

# From Chianti to Kimchi: Geographical Indications, Intangible Cultural Heritage, and Their Unsettled Relationship with Cultural Diversity

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## 1 INTRODUCTION

This chapter provides a critical perspective on the impact of two particular international legal constructs – geographical indications (GIs) and intangible cultural heritage (ICH) – on cultural diversity, with a focus on culinary culture. International law increasingly comprises a broad range of direct and indirect interactions with cultural diversity, such as international trade law, international human rights law, and cultural heritage law itself.<sup>1</sup>

The law of GIs, the form of intellectual property protection that is the main topic of this edited volume, is certainly relevant in this respect, and GIs are often casually mentioned as being potentially useful in the promotion and protection of cultural diversity.<sup>2</sup> So is the evolving law of ICH, a concept that

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<sup>1</sup> See JANET BLAKE, *INTERNATIONAL CULTURAL HERITAGE LAW* (2015); *CULTURAL DIVERSITY IN INTERNATIONAL LAW: THE EFFECTIVENESS OF THE UNESCO CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS* (Lilian Richieri Hanania ed., 2014); JINGXIA SHI, *FREE TRADE AND CULTURAL DIVERSITY IN INTERNATIONAL LAW* (2013); *CULTURAL HERITAGE, CULTURAL RIGHTS, CULTURAL DIVERSITY: NEW DEVELOPMENTS IN INTERNATIONAL LAW* (Silvia Borelli & Federico Lenzerini eds., 2012); TANIA VOON, *CULTURAL PRODUCTS AND THE WORLD TRADE ORGANIZATION* (2007).

<sup>2</sup> See Tomer Broude, *Taking “Trade and Culture” Seriously: GIs and Cultural Protection in WTO Law*, 26 *PENN. J. INT’L L.* 623 (2005) (providing some examples and critical analysis) [hereinafter Broude, *Trade and Culture*].

can overlap, and in certain circumstances may even conflict<sup>3</sup> with traditional intellectual property rights,<sup>4</sup> although in formal senses it is distinct from intellectual property. The 2003 Convention for the Safeguarding of the Intangible Cultural Heritage (CSICH), adopted under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), does not in itself establish intellectual property rights, whether individual or collective,<sup>5</sup> and indeed carefully distances itself from internationally recognized intellectual property disciplines, such as GIs.<sup>6</sup> Moreover, ICH is “not necessarily original or unique”<sup>7</sup> – hardly the makings of classical intellectual property rights. Yet like GIs, ICH also unmistakably interacts with cultural diversity – the CSICH itself goes so far as to state that ICH, with all its uncertainties, is “a mainspring of cultural diversity.”<sup>8</sup>

Similarly, both GIs and ICH have a special, though far from exclusive, affinity with culinary cultural practices. GIs are certainly assigned to various nonfood products, but are most clearly associated with agricultural products, as the ongoing debate (especially in Europe) on the extension of GI protection to nonagricultural products demonstrates.<sup>9</sup> As for ICH, the “Representative List of the Intangible Cultural Heritage of Humanity” under Article 16 of the CSICH<sup>10</sup> (the “Representative List”) and the “List of Intangible Cultural

<sup>3</sup> See, e.g., E. Wanda George, *Intangible Cultural Heritage, Ownership, Copyrights and Tourism*, 4 INT’L J. OF CULTURE, TOURISM & HOSPITALITY RES. 376 (2010) (discussing potential conflicts with copyright law).

<sup>4</sup> See LUCAS LIXINSKI, *INTANGIBLE CULTURAL HERITAGE IN INTERNATIONAL LAW* 175 (2013) (providing an extensive discussion of intellectual property tools for addressing ICH) [hereinafter LIXINSKI, *INTANGIBLE CULTURAL HERITAGE*].

<sup>5</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, October 17, 2003, 2368 U.N.T.S. 1 [hereinafter CSICH]. The CSICH does not grant property rights, although “ownership” of ICH, in a social, non-property law sense, is implicit through repeated references to State Parties, communities (indigenous communities in particular), groups, and “in some cases, individuals” as creators and bearers of ICH.

<sup>6</sup> See CSICH, art. 3: “Nothing in this Convention may be interpreted as: [...] (b) affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights . . .” *Id.*

<sup>7</sup> 2003 *Convention for the Safeguarding of the Intangible Cultural Heritage – Media Kit*, UNESCO (2014), [www.unesco.org/culture/ich/doc/src/18440-EN.pdf](http://www.unesco.org/culture/ich/doc/src/18440-EN.pdf) [hereinafter UNESCO, *Media Kit*].

<sup>8</sup> See CSICH, 2nd Preambular Recital.

<sup>9</sup> See, e.g., *Making the Most out of Europe’s Traditional Know-How: A Possible Extension of Geographical Indication Protection of the European Union to Non-Agricultural Products*, COM (2014) 469 final (July 15, 2014).

<sup>10</sup> See CSICH, art. 16(1) (“In order to ensure better visibility of the intangible cultural heritage and awareness of its significance, and to encourage dialogue which respects cultural diversity, the Committee, upon the proposal of the States Parties concerned, shall establish, keep up to date and publish a Representative List . . .”).

Heritage in Need of Urgent Safeguarding” under Article 17 of the same Convention<sup>11</sup> (the “Urgent Safeguarding List”) now include a broad variety of over 300 “elements” from all around the world, ranging from Madagascan wood-carving<sup>12</sup> to Karabakh horse-riding games.<sup>13</sup> The lion’s share of these is not related to food, but some of these elements relate, directly or indirectly, to culinary practices – food, beverage, and culinary customs can surely be “cultural,” whether in their production or consumption or their social representations of identities,<sup>14</sup> even if they are often in need of special, apologetic, justification.

