5.1 Introduction

Human communities have always generated, refined and passed on knowledge from generation to generation. Traditional Knowledge (TK) is a concept of cultural ecology, which, for matters of equity and sustainability, increasingly calls for legal protection as an emerging concept in international law. It expresses the exploitation by individuals or communities of genetic material, which the holders have discovered and identified as resourceful for the livelihood of contemporary and future generations.\(^1\) TK encompasses the process of extracting relevant genetic resources from nature. The effort of identifying genetic resources is complemented by skill and practices of preserving such knowledge for future generations.\(^2\)

Traditional knowledge is collective knowledge. Sometimes, due to the parallel development or due to the exchange of knowledge, communities with similar ecosystems have the same or similar knowledge. For those indigenous or local communities that did not have a written tradition, traditional knowledge takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, culinary recipes and agricultural practices, including the development of plant species and animal breeds. The individuals that form part of the communities are not the owners but only titleholders of the knowledge. It is extremely difficult to determine with

\(^1\) Anaya S.J. *Indigenous Peoples in International Law*, Oxford: Oxford University Press, 1996, p.105, indigenous people share a “deeply felt spiritual and emotional nexus with the earth and its fruits”, and depend upon to “secure land and natural resources base to ensure the economic viability of their communities”.

accuracy which communities are rightful owners of a certain knowledge or the relationship between individuals with community and traditional knowledge.³

5.2 Defining Traditional Knowledge and Geographical Indications

5.2.1 Local Traditions of Knowledge, Geographical Origins of Products

The Traditional knowledge can be defined as the knowledge, innovations and practices of indigenous peoples and local communities.⁴ Traditional knowledge includes knowledge of:

i) plants and animals and their protection;

ii) minerals and soil and their protection;

iii) combinations of organic and inorganic matters;

iv) process and technologies;

v) means of enhancing individual health;

vi) means of maintaining social cohesion and social health;

vii) culture.

The traditional knowledge is tradition based literary, artistic or scientific works, performances, inventions, scientific discoveries, designs, marks names, and symbols; undisclosed information, and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary, or artistic fields.⁵ The word ‘traditional’ is used not because the knowledge is old but because it is created, preserved,

³ Summary of the presentation “Geographical Indications and Traditional Knowledge” O’ Connor and Company European Lawyers.

⁴ The Expression “traditional knowledge” is used as a shorter form of “traditional knowledge, innovations and practices”, see e.g., the Convention on Biological Diversity, 5 June 1992, Art.9(j), 3 I.L.M. 818.

and disseminated in the cultural traditions of particular communities. It is a representative of the cultural values of a community and is held collectively by it.  

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

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

Traditional knowledge mainly expresses the exploitation by individuals or communities of plant genetic material resourceful for humans and the process of extracting from nature the genetic resources, as well as the skill and practices of preserving this knowledge for future generations. The discoveries, transmitted from one generation to the next, document the skills and practices assembled over time, which are often upgraded by subsequent innovations in the course of history. TK is not static. It expresses a continuous process of devising strategies for the survival of human kind and in so far a viable complement to formal science. Traditional knowledge is different from formalised, scientific and industrialised R&D efforts. The following areas of main application and potentially relevant to international trade regulation may be distinguished.

---

7 Supra n. 5.
5.2.2.1 Traditional Knowledge on Plant Genetic Resources (PGR)

Traditional knowledge on plant genetic resources embodies information, skills and practices about the healing and nutritional propensities of certain plants passed from one generation to the next. This first category of TK is representative for all other TK; because it relies upon a sustainable use of genetic resources. It subscribes to an equitable but sustainable access of human kind to genetic resources and informs about the value and diversity of genetic resources, namely the need for preservation for future generations. It thereby manifests a measure of respect for the diversity of nature and is committed to sustaining the life cycles of growth.⁸

5.2.2.2 Agricultural and Ecological Know-how

TK plays an important role in resource management (pruning of plants and domestication of animals to increase production) and environmental manipulation (irrigation, encourage growth by burning tracts of land, etc.)⁹ While the focus of what hitherto has largely been on indigenous peoples and their rights, broadening the scope to agriculture, renders TK an issue of interest to farming communities around the globe. Modern biotechnology in breeding of plant genetic resources may be complemented by deliberate polices to support the use and conservation of traditional plant genetic resources.¹⁰

