earth, which they spread around the lentiscus. The women are active mainly during the harvest, working on cleaning and selecting the "tears" (pieces of mastiha). They preserve mutual help practices, such as the "daneikes" (those who take turns to provide mutual help). These activities are an occasion for perpetuating the collective memory (through the narration of old tales and stories) and social renewal (through the establishment of matrimonial networks). Incision and the harvesting of mastiha is taught by the elderly, who have the experience and the patience. The role of the chairmen of the Primary Co-operatives in each village is important, because they represent the village community as the intermediary between the growers and the Association, which is of crucial importance as the institution that preserves production, and they are a factor in social cohesion.

The culture of mastiha is still alive thanks to the persistence of the oldest producers in using the traditional methods and involving young people, who occupy themselves intensively with it. The Chios Mastic Growers' Association has the major responsibility of ensuring the continuity of the methods for the culture of mastiha, a role that it has played successfully until now. The young growers either come from families who have a long tradition of producing mastiha or they have no family precedents (recently arrived on Chios). In both cases, they receive their know-how by word of mouth from experienced producers, because the relationship with the shrub is experienced and cannot be replaced by agronomic manuals. The oldest growers (men and women) make incisions in the shrub so that they find the veins without irreversibly damaging it. The youngest start by observing the process and then they do it themselves, supervised by an expert from the community who corrects them. At the same time as he/she is taught, the grower "teaches" the shrub, which "learns" to produce the resin via skilful incisions, thus strengthening the bilateral interaction between the producer and nature. Cleaning the product requires agility and experience; the women are irreplaceable for this. The refined selection of mastiha into different qualities, performed by hand, remains unequalled, according to the producers.

Mastiha has shaped the natural and cultural landscape of the Mastihohoria since the 14th century. Located on sites that are hard to spot and far from the sea, the villages were fortified by the Genoese, so they could better control the production and movement of the product, avoiding threats from pirates and smugglers. Most of the Mastihohoria, which are still inhabited, have retained their architectural character until the present day. Some of them are classified as historical monuments by the competent ministries.

Furthermore, growing mastiha provides a livelihood for local society. Through mastiha, the community preserves its specific identity and reassesses and rediscovers its traditional values through day-to-day experience. Rites and customs also bear witness to this: this is the case of the Festival of the Aga during the Carnival, representing the Ottoman collector of mastiha and his relationships with the local community. We also see a mobile young population, which is returning to the Mastihohoria and sometimes combines production with agro-tourism activities, thus enhancing the historical tradition of Chios.

Over the last twenty years, the culture of mastiha has been flourishing, demonstrating the potential for the economic use of local cultural heritage and the environment in a context of sustainable development. The local economy relies on the culture and production of mastiha, even though this has always been a supplementary agricultural task. The post-war financial crisis disrupted the demographic balance of the Mastihohoria. The association has always worked for the viability of mastiha. It has encouraged growers to plant new shrubs, to seek new markets and to revive traditional know-how. Very early, it took responsibility for processing and promoting natural mastiha, as well as various derived products. The element "Know-how concerning mastiha growing on the island of Chios" was included in the national inventory of intangible cultural heritage (<http://ayla.culture.gr/?q=en/inventory>).

Since 2000, several safeguarding measures were adopted. Among the protecting measures enter IPRs. Since 1997, Chios mastiha has been protected by the Controlled Designation of Origin label according to Regulation No. 123/1997 (L0224/24-1-97) of the European Union and has been registered on the community list of CDO products. This is indicated in the nomination file as a measure that foster the protection of the element, in an "inseparable" way "from its specific geographical environment, including natural and human factors and methods of cultivation and production". The EU Designation of Origin at stake has the following details: "Μαστίχα Χίου", class 2.5, registered on 24 January 1997, dossier number EL/PDO/0017/1558. The application was presented by the "Enosi Mastikhoparagogeon Khiou" (Union of Khios mastic producers), for Khios mastic oil, entering into the EU category of "Essential oils". This application was approved with the Commission Regulation (EC) No 123/97 of 23 January 1997 supplementing the Annex to Commission Regulation (EC) No 1107/96 on the registration of geographical indications and designations of origin under the procedure laid down in Article 17 of Regulation (EEC) No 2081/92 (Text with EEA relevance), published in the Official Journal L 022, 24/01/1997 P. 0019 - 0020