Just as GIs include Champagne, Darjeeling, and Parmigiano Reggiano, inscribed ICH elements include culinary ones such as the *Mediterranean Diet*,<sup>15</sup> the *Gastronomic Meal of the French*,<sup>16</sup> and *Traditional Mexican Cuisine – Ancestral, Ongoing Community Culture, the Michoacán Paradigm*,<sup>17</sup> and *Kimjang, Making and Sharing Kimchi in the Republic of Korea*.<sup>18</sup> Thus, both GIs and ICH lie at the intersection between cultural diversity and culinary practice. In this chapter I will discuss whether GIs and the legalized mechanisms of the CSICH can contribute to the protection and promotion of cultural diversity. My partial focus is on culinary practices, but the analytical framework is not specifically tailored to them, so that the analysis and discussion can certainly be extended to other types of GIs and ICH. Generally, my view of the effectiveness of GIs and ICH in this respect is

<sup>11</sup> See *Id.*, art. 17(1) (“With a view to taking appropriate safeguarding measures, the Committee shall establish, keep up to date and publish a List of Intangible Cultural Heritage in Need of Urgent Safeguarding, and shall inscribe such heritage on the List at the request of the State Party concerned.”).

<sup>12</sup> See *Woodcrafting Knowledge of the Zafimaniry*, UNESCO, [www.unesco.org/culture/ich/en/RL/woodcrafting-knowledge-of-the-zafimaniry-00080](http://www.unesco.org/culture/ich/en/RL/woodcrafting-knowledge-of-the-zafimaniry-00080) (last visited March 21, 2016); U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, November 8, 2008, U.N. Doc. ITH/08/3.COM/CONF.203/1, [www.unesco.org/culture/ich/en/Decisions/3.COM/1](http://www.unesco.org/culture/ich/en/Decisions/3.COM/1) [hereinafter “ICSICH”].

<sup>13</sup> See *Chovqan, a Traditional Karabakh Horse-Riding Game in the Republic of Azerbaijan*, UNESCO, [www.unesco.org/culture/ich/en/USL/chovqan-a-traditional-karabakh-horse-riding-game-in-the-republic-of-azerbaijan-00905](http://www.unesco.org/culture/ich/en/USL/chovqan-a-traditional-karabakh-horse-riding-game-in-the-republic-of-azerbaijan-00905) (last visited March 21, 2016); U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, December 7, 2013, U.N. Doc. ITH/13/8.COM/Decisions, [www.unesco.org/culture/ich/en/8com](http://www.unesco.org/culture/ich/en/8com).

<sup>14</sup> See Broude, *Trade and Culture*, *supra* note 2, at 642–44. <sup>15</sup> *Id.*

<sup>16</sup> U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage, November 19, 2010, U.N. Doc. ITH/10/5.COM/CONF.202/Decisions, [www.unesco.org/culture/ich/en/5com](http://www.unesco.org/culture/ich/en/5com).

<sup>17</sup> *Id.* <sup>18</sup> *Id.*

critical, even skeptical, because their impact on cultural diversity will be uncertain and inconsistent, if not perverse.

Given the focus of this book, an exposition of GIs is not required here. However, it is necessary to dwell on the main legal and institutional elements of ICH and the CSICH, and this will be done in Section 2. In Section 3, I will discuss the relationship between the concepts of ICH and cultural diversity, taking into account the respective legal contexts of the CSICH and UNESCO cultural diversity law, primarily the 2005 Convention on the Promotion and Protection of the Diversity of Cultural Expressions (the CCD).<sup>19</sup> The section builds on a positive framework I have previously developed elsewhere<sup>20</sup> with respect to GIs as a point of reference for the purpose of critically assessing the effectiveness of legal measures ostensibly aimed at the protection and promotion of cultural diversity. Section 4 loosely applies this framework to two culinary practices inscribed as ICH: the *Mediterranean Diet*, and (as a more specific example from Asia) *Kimjang, Making and Sharing Kimchi in the Republic of Korea*. Section 5 concludes with general observations on the prospects and pitfalls of applying legal frameworks to the dynamics of cultural diversity.

## 2 INTANGIBLE CULTURAL HERITAGE AND THE CONVENTION FOR THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE: A CRITICAL PRIMER

In this section, I shall neither provide a detailed exposition of the concept of ICH nor a full commentary on the CSICH. These are already available, mainly through the work of scholars and experts who were close to the drafting process of the CSICH.<sup>21</sup> Instead, I will merely survey some fundamentals that

<sup>19</sup> UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Diversity Convention) art. 2(1), October 20, 2005 [hereinafter CCD], [www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/CLT/pdf/convention\\_text\\_og\\_civilsociety\\_en.pdf](http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/CLT/CLT/pdf/convention_text_og_civilsociety_en.pdf).

<sup>20</sup> See, e.g., Broude, *Trade and Culture*, *supra* note 2.

<sup>21</sup> See, e.g., Mohammed Bedjaoui, *The Convention for the Safeguarding of the Intangible Cultural Heritage: The Legal Framework and Universally Recognized Principles*, 56 MUSEUM INT'L 150 (2004); Toshiyuki Kono & Julia Cornett, *What is Intangible Cultural Heritage? An Analysis of the Convention for the Safeguarding of Intangible Cultural Heritage and the Requirement of Compatibility with Human Rights*, in SAFEGUARDING INTANGIBLE CULTURAL HERITAGE: CHALLENGES AND APPROACHES: A COLLECTION OF ESSAYS (Janet Blake ed., 2007); JANET BLAKE, COMMENTARY ON THE 2003 UNESCO CONVENTION ON THE SAFEGUARDING OF THE INTANGIBLE CULTURAL HERITAGE (2006); *but see*, e.g., Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. OF INT'L L. 101 (2011); and LIXINSKI, INTANGIBLE CULTURAL HERITAGE, *supra* note 4.

are necessary for an analysis of the potential impact of the CSICH on cultural diversity in culinary practices.