---

¹⁰ Ibid.
5.2.2.3 Traditional Medicine (TM)

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

5.2.2.4 Traditional Cultural Expressions (ECEs)

Traditional Cultural Expressions (TCEs) demonstrate that information includes cultural expressions and is not limited to plant genetic resources. Such expressions are: Dance, Music, Weaving and Pottery Patterns, other traditions of healing, cooking, cleaning and dressing. The WIPO Intergovernmental Conference identifies TCEs as:

(i) the preservation and safeguarding of tangible and intangible cultural heritage.
(ii) The promotion of cultural diversity
(iii) The respect for cultural rights

(iv) The promotion of creativity and innovation including that which is tradition based as ingredients of sustainable economic developments.\(^{14}\)

### 5.2.3 Geographical Indications as definition and Protection of Origin

Geographical indications are closely related to functions assigned to trademarks and are well established in unfair competition law. Even if GIs have no property holder \textit{per se}, they nevertheless count towards an intellectual property right, because their benefit stream is the geographical area in relation to the producer of a product.\(^{15}\) In addition to IPRs and competition law, GIs are subject to consumer laws, as they embody the preference a consumer may express for locally produced goods. The benefit stream (value) of TK is encapsulated in the intellect of the human mind, while the benefit stream of a Geographical indication is a particular product originating in a particular geographical region.\(^{16}\)

### 5.3 Justifications for protecting Traditional Knowledge.

WIPO’s fact finding mission report identified certain concerns of the holders of TK. These included concern over lack of respect for TK and its holders, loss of traditional lifestyles, misappropriation of TK, and its usage without any benefit-sharing


\(^{15}\) Addor, F., Thumm, N. & Grazioli, A., ‘Geographical Indications, Important Issues for Industrialised and Developing Countries, Institute of Prospective Technological Studies (IPTS) Report, May 2003, p.25. “Geographical Indications and their protection is a suitable means to protect ‘informal innovation, Particularly because the right is related to the product itself and it does not depend to a specific right holders”.

and the reluctance of the younger members of the community to carry traditional practices forward. Following are some of the justifications for protecting TK.

5.3.1 To improve the lives of TK holders and communities

Great as its wider economic potential may, traditional knowledge is valuable first and foremost to indigenous and local communities that depend on TK for their health, livelihoods and general well-being. Thus, a TK regime that encouraged the conservation and continued use of TK relating to health and food production could potentially improve the lives of millions of people.

According to the World Health Organisation, up to 80 percent of the world’s population depends on traditional medicine for its primary health needs. While the high cost of pharmaceuticals is a factor in this, for many ailments traditional medicine is preferred, even by many urban populations.

Traditional low-input agricultural systems, based on extensive and applied knowledge about natural processes and local ecosystems have successfully enabled millions of people to subsist for thousands of years in some of the most hostile environments. However, many TK based agricultural systems have fallen into decline. This situation does not necessarily mean that people are abandoning them because they are obsolete. Factors in this decline include the spread of market economies, commercialisation of agriculture with the introduction of export crops and Green revolution technologies, all-too-prevalent assumptions that western techniques and methods such as high-input monocultural agriculture are superior to local ones like

17 Supra n.5.
intercropping, and the imposition of inappropriate laws and regulations by governments. The results are likely to be increasing impoverishment rather than the opposite.

Despite this, the original agricultural systems are intact in many parts of the world and continue to be the basis of much innovation. For example, in some parts of the world farming communities continue effectively to manage agricultural genetic diversity, experiment on farm with traditional and modern crop varieties and to produce their own varieties whose performance may be better than those provided by extension services.\footnote{Graham Dutfield, ‘Protecting Traditional Knowledge: Pathways to the Future, ICTSD International Centre for Trade and Sustainable Development Draft (April 2006) available at http://www.ichtsd.org. unctadictsd/docs,p.14-16.}

5.3.2 To benefit national economies

Some traditional medicines are used as inputs in biomedical research, suggesting that they may constitute a source of income not just as drugs in themselves but as the sources of chemical substances forming the basis of new pharmaceuticals. Indeed, traditional communities have already been responsible for the discovery, development, and preservation of a tremendous range of medicinal plants, health giving herbal formulations, agricultural and forest products, and handicrafts that are traded internationally and generate considerable economic value but not for those communities. It seems that protecting TK has the potential to improve the performance of many developing country economies by enabling greater commercial use of their biological wealth and increasing exports of TK related products.\footnote{Ibid.}

