TURUN YLIOPISTO
Oikeustieteellinen tiedekunta

Protecting Traditional Knowledge with Geographical Indications

The potential role of geographical indications and EU's quality schemes in protecting traditional knowledge

Re-examining the foundations of EU law
Master's Thesis
Juliana Laurila
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Author: Juliana Laurila

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Protection of traditional knowledge has been the subject of intense debate in the intellectual property field. Advances in biotechnology and biodiversity crisis has resulted in the increasing recognition of the value and utility of traditional knowledge in solving complex problems. There is a consensus that the level of protection of traditional knowledge should be enhanced but the question remains how. This thesis aims to analyze the feasibility of geographical indications in protecting traditional knowledge. It also aims to find out if European Union's geographical indication quality schemes can be extended to account for non-agricultural products as well. It is argued that through geographical indications, the protection for traditional knowledge is only indirect, and not sufficient enough. On the surface level this is due to the different characteristics of geographical indications and traditional knowledge. On a deeper level, geographical indication's inability to fully protect traditional knowledge stem from the historical development of intellectual property rights, different justificatory theories of intellectual property and the challenges that traditional knowledge faces in the global intellectual property system. This thesis concludes that for limited situations, geographical indications are useful and adequate, but a sui generis system should be created to ensure the full protection of traditional knowledge.

The theoretical analysis and discussion is conducted by examining the books, articles and official documents focusing on traditional knowledge, international intellectual property system, geographical indications, and the complex relationship between them.

Key words: geographical indications, intellectual property system, traditional knowledge, EU quality scheme

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Otsikko: Perimätiedon suojaaminen maantieteellisillä merkinnöillä: Maantieteellisten merkintöjen ja Euroopan Unionin laatujärjestelmän potentiaalinen rooli perimätiedon suojaamisessa

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Perimätiedon suojaamisesta ja suojan tasosta on keskusteltu valtavasti viime aikoina. Bioteknologian kehitys ja biodiversiteetin köyhtyminen ovat kääntäneet huomion perimätietoon ja sen hyödyntämiseen eri innovaatioissa. Perimätiedon suojaamiskysymys ei ole yksiselitteinen. Erimielisyydet koskevat erityisesti perimätiedon suojan laajuutta ja sitä, mikä olisi otollisin mekanismi suojaamaan perimätietoa. Tämä tutkielma analysoi maantieteellisten merkintöjen käyttökelpoisuutta perimätiedon suojaamisessa. Tutkielma pyrkii myös selvittämään voisiko Euroopan Unionin maantieteellisten merkintöjen laatujärjestelmä ulottaa koskemaan myös muita kuin maataloustuotteita ja elintarvikkeita. Tutkielman mukaan perimätiedon suojaaminen maantieteellisillä merkinnöillä ei ole ongelmatonta. Maantieteelliset merkinnät suojaavat perimätietoa vain välillisesti, sillä ne eivät kykene suojaamaan itse perimätietoa. Pintatasolla tämä johtuu siitä, että maantieteelliset merkinnät on suunniteltu ensisijaisesti suojaamaan alueen ja tuotteen nimen välistä suhdetta. Tutkielman mukaan tämä johtaa siihen, että maantieteelliset merkinnät eivät kykene riittävästi suojaamaan perimätietoa, vaan ovat hyödyllinen työkalu alkuperäiskansoille ja paikallisille yhteisöille vain rajatuissa tilanteissa. Pintatason lisäksi maantieteellisten merkintöjen kyvyttömyyttä suojata perimätietoa selittävät immateriaalioikeuksien historiallinen kehitys, immateriaalioikeuksien eri oikeuttamisteoriat ja perimätiedon kohtaamat eri haasteet nykyisessä immateriaalioikeusjärjestelmässä. Tutkielman johtopäätös on, että vain rajatuissa tilanteissa maantieteelliset merkinnät ovat riittäviä suojaamaan perimätietoa, mutta perimätiedon kattava suojaaminen vaatisi esimerkiksi *sui generis* systeemin luomista.

Teoreettinen analysointi ja keskustelu on tutkielmassa toteutettu tutkimalla kirjoja, artikkeleita ja virallisia lähteitä, jotka keskittyvät perimätietoon, kansainväliseen immateriaalioikeusjärjestelmään, maantieteellisiin merkintöihin ja näiden osatekijöiden väliseen monimutkaiseen suhteeseen.

Avainsanat: maantieteelliset merkinnät, immateriaalioikeusjärjestelmä, perimätieto, EU laatujärjestelmät

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LIST OF ABBREVIATIONS

CBD	Convention on Biological Diversity
CJEU	Court of Justice of the European Union
TRIPS	The Agreement on Trade-Related Aspects of Intellectual Property Rights
FAO	Food and Agricultural Organization
GI	Geographical Indication
ILCs	Indigenous and Local Communities
ILO	International Labour Organization
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
TCEs	Traditional Cultural Expressions
TK	Traditional Knowledge
TSG	Traditional Specialties Guaranteed
UNCHR	United Nations Commission on Human Rights
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
WHO	World Health Organization
WTO	World Trade Organization

1 INTRODUCTION

1.1 Background

Several reasons have led to the huge interest in the legal ownership over traditional knowledge. The concerns over the global environmental and biodiversity crisis have led to the increasing recognition of the use, application, and value of traditional knowledge. In the field of biotechnology and life sciences, there is an increasing use of animal, human and plant genetic resources[1] and over 70 % of the world's biological resources happen to be located in local and indigenous communities' traditional knowledge.[2] The term traditional knowledge refers to knowledge, know-how, skills, innovations, or practices that are passed between generations in a traditional context and forms an integral part of indigenous or local communities' (ILCs) traditional lifestyle and thus is closely related to their cultural and/or spiritual identity.[3] There are many forms of traditional knowledge: it can be agricultural, environmental, or medicinal knowledge or relate to genetic resources. It can be knowledge about traditional hunting techniques, animal migration patterns, water management or traditional medicines.[4]

Currently, traditional knowledge is not directly protected under any international legal instrument.[5] Indigenous peoples and local communities have demanded legal protection for their traditional knowledge, because of the numerous misappropriations and 'biopiracy' incidents. Biopiracy refers to a situation where multinational corporations from developed and highly industrialized nations claim ownership of traditional knowledge or utilize it in their inventions that they later protect via patents or other intellectual property rights without

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[1] Oguamanam The Journal of World Intellectual Property 2008, p. 31.

[2] This means, that over 70% of the world's biological resources are tied into the traditional knowledge of indigenous and local communities. For example, knowledge passed on generations about specific healing qualities of medicinal herb is traditional knowledge and the medicinal herb itself is a biological resource. Traditional knowledge has been utilized in searching of cures for diseases and in ways to enhance food security. The relationship between traditional knowledge and biological resources is most clearly recognized in international treaties like the Convention on Biological Diversity (CBD) that explicitly states that the protection of traditional knowledge is directly linked to preserving biological resources. See more, Oguamanam Law Text Culture 2004, p. 206.

[3] WIPO 2020, p. 13.

[4] Ibid., 14.

[5] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) do not mention traditional knowledge at all, and this has also been one of the major triggers of seeking protection to traditional knowledge.

giving adequate recognition or remuneration to the original traditional knowledge holders.[6] Traditional knowledge holders have called for a creation of a regime that would renumerate the holders of this valuable information and of its use. The issue in a nutshell is that there is a disagreement of how traditional knowledge should be protected, and what the scope of protection ought to be. Indigenous peoples, local communities and their representatives have turned their attention to intellectual property rights system and demanded intellectual property protection over traditional knowledge. They argue that traditional forms of creativity and innovation should be protected as well. However, this thesis aims to look deeper into the problem. It examines if the conventional global intellectual property system was ever designed to protect traditional forms of innovation and creativity because at least partly due to the historical roots of international intellectual property system itself, traditional knowledge was excluded from the intellectual property rights family.[7] Therefore, I find it interesting to scrutinize if intellectual property tools can provide adequate level of protection for traditional knowledge if they never were designed to accommodate the characteristics of traditional knowledge.[8] According to some[9], the historical development of intellectual property rights system is to be blamed for the *status quo*, where traditional knowledge is regarded as being part of the 'public domain', free for anyone to be used and utilized and in the views of indigenous peoples, local communities and developed nations, open to misappropriation, misuse, unauthorized access, and free riding by third parties. The term 'public domain' describes materials or resources that are ineligible for private ownership and intellectual property rights or materials or resources which intellectual property protection has expired.

A situation where a multinational pharmaceutical company appropriates a traditional remedy in their invention that they later patent is the most classic one and perhaps the most insightful if one wants to grasp a comprehensive understanding of the topic of this thesis. In 2000, German company Schwabe successfully patented South African herb that had been used by indigenous communities in South Africa for centuries to treat respiratory diseases. Schwabe made significant profits without compensating local communities and broke several

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[6] Mgbeoji, Ikechi UBC Press 2006, p. 12.

[7] See more Chapter 2.1.4 of this thesis.

[8] This is the reason why one of my main research questions concerns if one form of intellectual property tool (geographical indications) can provide an adequate level of protection for traditional knowledge.

[9] See Chapter 2.1.2.

provisions of the Convention on Biological Diversity 1992.[10] In 2010, the European Patent Office's Opposition Division issued a decision where it held the patent invalid. According to article 100 of the European Patent Convention (EPC), the grounds for opposition are that the subject-matter of the European patent is not patentable under Articles 52 to 57 of EPC.[11] In this case, the patent was held invalid because it did not fulfill the Article 52 of the EPC. Article 52 of the EPC states that "European patents shall be granted for any inventions, in all fields of technology, provided that they are new, involve an inventive step and are susceptible of industrial application".[12] Schwabe failed to show the inventive step in their patent[13] especially after the involvement of various NGOs, companies and indigenous community groups who had solid proof of the use of the herb by South African indigenous communities for decades. If something has been used for decades, the invention cannot be new or fulfill the inventive step criteria. This case highlights the one-way flow of goods in international trade from Global South to Global North: genetic resources, know-how, practices, and knowledge are extracted from developing countries because their knowledge is treated as part of 'common heritage of mankind' (equivalent to the concept of public domain) while genetically modified or industrially developed seeds or medicines do not belong to the public domain but are protected by intellectual property rights (IPRs). The next logical question would be why? Why is traditional knowledge treated as part of 'common heritage of mankind' and why applying the conventional intellectual property tools to protect it is so problematic? Is it because of the historical and philosophical ideologies of the West that nature itself is not a product of human creativity and that rural areas and peoples are 'uncivilized' or being 'pristine and wild' and thus their knowledge creation and management cannot be scientific or legitimate?[14] Or is it because the system of intellectual property is based on certain type of

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[10] Under the Convention on Biological Diversity 1992, patent applicants need to seek for prior informed consent from the party providing genetic resources or associated traditional knowledge. Further, patent holders are required to enter into benefit-sharing arrangements, to ensure that local or indigenous communities are compensated for providing the valuable information. See more, Daly Edward Elgar Publishing 2015, p. 368.

[11] Article 100 "Grounds for opposition" of the European Patent Convention.

[12] Article 52 "Patentable inventions" of the European Patent Convention.

[13] Daly Edward Elgar Publishing 2015, p. 368.

[14] These kind of (perhaps heavy) arguments are often seen in papers written by authors who examine issues through a post-colonial lens. For example, Oguamanam argues that this cultural (racial) superiority mindset is still present in our modern-day society: "The uncivilized European others were depicted as incapable of intellectual engagement or output in their dealings with the natural resources around them. (…) TRIPS' silence over local knowledge is therefore consistent with a historical pattern that reflects the exclusion, derogation and relation of local knowledge within the matrix of colonial culture and power hierarchies.". See more, Oguamanam The Journal of World Intellectual Property 2008, pp. 33-34. Also, recently scientists and policymakers are

values, and incentives that traditional knowledge do not match well with? Currently, it seems that the conventional international intellectual property system favors some players' creative contributions as authored works, protected by intellectual properties, while others' creative contributions are seen to provide mere resources, data, and information, like the case *Schwabe* illustrated. The herb used by South African indigenous communities was later used in an invention by the German company who first was able to obtain a patent, until it was revoked. So, it could be argued that the global intellectual property system is more favorable towards industrialized countries and companies.[15]

Another example concerned the neem, a tree that grows in tropical regions such as India. Neem (Azadirachta indica) contains chemicals that help reduce blood sugar levels, kill bacteria, and even prevent pregnancy. European Patent Office (EPO) granted patent over a fungicidal product derived from neem seeds to the US Department of Agriculture and the agricultural corporation W.R. Grace in 1994. In 2005, EPO revoked the patent, accepting the argument made by various organizations that the patent lacked an inventive step. The patent applicant had tried to argue that when they distinguished the fungicide from neem seeds (prior art) this was an inventive step and thus their 'invention' was eligible for patent protection. But Indian farmers had used fungicide for decades, so EPO agreed that no inventive step existed.[16] This is again one good example, how we have to recognize that there are many ways to manage and create knowledge and not one way is necessarily better than the other. Just because Western companies distinguish, extract, and remove parts of nature from their natural habitat and move them into laboratories and then make feasible solutions, it does not mean that indigenous or local communities would not have already observed the same and arrived at similar solutions, but by different methods. One distinction between Western science and traditional knowledge is that Western science separates their objects from their context and

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increasingly aware that nature is one of the biggest human artefacts. The most rural and pristine areas of the world are actually a product of complex human landscape 'management'. For example, seeds are not only cultivated in breeding labs, but also in the farmers' fields. This means that indigenous and local communities who have preserved their lands over thousands of years have shaped the ecosystem to look and be the certain way, and therefore it is 'one of the biggest human artefacts'. See more, Coombe DePaul Law Review 2003, p. 1178-1179.

[15] Looking into the global inequality or equality that the intellectual property rights system upholds is a whole another topic that cannot be addressed in this thesis. For instance, South African indigenous communities are (at least technically) as free as Western people to establish corporations and monetize and obtain patents to their traditional knowledge-based inventions. However, developing nations and indigenous communities might face practical barriers like the lack of capital that is needed in R&D heavy inventions.

[16] Brown India Wins Neem Patent Case https://web.williams.edu/AnthSoc/native/neem.htm (visited 28.2.2022).

prefer controlled environments when observing the subject matter, while traditional knowledge is always tied to their context and local conditions and does not separate the objects from nature.[17]

There is an increasing awareness that something needs to be done to preserve the global environment and biodiversity. In the 1990s, several significant international legal instruments on the environment has been signed and currently there are ongoing negotiations about the protection of traditional knowledge facilitated by World Intellectual Property Organization's (WIPO) bodies. Thus, there is a consensus that some kind of legal framework for the protection of traditional knowledge should be created.[18] The differing opinions concern the nature of the instruments and how exactly should the protection of traditional knowledge to be achieved.[19]

This thesis explores the feasibility of geographical indications, a form of intellectual property rights, in protecting traditional knowledge. I aim to look deeper into the European Union's geographical indications system and traditional knowledge in the EU. EU's view has been that traditional knowledge could be protected under existing intellectual property system, by using collective trademark or geographical indications. According to EU, "(…) all branches of traditional IP law can play a part in the protection of TK (directly or indirectly) as long as the application criteria are met."[20]

Geographical indications are indications which identifies that a specific product, good, or service originates from a specific territory, region, or locality and that the quality, reputation, or other characteristic of the good, product, or service is essentially attributable to its origin. In a similar fashion, traditional knowledge is closely linked to cultural identity and the land is often a symbol of identity for indigenous peoples and local communities. The connection to

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[17] Mazzocchi EMBO Reports 2006, p. 464.

[18] Agenda 21, the Convention on Biological Diversity, the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, are all examples of international legal agreements designed to combat environmental and biodiversity crisis. See more, Oguamanam The Journal of World Intellectual Property 2008, p. 31.

[19] There are many options how the protection of traditional knowledge could be done but the most popular ones have been the following: to use the existing intellectual property system and its tools to protect traditional knowledge, to modify the existing intellectual property tools to better suit for the protection of traditional knowledge and the third is to design a specific, *sui generis* system.

[20] WIPO/GRTKF/IC/12/5(B), p. 110.

land that indigenous peoples and local communities have explains the relationship they have with their knowledge. It is for this and other similarities between traditional knowledge and geographical indications why it has been suggested that geographical indications (GIs) could be used to provide some kind of protection for traditional knowledge. This thesis aims to analyze geographical indications, EU's geographical indication quality schemes and their potential role in protecting this valuable information, traditional knowledge.

1.2 The Scope of the Study, Research Questions, and Methodology

The reason why I have chosen to assess if geographical indications and EU's quality schemes can protect traditional knowledge is because the use of geographical indications have been mentioned several times by EU institutions, indicating that EU institutions consider this approach as the most relevant when it comes to strengthening the protection of traditional knowledge at the EU level. Trademark or unfair competition law could be other possible choices, but there has not been that much discussion of these two among scholars, governments, or institutions.[21]

The scope of the study is limited to the suitability of geographical indications and EU's quality schemes in protecting traditional knowledge. I examine the EU's geographical indications system (quality schemes), but it is noteworthy that different parts of the world have their own geographical indication systems. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) establishes a level of harmonization for intellectual property rights protection and requires that all World Trade Organization (WTO) members who are automatically bound by the TRIPS Agreement to provide the minimum standards of protection. The minimum standards of protection under TRIPS is limited to the prohibition of the use of geographical indications by producers who are not located in a specific region designated by the particular geographical indication, thus it is only providing protection against deception. It is for this reason that many countries have enacted domestic legislation

[21] WIPO/GRTKF/IC/3/16 Annex, p. 2: "In the field of trademarks, it is possible, under certain conditions, to protect in the EU signs used in respect of products of traditional communities/groups by collective, guarantee or certification trademarks, either at national or Community level. Geographical indications can also play a positive and complementary role in protecting traditional products and products incorporating elements of TK." and p. 5: "The EC and its Member States agree that, where possible, the existing IP protection system should be fully used to protect TK.".

about geographical indications that exceed the minimum standards of protection for geographical indications by TRIPS.

The purpose of this thesis is to examine if geographical indications and EU's quality schemes can protect traditional knowledge. Therefore, my research question is *can geographical indications and EU's quality schemes protect traditional knowledge and if not, why?* In Chapter 2, I begin answering the research question by asking what traditional knowledge is and what are the challenges that traditional knowledge faces in the conventional international intellectual property system. Chapter 2 will also assess if protecting traditional knowledge with any intellectual property rights tool is justified under the two most dominant justificatory theories of intellectual property rights. In Chapter 3, I will look into what are geographical indications and EU's quality schemes. Chapter 4 is dedicated into providing a comprehensive answer if geographical indications could be a feasible solution in protecting traditional knowledge. Chapter 4 also answers how EU's quality schemes could be utilized to enhance the level of protection for traditional knowledge in the EU.