The specification summary included in the application to register at the EU level the PDO, indicates that "Khios mastic oil" shall present the following technical characteristics: a white or yellowish fluid with the taste and aroma particular to "Khios mastic". It shall be produced in the southern part of the island of Khios, in the 24 villages and communities known as "Mastikhokhoria" (literally "the mastic villages"), viz: Ag. Georgios, Armolia, Vavili, Vessa, Vouno, Elata, Exo Didima, Tholopotami, Thimiana, Kalamoti, Kallimasia, Kataraktis, Kini, Livi, Mesa Didima, Mesta, Mirmiggi, Nenita, Nechoiri, Olimpi, Pagida, Patrika, Pirgi and Flatsia. It is forbidden to produce Khios mastic outside the territory of the above municipalities. The proof of origin for this element is indicated in that it is a traditional product produced only on the island of Khios and known for a great many years. It has medicinal, pharmaceutical and industrial applications. With regard to the method of production, it is stated that "Khios mastic oil" comes from the mastic tree (*Pistacia Lentiscus* var. *Chia*), which belongs to the family of *Anacardiaceae*. It is produced by distilling natural "Khios mastic". Its production is restricted to the island of Khios, so that it has a very profound link with the island of Khios and its population. In addition, it comprises a significant source of agricultural income and foreign exchange. The inspection body is determined in the Department of Agriculture, Khios. In addition, with regard to

the labelling, it is mentioned that "Khios mastic oil" has the code number XI, and the label bears the serial number and the last two digits of the year of manufacture.

21. Cont.: "Argan, practices and know-how concerning the Argan Tree" (Morocco)

The ICH element "Argan, practices and know-how concerning the Argan Tree" was inscribed in 2014 on the Representative List by Morocco. The geographic location of this element corresponds perfectly to that of the argan tree to which it is inextricably linked. South-west Morocco is a hotbed for the latter. The zone includes the Western High Atlas, the Anti-Atlas and the Souss Valley, in which the taxon covers 800,000 ha. It lies between Safi in the north and Guelmim in the south, and between the Atlantic to the west and the easternmost sector of the Taroudant region to the east. The practices and know-how concerning the argan tree are concentrated almost exclusively in this region. Nevertheless, other very minor isolates of argan trees are located south-east of Rabat, in the Berkane region in the far north-east of Morocco. Besides the main south-west Moroccan region, only the isolate in the Rabat region supplies oil using the same practices and know-how, albeit very infrequently

The argan tree is an endemic woodland species, emblematic of south-west Morocco, which can be traced back to the Tertiary Period. The exploitation of the argan tree and its fruit is attested to by medieval chroniclers. It is a fundamental element of an age-old agricultural-pastoral civilisation. The tree produces a fruit from which an oil is extracted that offers multiple benefits. Its wood is used to generate heat, its leaves make excellent fodder for livestock, its meal is used to fatten cattle, etc. Used essentially in food, argan oil is also exploited in ancient pharmacopoeia recipes and in cosmetic preparations, which have nowadays spread across the entire world.

Argane oil also plays a role in ecological sustainability as argan trees are acting as rampart against the encroachment of the desert. If producers do not find any economic benefits, argan tree forests will not be maintained and will let the sand move forward, he said. Some 600 hectares are already lost to this fight every year, he added, presenting the encroachment of the desert as an effect of climate change.

In addition, based on a gender approach, this element demonstrates the fundamental role that women play in preserving cultural practices with an economic dimension which contribute to sustainable and equitable development. The women, in fact, retain the mastery of the techniques for extracting the oil as well as the secrets of the preparation of medicinal recipes which have characterised local pharmacopoeia for centuries. The practices and know-how upheld by these women concern the traditional methods for extracting oil, the uses of this oil, the pharmacopoeia, and the crafting of tools used. According to the bearers of the element, "seven tasks" are required to obtain this remarkable oil: harvesting the fruit, drying, pulping, grinding, sorting, milling and mixing. The women excel in this process and thus maintain unique skills and know-how. Two main stages illustrate this knowledge: the milling of the kernels using a specific hand mill and the mixing, which involves gradually adding warm water in quantities that only an "argan woman" can master. Moreover, the transmission of traditional know-how specific to the extraction of the oil and its multiple uses is systematically ensured by the women, who teach their daughters to skilfully handle the different tools used (the hammer, anvil and hand mill) and the different processes mentioned above from a young age.