5.3.3 To prevent “bio-piracy”

A number of cases relating to traditional knowledge have attracted international attention. As a result, the issue of traditional knowledge has been brought to the fore of
the general debate surrounding intellectual property. These cases involve what is often refereed to as “biopiracy”. “Biopiracy”\textsuperscript{21} has emerged as a term to describe the ways that corporations from the developed world free ride on the genetic resources and traditional knowledge and technologies of the developing countries. “Biopirates” are those individuals and companies accused of one or both of the following acts: (i) the misappropriation of genetic resources and/or traditional knowledge through the patent system; (ii) the unauthorised collection for commercial ends of generic resources and/or traditional knowledge.

The examples of turmeric,\textsuperscript{22} neem and ayahuasca illustrate the issues that can arise when patent protection is granted to inventions relating to traditional knowledge which is already in the public domain. In these cases, invalid patents were issued because the patent examiners were not aware of the relevant traditional knowledge. In another example, a patent was granted on a plant species called Hoodia. Here, the issue was not whether the patent should or should not have been granted, but rather on whether the local people who had nurtured the traditional knowledge underpinning the invention, were entitled to receive a fair share of any benefits arising from commercialisation.

Partly as a result of these well–known cases, many developing countries, holders of traditional knowledge, and campaigning organisations are pressing in a multitude for traditional knowledge to be better protected.

\textsuperscript{21} “Bio piracy” is a compound word consisting of “bio”, which is short for “biological” and “piracy”. According to the concise Oxford Dictionary “Piracy” means the following; (1) the practice or an act of robbery of ships at sea; (2) a similar practice or act in other forms, especially hijacking; and (3) the infringement of copyright.

\textsuperscript{22} The turmeric case was a landmark case as it was the first time that a patent based on the traditional knowledge of a developing country had been successfully challenged.
5.3.4 Other justifications

Other possible reasons for protecting traditional knowledge are –

(i) equity considerations – the custodians of TK should receive fair compensation if the TK leads to commercial gain.

(ii) Conservation concern- the protection of TK contributes to the wider objective of conserving the environment, bio-diversity and sustainable agricultural practices.

(iii) Preservation of traditional practices and culture- protection of TK would be used to raise the profile of the knowledge and the people entrusted with it both within and outside communities.

(iv) Promotion of its use and its importance to development.23

5.4 Towards Protection of Traditional Knowledge

5.4.1 Objectives and scope of TK Protection

Linking the origin of product with the quality of the product is a well-established objective of intellectual property protection, namely of Geographical indications.24 The protection of the traditional values as opposed to the novelty of an invention has been a yet unseen objective for an IPR. It is not inconceivable. Like other form of intellectual property rights, such as trademarks or trade secrets, neither Geographical indications nor TK require novelty.25 TK protection is not only limited to intellectual property. The

varying scope of TK and its different functions touch upon many fields of law, ranging from unfair competition, unjust enrichment to contractual liability. 

5.4.2 Current Legal framework

There are several relevant international instruments tending to confirm the view that indigenous peoples should have some legal control over the exploitation of their traditional knowledge when such knowledge has special cultural significance. 

Article 7(1) of the international Labour Organisation’s Revised Convention of 1989 recognises the right of indigenous peoples to “decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development”. The overarching international legal framework is Agenda 21 that came out of the 1992 Earth Summit in Rio de Janeiro. Among Agenda 21 objectives of preserving biodiversity for future generations, principle 22 emerges as recognition that indigenous peoples have a vital role to play in environmental management and development because they dispose of alternative answers and solutions to formal science in the form of TK.

5.4.2.1 Traditional Knowledge on Plant Genetic Resources (PGR)

Since TK encapsulates information about plant genetic resources, scholars associated the idea with international Intellectual Property Protection (IPRs).

---

26 Cottier, T., the case for Protecting Traditional Knowledge and Geographical Indications in Agricultural Trade, World Trade Institute, University of Bern, Working Paper, 2003, p.370.
Eventually this approach has made its ways into discussions relating to the World Trade Organisations (WTO) Agreement on Trade-Related Intellectual Property Rights (TRIPs) and the World Intellectual Property Organisation (WIPO). The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (16C) values TK for its contribution to new cures for globally important diseases or for ensuring the food security of a region during draught.\(^{31}\) No international legal protection is yet in place to effectively empower TK holders with the legal means to defend his/her know-how against misappropriation and unfair competition.