The incompatibleness between intellectual property rights and traditional knowledge is widely acknowledged, therefore I find it interesting to look deeper into this and address the instrumentality of geographical indications in the protection of traditional knowledge. When it comes to protecting traditional knowledge with geographical indications in the EU, European Union has a harmonized geographical indications system for the protection of agricultural products and foodstuffs only, meaning that products like cheese, wine and spirits are well protected through geographical indications EU-wide. For non-agricultural products such as handicrafts and ceramics there is not EU-wide harmonized system available, thus producers and traditional knowledge holders who have non-agricultural products and wish to protect them through geographical indications would have to seek protection Member State by Member State.

My research question on the utilization of geographical indications in protecting traditional knowledge is contextualized within the general framework of international regimes governing intellectual property rights and traditional knowledge, thus this thesis naturally provides answers to other important questions as well that frequently arise in connection with the instrumentality of geographical indications and traditional knowledge. That is why Chapter 2 will look deeper into the different challenges that traditional knowledge faces in the current global intellectual property system. Further, the reason why Chapter 2 will examine if

protecting traditional knowledge with any intellectual property rights tool is in conformity with the existing justificatory theories of intellectual property is because the exclusion of traditional knowledge from intellectual property rights family has been justified by claiming its incompatibleness with justificatory theories of intellectual property. For example, Munzer and Raustiala[22] have argued that traditional knowledge should not be protected through intellectual property rights because its characteristics are not in line with the justificatory theories of intellectual property. In other words, according to Munzer and Raustiala, geographical indications as one form of intellectual property rights should not be used in protecting traditional knowledge, because traditional knowledge cannot be eligible for intellectual property rights protection if it is not in line with the justificatory theories of intellectual property.

In answering my research question, I mainly use theoretical legal dogmatics as a method. This method allows in-depth examination of the regulative framework and the tensions that traditional knowledge, intellectual property rights and geographical indications have with each other. On top of this, I utilize the post-colonial framework when briefly examining the challenges that traditional knowledge faces in the current global intellectual property rights system in Chapter 2. By choosing this approach, I take the standpoint that international intellectual property law is not a neutral law, but a tool of concealing, managing, and relocating power. That power, in the context of traditional knowledge has resulted in leaving the traditional knowledge out of TRIPS and thus out of international intellectual property protection. There is a limited application of postcolonial approaches in EU studies, which is why I believe it is valuable to approach my thesis topic from this point of view in Chapter 2.

Writing this thesis has been challenging because I have chosen rather a multidimensional than one-dimensional approach. I believe that in answering my research question about the feasibility of geographical indications, I also have to look into the general background and even the philosophical foundations of intellectual property rights. Why? One of the main problems revolves around the assumed inherent mismatch between the characteristics of traditional knowledge and the characteristics of intellectual property rights. This assumed mismatch is not happening only on a surface level, but stems from the ideology behind intellectual property rights that is at least to some extent influenced by the two most

[22] Munzer – Raustiala Cardozo Arts & Entertainment Law Journal 2009, p. 40.

prominent justificatory theories of intellectual property, Locke's natural rights theory and utilitarianism. Other factors contribute to this complex issue as well, like the historical development of intellectual property rights. Therefore, I see it as necessary to first dive deep into the historical and philosophical backgrounds of intellectual property rights to better understand the complex relationship that geographical indications, intellectual property rights and traditional knowledge have with each other. From there, my thesis moves to more surface and practical level and assesses the feasibility of geographical indications and EU's quality schemes in protecting traditional knowledge. However, it would not be possible to understand if geographical indications or the quality schemes can protect traditional knowledge or not without first understanding the core issue, which is that it is not that simple to protect traditional knowledge through whatever intellectual property rights tools compared to non-traditional knowledge that can be protected through patents, trademarks or copyrights depending on the nature of the object.

The legal system analyzed is international intellectual property system and European Union's geographical indications system. EU possesses a large market in the world, thus depending how traditional knowledge will be protected in the EU has major implications for the global trade.[23]

There are many limitations to my thesis. First of all, I am focusing only on traditional knowledge and not on traditional cultural expressions (TCEs). However, it must be acknowledged that for many communities, traditional knowledge and traditional cultural expressions are closely related, even integral to each other and distinguishing them is arbitrary. Nevertheless, it is possible to address them distinctly, just like the World Intellectual Property Organization (WIPO) addresses them as two separate areas. When their connectedness is recognized, it is possible to facilitate a holistic approach to protection. Additionally, it must be remembered that no international agreement specifically on the protection of traditional knowledge yet exists. This certainly creates some uncertainty, but for that reason I have chosen my topic to circulate around the suitability of geographical

[23] Traditional knowledge has been for decades utilized without indigenous peoples and local communities' consent or any mutually agreed agreement on sharing the benefits. Only recently, in 2000 onwards, there have been attempts to draft a comprehensive legal framework for addressing the misappropriation of traditional knowledge, in the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). It remains to be seen, will the legal instrument on the protection of traditional knowledge currently being negotiated in the WIPO's forum be the first internationally binding legal instrument specifically on the protection of traditional knowledge.

indications in protecting traditional knowledge, since geographical indications have been used for some time already and are recognized as intellectual property rights. Lastly, I am myself biased and I cannot approach the topic as tabula rasa: I bring to the table my current knowledge and background as a Finnish law student who has acquired the basics of intellectual property law in a Western legal environment.

2 INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE

2.1 General Background of Intellectual Property

2.1.1 The Definition of Intellectual Property

It is crucial to start with giving a general overview of the underlying philosophy behind the conventional international intellectual property system. In Chapter 2.2 the thesis will explore the underlying philosophy and rationale behind the protection of traditional knowledge. This is essential, since after acquiring the basic knowledge of both of the systems' rationale and basic philosophy, it becomes possible to assess if any form of intellectual property can ever accommodate to protect traditional knowledge, or if the two systems are inherently incompatible. Exploring traditional knowledge and intellectual property rights in a systematic and philosophical level contributes to the first primary research question which concerned if geographical indications (a form of intellectual property rights) could enhance the level of protection for traditional knowledge. If it is concluded that these two systems, traditional knowledge, and intellectual property rights, have too different underlying philosophical and moral foundations, it raises further questions how geographical indications as a form of intellectual property rights could enhance the level of protection for traditional knowledge despite of this possible incompatibility.

According to Fisher, 'intellectual property' refers to "(…) a loose cluster of legal doctrines that regulate the uses of different sorts of ideas and insignia."[24] The term 'intellectual property' is thus used to refer to a different legal regimes and legal doctrines which all confer rights of ownership over different sorts of ideas, and the level of protection varies depending on the particular subject matter and the legal regime in question.[25]

The three conventional forms of intellectual property are patents, copyrights, and trademarks. Patents protect inventions and discoveries, copyrights protect forms of expression like novels, trademarks protect words, symbols, phrases, designs, or combinations of these that identifies particular person's or firm's goods or services. The main rationale behind the intellectual property rights has been to ensure incentives to innovate. The creator has an incentive to

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[24] Fisher Cambridge University Press 2001, p. 1.

[25] WIPO-UNHCHR/IP/PNL/98/1 1998 Paragraph 1 'Definitional Observations'.

innovate or create because through intellectual property rights they can enjoy the benefits of monopoly rights over the commercial use of the invention or creative work for a limited period of time.[26]

Patents, copyrights, and trademarks are not the only forms of intellectual property protection that exist. The Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPS) has categorized intellectual property rights into patents, copyrights and related rights, trademarks, geographical indications, industrial designs, layout designs of integrated circuits, trade secrets, and protection against unfair competition.[27]

2.1.2 The Brief History of Intellectual Property Rights Development

Now that we have a general understanding of what intellectual property is, let's turn our focus on the historical development of it. Drahos divides the protection of intellectual property at an international level into three periods. The first period he calls 'the territorial period' and it was characterized by a total absence of international rules about intellectual property. Laws regulating the ownership and use of different kinds of information differed in different parts of the world. It is out of scope of this thesis to examine how national intellectual property regimes developed. The main take away about this period is that intellectual property rights were domestic. Under the principle of territoriality, intellectual property rights did not extend beyond the borders of the specific nation which had granted the rights.[28] The second period in Drahos' words is called 'the international period'. It begins in Europe at the end of the 19th century by the formation of the Paris Convention for the Protection of Industrial Property (1883), and the Berne Convention for the Protection of Literary and Artistic Works (1886). The reason why the world moved towards international intellectual property protection was to solve the classic free-riding problem, where intellectual property owners' works were reproduced abroad without permission or renumeration.[29] The third period, 'the global period', is characterized by many developing countries joining to Paris and Berne

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[26] According to Oguamanam, none of the rationalizations for intellectual property rights fully account for all intellectual property regimes and that the theoretical justifications around intellectual property are inadequate. See more, Oguamanam Wake Forest Intellectual Property Law Journal 2009, p.106.

[27] Agreement on Trade-Related Aspects of Intellectual Property Rights Annex 1c Part II.

[28] WIPO-UNHCHR/IP/PNL/98/1, Paragraph 2 "The History of Intellectual Property: The Territorial Period".

[29] Ibid., Paragraph 2 "The History of Intellectual Property: The International Period".

Conventions and pushing for revisions, reforms and adoptions of protocols and provisions that would better take into account their stage of economic development. Due to the principle of one-vote-one-state, Western states faced a reality where they could be outvoted by a coalition of developing countries. Into the Uruguay Round of trade talks in 1986, U.S. initiated that intellectual property should be included as a negotiating issue. This was important for the U.S. because intellectual property represented the backbone of their industries (film and pharmaceutical industries, copyrights and patents). The Uruguay Round of Multilateral Trade Negotiations ended up containing the TRIPS Agreement and the Agreement Establishing the World Trade Organization (WTO). TRIPS Agreement was made binding on all members of the WTO, thus countries who did not like the provisions of TRIPS would have to give up the membership of the WTO as well, thus giving up the opportunity to participate into the global trade.[30] The TRIPS Agreement established a set of minimum standards for intellectual property protection, and failure to meet these standards may lead to proceedings in WTO's Dispute Settlement Body.

2.1.3 The Justificatory Theories of Intellectual Property: Utilitarianism and Locke's Labor Theory

Now that the definition and historical development of intellectual property rights is clear, why does the law provide legal protection in the first place? How is this justified? This question leads us to the underlying philosophy of intellectual property, and to the justificatory theories of intellectual property rights. There is no single unified justification theory of intellectual property rights, and it is outside the scope of this thesis to explore all of the possible philosophical theories of intellectual property rights. I have chosen to focus on two dominant justifications underlying the existing intellectual property systems: utilitarianism and Locke's natural rights theory.

Utilitarianism is one of the most popular justifications for intellectual property rights in our current era.[31] The popularity of this theory is perhaps caused by the increasing importance of intellectual property in society and the rise of digital technology.[32] The essence of this theory circulates around the belief that intellectual property rights are the appropriate means to foster

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[30] Ibid., Paragraph 2 "The History of Intellectual Property: The Global Period".

[31] Fisher Cambridge University Press 2001, p. 168.

[32] Menell Encyclopedia of Law and Economics 1999, p. 129.

innovation. According to utilitarianism, without intellectual property protection, there would not be incentive to innovate, and thus, this would result in greater harm for the public because society could not enjoy the benefits of innovation.[33] This theory has received criticism over the years. For example, money and financial gain are not the only incentives for humans to create and invent and in many cases, it might not even be the primary incentive.[34] Further, Oguamanam sees that the more likely effect of intellectual property rights is that they promote the commercialization of inventions. But promoting the commercialization of inventions is not the same as incentivizing creativity and innovation in general, that is the underlying logic of the utilitarian theory. What Oguamanam means by this, is that without making the distinction between the incentive to commercialize the inventions and promoting innovation and creativity in general, this omission could potentially result in contradicting with the utilitarian proposition that by granting exclusive monopoly rights it maximizes the net social welfare. How? If intellectual property rights' actual effect is that it rather promotes the commercialization of innovations than innovation and creativity in general, it means that only commercially viable innovations are more likely to be invented and this channels the creative efforts to meet the logic of the market and might shift creative and inventive efforts outside the priorities of the larger society, thus contradicting the utilitarian proposition.[35]

It perhaps would be a severe omission not to mention Locke and his natural rights theory in a thesis that touches on justification theories of intellectual property rights. John Locke probably did not understand how profound influence his writings in his book Two Treatises of Government (1690)[36] would turn out to be for intellectual property rights and in general.[37] Locke's writings have almost like a status of a Bibel in the field of property and intellectual

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[33] Peter S. Menell mentions in his article that the utilitarian theory is the principal theory when it comes to the protection of utilitarian works, which are technological inventions. The value of technological inventions is to perform tasks or satisfy desires in the most effective and lowest cost as possible. Menell concludes that therefore it is logical if societies (especially highly industrialized ones) prefer a governance regime based upon utilitarianism. After all, almost all present days societies' economies are heavily dependent on technological inventions. See more, Menell Encyclopedia of Law and Economics 1999, p. 129.

[34] I think the best example of this is all kinds of open-source projects that rely on the contributions of the community. For example, I use an open-source drawing software called Krita, and it is completely free, but it is dependent on the contributions of the community members.

[35] Oguamanam Law Text Culture 2004, p. 121.

[36] Locke Phoenix 1993.

[37] His theory of property has been used to justify colonization and the expropriation of land. See more, Alpana Asia Pacific Law Review 2008, p. 224.

property rights and therefore I aim to examine Locke's natural rights theory more thoroughly here.[38] Chapter V of the Second Treatise is a short chapter which has led some to doubt did Locke even meant to formulate a theory of property.[39] Two Treatises was essentially a critique against a monarchical government and its mission was to weaken the authority of kings and the legitimacy of political power.[40]

Locke used the framework of natural law in his book because Two Treatises was a counterargument to the arguments presented by Robert Filmer in his book justifying the absolutist monarchy.[41] Filmer had pointed out many incoherencies in the writings of natural law thinkers who could not provide a sound reasoning how could natural law that declares the existence of a commons (public domain) lead to a state of private ownership. Locke had a difficult task in front of him; he had to reason with natural law that equality and the commons could coexist with the private ownership. But how can a private ownership co-exist if God gave everything for people in common? [42]

To provide a sound reasoning, Locke decides to approach the question with the assumption that "(…) every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his".[43] This assumption leads Locke to form the origination of property in the following way:

> "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property."[44]

The above quote is often referred to as 'Locke's labor theory' or mixing metaphor in the field of intellectual property law and according to labor theory, labor is either the sole or the dominant moral basis for property. The labor theory justifies intellectual property rights on

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[38] Drahos ANU eText 2016, p. 47.

[39] Ibid., 48.

[40] Ibid.

[41] Patriarcha: or the Natural Power of Kings (1680).

[42] Locke Phoenix 1993, Chapter V Section 25.

[43] Ibid., Chapter V Section 27.

[44] Ibid.

the ground that they constitute fair rewards for hard work.[45] For example, the international intellectual copyright law as codified in the Berne Convention, assumes that an individual author has a natural entitlement to the fruits of their labor, even though labor is not constitutive of property. Further, according to Locke, the objects of nature have very little value and become valuable once human labor is applied.[46] We can see this thinking reflected in most of the current patent systems around the world, where only inventions can be granted patents, but not discoveries. To acquire a patent over one's creation, a sufficient inventive step needs to be proved, meaning that human labor needs to be added. Locke also argues that the purpose of the Earth is for private appropriation: if all persons have the liberty to use the commons, have the right of self-preservation, and things are not of any use until they are appropriated[47], without private appropriation the Earth would not serve the purpose for which it was given by God.[48] However, Locke does not believe that the right to appropriate is absolute and he imposed two limitations to this right.[49]

Locke's natural rights theory and mixing labor metaphor has received critique over the years. Locke's writings have been used to justify intellectual property rights by specifically referring to the mixing of labor metaphor.[50] However, when focusing on the labor aspect of Locke's writings, some scholars argue that it results in shaky and weak basis for the justification of *intellectual* property.[51] These scholars base their arguments on top of one or both of the

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[45] Fisher Duke Law Journal 2018, p. 1543.

[46] He claimed that labour creates 99% of the objects value. Locke Phoenix 1993, Chapter V, Section 40.

[47] Because they are not valuable unless labor is applied.

[48] Craig Queen's Law Journal 2002, pp. 9-10.

[49] The first constrain is that one may take from the commons only as much as "any one can make use of to the advantage of life before it spoils". This is usually described as the 'spoilage limitation'. The second constrain is that one can remove objects from the commons only to the extent that there is "enough and as good left for others" to appropriate. This is simply known as 'sufficiency proviso'. See more, Locke Phoenix 1993, Chapter V Section 27 and 29. Also, Drahos ANU eText 2016, p. 58 and Tavani Ethics and Information Technology 2005, p. 88.

[50] To mention few, Gordon and Yen have formulated the existing labor theories of intellectual property by focusing on the ownership of one's labor and they argue that the products of intellectual labor are an extension of the author herself. Child takes slightly different approach and concludes that intellectual labor is creating ex nihilo, out of nothing and therefore the laborer should have strong rights over her products. Child sees intellectual labor as increasing the amount of value in the world and not destroying, diminishing, or depleting any existing resources. For Child, the abstract objects are fundamentally different in kind compared to physical objects. See more, Yen Ohio State Law Journal 1990, p. 547; Gordon Yale Law Journal 1993, p. 1545, and Child Rowman & Littlefield Publishers 1997, p. 67-68.

[51] Drahos ANU eText 2016, p. 64.

following observations. First, the kind of labor required to produce intellectual objects differs greatly from the process of creating or acquiring physical objects and physical objects and intellectual objects are qualitatively different kinds of things.[52] In terms of the first observation, Locke's theory seem problematic to justify ownership of an expression of an idea because ideas may simply come to someone while they are taking a walk. It does not require labor in the same way as producing physical objects.[53] This is why Drahos argues that labor is too vague and undefined concept on which to base a justification of intellectual property.[54] When it comes to the second observation, there is confusion what exactly does 'mixing one's labor' mean even in the context of *physical* objects. The assumption that a person should acquire property or an object merely because they mixed their labor with it can be described as a species of an 'entitlement theory' of property and is far from universal.[55] For example, Nozick challenges Locke's mixing one's labor metaphor by asking why to assume that a person should acquire the object because he mixed his labor with it:

> "Why isn't mixing what I own a way of losing what I own rather than a way of gaining what I don't? If I own a can of tomato juice and spill it into the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea or have I foolishly dissipated my tomato juice?"[56]

This is an important observation in the context of this thesis, since some indigenous and local communities do not assume that just because an object is in the public domain it could be acquired as private property, even if one contributes to its creation and thus 'mixes one's labor within it'. For some indigenous and local communities, it is natural to think that something can exist without being owned by anyone.