Currently these women organised themselves into cooperatives, associations and economic interest groups specifically designed for the production and commercialization of argan oil and its derivative products. This is part of recent efforts made by the communities to perpetuate the practice of the element and to adapt to the conditions of modern society. A newly revived interest in these age-old practices consequently emerged and young girls are encouraged to first of all learn the necessary

techniques and expertise for this trade from their elders, and then to integrate the production structures in order to improve their socio-economic conditions. All the more so as most of these cooperatives also provide literacy classes for women who express an interest. Direct learning from older women who are bearers of this knowledge is an effective and the only way of becoming an argan woman. This is true of both the extraction of argan oil and the different preparations related to its derived products, which mainly consist of traditional medical applications, argan oil-based health products and cosmetic formulas that are becoming increasingly popular among urban women. The transmission of this knowledge and these skills is therefore entirely non-formal.

Among the safeguarding protective measures the nomination file lists several that have been taken by the State with the aim of safeguarding the tree and, consequently, the age-old skills and practices that are linked to it. The Moroccan State undertook a project for safeguarding the argan tree between 2003 and 2008, in the framework of international cooperation, which aimed to bring argan women cooperatives and the preservation of the tree up to standard. In addition, the High Commission for Water and Forests (Haut Commissariat aux Eaux et Forêts) undertook an argan tree reforestation project over an area of 200 ha per year to address the problem of deforestation and desertification that the region has experienced over recent decades. The Moroccan forestry sector is regulated by laws specifying the rules of access and exploitation of forest tree species. Only the argan tree is still subject to a specific law that grants the communities who live there full user rights, particularly concerning grazing and the harvesting of argan fruits. The State has established legal and institutional frameworks for the creation of cooperatives and associations, particularly for the sustainable exploitation of the argan tree. Finally, in 2010 it created the Agence Nationale pour le Développement des Zones Oasiennes et de l'Arganeraie / ANDZOA (National Agency for the Development of Oasis and Arganeraie Zones).

Among the same protective measures the nomination file expressly includes IPRs. In fact, the file recalls that the State also intervened in 2010 with the publication of a decree defining a "Protected Geographical Indication" that specified the requirements that have to be respected during the extraction of argan oil in order to guarantee its original quality. The GI was registered in Morocco by the non-profit association l'AMIGHA.

According to the nomination file "this PGI indication requires that users of the "argan oil" label respect specifications guaranteeing the quality of the product obtained in compliance with traditional manufacturing, production and marketing standards. Such a geographical indication gives argan women considerable added value in their work and encourages them to continue applying their traditional skills". This statement of the nomination file was confirmed by the president of the just mentioned NGO, Mohamed Ourais, who emphasized that women are working in argane production almost all along the production chain, from the collecting of the raw material through all steps of the process. Argane and its valorisation through a GI is contributing to reducing economic precariousness, and increasing socio-economic conditions of women in Morocco. Thus, in this case IPRs on ICH is helping the role of women in society, unlike other cases where IP law, that are in principle gender neutral, is putting women at a distinct disadvantage.

Furthermore, the nomination file acknowledgements on the importance of GI to protect the ICH, was confirmed by a publication issued by the Government on Moroccan labeling of traditional products. In this publication, it is mentioned that such labelling was kept within the framework of the Green Morocco Plan, namely its Pillar II, among the main axes of development for agricultural products, especially local products. Since the entry into force of the law 25-06 related to Distinctive Signs of Origin and Quality (SDOQ), 37 products were labeled: 30 Geographical indications; 5 Designations of Origin; 2 Agricultural Labels. Among the 30 GIs Argan PGI is included and the following details are provided. The Applicant Group is the Moroccan Association for Geographical Indication of

Argan Oil « AMIGHA ». The objectives of the PGI are to structure the sector and establish a collective approach of marketing, communication and promotion; to keep the value added of the product in the region for the benefit of the local population; to provide guarantees to consumers; and to strengthen the positioning of Argan oil in the international market and fight the product's eventual commercial usurpation. The area of argan forest consists of 830.000 Ha. Argan has an ecological role since it fights against desertification. It has also a very important socio-economical role, since there are 140 women cooperatives and it is a source of income for over 4.000 rural families. It originates a provision of foreign currencies through exportation of over 300 T/year. The geographical limits include the Argan biosphere reservation, acknowledged by the UNESCO, including 250 rural and urban communities in 9 provinces. The Argan historical background relates to the "Argania spinosa", an endemic forest species in Morocco. With regard to these species, ancient scriptures from the twelfth century cited by Ibnou Redouane and Ibn El Bayatr testify the age of argan trees in Morocco. Among the Argan's main properties are the following. It is a natural oil exclusively extracted from kernels of Argan trees. Its color is clear and translucent. Its taste is that of grilled almonds. Its use is in local cuisine (tagines, couscous, Amlou) and as cosmetic and/or medicinal product too.