### 5.4.2.2 Agricultural and Geological know-how

Traditional knowledge plays an important role in cultural ecology, including resource management, such as in agricultural techniques of enhancing production of plants and animals and controlling their lives by domestication and fertilization.\(^{32}\) International environmental law namely protects the natural resources from extinction but does not relate to the informative value of such practices, processes and techniques. TK is expressed in Art.8 (j) of the aforementioned 1992 Convention on Biological Diversity (CBD), which was adopted in the context of the Earth Summit in Rio de Janeiro on 29 December 1993.

### 5.4.2.3 Traditional Medicines (TM)

The World Health Organisation (WHO) has acknowledge that TK, which provides for healing substances and practices and touches upon health policy, is to be recognised as traditional medicine (TM) forming one of the pillars of modern scientific...

---


\(^{32}\) Sutton, M.Q and Anderson, G.N., *supra* n.9, pp 110-117.
medicine. So far, the WHO neither has advocated an international legal regime protecting TM as a part of TK, nor sought to enhance the perception of the global role of TK in industrialised countries. Rather the WHO has confined TM to a role for development country medical policy only.33

5.4.2.4 Traditional Cultural Expressions (TCEs)

The concept of Traditional Cultural Expressions (TCEs) was recognised by the Office of the United Nations High Commissioners for Human Rights (OHCHR) and United Nations Educational, Scientific and Cultural Organisation (UNESCO). WIPO protects traditional cultural expressions (TCEs) insofar as these are recognised internationally or domestically as cultural rights, but WIPO does not itself establish an international legal protection regime.34 Neither copyright nor design protection under current international law, apply to TECs. No consensus at the WIPO today yet exists as to the attribution of an IP Right to TCEs which would empowers traditional artists and practitioners, the indigenous, local and other cultural communities against appropriation of their work by mass cultural industries.35

5.4.3 Intellectual Property Rights in Traditional Knowledge

Concern over the growing interest in and economic importance of traditional knowledge as well as the loss of this knowledge has generated a wide range of public policy issues including those associated with intellectual property protection. “Growing interest in ‘natural’ food, medicinal, agricultural, and body products signals increased research activities into traditional knowledge systems. Now, more than ever, the

---

35 Ibid.
intellectual property rights of native peoples must be protected and just compensation for knowledge guaranteed. Intellectual property law has been seen as a tool for promoting the conservation of biological diversity, sustainable use of its components, and for ensuring that benefits arising from the utilisation of genetic resources are shared in a fair and equitable manner among the relevant stakeholders.\textsuperscript{36} Intellectual property laws vary in nature and scope from one country to another. Intellectual property protected in one country may not be recognised in another country. Despite the existence of various international agreements that attempt to harmonise intellectual property protection, there are still differences among national laws, especially those regarding patents. For example, while the U.S.A. and countries in the European Union allow patent protection over genetically engineered organisms which meet the normal requirements of patentability, many other countries are opposed to extending patents to such subject matter.\textsuperscript{37}

There are also differences in the duration of patent protection. The period for which an inventor is granted a patent varies from one country to another. These differences in national application of intellectual property law are at the centre or much of the debate on the intellectual property rights of indigenous and local peoples.

5.5 Geographical Indications as a Tool for Traditional Knowledge Protection

5.5.1 Suitability of Geographical Indications to protect Traditional Knowledge

At the first sight the use of geographical indications for the protection of traditional knowledge seems to be particularly suitable. Geographical indications are not


intended to reward innovation, but rather to reward members of an established group or community adhering to traditional practices belonging to the culture of that community or group.

Though most of the systems of intellectual property protection are individualised, some intellectual property rights, such as trade marks and geographical indications are based on the concept of collective rights. A geographical indication identifies a good as originating from a particular territory where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. While copyright and patent are intended to reward investments in innovation, geographical indications reward producers who invest in building the reputation of a product. Geographical Indication can create economic rewards for producers who use traditional methods in the region where the product has been traditionally produced.

