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# Needs and opportunities for the EU in the TK debates: The agricultural dimension

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comité intergouvernemental de l'Organisation mondiale de la propriété intellectuelle sur les ressources génétiques, les savoirs traditionnels et les expressions du folklore (IGC).

Tobias Kiene, chercheur associé à l'Iddri, donne des pistes pour

que l'Union européenne mette à profit les débats internationaux sur les savoirs traditionnels afin de mieux protéger sa biodiversité cultivée et son agriculture.

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The European Union (EU) can achieve the objective of protecting its agricultural production and agrobiodiversity through strategic use of the international traditional knowledge debates. Whilst it has not been possible to obtain an extension of the protection for geographical indications at WTO negotiations and while the Convention on Biological Diversity is not adapted for intellectual property issues, the broad scope of the traditional knowledge definitions in the draft instruments already covers the kinds of goods, knowledge and practices for which the EU seeks protection. Through minor modifications of wording, the drafts can be brought to protect European traditional specialities internationally. The EU can thereby rely on the position it has taken up in the traditional knowledge debates, while at the same time gaining further political capital

## Protection Needs

EU policy has tried to keep European agricultural products competitive on the world market by emphasizing their local identity and capitalizing on the goodwill that these products have acquired over generations of high-quality production. Focusing on the regional origins and the traditional context of agricultural products and foodstuff has therefore become a core element of agricultural policy at the Community as well as EU Member States level. The authenticity and local identity of European local produce is being communicated by making transparent the linkage that exists between the quality of local products, the locality or territory of production (terroir) and the traditional production methods, thus valuing elements of agrobiodiversity as well as traditional practices and know-how involved in the production process.

The EU needs international legal protection for its agricultural products and specialities. In the field of international intellectual property, it has sought to protect them through its efforts in the debates on the extension of the protection for geographical indications, which have however been blocked at the WTO TRIPS Council. Besides these discussions being stuck, geographical indications are designed to protect a product's name and indications, but not explicitly the underlying (traditional) production methods and production processes, which are only to be taken into account during the application procedure.

What the European Union needs in the intellectual property field in order to defend its agricultural production is to internationally protect local, traditional agricultural products and production methods through adapted or additional forms of protection. By protecting the local production system and its function logic, especially in marginal rural areas, this would have major impacts on rural development, on the economic growth and environmental sustainability of the rural areas within the EU, thus principal goals of the Common Agricultural Policy.

## The multilateral debates

The EU has made considerable efforts in the trade negotiations within the TRIPS Council on the extension of the protection of geographical indications provided for in article 23 to products other than wines and spirits. However, even though these efforts have consumed much political capital, they have been blocked and have met with stiff resistance at the recent WTO Ministerial Conference in Hong Kong<sup>1</sup>. A consensus in the discussions and hence an extension of the protection for geographical indications can not be expected in the near future, while any further endeavours in advancing the extension debates will cost the EU high political capital.

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<sup>1</sup> WT/MIN(05)/DEC, par. 39

On the other hand, the Convention on Biological Diversity (CBD) and the negotiations related to its article 8(j) are basically non-intellectual property consistent and therefore do not match with the existing intellectual property protection approaches of the EU. Moreover, the CBD is in essence indigenous dominated and so does not cover the primary EU concerns.

By contrast, the approach followed by the traditional knowledge debates is broader and vitally intellectual property related with its point of origin in unfair competition, so as to cover the protection needs of the EU. The traditional knowledge debates at WIPO are characterised by a strong political demand from developing countries, their concerns standing at the beginning of the work of the Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Folklore (the Intergovernmental Committee). The EU has positioned itself as open to these demands, whereas other industrialised countries have taken a hard stance at the Intergovernmental Committee against the protection of traditional knowledge<sup>2</sup>. Starting from this preferential position, the EU has the continuing ability to shape the debates in order to meet its political needs, while in addition gaining political capital from agreeing to advance the work on the protection of traditional knowledge. The draft provisions developed by the Intergovernmental Committee are sufficiently mature as to allow concrete protection outcomes for EU local products, but the work is not yet too advanced to make it hard to still influence and shape it.

## Opportunities

The EU can achieve its objective of protecting local agricultural production in Europe through the international traditional knowledge debates, while gaining vast political capital, rather than consuming it. This is possible because existing draft instruments on traditional knowledge would cover traditional European agricultural products, for which the EU is currently trying to extend the protection of geographical indications, and because high political demand has evolved among developing countries for traditional knowledge protection.