Despite of all the uncertainties and disagreements when it comes to Locke's writings, is there a reason why Locke's labor theory still is heavily relied upon in our current era when scholars formulate justificatory theories for intellectual property?[57] If Locke's theory is contestable

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[52] Tavani Ethics and Information Technology 2005, p. 88.

[53] Ibid., 89.

[54] Drahos ANU eText 2016, p. 64.

[55] Tavani Ethics and Information Technology 2005, p. 90.

[56] Ibid.

[57] See supra note 50.

even in respect with appropriating physical objects, are the attempts to extend Locke's theory to intellectual property rights futile? There is no clear answer to this. Drahos argues that if the justification of intellectual property is linked to Locke, and specifically to the mixing of labor metaphor, it creates a theory that has a wide extensional reach. What Drahos means with the 'wide extensional reach' is that if the justification of intellectual property rests upon the idea that anything that is in the commons can be appropriated once labor is mixed, very few abstract objects can escape the private appropriation.[58] What is clearer is that if the trend of expanding intellectual property rights to diverse areas continues, the justificatory theories of intellectual property rights will deepen and widen as well.[59]

The purpose of this chapter was to define the term 'intellectual property rights' and provide insight to the philosophical justification theories of intellectual property rights. To conclude, the two justification theories examined here are built either on top of the idea to maximize the net social welfare of the society and promote innovation and creativity[60] or on the idea of private ownership.[61] In the following chapters, after having a comprehensive understanding of traditional knowledge, we can better understand whether there is an inherent mismatch between the characteristics of traditional knowledge and the nature of intellectual property rights. This in turn helps us to make an informed conclusion as to whether geographical indications, as a form of intellectual property rights, can provide adequate level of protection for traditional knowledge.

2.1.4 The Relationship Between Intellectual Property Rights and Traditional Knowledge

The relationship between the intellectual property rights and traditional knowledge is complex. Questions such as is intellectual property rights system compatible with the values and interests of indigenous and traditional communities, can intellectual property rights enhance the level of protection of traditional knowledge and are intellectual property rights the wrong choice in protecting traditional knowledge are challenging to tackle.

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[58] Drahos ANU eText 2016, p. 57.

[59] Dagne Nova Scotia 2012, p. 26.

[60] Utilitarianism highlights the importance of safeguarding innovation and intellectual productivity.

[61] Locke's labor theory is included in Locke's Two Treatises of Government and this book was essentially meant to challenge the idea of monarchy and justify private ownership.

As writing of this thesis, traditional knowledge is not protected in any international intellectual property agreements. As I already briefly covered in the introduction chapter, there are some serious consequences that result from the lack of protection, like bioprospecting and cultural misappropriation. What are the reasons why intellectual property rights have not been extended to cover traditional knowledge as well?

According to Posey, there are many conceptual problems when it comes to protecting traditional knowledge by intellectual property rights. Posey identifies seven difficulties that arise when intellectual property law is applied to the knowledge of indigenous peoples and traditional communities, and I want to highlight five of them here to give readers a comprehensive understanding of the complex relationship that traditional knowledge has with conventional intellectual property rights.

First difficulty is that intellectual property rights grant exclusive rights to 'natural', 'juridical' persons or 'creative individuals' and not to collective entities, like indigenous peoples.[62] When the conventional intellectual property law is overly focused on an individualistic author[63], those who do not fit into this notion are denied intellectual property protection. The way intellectual property law defines who is the author or creator of the work or invention is crucial, and if the definition is not taking into account how different societies culminate or create knowledge, it has the potential of excluding certain type of knowledge from protection, like it has excluded traditional knowledge.[64] For example, copyright law as embodied in international agreements such as the Berne Convention and the TRIPS Agreement, has four main requirements for copyright protection: copyrightable subject matter, originality, fixation, and authorship and ownership. Traditional knowledge usually fails to meet two of these requirements, the 'fixation' and 'authorship and ownership'. 'Fixation' means that the work must be in a fixed tangible form of expression. In the case of traditional knowledge, it is often orally passed on from generation to generation and many communities do not maintain forms of literary expression. In regard to the requirement of authorship and ownership, traditional

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[62] Posey IUCN 1996, p. 13.

[63] Chander and Sunder argue in their article 'The Romance of the Public Domain' that the concept of 'author' is 'romantic' because it has served to strengthen the property rights claims of the powerful at the expense of the marginalized. See more, Chander – Sunder California Law Review 2004, p. 1335.

[64] "*Recognizing* that intellectual property rights are private rights;". This sentence appears in the preamble of the TRIPS Agreement and is a great example how most forms of intellectual property rights emphasize that the intellectual property right-holders are either individualistic or corporeal.

knowledge is often a product of communal culture, and not a creation of an individual author.[65] The second difficulty, especially when it comes to patent law, is the concept of 'discovery'. One of the patentability criteria is that the work has to be an 'invention' thus discoveries are not protected. This leads to a situation where information that is transgenerational and communally shared cannot be protected but is considered to be in the 'public domain' and unprotected.[66] According to Okediji, the Western standards for inventiveness in patent law is an example where the global intellectual property system was shaped from the very beginning to account for only Western type of knowledge creation. She also notes that the bias is not linked to the intellectual property rights itself[67], but to the categories and criteria that have been formulated in international treaties such as TRIPS. These categories and criteria, such as copyright law's fixation or authorship criteria definitely reflect specific historical experiences and cultural bias, but the idea of ownership or stewardship for creative expression dates back to ancient civilizations and is thus universal.[68]

The third difficulty has to deal with the different understandings of concepts of ownership, tenure, and access. Indigenous peoples may attribute songs to the creator spirit or certain individuals within local and indigenous communities may prohibit the use of certain parts of knowledge or restrict access to it under specific circumstances or limit the access to restricted audiences. Intellectual property law often simply assigns the authorship of a creative work to an individual or entity, that can then freely decide how to enjoy their monopoly rights during the limited period of time. Therefore, intellectual property law fails to respond to the needs of non-western systems of ownership, tenure, and access.[69] The fourth difficulty relates to the purpose of the intellectual property rights. The main purpose of granting intellectual property rights under the conventional intellectual property system is to stimulate commercialization and distribution, whereas indigenous peoples and local communities might have the exact opposite in mind: to prohibit the commercialization, use, and distribution of their

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[65] See more, Alpana Copyright Reporter 2008, p. 114-115.

[66] Posey IUCN 1996, p. 13.

[67] What she means by this, is that some have argued that intellectual property rights per se would be inadequate as means to protect traditional knowledge because they would be biased in favor to Western societies.

[68] Okediji African Yearbook of International Law 2006, p. 226.

[69] Posey IUCN 1996, p. 13.

knowledge.[70] The fifth difficulty is that indigenous peoples and local communities' knowledge is tied to their cultural identity, the way of living, belief systems and symbolic unity. The conventional intellectual property rights are overly focused on market economic values and fail to acknowledge spiritual, aesthetic, or cultural values.[71]

Perhaps the deepest problem that characterizes the relationship between intellectual property rights and traditional knowledge has to do with the historical origins of international intellectual property system. According to Tunney, intellectual property as a body of law represents European industrial tradition and many of the concepts and doctrines internal to the conventional intellectual property law have European origins.[72]

A Harvard Law Professor Okediji argues that the most prominent critique towards the international intellectual property system is a power/historical critique.[73] It concerns the historical circumstances, where many developing regions were subjected to the international intellectual property system only by virtue of colonization.[74] The process of drafting the Berne Convention is a perfect example.[75] Article 19 of the Berne Convention[76] stated that Member States can include their colonies in their own accession documents and pick and choose which colonies are covered under Berne Convention and which are not. The colonies and foreign territories neither were asked about their opinion, nor their legal systems, philosophies or ways of knowledge governance were considered in the Berne Convention's drafting process. Many of the Member States included their foreign territories and colonies and thus the geographic scope of the treaties became significant.[77] Other influential

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[70] Ibid.

[71] Ibid.

[72] For example, the very notion of property itself, represents European values and is far from universal. See more, Tunney European Intellectual Property Review 1998, p. 337.

[73] Okediji African Yearbook of International Law 2006, pp. 216-230.

[74] Like Asia, the Americas and African countries. See more, Okediji African Yearbook of International Law 2006, p. 216. Also, remember how Drahos divided the development of international intellectual property rights into three periods? Intellectual property rights have not always been international but were first domestic. See more, Chapter 2.1.2 of this thesis.

[75] However, even before drafting the Berne or Paris Convention in the nineteenth century, many territories were already affected by intellectual property regulations imposed by Europeans. See more, Okediji Singapore Journal of International & Comparative Law 2003, p. 323.

[76] Berne Convention for the Protection of Literary and Artistic Works, 1886.

[77] Okediji Singapore Journal of International & Comparative Law 2003, p. 315.

international treaty for global intellectual property protection was the Paris Convention[78] and together with the Berne Convention they established a global legal framework for the intellectual property protection.[79] Needless to say, if only a handful of European sovereigns were responsible for drafting these two instruments, it is very likely that the treaties represent only the Western perspective of knowledge governance and intellectual property protection:

> "(…) the fact that the Berne Convention *itself* contained a clause that facilitated and confirmed the exercise of foreign power in Africa, Asia and the Americas is a significant factor in critiques that describe the modern intellectual property system simply as another form of European domination."[80]

Moreover, Paris and Berne Convention are integrated into the WTO's TRIPS Agreement and thus affect to the present.[81] Okediji notes how the power/historical critique's most powerful point is not the fact that there was a significant power imbalance between colonizers and colonized but how preventing developing regions to take part to the beginning of formation of the discipline of international law shaped international law itself to be Eurocentric.[82] It is quite self-explanatory how the discipline of international law would not include other voices if these voices weren't present in the negotiation tables, as it was the case in the drafting of Berne and Paris Conventions.[83]

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[78] The Paris Convention, 1883, is a convention covering industrial property, which includes patents, trademarks, industrial design, utility models, service mark, trade names, geographical indication and the repression of unfair competition. See, WIPO Paris Convention for the Protection of Industrial Property, https://www.wipo.int/treaties/en/ip/paris/ (last visited 29.11.2021).

[79] The aim of these treaties was to ensure that creators had their intellectual works protected in other countries as well. The need for harmonized international legal framework for the protection of intellectual property stems from the fact that intellectual property deals with abstract objects. Property rights concern tangible objects, like the ownership of land. When you own a piece of land, it does not move anywhere, it is situated where it is. It is also impossible to duplicate the land in quantity. Therefore, there is no need to think about the property protection of it in other countries or overseas. In the case of intellectual property, because it is about protecting abstract objects, it became important to ensure their protection in anywhere, especially since the reproduction of them does not exhaust the original object and the nature of abstract objects allows a simultaneous use.

[80] Okediji African Yearbook of International Law 2006, p. 219.

[81] Okediji Singapore Journal of International & Comparative Law 2003, p. 316. Also, less than 50 people were responsible for the drafting of TRIPS and these people represented mainly private, US businesses who had significant interests in intellectual property rights: "(…) in effect, twelve corporations made public law for the world", see more Sell SUNY Press 1999, p.171 and Tyfield Zed Books 2010, p. 66.

[82] Okediji African Yearbook of International Law 2006, p. 220.

[83] The difficulties do not end here. The different conceptualization of knowledge itself create tensions between traditional knowledge and intellectual property rights. The concept of knowledge, the origin of knowledge and the ownership of knowledge is different when it comes to traditional knowledge. For example, some scholars have made distinctions between 'Western scientific knowledge' and 'traditional knowledge'. The Western

2.2 General Background of Traditional Knowledge

2.2.1 The Definition of Traditional Knowledge

Perhaps not surprisingly, there is not yet uniformly accepted definition of traditional knowledge at the international level. World Intellectual Property Organization (WIPO) defines traditional knowledge as "knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity".[84] In a broad sense, traditional knowledge also includes traditional cultural expressions which usually are distinctive signs and symbols that are associated with it. For many communities, traditional knowledge and traditional cultural expressions are closely related. Due to the scope of this thesis, I am going to cover only the definition of traditional knowledge.

The narrow sense of traditional knowledge is that it is dynamic, evolving, and inherent to the specific community forming part of its cultural or spiritual identity. It can consist of know-how, skills, innovation, practices, teachings, or learnings.[85] It refers to knowledge originating from indigenous peoples, local communities or other communities and is "the result of intellectual activity, experiences, spiritual means, or insights in or from a traditional context".[86] Agricultural knowledge, scientific knowledge, technical knowledge, medicinal knowledge, and biodiversity-related knowledge are all categories of traditional knowledge.[87] Languages in general, human remains, immoveable cultural property such as sites of historical significance, and burials, or other similar elements of 'heritage' are not included in the description of traditional knowledge.[88]

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concept of knowledge is characterized as analytical, reductionist, positivist, and materialist while traditional knowledge has said to be more intuitive, spiritual, and has a more holistic approach. The conventional intellectual property rights better accommodate securing the creative works and inventions that represent Western knowledge, than traditional knowledge. See more, Mazzocchi EMBO Reports 2006, p. 464.

[84] WIPO Report 2001, p. 25.

[85] Okediji CIGI Papers 2018, p. 2.

[86] WIPO/GRTKF/IC/40/4 2019, p. 5.

[87] WIPO Report 2001, p. 25

[88] Ibid.

Given how broad, complex, and dynamic traditional knowledge can be, it is impossible to formulate one singular definition of the term and no single term would fully do justice to the diverse forms of knowledge that is created and held by indigenous peoples and local communities throughout the world. In general, it is often hard to develop exclusive definitions. In the field of intellectual property, it is common to provide non-exhaustive list of categories that constitute a specific term. This way the definition stays flexible enough. For instance, Article 2.1 of the Berne Convention does not define exclusively the term 'literary and artistic works'. In the same way, there is no need to define a singular term of traditional knowledge or to get stuck with definitions, especially if terms are contested in an attempt to avoid answering the substantive questions.[89] For example, Oguamanam notes that without doubt, clarification of terms is crucial, but in some contexts, it seems that contesting every given phrase or term is rather an attempt to take the focus away from the substantive questions and direct it to irrelevant ones.[90] Issues around indigenous people and traditional knowledge have problematic histories and are highly political[91], so it is important that attempts to create legal framework for the protection of traditional knowledge at the international level would not get stagnated just because of failing the impossible task of formulating perfect definitions.

I have offered very intellectual property focused definition of traditional knowledge because I have used WIPO as a source. Indigenous groups, local communities and other traditional knowledge holders have their own definitions regarding their knowledge, innovations, cultures, and practices.[92] Therefore, in the following chapters I will examine the Sámi

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[89] WIPO Report 2001, p. 62

[90] Oguamanam The Journal of World Intellectual Property 2008, p. 35.

[91] Oguamanam examines in his article how traditional knowledge is located in the hierarchies of culture and power. There is a historical pattern of excluding certain type of knowledge, people, and conceptions of culture. The West has perceived its 'other' as wild, undomesticated, and primitive, all characteristics that are undesirable and unfit for modern society. Europe treats indigenous and other non-Western cultures and traditional knowledge practices with derogation and this mindset has been used to justify the colonization process. This historical pattern manifests nowadays in many ways, for example how the first international conventions about intellectual property were concluded (indigenous peoples, or colonies were not involved in any way in the process of adopting the Paris and Berne Conventions). As a result, vast majority of the world's population were excluded from the negotiating table. Another and more recent example is the TRIPS Agreement and its silence over traditional knowledge. See more, Oguamanam The Journal of World Intellectual Property 2008, p. 34. Also, because the topic of protecting traditional knowledge is so political, it is important to resist upholding binaries, like setting traditional knowledge against scientific knowledge, because this binary upholds global inequality and adverse power relations. See more, Anderson Duke University School of Law 2010, p. 4.

[92] WIPO Report 2001, p. 62.

peoples' understanding of traditional knowledge. I have chosen Sámi people as an example because they are the only indigenous peoples in the European Union. But before that, I will briefly look into the relevant legislation regarding indigenous peoples' rights and traditional knowledge and the objective behind protecting traditional knowledge in the first place.

2.2.2 Relevant Legislation Relating to Indigenous Peoples and Traditional Knowledge

For many years, there was no initiatives to protect traditional knowledge, because it was regarded as part of the 'commons', as a resource open to all and it was treated the same way as the air or resources in the deep ocean seabed.[93] None of the WTO agreements recognize and protects traditional knowledge. Indigenous peoples and local communities feel that WTO has failed to address the issue of protecting traditional knowledge and therefore they have turned their focus on other various forums.[94] Because of this shift from WTO to another forums, the current state of affairs is that there is no holistic legislation protecting traditional knowledge, but several international regimes address the issue of protecting traditional knowledge, resulting into a very fragmented and confusing outcome.

The United Nations has been the principal forum for indigenous people's issues to be raised. The International Labour Organization (ILO) was the first international organization to deal with indigenous people's issues and it developed a special Convention 169 Concerning Indigenous Peoples in Independent Countries.[95] The language of this legal instrument is weak, but it provides minimum standards for indigenous rights. The other agency within the United Nations that is highly relevant when it comes to indigenous people's issues is the Food and Agricultural Organization (FAO).[96] FAO has been important in developing the concept of Farmer's Rights to ensure that the contributions of traditional farmers are acknowledged. Third important legal instrument is the Convention on Biological Diversity (CBD) which objective is to establish common rules about the use and conservation of genetic resources in a way that protects and respects indigenous peoples and local communities.[97] Other forums

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[93] Dagne Nova Scotia 2012, p. 226

[94] Okediji Singapore Journal of International and Comparative Law 2003, p. 317 and 355-356.

[95] Posey IUCN 1996, p. 2.

[96] Ibid., 3.

[97] Ibid., 4.

include the United Nations Commission on Human Rights (UNCHR) and the World Health Organization (WHO).[98]

The basis on which indigenous peoples express their demands to have control over their resources is their right to self-determination. The treaty establishing indigenous people's right to self-determination is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), specifically its Article 3:

> "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[99]

Important is also the Article 31, which establishes indigenous people's right to "(…) maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts."[100]

The legal tools available to indigenous peoples to protect their knowledge against misappropriation or unauthorized use are limited or unpractical. For example, if indigenous peoples and local communities would want to obtain patents to protect their traditional knowledge, the cost and complexity is often preventing them from actually doing it. Further, it is even more difficult to defend their traditional knowledge, as this would mean that indigenous peoples and local communities would have to become somehow aware that their traditional knowledge is being used by foreign companies without authorization or remuneration and the cost of litigation is simply too high while multinational companies can afford it.

Indigenous people and local communities can use existing human rights legislation, but these legal instruments are often mainly directed at individual rights. Indigenous people and local communities do not seem to benefit from intellectual property rights either, because these

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[98] Dagne Nova Scotia 2012, p. 244.

[99] Article 3 of the United Nations Declaration on the Rights of Indigenous Peoples (2007).