Geographical indications are especially suitable for use by communities because they are based upon collective traditions and a collective decision making process. They protect and reward traditions while allowing evolution. They are designed to reward goodwill and reputation created over many years or even centuries. They reward producers who maintain a traditional high standard of quality. They do not confer a monopoly right over the use of certain information, but simply limit the class of people who can use a certain symbol. They are not freely transferable from one owner to another and can be recognised as long as the collective tradition is maintained. Since

---

38 See Art.22 (1) of the TRIPs Agreement also see section 2 (1) (c) of the Geographical Indications of Goods (Registration and Protection Act 1999.

they have to be periodically renewed, they can help in ensuring that the quality of the product is maintained.\textsuperscript{40}

Geographical indications may be used to enhance the commercial value of natural, traditional and craft products of all kinds if their particular characteristics may be attributed to their geographical origin. A number of products that come from various regions are the result of traditional processes and knowledge implemented by one or more communities in a given region. The special characteristics of those products are appreciated by the public and may be symbolised by the indication of source used to identify the products.\textsuperscript{41} Better exploitation and promotion of geographical indications would make it possible to afford better protection for the economic interests of the communities with traditional knowledge.

Further, geographical indications are particularly useful in cases where supply is through small scale production and products are marketed directly to consumers. Geographical indications allow small local producers to enhance their reputations, and sell directly to find users, thus competing more effectively against large corporations. When others are excluded from using a particular name, an aura of uniqueness attaches to the product, thereby enhancing its premium.\textsuperscript{42}

\textbf{5.5.2 Conditions under which Geographical Indications can protect Traditional Knowledge}

Geographical indication can be used to protect only certain kinds of traditional knowledge.

\textsuperscript{40} Dr.Downes, “How Intellectual Property could be a Tool to Protect Traditional Knowledge” (2002) 25 \textit{Columbia Journal of Environmental Law} 253.

\textsuperscript{41} For example, Venezuela and Vietnam Protect Traditional Knowledge through Geographical Indications. “Cocuy the Pecay” a liquor made from the a gavez, in Venezuela, and “Phu Quoc”, fish soya sauce, and “Shan Tuyet Moc Chau”, a Variety of tea, in Vietnam are protected as geographical indications.

First, geographical indication identifies a ‘good’. This would exclude all intangible forms of traditional knowledge such as methods of medical treatment, techniques for dyeing cloth, folk music, and dances. However, a geographical indication may be obtained for, say a resulting medicine or dye or the recorded versions of songs and dances.

Secondly, geographical indication protection is of assistance only where the knowledge is associated with a defined geographical area. Thus, if the knowledge is scattered as in the case of the Aurvedic system of medicine a geographical indication cannot be used. However, there may be exceptions to this. For instance, the knowledge of ‘triphala’ is scattered across the country. ‘Triphala’ is a medicinal power used for ailments of the stomach. The raw materials for it are grown in a defined geographical area. It may be possible to treat ‘triphala’ as a manufactured good and argue that the activity of preparation takes place in the defined area. This is because, according to the Geographical Indication Act, a geographical indication can be obtained for a manufactured product if at least one of the activities of either the production or processing or preparation of the goods concerned takes place in the defined territory. Thus it is possible to have a geographical indication for ‘triphala’.

Thirdly, the good must enjoy a commercial reputation. This is because a geographical indication merely signifies the true source of the good, and if the source is not important to the consumer, protection by means of a geographical indication is immaterial. It has been suggested that the representatives of interested local communities must first survey the industry and consumers groups regarding the market demands for

---

various indigenous products because significant market for the product is an essential criterion for use of a geographical indication.\textsuperscript{44}

However, it should be clarified that protection of geographical indications is aimed at protecting the names of goods, and not knowledge as such. Geographical Indications could play a complementary role in protecting traditional products, but it seems to be not possible to protect all forms of traditional knowledge just by using this form of intellectual property alone.

5.5.3 Limitations of Geographical Indications for the protection of Traditional Knowledge

The use of geographical indications for traditional knowledge protection is promising but also suffers from certain limitations. Firstly, they can only be used to protect an indication and cannot constitute a tool to protect the underlying knowledge. Secondly, geographical indications that are deemed to have become generic lose all their usefulness from the point of view of traditional knowledge protection.