In addition, the nomination file includes among the "safeguarding measures" to be adopted after the inscription on the UNESCO List, the recognition of an "international" GI, intended as a GI that could protect the element not only in Morocco but also in other countries. The nomination file, in fact, states "to ensure greater visibility of the element, not only at the local and national level but also at the international level, initiatives taken by non-governmental organizations with the support of state institutions are currently under negotiation with the aim of obtaining a 'Protected Geographical Indication', PGI, on an international scale, guaranteeing respect for the traditional and ancestral methods employed throughout the entire argan oil extraction process". This international recognition of the Moroccan GI, according to the nomination file "will enforce the 2010 decision by the Moroccan state services to assign a national "Protected Geographical Indication", PGI". In addition the same nomination file indicates that "the High Commission for Water and Forests, the principal public actor in the management of environmental issues, supports the activities related to the protection and preservation of everything concerning the argan tree, including of course the awarding of an international "Protected Geographical Indication", PGI, label".

These activities related to the protection of the ICH element through the "awarding of an international "Protected Geographical Indication", PGI, label" were the following. After registering the GI in Morocco, Amigha took European recognition to have the GI protected in all European countries (IPW, Trademarks/Geographical Indications/Domains, 1 July 2009). An application for Argane to become a Protected Geographical Indication (PGI) was made in October 2011 with the European Commission. The application is visible here http://ec.europa.eu/agriculture/quality/door/list.html?&recordStart=0&filter.dossierNumber=&filter.comboName=argan&filterMin.milestone__mask=&filterMin.milestone=&filterMax.milestone__mask=&filterMax.milestone=&filter.country=&filter.category=&filter.type=&filter.status=&locale=en

This application was welcomed by WIPO publication on "Protecting Society and the Environment with a Geographical Indication", in particular in the part dedicated to Argan According to WIPO, in fact, if approved such EU GI registration could be one of the first PGIs from Africa to receive such protection within EU regulatory framework. The benefits of this registration would be that it "would identify Argane as being from a specific region with resulting unique properties and signal to consumers that its production meets specific standards. It also could help protect traditional knowledge and promote producers' collective rights". In addition, WIPO lists three other main benefits which could derive from the Argane PGI be registered. "First, the argane name would be reserved for those having the right to use it and products derived from argan (such as argan oil) and the producers

of these products could benefit. Second, argan producers would have the possibility to enter the EU market under a PGI, which would allow them to differentiate their products from competitors and highlight the specific characteristics of Argane products. Third, it would require products such as Argane oil to be produced according to specific standards, which could guarantee product origin and ensure consumers receive genuine Moroccan products. These standards could also make it easy to detect unofficial and fake Argane based products, thus protecting both local producers and consumers”.

Yet, despite “a lot of money has been invested in the argane oil GI since 2009” the GI was not registered in Europe. According to Mr. Ourais the European Union wanted the producers’ association to get the accreditation of a verification body, which was not yet set up in Morocco. In order to save time, Amigha asked Cofrac (the French certification agency) to deliver this accreditation, but the EU asked Amigha to wait until the Moroccan certification agency was set up. Another issue concerned the “name” to be registered as a GI. “Argane,” which is the traditional Moroccan name given to argan oil, and which appears in texts dating back to the 12th century, was not approved by the EU Commission, which proposed to register “Argane from Morocco.” Yet, the association refused this proposal since “it could open the door to other argan oil, while this product is typically from Morocco, Ourais said”.

In addition, “Argane” was found to be registered as a trademark in Europe by Pierre Fabre, a cosmetic laboratory, in 1983. While Amigha was seeking for an arrangement with the laboratory, a legal dispute opposed Pierre Fabre with a third party and the Paris Tribunal decided in December 2010 to invalidate the trademark.

Yet, finally, the recognition of the Moroccan GI could be obtained through a bilateral agreement. This agreement will protect GIs listed as an annex, namely around 3200 EU names will be protected against misuse and counterfeiting in Morocco and reciprocally, 30 Moroccan GIs will be protected into the EU, which are the ones listed in the aforementioned publication on the Moroccan GI. A regular update of the list of names to be protected will be carried out, to ensure as well the reciprocal protection of new GIs. In fact, from the willingness expressed by the Member States to ensure protection of the EU GIs in Morocco, the Council gave the Commission the mandate to negotiate an Agreement on GIs protection with Morocco in October 2005, along with further trade liberalisation for (processed) agriculture and fishery products, in the overall context of reinforcing EU trade relations with Morocco. According to the Commission “this initiative shows the converging views of the European Union and Morocco on matters related to quality policy, consumer protection and intellectual property. In addition, this initiative promotes the protection of GIs internationally, and more particularly in the Southern Mediterranean countries”.