[100] Ibid., Article 31.

rights are mainly designed to protect private property but not knowledge or creative works developed and held by collective. Therefore, indigenous peoples and local communities often demand *sui generis* systems to be developed to achieve an adequate level of protection of traditional knowledge.[101] A *sui generis* means 'unique' or 'of its own kind' and in the context of traditional knowledge, the indigenous people prefer that a whole alternative legal regime to protect traditional knowledge should be created. The World Intellectual Property Organization (WIPO) has been the most active recently in the efforts to protect traditional knowledge. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established in 2000 and it was assigned to create an international legal instrument for the protection of traditional knowledge, traditional cultural expressions, and genetic resources. The IGC proposes that if possible and for now, existing intellectual property rights should be used as much as possible to protect traditional knowledge and the IGC suggests *sui generis* approach to forms of traditional knowledge, that existing intellectual property rights cannot protect.[102] The negotiations started in 2000 and are still ongoing, and the stagnation of the negotiations reflect the multitude of challenges that traditional knowledge and intellectual property rights have with each other. When or if the negotiations will ever be finalized, it would mean that the very first international legal agreement that specifically addresses the common rules and principles about traditional knowledge protection, would be created.

There certainly is many approaches when it comes to the protection of traditional knowledge and some countries believe that the existing intellectual property system alone cannot protect traditional knowledge and they have enacted sui generis systems for the protection of traditional knowledge. The Philippines has for example enacted sui generis legislation that provides effective legal tools for indigenous peoples to protect their traditional knowledge. On the other hand, there are many examples where countries have utilized existing intellectual property tools to preserve, promote and prevent the misuse of traditional knowledge. Australian patent offices have granted national certificate trademarks to aboriginal artists, Canada has utilized copyrights in protecting tradition-based creations like totem poles, Kazakhstan has granted industrial designs to protect the physical appearance of carpets and

[101] Posey IUCN 1996 p. 1-2.

[102] WIPO/GRTKF/IC/2/5, p. 14.

Venezuela and Vietnam utilize geographical indications for protecting traditional products like liquors and teas.[103]

2.2.3 The Objective of Protecting Traditional Knowledge

Why should traditional knowledge be protected in the first place? What is the underlying idea of protecting traditional knowledge? To answer this, one must first recognize what interests, values, and goals traditional knowledge holders possess and also identify general policy objectives and incentives to protect traditional knowledge. When assessing if geographical indications can be a suitable tool for indigenous and local communities, we must first know what these people and communities are trying to achieve and what are their objectives.

Indigenous and local communities differ greatly from each other. A local community in Europe in Greece producing and preserving the traditional ways to produce feta cheese might have different interests and face different threats than a local community in South Africa preserving their medicinal plants and practicing their culture. Every indigenous and local community have their own customary protocols, laws, or practices, as the example of the Sámi peoples' Siida system relieved. The Siida system is something unique for the Sámi people but a foreign concept to other indigenous and local communities. In a similar fashion, indigenous and local communities' objectives for their traditional knowledge can also differ. We can identify at least nine different objectives underlying the protection of traditional knowledge: preserving, promoting, and developing traditional knowledge; protecting tradition-based creativity and innovation; recognizing and promoting the value of traditional knowledge; safeguarding the cultural identity and values of communities; empowering indigenous and local communities; promoting cultural diversity; preventing illicit use and abuse; preventing false claims to authenticity and origin and creating wealth, and sustainable economic development.[104] I will analyze shortly some of these objectives to provide readers a comprehensive foundation as to why traditional knowledge should be protected.

Traditional knowledge offers value to indigenous and local communities and to the world population at large in many ways. Traditional knowledge is culturally significant because it is an integral part of indigenous and local communities' cultural heritage. Therefore, protecting

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[103] Rajesh – Anagha – Varsha Pen Acclaims 2018, p. 2.

[104] WIPO Booklet Switzerland 2020, p. 26.

traditional knowledge is a way for indigenous and local communities to protect their cultural identity.[105] Further, traditional knowledge is crucial if we wish to maintain our biological diversity and ecological integrity. Traditional knowledge and indigenous and local communities' practices and alternative ways to manage environment is seen as valuable in providing insight how to protect the environment and biodiversity.[106] Traditional knowledge contributes to science and the development of biotechnology as well, especially in the areas of food and beverage, pharmacy, and agriculture.[107] Thus, it benefits the scientific community and consequently the humankind in general to protect traditional knowledge. Protecting traditional knowledge has also some socio-economic aspects: in many developing countries, traditional medicines are the only affordable treatment available to the poor, and 1.4 billion people rely on local agricultural knowledge just to have something to eat every day.[108]

What does it mean when indigenous and local communities aim to enhance the level of protection for traditional knowledge? In the context of traditional knowledge holders, protection means what tools and principles could be used to prevent the unauthorized or inappropriate use of traditional knowledge by third parties.[109] In the context of intellectual property rights, intellectual property law usually recognizes two types of protection. First, establishing exclusive property rights in order to grant control over the (commercial) exploitation and provide incentives for further creativity. Second, providing other forms of protection like moral rights protection, equitable compensation, and protection against unfair competition.[110] Given the focus of this thesis, which is to address if geographical indications as a form of intellectual property rights can provide adequate level of protection for traditional knowledge, what are the approaches that could be taken within the intellectual property

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[105] International human rights instruments support this objective and for example the United Nation's Declaration on the Right of Indigenous Peoples confirms that indigenous peoples have the right to 'maintain, control, protect and develop' their knowledge. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) Article 31.

[106] Dagne Nova Scotia 2012, p. 148.

[107] According to study by Fischer and Emans, one-quarter of all currently available prescription drugs are derived from plants. See more, Fisher – Means Transgenic Research 2000, p. 299 and Dagne Nova Scotia 2012, p. 150.

[108] World Health Organization EB134/24 2013 p. 3.

[109] WIPO Booklet Switzerland 2020, p. 20.

[110] Ibid., 21.

system to protect traditional knowledge? Further, do these approaches meet the needs of traditional knowledge holders?

World Intellectual Property Organization (WIPO) has categorized intellectual property protection approaches into 'positive' and 'defensive' protection.[111] Positive protection means that traditional knowledge holders could use intellectual property rights in acquiring and asserting intellectual property rights in their traditional knowledge. For example, geographical indications are a form of positive intellectual property protection, because with geographical indications at least some forms of traditional knowledge can be promoted, controlled, and benefitted from their commercial exploitation.[112] Also, acquiring geographical indications or any other form of intellectual property over the creation, it prevents unwanted, unauthorized or inappropriate uses by third parties, which perhaps is the main objective of indigenous and local communities'. In short, positive protection for traditional knowledge holders means that they utilize intellectual property tools for their own purposes. Defensive protection on the other hand is meant to prevent anyone else from having access to intellectual property rights by third parties. For example, India has collected their traditional medical knowledge into a large database that patent examiners can use when making sure that their inventions are truly new and not already in use by traditional knowledge holders. From the traditional knowledge holders' point of view, defensive protection entails preventing anyone else from having access to their traditional knowledge when it goes against the interests of traditional knowledge holders.[113]

The options for intellectual property protection for traditional knowledge are to use existing intellectual property laws and legal systems, to adapt intellectual property rights to better suit the characteristics of traditional knowledge or to design *sui generis* systems for traditional knowledge. Indigenous and local communities support the establishment of a *sui generis* system because they believe that existing intellectual property mechanisms cannot provide an adequate level of protection for traditional knowledge[114], and to some extent this is due to the

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[111] Ibid., 22.

[112] The reason I say 'at least some forms of traditional knowledge' is because there are certain requirements that need to be met in order to acquire geographical indication protection. Thus, not all forms of traditional knowledge can be protected through geographical indications. See more, Chapter 4 of this thesis.

[113] WIPO Booklet Switzerland 2020, p. 22.

[114] Romero International Law 2005, p. 315.

differences between traditional knowledge and intellectual property rights.[115] For example Panama and Peru have established *sui generis* systems for the protection of traditional knowledge at national level. The reason these two countries have established *sui generis* systems might be because indigenous peoples in these two countries make up a significant percentage of their whole population. For example, in Peru indigenous peoples make up over half the population.[116]

For instance, Oguamanam introduces the idea of differentiated approach in protecting traditional knowledge.[117] Traditional knowledge, especially plant genetic resources, have been regarded as belonging to the public domain and these resources have been freely exploited in research and innovation by companies. The differentiated approach recognizes that a vibrant public domain is essential for there to be innovation and does not suggest the withdrawal of traditional knowledge from the public domain completely. The purpose of the differentiated approach is to divide traditional knowledge into different categories depending on how diffused it is. The differentiated model acknowledges that some forms of traditional knowledge are already so widely used that it should be regarded as part of the public domain. Oguamanam summarizes the idea of the differentiated model succinctly:

> The tiered approach is a pragmatic and malleable strategy that seeks to negotiate the extent of exclusive rights or non-exclusive rights that attach to the beneficiaries or claimants of TK/ TCEs, as a factor of how much of those, or aspects thereof, may already be in the public domain.[118]

The differentiated approach categorizes traditional knowledge into five different categories: sacred, secret, narrowly diffused, widely diffused traditional knowledge, and generic traditional knowledge.

It would be problematic to try to 'force the genie back inside the bottle' and under the differentiated approach, it is not suggested that generic traditional knowledge or widely diffused traditional knowledge would suddenly be taken away from the public domain. An

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[115] For example, traditional knowledge is often communal in nature and not individualistic and it is usually passed on by oral means and therefore failing the 'fixation' criteria. See more, Chapter 2.1.4 of this thesis.

[116] Romero International Law 2005, p. 317.

[117] Oguamanam CIGI Papers 2018.

[118] Ibid., p. 6.

example of widely diffused traditional knowledge that would be impossible to be taken away from the public domain now is yoga. Yoga is associated with India, but it has gradually disconnected from Indian cultural identity and thus it would be unjustifiable to suddenly legislate exclusive rights to it. Instead, the model suggests that traditional knowledge in the widely diffused category could be given weak rights like attribution rights or even reparation rights if traditional knowledge in question were diffused through illicit actions. Generic traditional knowledge category would be the weakest and should not be afforded any rights. An example of generic traditional knowledge is the art and process of body tattooing: it is so widespread that it is impossible to identify any single group where this process of art would belong to. Traditional knowledge in the secret and sacred category would be given the strongest rights, exclusive rights.[119] The differentiated model is met with caution by some countries[120] and supported by others.[121] It is met with caution because there is uncertainty as how the differentiated model would affect in practice to the existing freedoms and the public domain, innovation, and creativity, and how terms like 'sacred', 'secret', 'narrowly diffused', and 'widely diffused' are open to interpretation.[122]

The reason I introduced the differentiated model in this thesis is because it illuminates well the objectives that traditional knowledge holders have. They do not support a total withdrawal of traditional knowledge from the public domain because they too recognize the value of vibrant public domain for innovation and creativity. Differentiated approach to the protection of traditional knowledge could be embedded into the *sui generis* system because it takes better into account the holistic and layered nature of traditional knowledge while respecting a vibrant public domain.

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[119] Okediji suggests that traditional knowledge in this category could be given the same protection as trade secrets. Traditional knowledge holders could be entitled to economic and moral rights, and principles of trade secret, patent and unfair competition law could be used as a model. Examples of secret traditional knowledge are knowledge maintained by tribal elders, who have permitted some access to the traditional knowledge for outsiders, but the knowledge is still strongly part of the indigenous group's cultural heritage. Sacred rituals, that only the indigenous group members are allowed to participate in are examples of sacred traditional knowledge. See more, Okediji Centre for International Governance Innovation 2018, p. 14.

[120] The European Union, United States, Japan, Thailand, Republic of Korea and Canada are cautious about the model. See more, Oguamanam CIGI Papers 2018, p. 6.

[121] India, Indonesia and African countries support this model. See more, Oguamanam CIGI Papers 2018, p. 6.

[122] WIPO/GRTKF/IC/27/10 paragraph 41, 53, and 163.

Unfortunately, due to the scope of this thesis, I am unable to look deeper into the suitability of a *sui generis* system and therefore it is represented here only as a possible solution for the protection of traditional knowledge.

2.2.4 The Sámi Peoples' Understanding of Árbediehtu (Traditional Knowledge)

After acquiring the basics of traditional knowledge, the purpose of the following chapters is to deepen our understanding of traditional knowledge, by focusing on Sámi peoples' understanding of traditional knowledge.

The Sámi language has a term *árbediehtu* which refers to traditional knowledge.[123] Nature is used as the starting point for an examination of traditional knowledge, an approach that has been taken also in the Convention on Biological Diversity.[124] Therefore, to acquire an accurate understanding of Sámi peoples' traditional knowledge, one has to take nature into account and the Sámi peoples' understanding of life in nature. Answers to questions like how to subsists in nature, how to find one's way in nature, how to observe and interpret natural phenomena, and how to communicate nature, formulates the Sámi peoples' understanding of their traditional knowledge.[125] *Arbediehtu,* traditional knowledge in the Sámi context, emphasizes the holistic aspect and the place of man in nature, and the interaction what man has with nature is an important factor in traditional knowledge.[126]

Reindeer herding is a useful example if one wants to understand better the Sámi peoples' concept of traditional knowledge. Reindeer herding forms a part of Sámi cultural heritage and traditional knowledge. Reindeer husbandry in the Käsivarsi area is based on the traditional Sámi way of reindeer husbandry, the old siida system, but the Reindeer Husbandry Act and the system of reindeer herding cooperatives do not acknowledge the Sámi peoples' siida system. Siida is essentially a community, a system, that lays down the rules how to manage the Sámi reindeer husbandry between individual reindeer owners. It consists of "the individuals, the husbandry units, the collective and the herding unit, the siida territory, resources, and infrastructure, and the semi-nomadic or nomadic lifestyle in accordance with

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[123] Guttorm Sámi University College 2011, p. 62.

[124] Ibid., 68.

[125] Ibid.

[126] Ibid.

the flow of the seasons."[127] To put it simply, it is a Sámi peoples' own sophisticated institutional framework to govern the use and allocation of natural resources and it is closely related to the societal issues and way of living.

I mentioned above that to acquire a comprehensive understanding of Sámi peoples' traditional knowledge, one has to take nature into account and the Sámi peoples' understanding of life in nature. In the context of reindeer herding, the underlying characteristic of the traditional knowledge is based on the Sámi peoples' understanding that in nature, predictability and unpredictability coexist. The traditional knowledge created as a result of traditional reindeer herding practices consists of information that aims to provide answers on how to control the animals' movement in their natural habitat. At the same time, it is understood as a compromise, and that the control is never complete or guaranteed precisely, because animals are autonomous beings. When the Sámi people aim to exercise control over the movement of the animals, they have to take many factors into consideration, and all this forms the essence of their traditional knowledge.[128] For instance, herders must consider the 'characteristics of reindeer', like its reflexes, reactions to external stimuli, typical behavior in relation to other reindeer, natural surroundings and seasons, behavioral characteristics of groups of animals, and learned affiliation to specific landscapes.[129] Moreover, the knowledge about the effect that appearances of humans have on the animals, the reindeers' migration routes, and the attempt to form order and predictability of the natural environment and animals are parts of the traditional knowledge that is being created as a result of the traditional reindeer herding practice.[130]

Further, for the Sámi, there is a distinction between knowing something (*mahttit*) and knowing about something (*diehtit*).[131] We all might know some person who seem to know a great deal about something, but who necessarily do not know it. This might be confusing, but to put it simply, it refers to the difference between knowledge of an action and the ability to perform the action. It's a difference between theoretical (*diehtit*) and practical knowledge

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[127] Mikkel Northern Review 2009, p. 157.

[128] Ibid., 160.

[129] Ibid.

[130] Ibid.

[131] Guttorm Sámi University College 2011, p. 62.

(*mahttit*). Traditional knowledge, *arbediehtu,* includes both skills and knowledge. Traditional knowledge is not only knowledge (*diehtu*) about something but also includes the knowledge through action (*mahttit*) which in practice consists of the way of living as individuals in the community. The above example about traditional reindeer practices is a perfect example of Sámi peoples' traditional knowledge: it consists of *diehtu,* knowledge about a lot of skills and information about nature, land, and the animals but it becomes traditional knowledge when the knowledge through action, *mahttit,* is applied. For example, the way the old systems of Siida are formed and maintained is an example how people have agreed on the use of nature and have their own custom rules about it. This is the reason why taking into account the nature and peoples' understanding of life in nature is so crucial in the process of understanding their view of traditional knowledge.

Other important terms that reveal what traditional knowledge means for Sámi people are *láhi* (the idea that people share their knowledge with others), and *čalbmi* (the knowledge bearer, the literally means 'eye'). *Láhi* term demonstrates how the knowledge evolves in a social context with different social hierarchies, such as where the bearer of the knowledge is the authority.[132] This is also an example how not everyone is authorized to use or transmit certain type of traditional knowledge, and in a way, this is equivalent to Western intellectual property system's exclusive and monopoly rights, even though indigenous people might not see it this way.

2.2.5 The Difference Between 'Indigenous' and 'Traditional' Knowledge

There is a difference between the terms 'indigenous' and 'traditional knowledge'. 'Indigenous knowledge' describes knowledge that is held and used by communities, peoples and nations that are indigenous. This means that not all traditional knowledge is necessarily indigenous, because not all traditional knowledge holders are indigenous people. However, indigenous knowledge is always traditional knowledge, and traditional knowledge is the 'umbrella term' and indigenous knowledge is part of the traditional knowledge category, as is illustrated in the Figure 1.[133]

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[132] Ibid., 70.

[133] WIPO Report 2001, p. 23.

Figure 1: **Traditional knowledge and Indigenous Knowledge**

Traditional knowledge is the umbrella term and indigenous knowledge is part of the traditional knowledge category. Source: The graphic is made with Canva by Juliana Laurila.

Grete Gunn Bergstrøm argues that the distinction between traditional local knowledge and traditional indigenous knowledge can be made depending on the emphasis on the spiritual dimension: traditional indigenous knowledge has a strong spiritual aspect, whereas traditional local knowledge might not have.[134] Among Sámi people, understanding the relationship between man and nature is an important spiritual aspect. The spiritual aspect, the relationship between man and nature is preserved in rituals, where we as human beings are seen as part of nature and the rituals guide us to act accordingly.[135]

Additionally, the word 'traditional' does not mean that the knowledge itself would be ancient, outdated, or static, quite opposite: traditional knowledge is being created every day, it is a way of living, and evolves to address individuals and communities' challenges posed by their current social environments. What is 'traditional' is only the social process of learning and sharing it in the specific cultural tradition of the community.[136]

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[134] Guttorm Sámi University College 2011, p. 69.

[135] Ibid., 70.

[136] WIPO Report 2001, p. 212.