In the most general of terms, the CSICH reflects the understanding that significant dimensions of humanity's cultural heritage are encapsulated not in physical and inanimate (i.e., tangible) artifacts, monuments, or sites but rather in living practice and knowledge. Furthermore, the CSICH is explicitly driven by the fear that "the processes of globalization and social transformation" give rise to "grave threats of deterioration, disappearance and destruction" of ICH.<sup>22</sup>

Article 2(2) of the CSICH refers to a non-exhaustive list of five "domains" in which ICH is revealed: oral traditions and expressions (including language); performing arts; social practices, rituals, and festive events; knowledge and practices concerning nature and the universe; and traditional craftsmanship.<sup>23</sup> This very broad range of ICH manifestations is amplified by the even broader overarching definition: "Intangible Cultural Heritage" means "the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."<sup>24</sup>

Despite the best efforts of the drafters of the CSICH (or not),<sup>25</sup> these definitions raise significant problems of legal application and operationalization, if taken seriously. First, they seem exceedingly broad, with no clear outer limits. In this respect, it is not very helpful to observe that "not all human cultural activity is defined as [ICH]."<sup>26</sup> The drafters of the CSICH may have assumed that ICH is first and foremost limited to "traditional" culture, as opposed to new, contemporary, or modern cultural expressions, but this is not effectively reflected in the text,<sup>27</sup> which is ultimately very inclusive. Indeed,

<sup>22</sup> See CSICH, *supra* note 5, 2nd Preambular Recital.    <sup>23</sup> See *Id.*, art. 2(2).

<sup>24</sup> See *Id.*, art. 2(1).

<sup>25</sup> See Lucas Lixinski, *Selecting Heritage: The Interplay of Art, Politics and Identity*, 22 EUR. J. OF INT'L L. 81, 94 (2011) (noting that there was resistance among drafters toward establishing specific legal obligations of protection in the CSICH).

<sup>26</sup> See Richard Kurin, *Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal*, 56 MUSEUM INT'L 66, 69 (2004).

<sup>27</sup> See CSICH, *supra* note 5, art. 2(1). Article 2(1) does refer to ICH as being "transmitted from generation to generation," implying a requirement of some intergenerational history and tradition, and indeed most applications for inscription in the Representative List allude to such transmission. But arguably, contemporary traditions would also qualify as ICH, even "invented traditions," as elaborated by Hobsbawm. See Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION 1–14* (Eric Hobsbawm & Terence Ranger eds., 1983).

UNESCO prides itself on the inclusiveness of the CSICH.<sup>28</sup> Thus, to the extent that the CSICH establishes rights and obligations of states parties to it, the scope of application appears to be both very far-reaching and inadequately delimited.

Second, the general definition of ICH seems to be particularly woolly. Indeed, on its face, it appears to be utterly tautological and self-selecting: ICH is what someone “recognize[s] as part of their cultural heritage.”<sup>29</sup> It is not clear in what sense the word “recognize” is employed here – is it declarative or constitutive, objective or subjective, or some combination thereof? Some commentators have embraced this “self-identification” character of ICH, citing it as an indication of a significant “philosophical” rationale of the CSICH that distinguishes it from the 1972 World Heritage Convention, making ICH totally dependent upon the “subjective perspective of its creators and bearers.”<sup>30</sup> In theory, such unchecked self-selection is problematic. In practice, it is disingenuous. While it applies to ICH in general, the more robust inscription and listing processes under Articles 16 and 17 CSICH,<sup>31</sup> discussed below as the hardcore of CSICH substance, ultimately require institutional, political, non-idiosyncratic approval.

Third, in one fell swoop, tangible elements are clearly incorporated into the intangible realm of cultural heritage. Indeed, by any account, the tangible and intangible components of cultural heritage are difficult, if not impossible, to disentangle.<sup>32</sup> But the CSICH only glosses over this connection, leaving open operative questions relating to the degree of dependence of ICH on tangible components and vice versa.

Fourth, none of the constituent terms (such as “practices,” “representations,” “artefacts,” “cultural spaces,”<sup>33</sup> etc.) is defined anywhere. These are terms whose meanings are gradually being filled post hoc and ad hoc through the work of expert and/or intergovernmental bodies at UNESCO, but whose forward-looking and conduct-defining capacities are a priori limited. Indeed,

<sup>28</sup> UNESCO, *Media Kit*. <sup>29</sup> See CSICH, art. 2(1). <sup>30</sup> Lenzerini, *supra* note 21, at 108.

<sup>31</sup> See CSICH, arts. 16(2), 17(2) (prescribing that “[t]he Committee shall draw up and submit to the General Assembly for approval the criteria for the establishment, updating and publication of this Representative List”).

<sup>32</sup> See, e.g., Mounir Bouchenaki, *The Interdependency of the Tangible and Intangible Cultural Heritage*, in 14th ICOMOS General Assembly and International Symposium, *Place, Memory, Meaning: Preserving Intangible Values in Monuments and Sites*, October 27–31, 2003, <http://openarchive.icomos.org/468/>; see also CSICH, 1st Preambular Recital (referring to the “deep-seated interdependence” between the tangible and intangible cultural heritage).