EU's Common Agricultural Policy attaches importance to rural development policy. The main emphasis is on supporting rural communities, contributing to sustainable development of rural areas and developing the rural economy as a whole. "The EU farming sector serves rural communities, reflecting their rich tradition and diversity; its role is not only to produce food but also to guarantee the survival of the countryside as a place to live, work and visit."<sup>3</sup> These aims are compatible with the policy objectives of the current draft provisions for the protection of traditional knowledge: Its article xiii states that the protection of traditional knowledge should aim to "promote the use of traditional knowledge for community-based development [...] and promote the development of, and the expansion of marketing opportunities for, authentic products of traditional knowledge and associated community industries"<sup>4</sup>. Also, these draft instruments would "repress unfair and inequitable uses" of traditional products and their indications and "acknowledge the distinctive nature of traditional knowledge" systems and products. Like these provisions, which have their roots in the law of unfair competition, the Council Regulation on "traditional specialties guaranteed" aims at preventing "unfair conditions of competition"<sup>5</sup>, apart from also explicitly referring to rural development. It can be considered as an example for the kind of protection which European traditional agricultural products need.

Through appropriate modifications, the draft instruments on the protection of traditional knowledge could become a vehicle of achieving protection for the quality and goodwill, which traditional European agricultural products and producers have obtained through their traditional production methods and standards.

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<sup>2</sup> WIPO/GTRKF/IC/8/15 Prov.2

<sup>3</sup> European Commission (2004) The Common Agricultural Policy Explained, p. 3 ([http://europa.eu.int/comm/agriculture/publi/capexplained/cap\\_en.pdf](http://europa.eu.int/comm/agriculture/publi/capexplained/cap_en.pdf))

<sup>4</sup> WIPO/GTRKF/IC/9/5, Annex, p. 4

<sup>5</sup> Council Regulation (EC) No 509/2006 (OJ L 93, 31.3.2006, p.1)

These current draft provisions already cover the subject matter for which the EU needs protection. A traditionally brewed beer for example could fall within the subject matter as defined by articles 3 to 5 of part III of the policy objectives and core principles: Traditional brewing methods that have been maintained over generations within a local community are “the content or substance of knowledge resulting from intellectual activity in a traditional context”<sup>6</sup>, since they constitute know-how and practices that form part of the traditional culture of a local community, which consider it as integral to its cultural identity. When inserted into the draft instruments, existing wording in EU legal documents like the Regulation on “traditional specialities guaranteed” could ensure further consistency with community law on the protection of European traditional agricultural products, thus ensuring their international protection.

## Developing an EU Approach

The overall aim of an EU approach in the international traditional knowledge debates could therefore be to meet the protection needs for European traditional agricultural produce and production, including agrobiodiversity, through these debates rather than through attempts to extend the protection of geographical indications. The methodical way would be not to insert references to geographical indications into the traditional knowledge (traditional cultural expressions) drafts, because this would trigger immediate resistance from a considerable number of countries. Traditional knowledge (and cultural expressions) drafts should rather be modulated in such a way as to cover the protection needs of European traditional agricultural products, without explicitly referring to geographical indications. A purely functional use of the traditional knowledge debate and the term “traditional knowledge”, as well as of geographical indications on the other hand, should therefore be chosen. Due to the current situations in the multilateral negotiations, political capital would in this way rather be gained than burnt.

## Looking Ahead: Next Steps

The next steps to implement an EU approach on the protection of traditional knowledge would be to keep the above-mentioned options open for the EU in the traditional knowledge (traditional cultural expressions) debates at the current 9th session of the WIPO Intergovernmental Committee on Traditional Knowledge, Genetic Resources and Folklore.

At the same time, the EU should make proposals on all three subjects identified in paragraph 10 of document WIPO/GRTKF/IC/9/5<sup>7</sup>:

### *The content or substance of any outcome*

It is important to put further emphasis on the protection of traditional knowledge against misappropriation, based on existing unfair competition principles, and on the provisions aiming at rural development, especially the promotion of rural industries in marginal and less developed regions, while at the same time ensure a certain flexibility of the drafts.

### *The form or legal status of any outcome*

The purpose should be the two draft texts to be adopted as non-binding instruments, such as guidelines, recommendations or other forms of soft law, with a view to their possible development into binding legal form in the future, subject to successful outcomes and proven feasibility of the

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<sup>6</sup> WIPO/GRTKF/IC/9/5, Annex, p. 19

<sup>7</sup> WIPO/GRTKF/IC/9/5, p. 5

protection models. Sufficient flexibility of the instruments being ensured, the EU Member States will have the final decision on how to implement them. The traditional knowledge instrument should be adopted jointly by the WIPO General Assembly and the Paris Union, like the traditional cultural expressions instrument by the WIPO General Assembly and the Berne Union.

***The consultative and other working procedures necessary to achieve any agreed outcome***

The Member States as well as the Community shall submit comments on the draft texts, including additional wording. In addition, an Intergovernmental Committee Contact Group with equal geographical representation and traditional knowledge holder participation is to be created to work on the draft traditional knowledge and traditional cultural expressions text for consideration at the next Intergovernmental Committee session.

With a view to the inter-sessional commenting process and the 10th session of the Intergovernmental Committee, modifying the traditional knowledge and traditional cultural expressions texts so as to meet the EU protection needs through improvements to the current draft texts should be ensured.