2.2.6 Concluding Remarks on Traditional Knowledge

To conclude our remarks about the definition of traditional knowledge, Ruth Okediji offers a well-thought formulation of it:

> "Traditional knowledge is, in short, a *constitutional* structure – that is, it reflects a governing collection of principles around which the institutions of a group are developed, and within which values and norms are cultivated, dynamically implemented, and sustained. This knowledge continues to evolve in response to, and in interaction with, external forces."[137]

In my opinion, her definition is well-thought, because of the word 'constitutional'. According to Britannica Encyclopedia, "constitution is a body of rules governing the affairs of an organized group".[138] Defining traditional knowledge as a constitutional structure takes well into account that there are many diverse indigenous groups, local communities and other traditional knowledge holders who have distinctive collection of principles, set of rules, values and norms that all form the constitutional structure of their knowledge. The brief look into the Sámi peoples' understanding of their traditional knowledge in the context of traditional reindeer herding practices illustrates how diverse practices the term 'traditional knowledge' could include. Sámi people's conceptualization of traditional knowledge is for sure different from traditional healers' understanding of it in South Asia. This is due to the fact that the environment, traditional practices, and the way of living form integral part of the traditional knowledge. So, even though different local communities' and indigenous peoples' way of living and traditional practices differ greatly from each other to me the similarity here is that traditional knowledge is always something dynamic, evolving, connected to the environment and to the way of living, consists of know-how, skills and social relations and always represents a broader belief system about the life of the communities. Traditional knowledge develops and maintains group identity and is linked to the community's survival, whereas modern intellectual property rights primarily promote individual gain. If intellectual property rights are justified by utilizing Locke's natural rights theory, which emphasized the role of labor in the process of acquiring property, it contradicts with the characteristics of traditional knowledge in my opinion. This is because Locke's natural rights theory is built on

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[137] Okediji CIGI Papers 2018, p. 2.

[138] Tate 2020 Encyclopedia Britannica (https://www.britannica.com/topic/constitutional-law, visited 3.11.2021)

top of the idea of private ownership and the concept of labor.[139] Traditional knowledge typically is passed on through generations and it is created, modified, and adjusted little by little. The work done by members of the present generation modify the traditional knowledge gradually or not at all. Thus, it seems that the labor involved in creating the traditional knowledge is more modest, subsequently it should not be granted full protection. For example, sometimes a creator of a derivative work can acquire copyright protection to the modification, but such protection do not give any rights over the original work.[140] Further, creators of traditional knowledge usually have very different objectives in mind than to control the knowledge.[141] For instance, original developers of a medicinal plant were most probably trying to cure the members of their community and not to commodify or acquire proprietary rights over that knowledge.[142] Lastly, even in the context of classical intellectual property rights it is hard to give a laborer a reward proportional to their effort. Therefore, in the context of traditional knowledge this is extremely difficult given that labor of the present members has to be somehow distinguished from the labor done by past generations.

On the other hand, utilitarianism is more flexible, since it promotes the greatest benefit for the greatest number.[143] Intellectual property rights protection, when justified according to utilitarianism, do not conflict with the characteristics of traditional knowledge in my opinion, and it should certainly be possible to give intellectual property protection for traditional knowledge as well. For example, I disagree with Munzer and Raustiala[144] who argue that traditional knowledge should be treated merely as an extension of public domain because its characteristics and the creative process behind its creation are not in line with the existing

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[139] His Two Treatises of Government was essentially a book designed to challenge monarchy and justify private ownership.

[140] Fisher Duke Law Journal 2018, p. 1544.

[141] Ibid.

[142] For example, some healers see traditional medical knowledge as a relationship where boundaries between the self and others are not clear. They believe that commodification of knowledge can negatively affect the efficacy of healing patients, since large part of healing involves a spiritual reaching out for the poor and sick. If the entire relationship is based on commercial transaction, it separates the healer from the community. Obviously, not all indigenous groups or local communities share this view and within many communities financial-based benefit sharing arrangements do not violate their values. See more, Natural Justice 2009, p. 10.

[143] See more Chapter 5 of this thesis.

[144] Munzer – Raustiala Cardozo Arts & Entertainment Law Journal 2009, at p. 40: "Although we are sympathetic to the efforts of TK advocates, we find that TK fits poorly within standard justifications of property."

theories of property and thus the global intellectual property system should not grant classic intellectual property protection for traditional knowledge at all.[145]

[145] Okediji CIGI Papers 2018, p. 2.

3 GEOGRAPHICAL INDICATIONS AND TRADITIONAL KNOWLEDGE IN THE EUROPEAN UNION

3.1 The Definition and International Legislation of Geographical Indications

We can see the trend of intellectual property rights expanding to different categories. We also know about the difficulties of using intellectual property rights regime to include traditional knowledge.[146] On the other hand, there is an increasing need to establish an adequate level of protection for traditional knowledge, because of its increasing significance, value and cases of misappropriation and misuse. Could intellectual property rights regime be used to protect traditional knowledge? There should be no problem in including traditional knowledge in the definition of 'intellectual property'. In Article 2 (viii) in the Convention Establishing the World Intellectual Property Organization (1967), 'intellectual property' includes rights relating to:

> literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, *and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.*[147]

Moreover, intellectual property rights are not limited only to categories such as patents, copyright, and trademarks. These three most dominant categories of intellectual property are perhaps not the most suitable ones that could be able to take the special characteristics of traditional knowledge into account. But what about other forms of intellectual property protection, like geographical indications?

Intellectual property is evolutionary and adaptive. Recently we have seen how intellectual property rights have been extended, for instance, to computer software, databases, and compilations of data, or to biological material, plants, and animals. Thus, it seems odd, if tradition-based innovations and creations would not be eligible for intellectual property

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[146] See Chapter 2.1.4 of this thesis.

[147] Article 2 (viii) of the Convention Establishing the World Intellectual Property organization, 1967, italics added.

protection as well.[148] Especially given the fact how traditional knowledge contributes significantly to modern innovation in the field of pharmaceuticals. For example, U.S. chemical company has conducted laboratory tests on tikiuba plant that is used by a Brazilian Amazon tribe to develop a new anticoagulant drug.[149]

Additionally, certain fields of copyright, such as music and literary works can be managed collectively, and the Western copyright system has well-established principles and mechanisms regarding the collective management of copyright. Thus, blindly stating that Western intellectual property system is only individualistic does not reflect the reality either, because concepts such as co-author and co-inventor exist. Further, trademark law recognizes 'collective marks' and geographical indications usually protect the interests of a collective.[150] This is the reason why I want to dive deeper into the geographical indications to assess their suitability in protecting traditional knowledge. The following chapters aim to give an overview of geographical indications, their legislation at the international level and in the European Union and also about the role that traditional knowledge has in the European Union.

Originally, geographical indications were first protected by national laws and developed at the local level.[151] When international law emerged and first legal international intellectual property rights instruments were concluded, provisions on the protection of geographical indications were also included in them to deal with the problems of free-riding and non-authorized imitation.[152] Geographical indications for the very first time were mentioned in the Paris Convention for the Protection of Industrial Property (1883), but the convention is said to be weak because it does not define the concept of a geographical indication[153] and there are

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[148] WIPO Report 2001, p. 6.

[149] Peterson Harvard International Law Journal 1992, p. 283.

[150] See more, WIPO Report 2001, p. 219.

[151] Like any other intellectual property rights. According to Drahos, there were three periods of intellectual property rights development, and intellectual property rights were first only domestic, and the principle of territoriality prevailed. See more Chapter 2.1.2 of this thesis and Navarra – Thirion European Added Value Unit 2019, p. 4.

[152] Dagne Nova Scotia 2012, p. 110 and 112. See also Chapter 2.1.2 of this thesis.

[153] The Paris Convention only recognizes geographical indications as a separate form of intellectual property right, and it only provides protection against deception: Article 10 provides remedies if indications of source are used unlawfully. Indications of sources are used unlawfully if they are used on products or goods that refers to a geographical area from which the product in question did not actually originate.

no true enforcement provisions.[154] Therefore, in the context of geographical indications, there are three international legal instruments that are of importance: The Madrid Agreement for the Repression of False or Deceptive Indications of Source, the Lisbon Agreement for the Protection of Appellations of Origin and the TRIPS Agreement. The Madrid Agreement provided a slightly higher level of protection for geographical indications than the Paris Convention because it includes specific remedies against false and deceptive use of already registered indications of source. The Lisbon Agreement extended the level of protection for geographical indications by extending the protection to translations and to terms such as 'kind', 'type', 'make' or 'imitation'. This means that the registered appellation of origin[155] is protected against any imitation, even if the appellation is used in translated form or with the terms mentioned in the last sentence.[156] Unfortunately, both of the agreements, the Lisbon and Madrid Agreement did not attract enough international recognition for them to truly be effective and establish a robust international legal framework for geographical indications.[157] The TRIPS Agreement on the other hand is the most influential international treaty governing intellectual property, because it provides enforcement mechanisms and dispute settlement procedures and has the most countries as signatories.[158] Articles 22-24 of TRIPS addresses geographical indications. TRIPS recognizes three different levels of protection for geographical indications, for wines and spirits, for all other products, and for wines only.[159]

Each of these three instruments have slightly different term of geographical indication: TRIPS Agreement uses the term 'geographical indication'[160], the Lisbon Agreement uses the term 'appellation of origin'[161], and the Madrid Agreement uses the term 'geographical indication of source'.[162] The difference between these terms is that the term 'geographical indication' used

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[154] Gutierrez Hastings International and Comparative Law Review 2005, p. 32-33.

[155] Each of the three international treaties relevant in the field of geographical indications uses different terms, this is explained in more detail further below.

[156] Navarra – Thirion European Added Value Unit 2019, p. 5.

[157] Ibid., 33.

[158] All the WTO Members are bound by the TRIPS Agreement. There are 164 WTO Members currently.

[159] Insight Consulting p. 6.

[160] Ibid.

[161] Dagne Nova Scotia 2012, p. 110.

[162] Kur – Knaak Kluwer Law International B.V. 2008, p. 305.

in the TRIPS Agreement is narrower than the term 'geographical indication of source' used in the Madrid Agreement, but broader than the term 'appellations of origin' used in the Lisbon Agreement:[163]

> "Geographical indications are (…) indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."[164]

The way TRIPS Agreement extends the term 'appellation of origin' used in the Lisbon Agreement is that under TRIPS products that merely derive their reputation from their place of origin are also protected. Under the Lisbon Agreement, the appellation of origin protects products that derive their reputation from their place of origin *and possess qualities or other characteristics that are derived from that place*.[165] Also, according to TRIPS, a geographical indication needs to be 'an indication' but it does not have to be the name of the geographical place.[166] The reason there is diversity among terminology in the field of geographical indications might be because geographical indications has been used to meet slightly different policy goals. Geographical indications can be used to promote agricultural marketing, rural development, the preservation of traditional knowledge and cultural heritage.[167]

To put it simply, geographical indications are signs used on goods to indicate their geographical origin and have the status of intellectual property rights. The geographical location may be valuable because of natural factors like the local soil or climate or because of human factors like skills, knowledge or traditions or the combination of the two. For example, Parma is a city in the northern Italian region of Emilia-Romagna and Prosciutto crudo di Parma is one of the two famous types of Italian prosciutto crudo (ham) that is covered by a Protected Designation of Origin (PDO). Thus, geographical indication is a distinctive sign or name (Prosciutto crudo di Parma) used on a good (ham) that has a specific geographical origin (the city of Parma in Italy) and the good (the ham) possess qualities or reputation that is

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[163] Ibid.

[164] Article 22.1 of The Agreement on Trade-Related Aspects of Intellectual Property Rights.

[165] Navarra – Thirion European Added Value Unit 2019, p. 5.

[166] Ibid.

[167] Blakeney Elgar Intellectual Property Law and Practice series 2014, p. 7.

due to that origin (the city of Parma in Italy). The rationale behind this form of intellectual property protection is to provide consumers reliable information on the quality of the product and its method of production and where it has been produced. Geographical indications are also used to ensure fair competition between producers and to prevent free riding on the reputation of the original goods. Free-riding means that some producers imitate the product, manufacture it somewhere else where there is no link to the designated place of origin and free-ride on the reputation of the original goods. According to European Commission, this way geographical indications indirectly preserve traditional knowledge-related products and the know-how and jobs relating to them.[168] Especially if traditional knowledge holders have small or medium-size business, geographical indications could be very helpful. Familiar examples of geographical indication protected products within the EU are Champagne, the already mentioned Prosciutto di Parma, and Vetro di Murano (glass).[169] Traditional intellectual property rights such as trademarks, patents, and copyrights focus mostly on the innovations and creations of the mind, while geographical indications aim to recognize the art and tradition of a particular community belonging to a certain region.[170] Geographical indications give special attention to the relationship between human activity, culture, land and resources.[171]

In my opinion, the nature and essence of geographical indications is easier to understand when it is compared to trademarks. There is a degree of commonality between geographical indications and trademarks but the differences between these two forms of intellectual property protection illuminate well what geographical indications truly are about. Geographical indications must always certify the origin of the product, while trademarks may certify the origin of the product. Both groups and individuals can register trademarks and if the group is the one registering, one entity allows its members to use the mark. Geographical indications are usually submitted by a group and once it is registered, it becomes available to any producers who are in the specific area and who meet the requirements set out in the geographical indication once it is registered. So, to me, the difference here is that with trademarks, to allow others to use the trademark requires actively giving permission to this,

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[168] Ibid.

[169] COM(2014) 469 final, p. 4.

[170] Rajesh – Anagha – Varsha Pen Acclaims 2018, p. 2.

[171] MEMO/14/486 European Commission 2014.

while with geographical indications producers cannot deny other producers from using the geographical indication as long as the producers in question meet the requirements. Other obvious difference between trademarks and geographical indications is that with trademarks, the production is not linked to a specific place whereas with geographical indications the production must happen completely or at least partly in the specific geographical area. The scope of protection is also different. With trademarks, trademark gives its owner exclusive rights on the use of the name and/or logo, trademark do not protect against the use of the trademark in translation and with expressions like 'style' and 'type', trademark name can become generic if its owner does not assert their rights and trademark must be used on the market because if it is not, it becomes ineffective and leads to cancellation. Geographical indications' scope of protection is quite different. EU *sui generis* geographical indication system for agricultural products currently provides protection against misuse of the name on a non-registered product also including expressions such as 'style' and 'type' and also in translations, geographical indication cannot become generic once it is registered and protection of the geographical indication is not conditioned on the use on the market. The duration of the protection is also different: in the EU, trademarks must be renewed every 10 years whereas geographical indications are not limited in time and the protection lasts as long as the conditions are fulfilled.[172] Also, trademarks are intangible assets that are freely transferable, meaning that it has economic value that can be sold like any other resource, while geographical indications cannot be sold to someone, they are non-transferable.[173] Both geographical indications and trademarks are designed to protect goods and services and focus on protecting the reputation of a product or good.[174] The differences and similarities between geographical indications and trademarks is illustrated in Table 1.

[172] Navarra – Thirion European Added Value Unit 2019, p. 3.

[173] Ibid., 4.

[174] Ibid., 2.

Table 1: **The Differences Between Trademarks and Geographical Indications**

TM = Trademark, GI = Geographical Indication.

	TM	**GI**
Registration	Individuals and groups	Usually only a group registration
Scope of Protection	Give its owner exclusive right on the use of the name and/or logo, no protection against the use in translation and with expressions like 'style' and 'type', can become generic and must be used on the market.	Give protection against misuse of the name on a non-registered product, protects against expressions such as 'style' and 'type' and translations, cannot become generic, and protection is not conditioned on the use on the market.
Duration of the Protection	Must be renewed every 10 years.	Not limited in time, the protection lasts as long as the conditions are fulfilled.
Transferability	Are freely transferable.	Non-transferable.
The Purpose	To protect goods and services and their reputation.	To protect goods and services and their reputation.

3.2 European Union Legislation on Geographical Indications

Before 1992 there was no EU-wide legislation about geographical indications at all, but different Member States had their own domestic laws. The need for a uniform legal framework of geographical indications became apparent after the *Cassis de Dijon* judgment.[175] In the case, the applicant sought to import the liqueur 'Cassis de Dijon' into Germany from France. The importation was not authorized by the German authorities because the drink did not have a sufficient level of alcohol content under German law.[176] The judgment has been significant in many ways, but what is important in the context of geographical indications is that the case reinforced the *Dassonville* judgment[177] and the fundamental assumption that goods lawfully marketed in one Member State should be admitted to another state without restriction.[178] In paragraph 8 of the judgment, the European Court of Justice (EJC) affirms the right of the Member States to regulate all matters that are

[175] IPR2 Publication 2011, p. 5.

[176] Craig Oxford University Press 2020, p. 708.

[177] Judgment of 11 July 1974, *Dassonville*, C-8-74, EU:C:1974:82.

[178] Ibid., 710.

not yet harmonized by European Union.[179] This prompted the establishment of EU-wide legislation on geographical indications and the Council Regulation 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs was adopted and became the first legal instrument to cover all agricultural products. As of now, this Regulation has been replaced by Regulation 510/2006.[180] Under the Regulation 510/2006, geographical indications provide information on a product's quality, reputation and traditional production method and give producers other means to differentiate their products from others. The definition of a geographical indication in the EU's Regulation 510/2006 is very similar to the one in the TRIPS Agreement. Under the Regulation 510/2006, the conditions which have to be fulfilled in order for a sign to be recognized as a geographical indication are that the name or sign must originate from a specific region, place or country, which possesses a specific quality, reputation or other characteristics attributable to that geographical origin and that the production and/or processing and/or preparation of it takes place in the defined geographical area.[181] If all of these conditions do not fulfil, the sign won't be considered as a geographical indication.

The currently effective Regulation does not address the protection of traditional knowledge in any way[182] and it relates to only agricultural products and foodstuff, thus excluding many forms of traditional knowledge. This means that currently at EU level, the *sui generis* unitary geographical indication protection system is available for agricultural products and foodstuffs (wines, spirits) only. Any local skills and traditions relating to products such as ceramics, glassware, clothing, lace, or knives[183] cannot be protected through geographical indications EU-wide easily, because there is no unitary protection for non-agricultural products. However, many Member States and EU as well is bound by the international legal instrument,

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[179] Judgment of 20 February 1979, *Cassis de Dijon*, C-120/78, EU:C:1979:42, paragraph 8: "In the absence of common rules relating to the production and marketing of alcohol (…) it is for the Member States to regulate all matters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.".

[180] Council Regulation 510/2006 of 20 March 2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

[181] Article 2 (b) Council Regulation (EC) 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.

[182] Bicskei – Bizer – Sidali and others WIPO Journal 2012, p. 33

[183] The EU is rich in non-agricultural products based on traditional knowledge. Good examples are Český křišťál (Bohemian crystal), Scottish tartans, Marmo di Carrara (marble) or Meissner Porzellan (porcelain). These products are rooted in the cultural heritage of these communities who produce the goods and contribute to the cultural and creative economy. See more, COM(2014) 469 final, p. 4.