At that time, the trade relations between the EU and Morocco are governed by an Association Agreement which entered into force 1st March 2000. Following the mandate received in 2005, further trade concessions were negotiated first, resulting in the EU-Morocco Agreement on agricultural, processed agricultural products, fish and fisheries products, which entered into force 1st October 2012. Article 8 of Protocol 2 and Article 9 of Protocol 1 of this agreement foresee the opening of negotiations for an agreement on GIs in the three months following the entry into force of the agreement.

Negotiations on GIs were then opened in December 2012. The initiative aimed at modifying the existing EU-Morocco Agricultural Agreement under the form of an Exchange of Letters. The GIs Agreement is intended to be in Annex. Bilateral negotiations are on-going with Morocco for a Deep and Comprehensive Free Trade Agreement (DCFTA) that will deepen the Association Agreement. Agriculture is not included in the DCFTA so far but the agricultural protocol and the agreement on GIs will be inserted later on in it. EU quality policy (part of Common Agricultural Policy, international

dimension) The initiative is part of the overall effort of the EU to promote its high quality agri-food products all over the world, bilaterally and multilaterally.

On January the 16th, 2015 a joint press release from the European Commission and the Ministry of Agriculture and Fisheries of the Kingdom of Morocco stated that “the European Union and Morocco have concluded negotiations on an agreement to mutually protect their Geographical Indications (GIs). Through this agreement Morocco and the EU will ensure high level protection for their respective GIs for food products. Also aimed at promoting and fostering trade relations in agricultural products and foodstuffs produced in Morocco and the European Union, the text of the agreement was initialled today at chief negotiator's level”. “Morocco is the first amongst the Southern neighbours of the EU to take this important step forward in promoting and protecting the quality of agricultural production. The objective of this agreement is to better protect consumers in terms of not being misled on the true origin and quality of the product. The agreement is also a response to the willingness expressed by the EU Member States to promote the protection of Geographical Indications internationally and is a reflection of the converging views of the European Union and Morocco on matters related to quality policy, consumer protection and intellectual property. The agreement should serve as a dynamic instrument that will lead to the improvement in the quality of the products traded between the European Union and Morocco. It will introduce a mechanism for updates and for regular consultations, which will help when it comes to integrating new products in the list of the Geographical Indications. The Agreement will now be passed to Council and the European Parliament – and to the legislative authorities in Morocco – where it must be approved before its final entry into force”.

In September 2015 the Commission adopted a **“Proposal for a Council Decision on the signature, on behalf of the European Union, of the Agreement in the form of an exchange of letters between the European Union and the Kingdom of Morocco concerning protection of geographical indications and designations of origin for agricultural products, processed agricultural products, fish and fishery products and amending the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part”**.

Among the States that registered domestic GIs for ICH elements within their territory is the Republic of Korea, that registered a GI for the ICH element “weaving of Mosi (fine ramie) in the Hansan region,” inscribed in 2011 on the Representative List. See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 2011, *Nomination File for Weaving of Mosi*, pp. 7-8, available at: unesco.org/culture/ich/doc/download.php?versionID=13427 [accessed 2 September 2016].

In the Republic of Korea for instance Article 49 of the Act on Preservation and Promotion of Intangible Cultural Property prescribes as follows: “(1) The Administrator of the Cultural Heritage Administration shall protect intangible cultural heritage against acquisition of domestic and international patents, by such means as digitalizing the details and elements of the intangible cultural heritage transmitted, and posting such details and elements on the website accredited under the Patent Cooperation Treaty in order to seek domestic and international patent protection for such intangible cultural heritage. (2) The Administrator of the Cultural Heritage Administration shall endeavor to create advanced knowledge or craftsmanship from intangible cultural heritage, in order to facilitate the transmission of the intangible cultural heritage, and shall take measures necessary to protect the intellectual property of successors, as provided for in the Framework Act on Intellectual Property”.

Turkey registered a GI for its territory for its ICH element “Traditional Craftsmanship of çini-making” inscribed in 2016 on the Representative List. See Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, 2016, *Nomination File for Traditional craftsmanship of Çini-making*, p. 8, available at: unesco.org/culture/ich/doc/download.php?versionID=40366 [accessed 2 September 2016].