<sup>33</sup> See CSICH, art. 2(1).

even the Operational Directives prepared and adopted under the CSICH do not add formal clarity in this respect.<sup>34</sup>

Fifth, the relationship between the safeguarding of ICH, on the one hand, and other potentially overriding public policy considerations, on the other hand, is not sufficiently clarified in the CSICH, to say the least. The anthropological definition of culture is broad enough to include “almost all aspects of human behavior,” including practices that violate human rights<sup>35</sup> or even Female Genital Mutilation.<sup>36</sup> The drafters of the CSICH were well aware of such potential conflicts, and attempted to embed ICH within a human rights context. Already the 1st recital of the CSICH refers to “international human rights instruments,”<sup>37</sup> alluding not only to economic, social, and cultural rights but also to civil and political rights. Article 2(1) CSICH, in its third sentence, provides that the Convention will consider ICH only if it “is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.”<sup>38</sup> As far as human rights are concerned, this clearly raises the problem of cultural relativism, and no less importantly, of cultural politics.<sup>39</sup> The phrasing of the relevant part of Article 2 CSICH is fuzzy, much less resolute than its corollary in Article 2(1) CCD, which clearly provides that no one may invoke the CCD in order “to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.”<sup>40</sup> But in any case, the potential for conflict is considerable, entering dangerous and politically sensitive waters.

The above are general definitional problems regarding the CSICH. What of its substance? The purposes of the CSICH under Article 1 include “safeguarding” ICH, “ensur[ing] respect” for ICH, “raising awareness” of the importance of ICH, and providing for international cooperation and assistance.<sup>41</sup>

<sup>34</sup> See UNESCO (2012), *for the Implementation of the Convention for the Safeguarding of the Intangible Cultural Heritage*, adopted by the General Assembly of the States Parties to the Convention at its second ordinary session (Paris, France, June 16–19, 2008), amended at its third session (Paris, France, June 22–24, 2010), at its fourth session (Paris, France, June 4–8, 2012), and its fifth session (Paris, France, June 2–4, 2014) [hereinafter UNESCO, *Operational Directives*].

<sup>35</sup> See William S. Logan, *Closing Pandora's Box: Human Rights Conundrums in Cultural Heritage Protection*, in *CULTURAL HERITAGE AND HUMAN RIGHTS* 33 (Helaine Silverman & D. Fairchild Ruggles eds. 2007) (using the Ku Klux Klan rituals as an example).

<sup>36</sup> Kurin, *supra* note 26, at 70. <sup>37</sup> CSICH, 1st Recital. <sup>38</sup> See CSICH, art. 2(1).

<sup>39</sup> Logan, *supra* note 35, at 39 (showing the most scathing critique of the political and indeed hegemonic nature of cultural heritage, which can be found in her exposition of “Authorized Heritage Discourse”); see LAURAJANE SMITH, *USES OF HERITAGE* (2006).

<sup>40</sup> CCD, *supra* note 19, art. 2. <sup>41</sup> CSICH, art. 1.

Safeguarding is perhaps the most important of these operative purposes, and is defined very broadly in Article 2(3) CSICH as “measures aimed at ensuring the viability of the [ICH],” including softer yet more technical measures such as identification, documentation, research, and education, but also harder and potentially much broader measures such as “preservation, promotion, enhancement, [and] transmission.”<sup>42</sup>

How does the CSICH translate these goals into concrete rights and obligations? At the national level (Title III, CSICH),<sup>43</sup> states parties are subject to a broad obligation to take “necessary measures to ensure the safeguarding of ICH present in [their] territory.”<sup>44</sup> These measures consist mainly of drawing up inventories, submitting periodic reports to the CSICH Committee, adopting policies for promoting ICH in society, establishing institutions, fostering research, and adopting other measures, including financial ones to this end.<sup>45</sup> States parties also endeavor to ensure education, awareness, and capacity building, all with participation of communities, groups, and where appropriate, individuals who are creators and bearers of ICH.<sup>46</sup> In short, the obligations are very general, discretionary, policy-oriented, and lacking in terms of enforceability and accountability. This is not to say that the provisions on safeguarding of ICH at the national level may not have any legal consequences whatsoever, e.g., in the justification of measures taken in provisional violation of other international obligations (such as under trade and investment agreements), but I will not address this potential here.

At the international level, under Title IV of the CSICH,<sup>47</sup> legal commitment is even less apparent. The central construct of the CSICH is the establishment of the Representative List, the Urgent Safeguarding List, and a list of programs, projects, and activities, as articulated in Article 18.<sup>48</sup> Although the drawing up of these lists constitutes the bulk of the institutional and procedural work under the CSICH (and their political highlight), it bears emphasizing that the convention itself does not appear to produce any explicit legal consequences to inscription in them. The Representative List has been established merely to “ensure better visibility,” etc., as reflected in Article 16(1) of the CSICH,<sup>49</sup> and the Urgent Safeguarding List exists only “with a view to taking appropriate safeguarding measures” (Article 17(1) CSICH),<sup>50</sup> although nothing seems to prevent states parties from taking such measures notwithstanding inscriptive status of a particular item. Again,

<sup>42</sup> *Id.*, art. 2(3). <sup>43</sup> *Id.*, arts. 11–15. <sup>44</sup> *Id.*, art. 11. <sup>45</sup> See CSICH, art. 13.

<sup>46</sup> See *Id.*, art. 15. <sup>47</sup> See *Id.*, arts. 16–18. <sup>48</sup> See *Id.*, art. 18. <sup>49</sup> See *Id.*, art. 16(1).

<sup>50</sup> See *Id.*, art. 17(1).



inclusion in the lists may have evidentiary or indirect legal implications in other normative systems, but the absence of express legal consequences in the CSICH is striking.