TRIPS Agreement, therefore Member States' domestic laws offer at least the basic level of protection for geographical indications set out in the TRIPS Agreement.[184] It is also noteworthy that seven EU Member States[185] are signatories to the Lisbon Agreement and thus bound by the Lisbon system that includes also non-agricultural products and not only agricultural products and foodstuffs.[186] On the downside, the national laws differ from each other greatly when it comes to registration procedures and cost, scope of protection, enforcement means and even in definitions. Some Member States provide protection of geographical indications for non-agricultural products in the form of consumer protection laws, unfair competition laws, trademark laws, case-law or *sui generis* geographical indication systems.[187] This results in legal uncertainty, is very complicated for producers and expensive and certainly does not conform to the idea of a single market.[188] Thus, depending on the Member State, there are different possibilities how to protect traditional knowledge-based products and goods via geographical indications. The reason why the EU-wide geographical indications regime never accommodated other than agricultural products and foodstuffs is because the system originated from French approach, that protected knowledge related to the protection of wine and cheese.[189] Geographical indications have been relevant to agricultural products and foodstuffs within the EU for a long time, but it has not yet been extended to non-agricultural products.

However, the situation might be changing. In the EU, numerous legislative initiatives have been adopted since 2014, starting with Commission's green paper titled as '[M]aking the most out of Europe's traditional know-how: a possible extension of geographical indication

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[184] COM(2014) 469 final, p. 4.

[185] These seven EU Member States are Bulgaria, Czech Republic, France, Hungary, Italy, Portugal and Slovakia. See more, InsightConsulting – origin – REDD 2013, p. 18.

[186] None of the international legal instruments that establish protection for geographical indications limit their scope to only agricultural products. The Paris Convention, the Lisbon and Madrid Agreements and TRIPS Agreement all apply to all kind of products. See more, Ibid., 12.

[187] 15 Member States have *sui generis* geographical indication systems in place but each of them have their own specialties. These 15 Member States are Belgium, Bulgaria, Czechia, Estonia, France, Germany, Hungary, Italy, Latvia, Poland, Portugal, Romania, Slovakia, Slovenia, and Spain. See more, Navarra – Thirion European Added Value Unit 2019, p. 9.

[188] MEMO/14/486 European Commission 2014.

[189] Zappalaglio – Guerrieri – Carls International Review of Intellectual Property and Competition Law 2020, p. 33.

protection of the European Union to non-agricultural products'[190] to explore the possibilities to extend the EU-wide protection system of geographical indications to other than agricultural products and foodstuffs. In 2015, the Parliament drafted its own initiative report[191] and in 2020 the Council stated in its conclusions on intellectual property policy that it is ready to consider the introduction of a system for protection of non-agricultural products.[192] The EU also acceded to the Geneva Act of the Lisbon Agreement on Appellations of Origins and Geographical Indications in 2019, which was formulated under the WIPO. The Geneva Act covers geographical indications for both agricultural and non-agricultural products, so EU's accession to this international legal instrument at least signals willingness to consider possibilities for creating a unitary protection system for non-agricultural products and goods as well. A unitary geographical indication protection could certainly be possible for non-agricultural products as well, because for agricultural products and foodstuffs the EU's legal framework has been very successful.[193] Further, for the EU, there are potential benefits in extending geographical indications to also include non-agricultural products. It could benefit consumers, who could be able to make informed decisions about the purchases, it could strengthen the single market, it could have advantages for relations between the EU and third countries[194], and lastly, it could help to preserve the cultural and artistic heritage of Europe's own local and regional traditions.[195]

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[190] COM(2014) 469 final.

[191] 2015/2053(INI), Possible extension of geographical indication protection of the European Union to non-agricultural products.

[192] Council conclusions on intellectual property policy and the revision of the industrial designs system in the Union, Official Journal of the European Union 2020, paragraph 10.

[193] European Commission Directorate-General for Agriculture and Rural Development Publications Office 2019.

[194] EU has concluded bilateral trade agreements with third countries which have *sui generis* law for the protection of geographical indication products of all kinds (non-agricultural and agricultural). These countries, like Brazil, India and Thailand are not as eager to conclude these agreements with the EU if they know that their non-agricultural geographical indication products would not be protected through a unitary system because such a system do not exist for non-agricultural products. See more, InsightConsulting – origin – REDD 2013, p. 20.

[195] Opinion of the European Committee of the Regions Official Journal of the European Union 2015, paragraph 8-11.

3.2.1 European Union Quality Schemes

In the EU, geographical indications include Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Specialty Guaranteed (TSG).[196] These are called quality schemes and they are regulated by the Regulation 1151/2012.[197] The purpose of the EU's quality schemes is to preserve local values such as culture and tradition, empower farmers and producers financially[198] and help consumers to make informed decisions.[199]

The Protected Designation of Origin (PDO), the first quality scheme, is defined as follows:

> "(…) "designation of origin" is a name which identifies 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) the production steps of *which all take place* in the defined geographical area."[200]

The second quality scheme, Protected Geographical Indications (PGIs), are defined as "(…) a name which 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) *at least one of the production steps* of which takes place in the defined geographical area."[201]

The difference between PDO and PGI relates to the strictness of the criteria, which is highlighted by adding the italics to both of the definitions. PDOs are stricter: the whole production cycle from start to finish must take place in a particular region. For example, in the context of wines, the raw material (grapes) must come exclusively from the site where the wine will be produced. The PGI quality scheme on the other hand requires that at least one of

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[196] Glogovetan and others Sustainability 2022, p. 2.

[197] Regulation 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs, 2012.

[198] According to the study on the economic value of geographical indications carried out by the European Commission, products that are protected by geographical indications or quality schemes are twice as valuable compared to products that are not protected by geographical indications or quality schemes.

[199] Albuquerque – Oliveira – Costa Journal of the Science of Food and Agriculture 2018, p. 2475.

[200] Article 5(1) of the Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs 2012, italics added.

[201] Ibid., Article 5(2), italics added.

the production steps must take place at the place of origin, and in the context of wines this means that 85% of the raw materials (grapes) must come originally from the geographical area where the wine will be produced. The 'origin link' is also more flexible in the PGI quality schemes than in PDOs. In Protected Geographical Indication (PGI), merely a reputational element have to exist which is rather a broad one whereas in the definition of Protected Designations of Origin (PDO), reputational link is not mentioned.[202] Further, the product's quality or characteristics in PDOs must be 'essentially due to that area', whereas in PGIs the product's quality, reputation or other characteristics must be 'generally attributable', thus this is more flexible than the former.

The Traditional Specialty Guaranteed (TSG) differ from PDOs and PGIs in a way that they emphasize specifically traditional aspects of a product, thus it is not an origin label. These traditional aspects could relate to traditional raw materials and ingredients, traditional production methods or traditional composition of raw materials or ingredients. The traditional aspects do not have to be connected to any specific geographical area, like PDOs and PGIs have to. Therefore, any producer who respects the traditional production methods, traditional composition and ingredients or traditional recipes, can obtain a TSG certificate.[203] Article 18(1) states that a name can be registered as a TSG when it:

> "(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."[204]

Additionally, the name shall be traditionally used to refer to the specific product or identify the traditional character or specific character of the product.[205] The term 'traditionally used' means that a specific product is used on the domestic market at least for 30 years, because this period is long enough to allow transmission between generations.[206]

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[202] Blakeney Elgar Intellectual Property Law and Practice series 2014, p. 78.

[203] Ibid.

[204] Article 18(1) of the Regulation 1151/2012 of the European Parliament and of the Council on quality schemes for agricultural products and foodstuffs, 2012.

[205] Ibid., Article 18(2).

[206] Blakeney Elgar Intellectual Property Law and Practice series 2014, p. 130.

In practice the importance of Traditional Specialty Guaranteed quality scheme is little, since only a few names have been registered under this quality scheme.[207] It is important to note, that all these three quality schemes concern only agricultural food products and there is no quality schemes about non-agricultural products and foodstuffs. Figure 2 shows the different logos for each quality scheme.

In the subsequent Chapters of this thesis the possibility of extending these quality schemes to include non-agricultural products and foodstuffs is examined.

Figure 2: **EU's Quality Scheme Logos.**

From left to right: a logo of Protected Designation of Origin Label (PDO), a logo of Protected Geograpical Indication (PGI) and a logo of Traditional Specialties Guaranteed (TSG). Source: European Commission. Quality schemes explained, visited 9.5.2022.

3.2.2 European Union Case Law on Geographical Indications

Case Germany v Commission (Agriculture)[208] is illuminating when it comes to the exact scope of the definitions and how they work in practice. The case concerned the name 'FETA', and what territories of Greece were included to the name 'FETA', thus the case affected which producers where able to enjoy the protection of Protected Design of Origin (PDO), the 'FETA' name. Other countries like Denmark, Germany, and France had also been producing cheese under the name of FETA. The case established that only the territory of mainland Greece and the island Lesbos were covered by the FETA PDO. All other Greek islands and other countries, like Germany, Denmark, and France were excluded, thus making it impossible to produce cheese products and use the name FETA if the cheese is produced

[207] Ibid., 129.

[208] Judgment of 25 October 2005, *The name "Feta"*, C-465/02, EU:C:2005:636.

somewhere else than the mainland Greece or the Lesbos Island.[209] What affected the European Court of Justice's decision was that the necessary natural and/or human factors were only present in the mainland of Greece and in the Lesbos Island, such as the specific feed for goats was present only in the specific region and the farmer's tradition of moving with the goats depending on the season produced specific native breeds of sheep and goats. Producing cheese in, for example Denmark, where ancestral tradition of farmers moving with the sheep does not exist was one of the reasons why cheese produced in Denmark cannot use the name 'FETA', because the necessary human factor defined in the registration of the FETA PDO did not fulfill.

Another case that illustrates how even slicing or packaging a product protected under a PDO can be required to be done in a specific geographical area is the case C-108/01 PROSCIUTTO DI PARMA.[210] This case established that operations such as slicing and packaging of the product that are laid down in the specification of the specific Protected Designation of Origin, in this case in the PDO of 'PROSCIUTTO DI PARMA', are compatible with the Article 29 EC, that is a provision dealing with measures having equivalent effect to a quantitative restriction on exports. The case was between an UK-based company (Hygrade Foods Ltd) and the Consorzio, an inspection body responsible for ensuring that no infringements would happen towards the 'PROSCIUTTO DI PARMA' PDO label. The problem here was that the UK-based company had exported the Parma in compliance with the conditions of the PDO 'PROSCIUTTO DI PARMA' but it had not sliced, packaged, and labelled the ham in accordance with the conditions. According to the court, the condition that the ham also must be sliced, packaged, and labelled in the region of production was justified and not infringing the Article 29 of EC. It was justified because the conditions that the ham must be sliced, labelled, and packaged in the region of production ensure the authenticity and quality of the product and is necessary so those who are entitled to use the PDO 'PROSCIUTTO DI PARMA' could control the ways the product appears on the market and would not suffer from the diminished reputation of the PDO if third parties would slice, label, and package the product in a wrong way. The slicing and packaging of Parma ham are important operations

[209] Blakeney Elgar Intellectual Property Law and Practice series 2014, p. 79.

[210] Judgment of 20 May 2003, C-108/01, *Prosciutto di Parma,* EU:C:2003:296.

that affect to the quality and consequently the reputation of it. The outcome of the judgment is that it prevents third parties from profiting from the reputation.[211]

3.3 The Significance of Traditional Knowledge and Geographical Indications in the EU

European Union is a union consisting of 27 member states. It has 24 official languages, and it goes without saying that there are a great variety of regional cultural traditions in Europe. Despite of the fact that EU's population is highly urbanized[212], European traditional rural societies exist, and they have for centuries preserved their own systems of knowledge, especially when it comes to natural resource management and agriculture.[213]

The only indigenous people in the European Union area are the Sámi people who live in Sweden, Norway, Finland, and Russia. The Sámi people are known for their knowledge and skills especially in reindeer herding and hunting. The Sámi people share similar experiences with other indigenous peoples in the world, but some differences exist. For example, the colonization process has not been exactly the same and today the Sámi people do not live in extreme poverty or face significant levels of violence, compared to Native Americans in Canada and United States.[214]

In the EU, there are more local communities than indigenous groups. In the absence of widely accepted definition of traditional knowledge, it is often defined as knowledge that has been developed in traditional context, it is transmitted between generations, and it is dynamic and evolving in its nature. As has already been said, traditional knowledge does not only comprise indigenous knowledge, but applies to other forms of knowledge as well, as long it has the basic characteristics such as being developed in a traditional context. Therefore, local communities suffer the same way than indigenous peoples from the shattered legal rules regarding the protection of traditional knowledge.

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[211] Blakeney Elgar Intellectual Property Law and Practice series 2014, p. 86.

[212] EEA Report 2016, p. 11.

[213] Kiene Iddri 2006, p. 2.

[214] Green Ngā Pae o te Māramatanga 2010, p. 119.

Traditional practices and local knowledge contribute the most in the areas of biodiversity and agriculture in EU. In the area of biodiversity, two examples can be given. For example, orchard meadows have been created over the centuries by local farming communities. These local communities, primarily in France and southern Germany, hold a significant amount of valuable ecological knowledge about the land, different species, and the know-how that is needed to preserve these unique ecosystems, which are the home to hundreds of varieties of fruit trees. Preserving these unique ecosystems forms a large part of the local communities' identities and is a dynamic part of their lives. The knowledge needed to preserve the ecosystem is transmitted through generations. Another example of local knowledge in the area of biodiversity is the Cévennes National Park in France. It has an extraordinary biodiversity and in 1985 it was declared a UNESCO 'World Biosphere Reserve'. The national park is inhabited mostly by farmers and livestock breeders who have maintained their traditional knowledge systems for hundreds of years and therefore contributed significantly to the unique ecosystem and formed their cultural identity in relation to the land.[215] When it comes to local knowledge in the area of agricultural foodstuff, the 'Bregenzerwälder Bergkäse', Austrian hard cheese, is a perfect example. The Bregenzerwald is a region located in Austria and for centuries local farming communities have produced the hard cheese. The traditional know-how developed through years in producing the cheese has become a distinctive element of the cultural identity of the local community as well.[216] These examples illuminate how EU possesses valuable local ecological knowledge.

The significance of geographical indications is huge for the EU. A study on the economic value of EU quality schemes, geographical indications and traditional specialties guaranteed carried out by the European Commission revealed that the estimate of sales value of geographical indications and traditional specialties guarantees was 77.1 billion euros in 2017 as can be seen in Figure 3. Wines represented more than half of the total sales value, next came agricultural products and foodstuffs and lastly spirit drinks. The study mentions that France, Italy, Germany, and Spain had the highest sales value of geographical indication products in the EU.[217] According to the study, the sales value of a product with a protected

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[215] Kiene Iddri 2006, p. 3.

[216] Ibid.

[217] Ibid., p.1.

name (geographical indication) is on average double compared to similar products without a certification.[218]

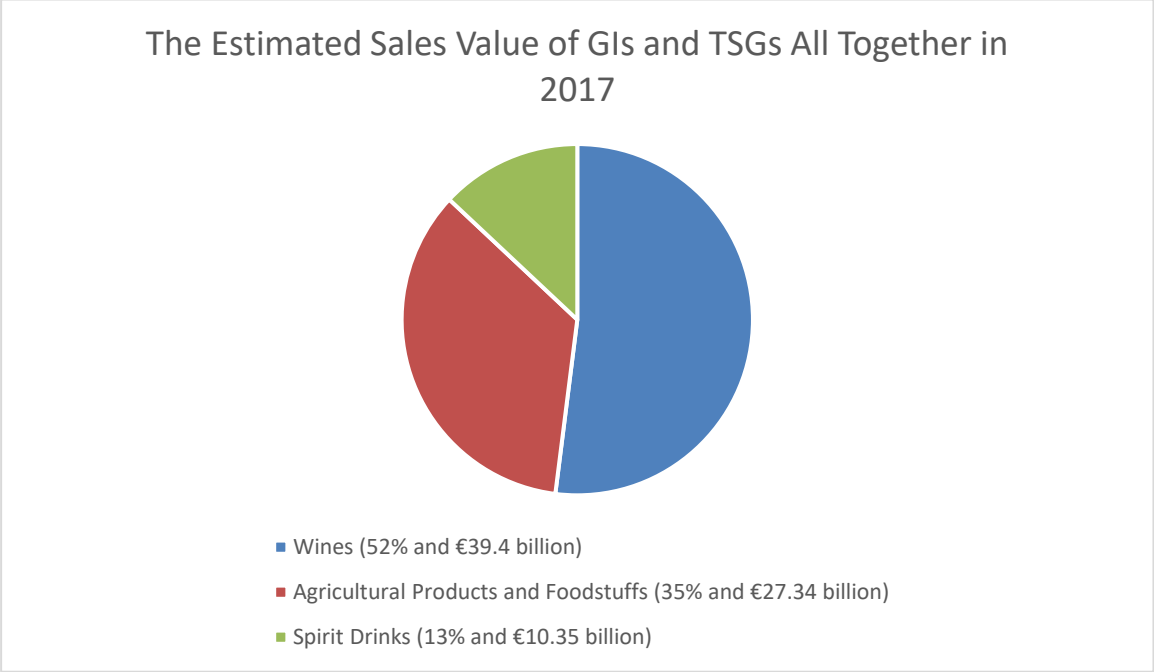

Figure 3: **The Estimated Sales Value of GIs and TSGs All Together in 2017**

GIs = geographical indications. TSGs = Traditional Specialties Guaranteed. Source: Geographical Indications – a European Treasure Worth €75 Billion. European Commission 2020, visited 9.5.2022.

Geographical indications are creative way for EU to maintain the distinctness of each Member States and protect separate local industries while at the same time benefit financially at the international level. This is the reason why for the EU geographical indications are crucial and for example a united legal framework about trademarks is not enough, because trademarks are not linked to specific region, but only to a specific business or entity. Geographical indications add marketing power to a product and for the EU it is extremely crucial to protect its established reputations, like elitist products of French, German, or Swiss.[219]

[218] European Commission Press Release Brussels 2020.

[219] Gutierrez Hastings International and Comparative Law Review 2005, p. 38.

4 EU'S APPROACH TO THE PROTECTION OF TRADITIONAL KNOWLEDGE

4.1 The Feasibility of Geographical Indications in Protecting Traditional Knowledge

As was addressed already in Chapter 2.1.4, the most common arguments that existing intellectual property tools cannot provide adequate level of protection for traditional knowledge were that intellectual property rights are individualistic in nature and thus unable to accommodate the collective creative processes that generate the traditional knowledge, the author or ownership criteria is rarely fulfilled[220], and intellectual property rights are limited in time.[221] In the following chapters I am going to examine the feasibility of geographical indications in protecting traditional knowledge. Could geographical indications be utilized to enhance the level of protection for traditional knowledge? Or are geographical indications just like any other intellectual property rights, that do not actually provide an effective solution to the problem that indigenous peoples and local communities face?