22. Cont.: “the Art of Neapolitan ‘Pizzaiuolo’” (Italy)

The ICH element “the art of Neapolitan ‘Pizzaiuolo’” was inscribed on the representative List in 2017 by Italy. The element is located in Naples, the capital of Campania Region, the third-largest Italian municipality with about 4 million people living in its metropolitan area. Naples (listed by UNESCO as a World Heritage Site since 1995) is situated on the Gulf of Naples, lying between Mount Vesuvius Volcano to the east, the Campi Flegrei to the north and Sorrento and the Amalfi Coast to the south. Because of the small urban area, which accounts only 118 km², the population density is among the highest in the world with more than 8,100 inhab./km². The community of Naples is a network of social and cultural relationships enhanced by a strong multiculturalism; a succession of foreign dominations and dynasties (Greek, Romans, Norman, Angevin, Aragonese, Bourbon) enriched the artistic and cultural heritage of the city and of the nominated element, transforming Naples in an important model of integration and dialogue between different cultures.

Pizzaiuoli are the symbol of Naples, especially around the world. The typical Neapolitan vocabulary linked to this art is unique, relevant part of the community's identity. This has been represented in various movies, like “L'oro di Napoli” (1954), where Sophia Loren, directed by Vittorio De Sica, expresses this value. It is not by chance that the most famous product of the Pizzaiuoli's art, “pizza margherita” with basil, mozzarella and tomato, created in Naples on 1889, has the same colours of the Italian flag.

Gestures, songs, smiles, skills, motions, performance, sharing: the art of Neapolitan Pizzaiuolo is a culinary know-how transmitted through generations until today, consisting of four different phases. The first lies in the kneading of the dough by the Pizzaiuolo until it reaches the desired consistency and smoothness, the shaping of dough balls (in local dialect “staglio”) and the preparation of the oven only by burning beech wood. The second phase represents a performing art characterized by ability and spectacularity of Pizzaiuolo, who spreads the dough (so-called “ammaccatura”), and models the raised rim (called “cornicione”), with skilfully motions for its extension (called “schiaffo”) creating a disk. The Pizzaiuolo makes the dough spinning and twirling it between both hands and then raises it to the air with a quick movement, often singing traditional songs. In this way, the dough assumes its correct oxygenation and consistency thanks to an appropriate and harmonic manipulation. The third phase is related to the topping of the dough: Pizzaiuolo put ingredients on from the centre outwards with a spiraling and clockwise motion, shaping an imaginary “6”. The fourth consists in baking it in a wood-fired oven, with a rotatory movement of the baker.

The element concerns a process engaging Pizzaiuolo and their guests: a social ritual that found its place between the Pizzaiuolo's bench and the oven, always in the center of the “stage”. Pizzaiuolo and hosts share together a convivial moment where stories, songs and social value of everyday life find their opportunity to be spread in a continuous collective feedback. Infact, Neaples's families try, at home, especially during festive days, to repeat this ritual and to learn by Pizzaiuolo how to re-create this art.

The element plays relevant functions of social aggregation and inter-generational exchange. It assumes a character of sacredness and spectacularity: children assist breathless to Pizzaiuolo's art, showing off it on a bench in plain sight by performing a jaw-dropping show full of cultural values, singing traditional songs. Pizzaiuolo is not aside but stays at the centre of the “bottega”, sharing its art with all the customers. Families look him with admiration in front of the bench, recognizing values of friendliness and conviviality, telling stories and sharing social traditions, as the older go back to their childhood.

Therefore, the element offers an important chance for social emancipation to many young people: learn to be a Pizzaiuolo represent for them the only option instead of living in social marginality

(historically, in fact, Pizzaiuolo came from neighborhoods with higher crime density). The sense of solidarity is also given by the “pizza sospesa” custom: in Naples everyone buying a pizza can pay another one for stranger poorer who will go after him in the “bottega” to eat something. The Association of Neapolitan Pizzaiuoli, with its Academy and the Association of young Pizzaiuoli, since 2005 organises training courses for young people in districts of Naples such as Scampia and Quartieri Spagnoli, urban neighbourhoods with a high crime rates, attended by more than 100 young people who can learn a honest and creative know-how useful for their social emancipation.

Among the measures to protect and preserve the element, the nomination file includes the following. To avoid any abuse of the inscription on the UNESCO ICH Representative List and any form of over-commercialization, the it will be established with an Official Decree adopted after consultation with local communities, a specific Agro-Food ICH Committee, consisting of experts and representative of the community. In addition, to safeguard the “bottega”, as cultural space linked to the element, the Italian Cultural Heritage Code fix, at par. 52.1bis, specific acts for preserving the historical place where elements inscribed on UNESCO ICH List take place.