### 3 LAW'S UNCERTAIN IMPACT ON CULTURAL DIVERSITY: FROM INTANGIBLE CULTURAL HERITAGE TO GEOGRAPHICAL INDICATIONS AND BACK AGAIN

With these general critical comments on the CSICH as an international legal instrument in mind, what indeed is the purported relationship between ICH and cultural diversity, writ large? As already mentioned, in its 2nd preambular recital, the CSICH denotes ICH as “a mainspring of cultural diversity.”<sup>51</sup> What does this mean, at least in theory? Indeed, this very phrase might be cause for concern and confusion. In English, “mainspring” refers to the driving force of a mechanical device. Yet in the other equally authoritative language texts of the CSICH (as per Article 39),<sup>52</sup> the word employed is quite different (e.g., *Creuset* in French, *Crisol* in Spanish) – meaning “crucible” or “melting pot[.]”<sup>53</sup> Cultural diversity is surely not a mechanical device, and melting pots (indeed a culinary phrase) produce uniformity, not diversity, the very term strongly associated with assimilationist and homogenizing (even “Americanizing”) approaches to immigrant cultures.<sup>54</sup>

This suboptimal clarity in the formulation of the relationship between ICH and cultural diversity in the CSICH’s very preamble, I would suggest, is not merely textual, or (only) a matter of drafting, but rather stems from the essential dialectics and conceptual differences underlying the interlocking projects of safeguarding ICH and protecting and promoting cultural diversity. It is also a reflection of the inherent tensions between socio-anthropological conceptions of culture as fluid, dynamic, and “living” (a term which inevitably implies also the possibility of extinguishment, and “dying,” although this is rarely, if ever, acknowledged), on the one hand, and advocacy tendencies to agitate for positive, legalized protection, on the

<sup>51</sup> *Id.*, 2nd Preambular Recital.   <sup>52</sup> *Id.*, art. 39.

<sup>53</sup> It is rare, though not unheard of, for different authentic language texts of treaties to have such widely discrepant meanings. See Bradley J. Condon, *Lost in Translation: Plurilingual Interpretation of WTO Law*, 1 J. OF INT’L DISPUTE SETTLEMENT 191 (2010).

<sup>54</sup> See, e.g., Horace M. Kallen, *Democracy Versus the Melting Pot: A Study of American Nationality*, THE NATION, February 25, 1915 (critiquing cultural diversity in immigrant cultures).

other hand. It also casts more than a shadow of doubt on the very need and justification for the CSICH, and their nature, to begin with.

Having said that, and without any conviction that these tensions can or should be reconciled in an international institutional manner, I would make the following proposition regarding the structural and interpretative relationship between ICH and cultural diversity, which is consistent with both the CSICH and the CCD. Simpliciter, the CSICH at least aims to do exactly what it says it will do, namely, “safeguard”<sup>55</sup> ICH (a term that in itself encapsulates the tension between the dynamic nature of culture and the more static nature of legal protection). Thus, for example, the knowledge of following a particular culinary recipe or method – say, Tiramisu, Bresaola, or Biltong – might be an ICH “item.” However, ICH – as an abstract concept, and as a collection of particular ICH “items” – is not a goal unto itself; rather, the aim is the protection and promotion of cultural diversity. The 2nd preambular recital of the CSICH indeed refers to the dangers of the “deterioration, disappearance and destruction” of ICH, but it does so in the broader context of cultural diversity.<sup>56</sup> The traditional making of each of Tiramisu, Bresaola, and Biltong, as we know them today, may each deteriorate and disappear, as many other traditional practices have died out over the centuries. The threat to be countered is not this dynamic process of change and recreation, but the fear that “the rich cultural variety of humanity is progressively and dangerously tending towards uniformity[.]”<sup>57</sup> i.e., not the disappearance of ICH expressions as such, but the erosion of cultural diversity, as an overarching value.

If this understanding of the role of ICH in cultural diversity (including culinary aspects) indeed manifests the deeper teleology of the CSICH, how is it expressed in the operational strategy(ies) of the conventions?

One approach would be a “kitchen sink” attitude to diversity in ICH, the-more-the-merrier. Anything remotely resembling ICH (e.g., any culinary or dietary dimension) is worthy, non-judgmentally, of safeguarding and promotive of diversity. This possibility is evident, for example, in Article 7 of the 2001 UNESCO Universal Declaration on Cultural Diversity, noting that “heritage in all its forms must be preserved, enhanced and handed on to future generations . . . ,”<sup>58</sup> as well as in Article 13 of the UNESCO 2003 Main Lines of an Action Plan for the Implementation of [the Declaration], which referred to the formulation of policies and strategies for the “preservation and

<sup>55</sup> CSICH, art. 2. <sup>56</sup> *Id.*, 2nd Preambular Recital. <sup>57</sup> Lenzerini, *supra* note 21, at 103.

<sup>58</sup> See UNESCO *Universal Declaration on Cultural Diversity*, UNESCO, art. 7, <http://unesdoc.unesco.org/images/0012/001271/127162e.pdf>.

enhancement” of “notably the oral and intangible cultural heritage.”<sup>59</sup> This would amount to a *laissez-faire* approach in cultural terms, an approach that would cover anything that could fit a very broad definition of ICH, neither creating nor helpful to legal regulation based on a given set of established priorities.

In this respect, an alternative approach could be to be much more selective in deciding the relevance of ICH expressions for safeguarding because of its contribution to cultural diversity. Inclusion could thus be subject to criteria that promote policy goals, such as cultural diversity (for example, the need for “a better thematic, cultural and geographical balance” in cultural heritage).<sup>60</sup> Taken to an extreme, expressions of ICH would have to be selected for safeguarding according to predefined criteria. This appears, in fact, to be the unspoken strategy of the CSICH. Inscription in the Representative List (or Urgent Safeguarding List) reflects an understanding whereby listing (i.e., inclusion in the lists) makes a positive contribution to the safeguarding of ICH, which in turn makes a contribution to cultural diversity. Inscription in the lists therefore seems to be the crux (if not crucible) of the matter. And hence, the criteria for inscription become crucial, although they are not defined in the CSICH itself, and have instead been elaborated through expert and intergovernmental decisions and ultimately in the Operational Directives.<sup>61</sup>

Turning to the inscription criteria themselves, the first criterion merely requires that the “element” constitute ICH,<sup>62</sup> adding nothing to the Article 2 CSICH definition. The second criterion is that inscription will contribute to visibility and awareness toward ICH, a purely discretionary call.<sup>63</sup> The third criterion requires a program for protection and promotion of the element – but demands no accountability from those who would promote and preserve under such a program.<sup>64</sup> The fourth criterion requires community/group/individual support for the element’s nomination, as a possible counterweight to institutional biases, but is certainly not difficult to satisfy.<sup>65</sup> And the fifth criterion requires some sovereign commitment by the states in whose territory the ICH is present – again, not a tall order, by any measure.<sup>66</sup> These criteria

<sup>59</sup> See UNESCO, *Main Lines of an Action Plan for the Implementation of the UNESCO Declaration on Cultural Diversity*, art. 13.