At least in the literature and among professionals who work with intellectual property issues, there is hope when it comes to the potentiality of geographical indications in protecting traditional knowledge. Ms. Delphine Marie-Vivien, an intellectual property expert from French Agricultural Research Centre, believes that geographical indications can be useful to meet the needs of indigenous peoples and local communities:

> "Geographical indications are well adapted for the preservation and the promotion of traditional knowledge and the associated biodiversity of indigenous peoples and local communities, because (…) it is based on collective traditions – old traditions. It's a way to protect, to preserve the collective traditions while allowing some modernization."[222]

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[220] Meaning that it might be impossible to determine who created the creative work or what group of individuals created it when it comes to traditional knowledge and traditional knowledge-based innovations, products, and/or goods.

[221] Such a time limit is artificial in the context of dynamic and evolving traditional knowledge that is an inherent part of a specific group of people's way of living and culture, thus it should be protected at all times.

[222] WIPO Using Geographical Indications to Protect and Promote Culture 2021, https://www.wipo.int/tk/en/news/tk/2021/news_0014.html (visited 23.2.2022).

But is this overstating the value of geographical indications? Could they truly make a significant impact to the level of protection of traditional knowledge? The following sub chapters analyzes this in more detail.

4.1.1 Geographical Indications Are Unlike Other Intellectual Property Rights

There have been a lot of debate whether traditional knowledge belongs within intellectual property law or should it be characterized as a sui generis form of protection. Sui generis is a Latin term meaning 'a special kind'. In intellectual property discourse this term is used to refer alternative protection regimes outside the known framework such as patents, copyrights, and trademarks. This similar discussion has happened in the context of geographical indications as well. Geographical indications have been argued to be something different compared to other forms of intellectual property rights, because they are perceived as pre-modern and traditional, just like traditional knowledge is. Geographical indications seem to have different underlying objective than most intellectual property rights because they focus on preserving and sustaining localized traditional practices whereas patents, designs, and copyright are focused on protecting novelty, innovations, and advancement.[223] For example, Downes[224] notes that geographical indications are fundamentally designed to reward producers to maintain valuable traditional production practices that are linked to a certain region, culture, and customs. Thus, the underlying objective of geographical indications is different compared to patents and copyrights which are specifically designed to reward innovation. Indigenous peoples and local communities often worry, that because their primary goal is not to reward innovation but rather to have control of their own traditional knowledge and cultural identity, that classic intellectual property rights would be inherently unsuitable to provide an adequate level of protection for traditional knowledge. It has been argued that geographical indications would be suitable to protect traditional knowledge, because both traditional knowledge and geographical indications concern the preservation and sustainability of the indigenous and local communities' cultural and spiritual identity. So,

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[223] Also, Sunder points out that geographical indications are 'poor people's intellectual property rights'. Many developing countries have struggled with the patent provisions of TRIPs because these countries generally lack capital for R&D-intensive projects and have less manufacturing capacity, whereas geographical indications recognize less high-technology contributions of farmers, and craftspeople and the administrative costs are relatively cheap compared to patents. See more, Sunder Law and Contemporary Problems Cultural Environmentalism 2007, p. 114.

[224] Downes Columbia Journal of Environmental Law 2000, p. 268.

both geographical indications and traditional knowledge seem to have maverick status in the conventional intellectual property family. In short, if the underlying objective under geographical indications differs from patents and copyrights, and actually seems to be in synergy with the objectives of indigenous peoples and local communities, does this mean that geographical indications are better suited as a legal tool to protect traditional knowledge?

Despite of the status of the geographical indications as being something different than conventional intellectual property rights, they can only be used to protect certain kinds of traditional knowledge. Not all intangible forms of traditional knowledge can be protected and for example methods of medical treatment, folk music, techniques for dyeing cloth cannot be protected with geographical indications per se, unless the traditional knowledge results in actual medicine, a product or service that is related to the traditional knowledge in question.[225] In other words, geographical indications do not directly protect the subject matter associated with traditional knowledge, but this subject matter remains in the public domain and can be misappropriated by third parties. Geographical indications do not actually protect the knowledge of the community or group, but only protects the indication as to where it originated from.[226] Geographical indications are problematic also if the knowledge is not associated with a defined geographical area but scattered.[227] Also, there is little consensus about the scope and the exact form of protection for geographical indications themselves, so it seems odd that they would be effective tools for actually protecting traditional knowledge.[228] However, the advantage is that geographical indications are regulated under TRIPS Agreement, the most important treaty when it comes to international intellectual property rights, so if geographical indications are utilized in protecting traditional knowledge, they are already recognized by TRIPS and all the 164 WTO Member States who are obliged to change their domestic legal frameworks to meet the TRIPS' minimum standards of protection for intellectual property rights, geographical indications included.[229] However, the limitation in this is that there is no unified legal framework on geographical indications and the TRIPS

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[225] Rajesh – Anagha – Varsha Pen Acclaims 2018, p. 6.

[226] Ibid.

[227] Ibid.

[228] The TRIPS Agreement only lays down the minimum standards and gives the contracting parties flexibility when it comes to means how to set up a geographical indication protection system.

[229] Frankel Prometheus 2011, p. 257.

only sets out the minimum standards and even within the EU, there are great variety when it comes to the legal rules and regimes in the context of non-agricultural products and geographical indications. In the EU, there is only a unified system in place for agricultural products and foodstuffs. Needless to say, outside the EU, nations will likely have very different legal rules in place concerning geographical indications. However, the situation is still better when compared to the legal status of traditional knowledge, which is currently not protected under the existing international intellectual property regime. At least geographical indications are recognized internationally as belonging to the intellectual property family, therefore if the traditional knowledge can be embodied into a product or service that is linked to the geographical area, there is a way to indirectly protect the underlying traditional knowledge of the product, good or service.

4.1.2 Traditional Knowledge and Geographical Indications Are Both Collective in Nature

Downes has argued that geographical indications could be a powerful tool for indigenous peoples and local communities.[230] He bases this on the fact that both traditional knowledge and geographical indications are collective in nature and have many other similarities with each other:

> "(…) they protect and reward traditions while allowing evolution; they emphasize the relationships between human cultures and their local land and environment; they are not freely transferable from one owner to another; and they can be maintained as long as the collective tradition is maintained."[231]

On the other hand, according to Frankel, the perception that both traditional knowledge and geographical indications are collective in nature is only a superficial one and thus weak in supporting the idea that geographical indications could play a major role in the protection of traditional knowledge. When it comes to the ostensible similar collective nature of traditional knowledge and geographical indications, Frankel argues that there is a different sort of collective ownership over geographical indications compared to traditional knowledge.[232] For example, any producer who meets the requirement of the champagne geographical indication can use the geographical indication 'champagne', so it is true that the geographical indication

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[230] Downes Columbia Journal of Environmental Law 2000, p. 268.

[231] Ibid., 269.

[232] Ibid., 259.

is not made available exclusively to only one individual, but anyone who meets the criteria, can use the geographical indication for their independent business. However, there are no collective rules, obligations, or recommendations about how to conduct the business in a way that preserves the traditional procedures. Therefore, even though the geographic indication has a collective status, group of qualified individuals are each individually entitled to the collective and there is no collective interest in the same way as among indigenous and local communities. Among indigenous peoples and local communities, a more dominant view is that no individual has any entitlement to the collective traditional knowledge.[233] The collectiveness is quite different: indigenous and local communities aim to preserve their identity and cultural heritage and they often have in place complex and sophisticated customary rules how to responsible carry the traditional knowledge forward and how to develop it for future generations. Many indigenous peoples and local communities have rules in place about who can use certain parts of the knowledge and how. The main difference here regarding the ostensible similarity in the collective nature is that indigenous peoples stay as a more unified group because of their collective interest (preserving their identity and cultural heritage and developing it for future generations) whereas individuals who meet the criteria for geographical indications are each free to determine how to conduct their business in a way that best fits their independent business purposes as long as they meet the criteria of the geographical indication.

4.1.3 Geographical Indications Provide Indefinite Protection, Are Not Freely Transferable, And Respect Indigenous Customary Laws

Geographical indications can be indefinite, and this has been taken as a positive indication to conclude that it would be a great legal tool to protect traditional knowledge.[234] As long as the product or good fulfills the criteria for the specific geographical indication, the legal rights remain in force and do not run out and return to the public domain, solving one of the concerns that indigenous and local communities have regarding their traditional knowledge.[235]

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[233] Frankel Prometheus 2011, p. 259.

[234] Sherman – Wiseman Edward Elgar Publishing 2016, p. 490.

[235] Indigenous peoples and local communities often want to prevent the misappropriation and unauthorized use of their traditional knowledge by third parties. The reason why misappropriation is so easy is because traditional knowledge is seen as belonging to the heritage of mankind and being part of the public domain, a pool of resources that are not protected by any intellectual property rights and are thus free for anyone to use.

However, as was mentioned already before, geographical indications do not actually protect the underlying knowledge of the name, product, or a service. Indigenous peoples and local communities want to protect the knowledge, the link that is tied to the community's identity and cultural heritage.[236] Therefore, even though geographical indications give indefinite protection for products, goods, or services related to traditional knowledge, it misses the point. It does not meet the core need of the indigenous peoples and local communities who would want to establish legal regime to protect the traditional knowledge itself and remove it from the public domain, where it currently 'belongs'. Intellectual property rights in general, like patents and copyrights, do not protect knowledge. Patents protect inventions where the knowledge is embodied, but in theory that same knowledge is available to others to use in their inventions as long as it does not infringe existing patents. In a similar fashion, copyrights only protect particular expressions, not the knowledge or ideas. Therefore, indigenous peoples and local communities who wish to protect their traditional knowledge can do that with the help of geographical indications but only indirectly and when their traditional knowledge can be incorporated into a product or service. Not all forms of traditional knowledge can be turned into products or services that could subsequently be protected via geographical indications against misappropriation and unauthorized use.

When it comes to the non-transferability of geographical indications, it means that the legal rights remain connected to the specific group of individuals who acquired the legal protection for a product or good.[237] The geographical indication cannot be transferred to producers outside the geographical region or to producers who do not fulfill the set-out criteria of the geographical indication in question.[238] In my opinion, this could be one factor to support the assertion that geographical indications are a great tool to protect traditional knowledge. Unfortunately, there is one downside to this. The non-transferability suggests that indigenous peoples and local communities can effectively control who gets access to their traditional knowledge. When the geographical indication cannot be transferred like any other resource, it means that not anyone can utilize the geographical indication, only those who fulfill the criteria that the specific indigenous or local community group has defined in the establishment process of the specific geographical indication protection can. However, in reality, many

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[236] Frankel Prometheus 2011, p. 258.

[237] Sherman – Wiseman Edward Elgar Publishing 2016, p. 490.

[238] WIPO 2021, p. 17.

geographical indication protection systems do not have effective ways to require the actual compliance with traditions or methods of production according to the criteria set out in the geographical indication. The quality control is therefore not an inherent part of most geographical indication registration systems and even those systems that do have quality controls are said to be quite flexible. For example, large mass production of Champagne do not reflect anymore the traditional roots, and Champagne as an appellation of origin is protected and 'controlled' by the French *appellations de origins controlees* system, supposed to have strict rules about who can qualify for obtaining the Champagne appellation of origin label.[239]

The community or group that is seeking protection via geographical indications can determine the rules what type of subject matter ought to be protected, and how and when that subject matter can be used by third parties, thus it gives them the freedom to determine the internal rules that dictate the use of the name of a product. To me, this is quite strong argument in favor of the suitability of geographical indications in protecting traditional knowledge. Indigenous own customary laws can be incorporated into the internal rules of the specific geographical indication to determine the rules who qualifies to use the geographical indication.[240] This acknowledges well the obligations laid down in international agreements like UNDRIP that establishes indigenous people's right to self-determination.[241] However, significant limitations to this exist as well, because as was stated above, most geographical indication systems do not have an effective monitoring or controlling mechanisms at place to truly control the production methods.

4.1.4 The Terroir Justification for Geographical Indications

The terroir justification means that the geographical area, land, is crucial because it gives the special characteristics to the products with ingredients from the land.[242] Feta is only feta if it is produced in the mainland of Greece or Lesbos Island. Geographical indications are used to

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[239] Frankel Prometheus 2011, p. 260.

[240] Sherman – Wiseman Edward Elgar Publishing 2016, p. 491.

[241] UNDRIP Article 31 establishes that indigenous peoples "have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.". Also, Article 3: "Indigenous peoples have the right to self-determination."

[242] Frankel Prometheus 2011, p. 259.

demonstrate how a specific product originates from specific place, town, region, or country, instead of from a specific individual.[243] At first glance, it seems that geographical indications could be especially suitable for the protection of traditional knowledge, especially since one of the basic problems traditional knowledge faces in relation to conventional intellectual property rights is that an individual or specific creator behind the knowledge is often impossible to identify. Conventional intellectual property rights often require that a specific author, or inventor can be identified to who the exclusive rights can then be granted. Therefore, in my opinion, geographical indications tackle the problem of identifying a specific author or inventor successfully. Geographical indications allow indigenous and local communities to establish collective rights over their traditional knowledge without a need to identify a specific right holder. In this respect, geographical indications are an appropriate way to protect traditional knowledge because they respect the connection to place, which is very important to many indigenous and local communities. Unfortunately, then another problem with justifying geographical indications on the basis of terroir occurs because it ignores the ugly truth that many indigenous peoples have been removed from their land and have no longer access to it.[244] Further, again, the fact that geographical indications protect a name, not the knowledge itself is a limitation. Also, the argument that geographical indications are suitable for the protection of traditional knowledge because they value the connection to the land do not fully understand the relationship that indigenous peoples and local communities have with their knowledge and land. Indigenous peoples and local communities seek to protect their relationship with their traditional knowledge and the land is an important factor of it, explaining the relationship that indigenous peoples and local communities have with their knowledge. In other words, the protection of traditional knowledge is not only about the land, but the relationship indigenous peoples and local communities have with their land, how to use it and how to live in synergy with it.[245] For example, as was examined in the previous Chapters of Sámi traditional knowledge, their traditional knowledge is not only about the geographical area where they reindeer hunt, but the act of hunting, the innovative ways how to subsist on nature and the traditional forming and maintaining of Siida systems are also important aspects of their traditional knowledge.

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[243] Dagne Nova Scotia 2012, p. 114.

[244] Frankel Prometheus 2011, p. 259.

[245] Ibid., 260.

4.1.5 Geographical Indications Are Incapable of Recognizing the Innovative Aspect of Traditional Knowledge

An important aspect of traditional knowledge is the innovative, dynamic, and evolving part of it. Traditional knowledge is not static, but innovative and evolving in a sense that it is supposed to change over time and respond to the challenges brought by different decades. The geographical indications system has been suggested to inhibit innovation and preserve the *status quo* rather than allow room for development. For example, if a group has laid down the criteria and internal rules that establish the geographical indication, any new methods of production cannot be added to the specific geographical indication because it would compromise it. This means that if the traditional knowledge-based product, service, or good changes over time, which is often the case when it comes to traditional knowledge, although this might be a slow process, it might not be able to be protected under the same geographical indication. So, even if the deviation is for innovative purposes, the nature of geographical indications is fixed. It is not a development tool.[246] This is problematic because traditional knowledge can be highly innovative and therefore extremely valuable. The aim of indigenous peoples and local communities is not to make their knowledge static, rather, some indigenous peoples and local communities seek to benefit from that innovation because they need economic development.

4.2 Analyzing the Suitability of EU's Quality Schemes in Protecting Traditional Knowledge

Despite the general overview of the feasibility of geographical indications in protecting traditional knowledge might seem rather a dark and unpromising one, in this Chapter I will analyze could EU's quality schemes be extended to non-agricultural products as well to enhance the level of protection for traditional knowledge. Although it was stated in the previous Chapters that geographical indications as a tool probably will not precisely meet the needs of indigenous peoples and local communities, the harsh truth is that the intellectual property system is poorly designed for traditional knowledge[247], partly due to the historical process of developing the international intellectual property system itself, as the Chapter 2.1 revealed. However, even when intellectual property rights do not protect traditional

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[246] Ibid., 261.

[247] WIPO 2017, p. 10.

knowledge as such, they can still be used to protect some forms of traditional knowledge, especially traditional knowledge that is imbodied into goods, services or products that are closely linked to a specific geographical area, which is often the case in traditional knowledge because it is closely related to land. Acquiring a geographical indication, a form of intellectual property right, over traditional knowledge-based good, product or service, traditional knowledge holders can prevent others from falsely claiming ownership of creations or inventions that are based on or developed using traditional knowledge. Also, through the use of geographical indications, the risk of free-riding by third parties who wish to benefit from the quality or reputation of the traditional knowledge-based product in markets reduces.[248]

Currently at the EU level, only agricultural products and foodstuffs are protected by a *sui generis* unitary system. If a producer wants to acquire a geographical indication protection for non-agricultural products like ceramics, they have to seek protection Member State by Member State and because the domestic rules differ greatly among Member States, it is often not a feasible option for traditional knowledge holders and producers who have non-agricultural products, goods, or services that are linked to traditional knowledge. Therefore, establishing a unitary geographical indication system for non-agricultural products as well would, in my opinion, indirectly enhance the level of protection for traditional knowledge. The reason I think it is indirect is due to the fact that geographical indications do not protect the traditional knowledge itself, but only the name, as I already analyzed in the previous Chapter 4.1 above. Despite of this, EU has considered extending geographical indication protection for non-agricultural products.

Zappalaglio, Guerrieri and Carls' have examined the range of possibilities that EU has when it comes to the expansion of geographical indications to other than agricultural products and foodstuffs. First, EU could establish *sui generis* geographical indications system, and imitate for example French or Portugal's legislation on this. Or EU could extend its existing quality schemes (Protected Geographical Indications, Protected Designations of Origin and Traditional Specialties Guaranteed) to include non-agricultural products, when currently the quality schemes only concern agricultural products and foodstuffs. According to Zappalaglio and others, the option to modify the existing quality schemes to include non-agricultural products as well would the best option. There are three quality schemes, and in their view, the

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[248] Ibid., 18.

Protected Geographical Indications quality scheme would be the best option when it comes to extending EU's geographical indication quality scheme to include non-agricultural products.[249] They arrive at their conclusion by analyzing a sample of non-terroir agricultural products, because these goods are similar in some extent with non-agricultural products, because of their non-terroir nature. Non-terroir agricultural products do not have to have a specific link with their local origin, but the distinctive features of the product come from other links. These other links are for example the reputation link[250], or through a historical link, meaning that products are made following methods of production that are rooted in the history of the designated area.