Thus, if basmati rice was to be generally recognised as a generic name, Indian and Pakistani Rice growers would lose all claims to the indication. Thirdly, the effectiveness of the protection for traditional knowledge holders may require the setting up of specific safeguards. Thus, the geographical limitation of protection does not necessarily imply that outsiders cannot acquire a company making the good within the protected area. Overall, geographical indications on their own provide some scope to protect traditional knowledge but the protection remains limited insofar as indications are conceived as marketing took and do not protect the knowledge related to the product.\textsuperscript{45}

\textsuperscript{44} Dr. Downes, \textit{supra} n. 40.
5.6 TRIPs, Doha and Traditional Knowledge

Importance of traditional knowledge in the Doha context

The protection of traditional knowledge has progressively taken centre stage in global discussions concerning intellectual property and trade, especially since it is expressly mentioned in the Doha Ministerial Declaration.\(^46\) There are several reasons for the issue’s sudden move to the forefront. First, a large number of countries believe that up to now they have not derived great benefits from “traditional” forms of intellectual property, yet find themselves rich with traditional knowledge, especially genetic resources and folklore. They would like to exploit these resources, and several major companies share this interest. Another reason is the growing political importance of aboriginal communities in several countries. The statement issued by the WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge organised in Chiang ray Thailand in November 2000, makes the point quite clearly:

“with the emergence to modern biotechnologies, genetic resources have assumed increasing economic, scientific and commercial value to a wide range of stakeholders…. Traditional knowledge, whether or not associated with those resources, has also attracted widespread attention from an enlarged audience, other traditional-based creations, such as expressions of folklore, have at the same time taken on new economic and cultural significance with a globalised information society”. \(^47\)

While pharmaceutical and biotechnological companies are looking at ways to exploit indigenous medicinal knowledge, plants and other resources that are often found

---

\(^46\) Paragraph 19 reads in part as flows: “Ministers instruct the council for TRIPs, in pursuing it work programme to examine, \textit{inter alia}, the relationship between the TRIPs agreement and the convention on Biological Diversity, the Protection of Traditional Knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1.

\(^47\) WIPO Inter-Regional Meeting on Intellectual Property and Traditional Knowledge, meeting statement: A policy and Action Agenda for the Future (Nov. 9-11, 2000)
in developing counties, the intent is progressively allowing creators of folklore or folklore based copyrighted material to disseminate their material worldwide at very low cost.

5.6.1 Protection of traditional knowledge under TRIPs Agreement

The negotiation and adoption of the TRIPs Agreement as part of the Uruguay Round in 1994, have added new dimensions to the debate on intellectual property rights in traditional knowledge. The TRIPs agreement sets minimum standard for countries to follow in protecting intellectual property. Its objective is stated in the preamble as “to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade”.48 Countries that ratify the agreement are expected to establish comprehensive intellectual property protection systems covering patents, copyright, geographical indications, industrial designs, trademarks, and trade secrets.

However, Article 1 of the TRIPs Agreement (on the nature and scope of the obligations) provides some flexibility in the implementation of the provisions of the agreement. It states in paragraph 1 of that Article that “members may, but shall not be obligated to, implement in their domestic law more extensive protection than is required by the agreement, provided that such protection does not contravene the provisions of the agreement”.49 According to Duffield, parties to the TRIPs agreement can invoke this provision to enact legislation for protecting traditional knowledge. He asserts the

49 Ibid., p.436.
absence of any mention of traditional knowledge in the agreement, does not prevent any member from enacting legislation to protect such a category of knowledge”.  

The TRIPs Agreement requires member states to provide patent protection for “any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. The “inventive step” and “capable of industrial application” requirements are deemed to be synonymous with the terms ‘non obvious’ and ‘useful respectively’. Traditional knowledge products fail the test for patenting on one, or all, of the “new”, “inventive step” and “industrial application” standards. On the “new” standard it will probably fail because by its very nature traditional knowledge has been known for some length of time. One could try and argue that traditional knowledge is new to the world outside of the community from which it came but this is unlikely to succeed.

In short it can be said that, the conditions set under the TRIPs agreement do not enable the patenting of traditional knowledge.

The TRIPs Agreement has, on the other hand, generated new opportunities to develop alternative property rights regimes which are ethically, socially and environmentally appropriate to the needs and conditions of indigenous and local people in developing countries. As provided in Art.27.3(b) of the TRIPs agreement, members may establish effective *sui generis* regimes. This is an opportunity which developing countries should quickly tap by devising and promoting non-patent measures.