<sup>60</sup> See Marie-Theres Albert, *World Heritage and Cultural Diversity: What Do they Have in Common?*, in *WORLD HERITAGE AND CULTURAL DIVERSITY* 17, 18 (Dieter Offenhäuser et al. eds., 2010).

<sup>61</sup> UNESCO, *Operational Directives*, *supra* note 34. <sup>62</sup> See *Id.*, ch. I.1: U.1.

<sup>63</sup> See *Id.*, ch. I.1: U.2. <sup>64</sup> See *Id.*, ch. I.1: U.3.

<sup>65</sup> See *Id.*, ch. I.1: U.4; see, e.g., Lixinski *supra* note 25.

<sup>66</sup> See UNESCO, *Operational Directives*, *supra* note 34, ch. I.1: U.5.

seem quite meaningless in a normative sense – perhaps especially so, when dealt with in the culinary field.

Thus, it would appear, between the inoperability of full inclusiveness, on the one hand, and the impossibility and nonpolitical correctness of substantive cultural criteria, the CSICH follows the poorest possible path, subjecting inclusion in the ICH lists to political and diplomatic decision-making, while paying some lip-service to non-sovereign community expressions of concern. The gnawing doubts remain. Can, and should, such a legal and institutional structure safeguard ICH? Can it protect and promote cultural diversity, any more than conventional intellectual property may? Does it have any real relevance to cultural expressions?

In a previous study,<sup>67</sup> I asked very similar questions with respect to the purported role of GIs in cultural diversity. This was undertaken in the particular context of GIs for food and wine products, as beneficiaries of enhanced international legal protection under the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS Agreement”),<sup>68</sup> with distinct effects on the regulation and indeed restriction of international trade.<sup>69</sup> My conclusions were unequivocal: GIs “as legal mechanisms . . . evidently do not have the independent capacity to protect local cultures . . . or to prevent the erosion of cultural diversity. Market forces inevitably induce changes in local production methods and consumption preferences, in spite of the [GIs] that should, in theory, play a role in preserving them.”<sup>70</sup> Thus, the goal of cultural diversity, in itself, cannot justify the special commercial advantages granted by GIs as intellectual property (or quasi-intellectual property) rights to certain food products. There may be other justifications, but it does not seem that the protection and promotion of cultural diversity is one of them.

Moreover, there does not appear to have emerged any countervailing logic or evidence over the last decade. In this respect, it is in fact worth clarifying and emphasizing that at no point does the argument against the utility and effectiveness of legal protections of culinary cultural diversity – whether through GIs, or the concept of ICH, for that matter – target

<sup>67</sup> Broude, *Trade and Culture*, *supra* note 2.

<sup>68</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS – RESULT OF THE URUGUAY ROUNDS vol. 31, 33 I.L.M. 81 (1994) [hereinafter TRIPS].

<sup>69</sup> In the present chapter, focused as it is on ICH and culinary practices, I will ignore the potential implications of the CSICH, for all its normative “softness,” in the arena of international trade regulation.

<sup>70</sup> Broude, *Trade and Culture*, *supra* note 2, at 678.

“a preservationist notion of cultural heritage[,]” or rely upon the drawing of “binary distinctions between tradition and innovation[.]”<sup>71</sup> To be sure, as already discussed, such static/preservationist notions do exist in both scholarly work and legal formulations, often in tension with the more fluid and dynamic concepts of culture, which I most certainly share. However, the analysis of the irrefutably immense and fundamental changes in the substantive content of (model) protected GIs (such as the wine Appellations of Origin of Chianti Classico or St. Joseph, as mere cases in point)<sup>72</sup> does not just describe the occurrence of these changes, and certainly does not decry them as such. Rather, the critique seeks to explain these changes as primarily driven by markets, local and global, and/or by regulatory capture, despite legal protection. It is these important attributes of the process of change in cultural expressions in the shadow of legal regulation that often negate deep-seated traditions and heritages of innovation and cultural evolution. Thus, the values underlying the cultural heritage and diversity discourse are not meaningfully promoted by the legal frameworks that have ostensibly been constructed around them. To belabor the point somewhat, tradition and innovation are mutually conducive, not exclusive, and cultural diversity is a value nourished by both. It is, however, less than clear – rationally and empirically – that legal frameworks, of intellectual property rights or their ilk, truly protect or promote either one or the other.

Moreover, the framework of analysis applied to the cultural impacts of GIs can also relate, *mutatis mutandis*, to the international legal “safeguarding” of ICH. I refer to three dimensions of culture relevant to GIs: the culture of production, in which the process of creating a good – the way in which it is made – endows it with “cultureness”; the culture of consumption, in which a good gains cultural value “by virtue of the context in which it is consumed”;<sup>73</sup> and the culture of identity, in which a good is somehow representative of a group’s cultural identity. To be sure, with respect to GIs, the focus of these dimensions is on tangible goods – a type of cheese, a wine from a particular region, a cut of beef. Thus, one might ask, how do they apply to ICH? It is always the intangible traditions that endow goods with cultural value: the method of production (how the cheese is made, in which conditions, from which materials), the context of consumption (the cultural preference for one type of wine over another, the ceremonial dimensions of

<sup>71</sup> Dev S. Gangjee, *GIs and Cultural Heritage*, 4 *WIPO J.* 85, 94 (2014).