There are three points of why only extending one of the quality schemes, the Protected Geographical Indications (PGIs), to include non-agricultural products would be the best option. Why not extend all of the quality schemes to include non-agricultural products as well? According to the data presented by Zappalaglio and others, extending EU's all three quality schemes to include non-agricultural products would result in too complex system for both producers and consumers and non-agricultural products are not often made from local raw materials, meaning that the Protected Designations of Origin quality scheme would rarely apply because under this quality scheme it is required that the whole production process takes place in a specific geographical area. In practice this means that the raw materials must come exclusively from the site where the product will be produced.[251] Lastly, the quality schemes system is only EU's specialty, and other countries in the world do not make any distinctions between different quality schemes. Thus, extending geographical indication protection to non-agricultural products only through one quality scheme, the Protected Geographical Indication quality scheme, would make EU's system more appealing to other countries, simply because it would be more familiar to them and easier to understand. This in turn might strengthen EU's position in the international negotiations with third countries.[252]

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[249] Zappalaglio – Guerrieri – Carlos International Review of Intellectual Property and Competition Law 2020, p. 64.

[250] The product can be linked to the area of origin through their reputation and the raw materials do not have to be sourced locally.

[251] See Chapter 3.2.1.

[252] Zappalaglio – Guerrieri – Carlos International Review of Intellectual Property and Competition Law 2020, p. 63.

In my opinion, both the Protected Geographical Indications (PGIs) and Traditional Specialties Guaranteed (TSGs) quality schemes could be extended to include non-agricultural products. In practice, the Protected Geographical Indication quality scheme already overlaps with the Traditional Specialties Guaranteed quality scheme, because PGIs are capable of acknowledging the traditional character of the method of production. In other words, PGIs are already used to protect non-terroir agricultural products that derive their distinctive characteristics from the traditional way of producing them. However, if a producer wants to protect their non-terroir agricultural product via PGIs, they also have to prove how the product has at least a reputational link with a given geographical area. This is because the definition of PGIs required that at least a reputational link, quality, or any "(…) other characteristic is essentially attributable to its geographical origin."[253] Therefore, just explaining how the method of production is traditional is not enough if this traditional method of production does not fulfill a reputational link or have any other characteristic that is attributable to its geographical origin as well. Traditional Specialties Guaranteed quality scheme is not widely used when compared to Protected Geographical Indications[254], and I believe this is one of the reasons why Zappalaglio and others conclude in their article why PSGs would be the best option to go with if EU will extend its geographical indications protection to non-agricultural products. If PGIs already seem to be fit to protect non-terroir agricultural products, it is safe to assume that this quality scheme could be used to protect non-agricultural products, because as was already mentioned, non-terroir agricultural products and non-agricultural products are similar with each other. As a remainder, non-terroir goods are usually linked to their place of origin dominantly by human elements[255] or because the production method can be defined as 'traditional' and not because of their geographical link, and this is the case with non-agricultural products as well. For example, the production method of handicrafts can be traditional or include human elements like specific skills or know-how how to produce them.

If Protected Geographical Indications (PGIs) quality scheme can in theory be used to include non-agricultural products as well, in my opinion it is very likely that Traditional Specialties

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[253] Article 5(2) of the Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs 2012.

[254] Zappalaglio – Guerrieri – Carlos International Review of Intellectual Property and Competition Law 2020, p. 65.

[255] Like a particular skill or know-how.

Guaranteed quality scheme can fulfill the task as well. In order to obtain TSGs, the good or product must result from "(…) a mode of production, processing or composition corresponding to traditional practice for that product or foodstuff or is produced from raw materials or ingredients that are those traditionally used."[256] The only reason why Protected Geographical Indications quality schemes seems a more safer option to use if extending the quality scheme to include non-agricultural products is because there is already evidence showing how PGIs are being used to protect non-terroir agricultural products. TSGs, however, are not that widely used, so there is not much supporting data, compared to the data of PGIs.[257]

Currently, EU's quality schemes protect effectively agricultural products and foodstuffs, that account for some forms of traditional knowledge. However, traditional knowledge consists of other forms than just agricultural products and foodstuffs. For example, handicrafts, ceramics, and other creative works form a part of traditional knowledge as well. As of writing this thesis, these forms of traditional knowledge cannot be protected under EU's quality schemes. This chapter analyzed the suitability of the EU's geographical indication quality schemes to be extended to non-agricultural products and concluded that both Protected Geographical Indications and Traditional Specialties Guaranteed could be extended to include non-agricultural products. The reasons why PGIs quality scheme is seen as a safer option is because there is already evidence suggesting how they are widely used in protecting non-terroir agricultural products, that are similar in their nature with non-agricultural products, TSGs quality scheme is not used that widely and for the sake of clarity and simplicity, it is recommended that only one of the EU's three quality schemes would be extended to non-agricultural products. Establishing a harmonized geographical indication protection for non-agricultural products would bring positive effects for the EU's trade, employment and it would boost rural development.[258] It would also enhance the overall level of protection of traditional knowledge, but only indirectly.

The reason the level of protection would only be indirect is because geographical indications do not really provide an answer to the core problem, which is the fact that traditional

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[256] Article 18(1) of the Regulation 1151/2012 on quality schemes for agricultural products and foodstuffs 2012.

[257] Zappalaglio – Guerrieri – Carlos International Review of Intellectual Property and Competition Law 2020, p. 66.

[258] Navarra – Thirion European Added Value Unit 2019, p. 2.

knowledge is currently regarded as belonging to the public domain and is free for anyone to use. Geographical indications do not protect the traditional knowledge itself, only the name, product, good or service that is built on utilizing the traditional knowledge. Geographical indications are only a success if there is a business behind the traditional knowledge that has made the products, goods or services well-known among consumers and in the domestic and international markets. Essentially, geographical indications are marketing tools to sell products and without a product, geographical indications are of little use when it comes to the protection of traditional knowledge. One very practical limitation is also the cost and effort to obtain geographical indication protection for the traditional knowledge-based product, good, or service. At the moment in the absence of harmonized unitary system for the protection of non-agricultural products, the level and scope of protection in practice is unsure, since countries have different domestic rules how to register geographical indication, what is the scope of protection and what is the cost. Producers and traditional knowledge holders who want to protect their traditional knowledge-based products, goods, or services that are not agricultural products through geographical indications need to have a significant amount of knowledge, expertise, and money. Geographical indications have the potential to generate wealth for some nations and some indigenous groups and local communities, but it is not at all guaranteed. My conclusion against all this is that geographical indications are a solution for only specific type of knowledge and enhancing geographical indications will likely just empower the existing incumbents of the geographical indications regime and might not necessarily empower those indigenous peoples and local communities whose traditional knowledge is not embedded into any products, goods or services or is not in a form of any business.

5 CONCLUDING REMARKS

My research question was *can geographical indications and EU's quality schemes protect traditional knowledge and if not, why.* I began to answer this research question by examining what traditional knowledge is and what challenges traditional knowledge faces in the conventional global intellectual property system in Chapter 2. Chapter 2 also assessed if protecting traditional knowledge aligns with either Locke's natural rights theory or utilitarianism, thus assessing if protecting traditional knowledge with intellectual property rights in the first place is justified.

Traditional knowledge is dynamic, evolving, connected to the environment and to the way of living of indigenous peoples and local communities, consists of know-how, skills and social relations and always represents broader belief systems. Posey identified five challenges that traditional knowledge faces in the global intellectual property system: intellectual property rights are designed better to grant exclusive rights to individualistic than collective entities. The criterion for intellectual property rights such as copyright law's fixation is problematic for often orally passed traditional knowledge that does not have a fixed form. The third challenge concerned the different understandings of concepts of ownership, tenure, and access. Last but not least, indigenous peoples and local communities' traditional knowledge is part of their cultural identity and way of living thus intellectual property rights that are overly focused on market economic values have a hard time acknowledging spiritual values. The philosophical foundations of intellectual property rights rests heavily on the two justificatory theories of intellectual property rights, Locke's natural rights theory and utilitarianism. The former is built on top of the idea of private ownership and the latter aims to maximize the net social welfare of the society and promote innovation and creativity by incentivizing people to produce as many knowledge goods as possible. Particularly Locke's natural rights theory, that emphasizes the individual's contribution and the notion of labor, does not do well in taking into account often the communal, evolving and dynamic nature of traditional knowledge. This results in traditional knowledge not aligning well with Locke's natural rights theory. On the other hand, when it comes to utilitarianism, traditional knowledge aligns better with the underlying objectives of utilitarianism. Therefore, protecting traditional knowledge with intellectual property rights is justified if intellectual property rights are justified under utilitarian theory.

Chapter 3 provided insight to my research question by asking what geographical indications and EU's quality schemes are. Geographical indications are signs used on goods to indicate their geographical origin, they were designed to provide reliable information of the product, ensure fair competition and to prevent free riding. Geographical indications take into account the relationship between human activity, culture, land, and resources. EU's quality schemes include Protected Designation of Origin (PDO), Protected Geographical Indication (PGI) and Traditional Specialty Guaranteed (TSG).

After understanding what geographical indications and EU's quality schemes are about, the Chapter 4 examined if geographical indications could be a feasible solution in protecting traditional knowledge and how EU's quality schemes could be utilized to enhance the level of protection for traditional knowledge in the EU. Chapter 4 revealed that geographical indications cannot quite fully capture the nature of traditional knowledge for several reasons, thus rendering geographical indications a feasible solution only in limited situations. When it came to the EU's quality schemes, the limitations were that currently in the EU, only agricultural products and foodstuffs can be protected through the unitary geographical indications system. If EU were to extend geographical indication quality schemes to include non-agricultural products as well, the best option would be to extend Protected Geographical Indications (PGIs) quality scheme to include non-agricultural products as well.

My conclusion to my research question, *can geographical indications and EU's quality schemes protect traditional knowledge and if not, why*, is that geographical indications and EU's quality schemes can only in limited situations and even then, only indirectly protect traditional knowledge. The reasons are multifold, but the surface level reason is because there is an inherent mismatch between the characteristics of geographical indications and the characteristics of traditional knowledge. For example, geographical indication's collective nature do not represent the same collectiveness that traditional knowledge represents. Geographical indication's collective nature relates to the collective ownership, where each individual has a claim to the collective if they fulfill a specific criterion. The collectiveness in traditional knowledge is quite different: no individual has an entitlement to the collective traditional knowledge, but they have a responsibility in passing the traditional knowledge on for further generations and developing it. It is about the group's cultural and spiritual identity and survival. Additionally, the owner or author of the traditional knowledge is often impossible to identify. Geographical indications tackle this problem quite well, because geographical indications are available to groups who fulfill the criteria and the objective of

geographical indications is not to reward an individual but to provide information about a specific product, good or service and enhance the value of it. But geographical indications do not directly protect the traditional knowledge itself, only the products, goods or services that have traditional knowledge embedded into them. Further, the nature of geographical indications makes it hard for them to protect traditional knowledge. Geographical indications mainly are used to stimulate commercialization and distribution, and this is not always the objective of indigenous peoples and local communities. Geographical indications are essentially marketing tools. There is no geographical indication if there is no product, good, or service that needs to be protected. If the traditional knowledge holders aim to prevent the commercialization and distribution of their traditional knowledge, utilizing a tool which objective is to commercialize is not an answer. All it does is that it prevents others commercializing and distributing the traditional knowledge, thus it gives some level of control for the traditional knowledge holders over how their traditional knowledge is distributed. But if the objective is to overall prevent the distribution of traditional knowledge, the solution that indigenous peoples and local communities would have to start commercializing and distributing it to the markets themselves does not really make sense. Lastly, the nature of traditional knowledge is dynamic, and it is tied to the cultural and spiritual identity of indigenous peoples and local communities. Geographical indications do not do well in accommodating the evolving nature of traditional knowledge but might actually hamper innovation. Therefore, geographical indications are useful only if traditional knowledge can be embedded into agricultural product or foodstuff, and in the future if EU's quality schemes are extended to include non-agricultural products and foodstuffs, the current scope of protection for various forms of traditional knowledge increases but still falls short since it is not possible to protect all forms of traditional knowledge via geographical indications. This does not necessarily mean that geographical indication as a tool would be inadequate entirely because I don't believe that any intellectual property right alone is enough to provide adequate level of protection for traditional knowledge. This is the reason why I proceeded to assess how EU's quality schemes could be utilized in enhancing the protection of traditional knowledge in the EU. I concluded that the best option would be to extend one of the quality schemes, Protected Geographical Indications (PGIs) quality scheme to include non-agricultural products as well. This is because there is already data supporting that PGIs are used to protect non-terroir agricultural products that are quite similar in their nature with non-agricultural products. It would also be the simplest approach since countries outside EU do not differentiate between different quality schemes and this would make EU's position in

international negotiations stronger. Protected Designation of Origin (PDOs) require that the whole production process happens in the specific geographical area, thus it is too inflexible and strict to be extended to non-agricultural products. Traditional Specialties Guaranteed (TSGs) quality scheme might work as well, but they are not widely used currently so there is no supporting evidence, and the Protected Geographical Indications quality scheme has mostly absorbed the TSGs category. If EU's quality scheme, the Protected Geographical Indication is to be extended to include non-agricultural products, it will enhance the level of protection of traditional knowledge indirectly, because then traditional knowledge holders can protect their non-agricultural products, goods, or services easily EU-wide. But to ensure the full protection of traditional knowledge, a *sui generis* system is needed specifically for traditional knowledge, or some other solution. Modifying existing intellectual property rights, like extending the EU's geographical indications quality schemes to include a wider range of products, will benefit only some indigenous peoples and local communities, those whose traditional knowledge happens to be in the form where it is easily made into product that can be protected under geographical indications legislation. When it comes to those indigenous and local communities whose traditional knowledge is not easily made into commercial product, expanding geographical indications quality schemes in order to enhance the level of protection for traditional knowledge is actually modifying indigenous peoples and local communities' interests to suit with the geographical indication's legal requirements. How? Because this approach would force indigenous and local communities to establish businesses and put their traditional knowledge in the form of product, good, or service in order to get it protected through intellectual property rights such as geographical indications.

The purpose of this thesis was to go deeper into the underlying reasons why geographical indications are unable to fully protect traditional knowledge. That is why I aimed to look past the surface level, and not only compare the characteristics of geographical indications and traditional knowledge, but also to assess the historical development of international intellectual property rights regime in Chapter 2. It revealed that not all parties took part into the beginning stages of the formation of international intellectual property field. According to Posey, this led to five difficulties that arise when intellectual property rights are applied to traditional knowledge, that were already examined above.

However, I was not yet satisfied, thus I examined the two most dominant justificatory theories of intellectual property rights, utilitarianism and Locke's natural rights theory. For example, Munzer and Raustiala have argued that it is impossible to provide any type or form of

intellectual property protection for traditional knowledge because it is not in line with existing theories of intellectual property. I agree, that when it comes to Locke's natural rights theory, traditional knowledge aligns poorly with it because Locke's natural rights theory is built on top of the idea of private ownership and emphasizes the notion of labor, but utilitarianism is more flexible because it aims to promote the society's overall well-being. It is for this reason why we should revisit the underlying philosophical understandings of intellectual property. For example, if the fundamental rule of utilitarianism rests upon the idea that actions should always aim for the betterment of a society *as a whole*, should we rethink what utilitarian understanding of intellectual property actually means? Currently, the utilitarian approach incentivizes to create *as much knowledge goods as possible*. But is this traditional utilitarian understanding of intellectual property outdated and even undermining the very foundation of utilitarianism?[259]

In other words, is it the most beneficial approach for the society as a whole to focus on incentivizing the creation of knowledge goods as much as possible or should some other factors be considered as well? For example, shouldn't we also ask *who produces these knowledge goods, who gets to participate in the process of knowledge creation and what kind of knowledge is worth protecting with as powerful legal tools as intellectual property rights*? Traditional knowledge holders have cultivated their knowledge for decades and they should be able to protect it legally as effortless as non-traditional knowledge holders can protect their creations through existing intellectual property rights. Conventional intellectual property rights suit perfectly to protect certain types of intellectual creations, like inventions (patents), books (copyrights), or even symbols that represent certain businesses (trademarks). Therefore, if we could establish a *sui generis* system that is able to take into account the special characteristics of traditional knowledge, this would enhance the level of protection for traditional knowledge and give traditional knowledge holders the actual legal tools how to protect their knowledge. This in turn would better their livelihoods and benefit the whole humankind since traditional knowledge contributes significantly to the preservation of biological diversity as we learned in Chapter 2. According to utilitarianism, the guiding principle of conduct should be that actions promote the greatest happiness of the greatest

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[259] I agree with Sunder who advocates for a broader understanding of intellectual property: in our current era, not only access to knowledge products but also access to the processes of creating knowledge, is a key if we want to promote social, cultural, and economic freedom of all people. See more, Sunder Law and Contemporary Problems 2007, p. 122.

number. Therefore, in my view, establishing a *sui generis* protection rather than forcing conventional intellectual property rights tools work on traditional knowledge is in conformity with the utilitarian justification of intellectual property and would be the ultimate solution for providing an adequate level of protection for traditional knowledge. As was stated in Chapter 2.2.3, a *sui generis* system built on top of a differentiated approach would be able to take into account the holistic nature of traditional knowledge while respecting the vibrant public domain and thus safeguarding important policy objectives like ensuring innovation and creativity. In my view, differentiated approach is in conformity with the utilitarian justificatory theory of intellectual property, because it would benefit the society as a whole: it would empower traditional knowledge holders because it would give them enforceable legal rights so they could participate in the process of knowledge creation. At the same time, it does not endanger the public domain, because not all traditional knowledge would be given rights, like generic traditional knowledge and traditional knowledge in the widely diffused category would be given only weak rights such as attribution rights.

To summarize everything that has been said above regarding my answer to my research question, geographical indications and EU's quality schemes cannot directly protect traditional knowledge. They do provide some indirect form of enhanced protection for traditional knowledge in the EU. And why geographical indications and EU's quality schemes cannot fully protect traditional knowledge? On the surface level, it is because geographical indications characteristics' do not match well with traditional knowledge characteristics. But where does this incompatibleness stem from? Partly, it stems from the historical development of intellectual property rights, from the five challenges that traditional knowledge faces in the global intellectual property system, and also from the fact that if intellectual property rights are justified with Locke's natural rights theory, traditional knowledge does not align well with this theory. However, Locke's natural rights theory has been criticized and it is not the only justificatory theory for intellectual property rights. On the other hand, traditional knowledge aligns well with utilitarianism.

Most indigenous peoples or local communities' needs do not revolve around how to commercialize or economically benefit from their knowledge but how to preserve their cultural and spiritual identity and how to guard it, pass it on respectfully and how to develop it to respond to each era's and coming era's challenges. If we aim to enhance the level of protection for traditional knowledge, this need of traditional knowledge holders should be the

guiding principle when changing the relevant legal framework towards a system that truly is able to take into account the holistic nature of traditional knowledge.