---

The TRIPs Agreement itself does not provide any protection for the traditional knowledge and innovations of indigenous and local people but it creates flexibility for establishing alternative non-conventional intellectual property protection measures.

5.6.2 Traditional knowledge and Developing Countries

The Doha Ministerial Declaration acknowledges that the majority of WTO members are developing countries. If the Doha Ministerial Declaration seeks to place their (developing countries) needs and interests at the heart of the work programme adopted in this Declaration”, traditional knowledge is considered one of the interests that the negotiations under the Doha Agenda should pursue because traditional knowledge “plays an important role in vital areas such as food security, the development of agriculture and medical treatment for up to 80 percent of Africa’s rural economy”. 51

Yet, many developing countries were for a long time indifferent towards the value of traditional knowledge. In the low-income sectors of agriculture it often has led to stagnation and, invariably, to the loss of traditional knowledge as structures changed. 52 Today, there is an increasing awareness that rendering the knowledge bearer attentive to the value of his/her knowledge will encourage the holder us to appreciate traditional knowledge as the “continuous and additive innovation”.

In the context of the Doha Development agenda, many, but not all developing countries propose, to seek an agreement on improved market access for agricultural products. 53 Developing countries like India and Nigeria, consider the protection of

traditional knowledge a san issue within the broader debate on food security. They also maintain that if traditional knowledge based agriculture is shielded off from global trading rules, developing countries retain their “food production capacity” and food security of developing countries would be enhanced.\footnote{54}{See WTO, Committee on Agriculture, special session, agreement on agricultures, proposal by Nigeria, WTO document G/AG/W/130 of 14 February 2001.}

\textbf{5.6.3 Doha Declaration on traditional knowledge (2001)}

While the TRIPs agreement of 1994 is silent on traditional knowledge, the Doha Declaration of 2001 introduces traditional knowledge as an item for work on intellectual property. The Declaration notes that while the TRIPs council “must examine the relationship between the TRIPs agreement, and traditional knowledge and folklore, and other relevant new developments”. It must do so by “fully taking into account the development dimension”. The WTO developing country members intend to ensure that developed countries will, by being called upon to recognise traditional knowledge, give more consideration for developing countries needs in installing an effective Intellectual Property Rights protection consistent with the TRIPs. Also, they seek to increase the demand in both developing and industrialised countries for traditional crops.\footnote{55}{Cottier, T. and Panizzon, M., \textit{supra} n 26. pp-371-373.}

\textbf{The “July 2004 Doha Development Agenda Package”}

The “July 2004 Doha Development Agenda package” of 1 August 2004 is a decision adopted by the General Council to reformulate the Doha Round objectives\footnote{56}{In the format of a “work programme”.} in order to keep the Doha Development Round on track and to successfully round up the negotiations with an agreement by the end of 2005. Traditional knowledge protection was left out in the July 2004 package, even if it had been a specific item on the Doha
Development Agenda. European Union at the last minute demands for extending geographical indication protection to products other than Wines and Spirits were discarded too.

5.7 Towards Enhanced Protection of Geographical Indication

5.7.1 Legal protection of “marks” of origin

Geographical Indications relates to “place names”, which stand for the quality and locality of a product and so generate a responsibility for a place and region, they contrast with anonymous, global, mass production. Geographical Indication protection is close to, but different from trademark protection.\(^{57}\) The priority principle “First in Time, First in Right”, resolves the conflict between Trademarks and Geographical Indications. It says that a validly registered prior mark should prevail against a later geographical indications and vice-versa.\(^{58}\)

5.7.2 Geographical Indications under section 3, TRIPs agreement

An absolute level of Geographical Indications protection applies to Wines and Spirits pursuant to Art.23 TRIPs, whereas a relative level of protection exists for all other goods under Art.22 TRIPs. The relative level of protection establishes a protection of Geographical Indications limited to the principles of unfair competition. The relative level of protection prohibits using a geographical name if such a name and use would mislead the public as to the true geographical origin of the product. As long as there no delusion of the consumer, a geographical name may be used under the condition that where a product is not produced at its geographical origin, the foreign location of


production is mentioned in combination with the name of the speciality, e.g. absolute and enhanced level of protection, products made elsewhere than in the protected geographical area are barred from using geographical name even where the true origin of the product is indicated, or even where it is accompanied by qualifications such as “kind” “type” “style”. The literally correct name or similar name must not be used under the enhanced protection of Art.23. The enhanced protection is available only to Wines and Spirits e.g. the local name of champagne may not be used for a local Swiss dry white Wine