<sup>72</sup> See Broude, *Trade and Culture*, *supra* note 2, at 662–78 (providing several more examples).

<sup>73</sup> *Id.*, at 640.

drinking it, and pairing it with food and social environments), and identity-related recognition (the association of a type of beef with a regional or otherwise group identity). It is these intangible dimensions that culture informs and changes over time and place, but also that markets inevitably apply pressure upon to change, become diluted, even to homogenize, regardless of culture. And it is with respect to these dimensions that we must ask whether legal protections can contribute to the safeguarding, protection, or promotion of culinary cultural diversity.

#### 4 INTANGIBLE CULTURAL HERITAGE, CULTURAL DIVERSITY, AND CULINARY PRACTICES: TWO CASE STUDIES

##### 4.1 The Mediterranean Diet

The *Mediterranean Diet* was inscribed on the Representative List in 2010,<sup>74</sup> at the nomination of Greece, Italy, Morocco, and Spain.<sup>75</sup> In 2013, the supporting parties and geographical range of the item were amended and expanded to include additional “emblematic” communities in Cyprus, Croatia, and Portugal.<sup>76</sup> There are significant differences between the nomination documents in 2010 and 2013 that are worthy of scrutiny, most notably the removal of all references to the nutritional characteristics of the diet.<sup>77</sup> The 2013 resolution defines the *Mediterranean Diet* as “the set of skills, knowledge, rituals, symbols and traditions, ranging from the landscape to the table, which in the Mediterranean basin concerns the crops, harvesting, picking, fishing, animal

<sup>74</sup> U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, November 19, 2010, U.N. Doc. ITH/10/5.COM/CONF.202/Decisions [hereinafter 5.COM, 2010].

<sup>75</sup> U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, November 2010, Nomination File No. 00394 [hereinafter UNESCO, CSICH, 5.COM].

<sup>76</sup> U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, December 2013, Nomination File No. 00884 [hereinafter UNESCO, CSICH, 8.COM].

<sup>77</sup> The nomination documents submitted in 2010 included the following definition for the Mediterranean diet: “[A] nutritional model that has remained constant over time and space, consisting mainly of olive oil, cereals, fresh or dried fruit and vegetables, a moderate amount of fish, dairy and meat, and many condiments and spices, all accompanied by wine or infusions, always respecting beliefs of each community.” See UNESCO, CSICH, 5.COM; U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, October 6, 2010, U.N. Doc. ITH/10/5.COM/CONF.202/6, 52.

husbandry, conservation, processing, cooking, and particularly sharing and consuming the cuisine[.]”<sup>78</sup>

This definition is incredibly broad, almost generic, but for its geographical delimitation.<sup>79</sup> One could substitute the word “Mediterranean” with practically any regional denomination, leaving the rest of the phrasing untouched, and we would have the makings of another equally valid element of ICH. The definition is, of course, somehow augmented by more detailed descriptions – referring, for example, to the importance of ceramic plates and glasses, then to the role of women, families, and various local festivals, as well as passing cultural references to Plutarch and Juvenal and the health and sustainability benefits of the diet, only generally referring to Ancel Keys’ seminal studies from which the very term “Mediterranean Diet” emerged.<sup>80</sup> Yet these descriptions are surprisingly paltry, given the wealth of knowledge available on Mediterranean culinary culture.<sup>81</sup> One is struck by the vagueness and all-inclusiveness of the definition of the element to be safeguarded – especially following the removal of reference to the “nutritional model” of the diet, which is its main claim to fame.

Indeed, one might wonder whether such a broadly defined culinary concept as a “diet” (or “meal,” or “cuisine”) even formally qualifies as ICH. The question is not trivial from legal perspectives. In the context of the CCD, for example, Pulkowski is of the opinion that “in the absence of an element of representation, food items and their protected GIs should not enjoy protection [as cultural expressions].”<sup>82</sup> According to this narrow view, food becomes cultural for the purposes of the CCD only if it expresses a cultural identity. Moreover, until 2008, UNESCO parties and officials displayed negative views on the possibility of inscribing culinary heritage.<sup>83</sup>

<sup>78</sup> UNESCO, CSICH, 8.COM, at 6.

<sup>79</sup> The geographical definition is in itself problematic; the Mediterranean diet (or diets) has migrated with “Mediterraneans” to distant corners of the earth, and has also been adopted outside the region due to its purported health effects. See Anne Noah & Arthur Stewart Truswell, *There are Many Mediterranean Diets*, 10 ASIA PAC. J. OF CLINICAL NUTRITION 2 (2001).

<sup>80</sup> ANCEL B. KEYS ET AL., SEVEN COUNTRIES: A MULTIVARIATE ANALYSIS OF DEATH AND CORONARY HEART DISEASE (1980); ANCEL B. KEYS & MARGARET KEYS, HOW TO EAT WELL AND STAY WELL THE MEDITERRANEAN WAY (1975).

<sup>81</sup> See, e.g., MEDITERRA 2012: THE MEDITERRANEAN DIET FOR SUSTAINABLE REGIONAL DEVELOPMENT (2012) (including bibliographies).

<sup>82</sup> DIRK PULKOWSKI, THE LAW AND POLITICS OF INTERNATIONAL REGIME CONFLICT 163 (2014).

<sup>83</sup> Morgan Figuers, *Monuments, Mountains and ... the Mediterranean Diet? Potential for UNESCO’s World Culinary Heritage Inscriptions to Positively Affect Sustainable Agriculture*, 24 COLO. NAT. RES., ENERGY AND ENVTL. L. REV. 419, 440 (2013).