Among the same protective measures the nomination file expressly includes IPRs. In fact, the file recalls that “in December 2009, the element obtained, by request of Italy, the Traditional Speciality Guaranteed (TSG) under the European Council Regulation (EC) 509/2006 (cfr: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:040:0017:0025:EN:PDF>). This measure was adopted by the European Committee for geographical indications (Commission Regulation EU 97/2010 of 4 February 2010) after that the local community, with the support of the Ministry of Agriculture, established a specific disciplinary of the art. In this way the EU approved rules to protect and preserve the element”.

The applicant for this TSG are two collective associations representing the community, namely Associazione Verace Pizza Napoletana and Associazione Pizzaiuoli Napoletani, both based in Naples. The name of the TSG is “Pizza Napoletana”, registered solely in the Italian language. Yet, the words “prodotta secondo la Tradizione napoletana” (produced in the Neapolitan tradition) and the acronym STG (TSG) which feature on the label of “Pizza Napoletana” TSG are translated into the language of the country where production takes place. In fact, TSG, unlike PDOs and GIs, as mentioned don’t pose any territorial requirement, namely that the element shall be produced in part or in its entirety in the country of origin. The TSG is registered for the Class 2.3 on Confectionery, bread, pastry, cakes, biscuits and other baker's wares.

Art. 3.5 of the specification describes the agricultural product to which the name applies, by stating that “‘Pizza Napoletana’ TSG is round with a variable diameter not exceeding 35 cm and a raised rim and is garnished and baked in the oven. The central part is 0,4 cm thick, with a tolerance of ± 10 %, and the rim is 1-2 cm thick. The overall pizza must be tender, elastic and easily foldable into four. ‘Pizza Napoletana’ TSG is distinguished by a raised rim, a golden colour characteristic of products baked in the oven, and a tenderness to touch and to taste; by a garnished centre dominated by the red of the tomatoes, perfectly mixed with oil and, depending on the ingredients used, the green of the oregano and the white of the garlic; by the white of the mozzarella slabs which are laid closer together or further apart as the case may be, and the green of the basil leaves, which are lighter or darker depending on the cooking. The consistency of ‘Pizza Napoletana’ is tender, elastic and easily foldable; the product is easy to cut and has a characteristic, savoury taste conferred by the raised rim which has a taste typical of bread which has risen and been baked well, mixed with the acidic flavour of the tomatoes and the aroma of the oregano, garlic and basil and the flavour of baked mozzarella. When the baking process is complete the pizza emits a characteristic aroma which is deliciously fragrant; the tomatoes, which have lost only their excess water, remain compact and solid; the ‘Mozzarella di Bufala Campana AOP’

or the 'Mozzarella STG' appear melted on the surface of the pizza and the basil, together with the garlic and the oregano, emits an intense aroma without appearing to be burnt".

Art. 3.6 of the specification describes the "production method", by stating that "the basic raw materials distinguishing 'Pizza Napoletana' are: type '00' common wheat flour, with the possible addition of type '0' flour, brewer's yeast, drinkable natural water, peeled and/or fresh tomatoes, sea salt or kitchen salt and extra virgin olive oil. Other ingredients which may be used in the preparation of 'Pizza Napoletana' are: garlic and oregano; 'Mozzarella di Bufala Campana AOP', fresh basil and 'Mozzarella STG'". Also, a detailed description of the preparation method for 'Pizza Napoletana' is indicated, according to which this method exclusively comprises the phases of work described in the specification, to be carried out in a continuous cycle on the same commercial premises. These methods phases are specifically described divided into preparation of the dough, dough rising process, shaping the dough balls, garnish, baking, conservation.

Art. 3.7 of the specification indicates numerous specific characters of the 'Pizza Napoletana', by emphasizing that they are directly linked to the duration and methods used in the operations, and also to the skill and experience of the pizzaiuolo, who is indicated as the "pizza chef" in the specification. For example, the importance should be stressed of the second rising, handling and work equipment, i.e. the oven, which must be a wood-fired oven, and the peels. Furthermore, the Neapolitan technique requires the pizzaiuolo, "after having prepared a series of three to six discs of garnished dough, to skilfully slide the pizza from the work surface to the peel using precise and rapid hand movements, and ensuring that the pizza does not lose its initial round shape (the pizza is taken in both hands by the pizza chef who, by turning it round approximately 90°, places it on a suitable peel). The pizza chef sprinkles a little flour on the peel going into the oven to enable the pizza to slide easily from the peel into the oven. This operation is carried out with a rapid flick of the wrist, by holding the peel at an angle of 20-25° to the oven surface, and by ensuring that the garnish does not fall from the surface of the pizza. The use of techniques other than those described above is not appropriate, taking the pizza directly from the work surface using the peel risks spoiling the pizza which is ready to go into the oven".