**Built in agenda of Article 23: 4 TRIPs agreement**

Article 23.4 TRIPs contains a built in agenda, which calls for negotiating a multilateral registration system of Geographical Indications for Wines and Spirits. This provision does not call for negotiating to extend the higher level of protection applicable to Wines and Spirits under the current law, to other protects. Nevertheless, the European Council as mentioned above refers to this built-in-Agenda when it argues in favour of expanding the coverage of the higher-level of Geographical Indication protection regime, which currently exists for Wines and Spirits, to other products. European Council maintains that the Doha Ministerial Declaration sets the deadline of the Fifth Ministerial Conference to be held on September 2003 in Cancun to establish such a register (absolute level of protection).

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

---

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

5.7.3 Specific Item on the Doha Development Agenda

The only reference to Geographical Indications was that the General Council discuss, in the context of implementation, “without prejudice to the positions of members, all outstanding implementation issues under paragraph 12(b) of the Doha Ministerial Declaration (DMD) including on issues related to the extension of protection of geographical indications provided for in Article 23 of the TRIPs agreement to products other than Wines and Spirits, if need be by appointing chairpersons of concerned WTO bodies as his friends and or by holding dedicated consultations”. 61

5.7.4 Increasing interest at the WTO

Debate relating to geographical indications has gained momentum in the WTO because of increasing pressure to do away with costly and trade distorting agricultural domestic support measures. It has become a divisive issue between WTO members in the agricultural negotiations, even if geographical, institutionally, are instruments of the TRIPs and not of the Agreement on Agriculture (AOA).

The protection of geographical indications is at the core of the EC’s and Switzerland’s position in reforming their highly subsidised agriculture. 62 The promotion of geographical indications forms part of the two countries review proposals to the TRIPs and part of their interest in agricultural negotiations. Rules of unfair competition protect local and regional speciality products and even if not an instrument of market access liberalisation itself, the EC and Switzerland seem to vest geographical with a *quid pro quo* function considering geographical indications a trade-off for dismantling existing barriers to agricultural imports from developing countries.

37 members, composed of developed and developing countries alike, have signed proposals advocating geographical protection at the WTO to be expanded to agricultural products. 63 Developing countries increasingly value geographical indications as an

---

61 WTO, Doha work programme, decision adopted by the General Council on 1 August 2004, WTO Document WT/L/579 of 2 August 2004, the Doha work programme is also called the “General Council’s Post-Cancun decision”, section 1 (d).


63 WTO Council on TRIPs, communication from Bulgaria, Cuba, Cyprus, the Czech Republic, Estonia, the European communities and their fifteen member states, Georgia, Hungary, Iceland, India, Jamaica, Kenya, Liechtenstein, Mall Mauritius, Pakistan, Romania, the Slovak Republic, Slovenia, Srilanka, Switzerland, Thailand and Turkey WTO Document ID/W 353 of June 24, 2002.
instrument contributing to a remunerative marketing of an agricultural production based upon traditional cultivation methods.\textsuperscript{64}

Cairns group countries such as Argentina, Brazil, United States, Australia whose economies are built upon immigration from Europe, consider geographical indications nothing but a protectionist tool to prevent immigrants from using the “original” recipes and methods of production of their forefathers, thereby denying them comparative advantages in producing and marketing highly competitive like products.

\textbf{5.8 Conclusion}

The advent of the TRIPs agreement created a new discussion on the relationship of public and appropriated information. The advances of biotechnology, protected by intellectual property, call for new instruments for the protection of traditional knowledge. Genetic engineering, which developing countries might rely on for food security in the light of droughts and floods exacerbated by global warming, bears the risk of further devaluating knowledge relating to the conservation and use of traditional crops and thus deplete the heritage of traditional biodiversity and conservation through use. Similarly, the protection of geographical indications no longer is exclusively seen as an instrument to protect European values. It equally bears the potential to enhance and diversify products from developing countries. Both traditional knowledge and geographical protection are inherently linked to liberalisation of market access in agriculture.

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