Art. 3.8 of the specification then describes in details the "traditional character" of the "Pizza Napoletana", by mentioning that its first appearance "may be dated back to the period between 1715 and 1725. Vincenzo Corrado, a native of the town of Oria, and chief cook for Prince Emanuele di Francavilla, in a treatise on the foodstuffs most commonly used in Naples, stated that the tomato was used to season pizza and macaroni, thereby associating two products which have been the source of Naples's fame and the reason for its inclusion in the history of gastronomy. This quotation marks the official birth of the 'Pizza Napoletana', a disc of dough seasoned with tomato. A great number of historical documents attest to the Neapolitan origin of this culinary speciality. The writer Franco Salerno claimed that this product was one of the greatest inventions of Neapolitan cooking. Even Italian-language dictionaries and the encyclopaedia Treccani expressly mention the 'Pizza Napoletana'. The expression 'Pizza Napoletana' is also quoted in numerous literary texts. There is no doubt that the first pizzerias appeared in Naples where, until the middle of the twentieth century, this product was exclusive to the town and its pizzerias. In the eighteenth century, the town already had several shops known as 'pizzerias', and the King of Naples, Ferdinand of Bourbon, heard of their reputation and, in order to taste this dish in the typical Neapolitan tradition, he did not hesitate to breach court etiquette and visit one of the most renowned pizzerias. Since then the 'pizzeria' has become a fashionable location, a place devoted to the exclusive preparation of the 'pizza'. The most popular and famous pizzas from Naples were the 'Marinara', created in 1734, and the 'Margherita', which dates from 1796-1810. The latter was presented to the queen of Italy upon her visit to Naples in 1889, specifically on account of the colour of its seasoning (tomato, mozzarella and basil) which are reminiscent of the colours of the Italian flag. Over time pizzerias appeared in every town in Italy and even abroad.

However, each of them, despite being located in a town other than Naples, has always linked its existence with the words 'Pizza Napoletana', or used a term which in some way evokes its link with Naples, where for more than 300 years this product has retained its authenticity. In May 1984 nearly all the Neapolitan pizza chefs drew up a brief product specification which was signed by the whole profession and registered by means of an official document witnessed by the notary Antonio Carannante of Naples. Over the centuries the term 'Pizza Napoletana' has become so widespread that everywhere, including outside Europe and in particular in Central America (in Mexico and Guatemala) and in Asia (in Thailand and Malaysia), the product in question is known by its name 'Pizza Napoletana', although the inhabitants sometimes do not have the slightest idea of the geographical location of the city of Naples".

Finally, art. 3.10 of the specification provides with a very detailed description of the Logo of the TSG by indicating that "the logo which distinguishes the 'Pizza Napoletana' is as follows: a horizontal white oval image with a light grey border, which represents the plate on which the pizza is presented, reproduced in a realistic but stylised manner, fully respecting the tradition and illustrating the classic ingredients, tomato, mozzarella, basil leaves and a trickle of olive oil. Under the plate there is an offset green shadow, which, in combination with the other colours, emphasizes the Italian colours of the product. Slightly superimposed above the plate containing the pizza, there is a red rectangular window with very rounded corners containing the words in white surrounded by black, with a offset green shadow with a white border: 'PIZZA NAPOLETANA STG'. Above this caption, and slightly to the right, in smaller white characters of a different type, features the caption 'Specialità Tradizionale Garantita'. Below, in the centre, in the same characters as the logo, 'PIZZA NAPOLETANA STG', but in smaller characters, in white with a black border, is superimposed the caption: 'Prodotta secondo la Tradizione napoletana'". All of this is specifically summarized in tables that indicate also the characters of each words, namely varga for "PIZZA NAPOLETANA STG", Alternate Gothic for "Specialità Tradizionale Garantita" and varga again for "Prodotta secondo la Tradizione napoletana". Also the tables indicates exactly the colours of the graphic and characters at stake.

Arts. 3.9 and 4 and name three inspection bodies as responsible for carrying out checks on various subjects in different parts of the national territory, namely Certiquality SRL, DNV Det Norske Veritas Italia, IS.ME.CERT. The minimum requirements and procedures to check the specific character of the Pizza Napoletana abovementioned are determined by the same specification. "In businesses, during the kneading, rising and preparation phase of the dough, checking the correct execution of the phases described; carefully monitoring the critical points of the business; checking the compliance of the raw materials with the product specification; checking the perfect conservation and storage of the raw materials to be used and ensuring that the characteristics of the final product are compliant with the specifications contained in this product specification".