However, the approach followed by the CSICH (and I would venture that also by the CCD, *contra* the above position) clearly emphasizes cultures of production and consumption, perhaps even more than identity. Culinary practices and traditions, therefore, should certainly not be excluded a priori. But in examining the formal descriptions of the *Mediterranean Diet*, one senses such a high degree of generalization that more than a shadow of doubt is cast regarding the prudence and value of this particular inscription. We have already seen the generality of the definition, but what is the *Mediterranean Diet* as a domain of ICH? In its nomination documents for the Representative List, the *Mediterranean Diet* was noted as an oral tradition and expression; a social practice, ritual, and social event; knowledge and practice concerning nature and the universe; and traditional craftsmanship<sup>84</sup> – all the enumerated ICH domains except performing arts. This lack of precision stems, to begin with, from the absence of a recognized ICH domain of culinary heritage, but it also appears to reflect an inability or perhaps unwillingness (or some combination thereof) to clearly define what it actually is that is being inscribed. Clearly, in order to expand the group of CSICH parties supporting the nomination and to avoid alienating others, definitional compromise was required; lowest common denominators were resorted to, with the resultant low level of resolution.

To be sure, the point here is not to question the validity of the claim that there is such a thing as a *Mediterranean Diet* in the cultural or nutritional senses – although some experts do not hesitate to do so,<sup>85</sup> and even some of the *Mediterranean Diet*'s main champions make clear that “despite a long list of shared foods, the Mediterranean is a plural and diverse world, and its food habits could not be otherwise[.]”<sup>86</sup> The critique here is primarily from the perspectives of legal determinacy and functional effectiveness, and relates *in*

<sup>84</sup> UNESCO, CSICH, 8.COM, *supra* note 76, at 5.

<sup>85</sup> See, e.g., Noah & Truswell, *supra* note 79 (providing an interview-based research finding that there are important differences in food habits between Mediterranean countries and at least four distinct categories of diets in the Mediterranean basin); Artemis P. Simopoulos, *The Mediterranean Diets: What Is So Special about the Diet of Greece? The Scientific Evidence*, 131 THE J. OF NUTRITION 3065 (2001) (explaining that “[t]he term ‘Mediterranean diet,’ implying that all Mediterranean people have the same diet, is a misnomer. The countries around the Mediterranean basin have different diets, religions and cultures.”)

<sup>86</sup> See Isabel González Turmo, *The Mediterranean Diet: Consumption, Cuisine and Food Habits*, in *MEDI'TERRA 2012: THE MEDITERRANEAN DIET FOR SUSTAINABLE REGIONAL DEVELOPMENT* 115 (2012) (subsequently listing no fewer than 29 “core typologies,” ranging from “cold or warm soups or broths, made with bread, oil, garlic or other spicy or sharp condiments” to “cooked or sweet-fried nuts”).



*concreto* to the previous discussion of the internal and external limits of ICH as a legal and institutional system aimed at promoting and protecting cultural diversity. At minimum, it is difficult to understand how such a vaguely and broadly defined element of ICH can serve as the basis for effective safeguarding. Indeed, in the light of the social, economic, and political sea changes that the Euro-Mediterranean regions have witnessed, even just over the last decade,<sup>87</sup> it seems either tremendously naïve or disingenuous to think that such a vaguely defined item can have any genuine safeguarding effects. Despite the commonalities between them, the inclusion of such different culinary traditions as the Moroccan, Spanish, Italian, Greek, Cypriot, Croatian, and Portuguese under the same *Mare Nostrum* umbrella at least raises the fear that these distinct cultures will indeed be thrown into a melting pot, at the risk of cultural dilution and caricaturization. Proponents of the *Mediterranean Diet* are not oblivious to the additional concern that the inscription will be commercialized and commoditized,<sup>88</sup> but as in the case of GIs, this seems quite likely to happen, whether with respect to products or to food tourism.<sup>89</sup> How this will affect the safeguarding of ICH and the promotion and protection of cultural diversity is impossible to predict.

What is clearer, however, is that the advent of the *Mediterranean Diet* – in 2010, but even more so with its amendments in 2013 – is a child of the new “culinary diplomacy” or “gastrodiplomacy,”<sup>90</sup> reflecting in high relief the fears of both the politicization and the expert reductionism of ICH – with little to show for an effective protection and promotion of cultural diversity.

<sup>87</sup> See Senén Florensa & Xavier Aragall, *Mutations in Mediterranean Societies*, in *MEDITERRA 2012: THE MEDITERRANEAN DIET FOR SUSTAINABLE REGIONAL DEVELOPMENT* 91 (2012), for an excellent big-picture review of social trends (or “mutations” as they call them), some associated with “globalization” others not: changes in values, new lifestyles, religiosity vs. secularization, increased tourism and emigration, and intra-society demographic transitions.

<sup>88</sup> See González Turmo, *supra* note 86, at 115 (noting that “[t]his nomination cannot stand as a mere brandname that can be attached to food products, events and publications”).

<sup>89</sup> See Ricardo Mazátlán Páramo, *Gastronomic Heritage and Cultural Tourism: An Exploration of the Notion of Risk in Traditional Mexican Food and the Gastronomic System*, 6 *ESSEX GRADUATE J. OF SOCIOLOGY* (2006) (discussing the potentially negative impacts of tourism on safeguarding of culinary cultural heritage, in the context of traditional Mexican food).

<sup>90</sup> See Sam Chapple-Sokol, *Culinary Diplomacy: Breaking Bread to Win Hearts and Minds*, 8 *THE HAGUE J. OF DIPL.* 161 (2013) (exploring the use of foods in diplomacy and international politics); Juyan Zhang, *The Food of the Worlds: Mapping and Comparing Gastrodiplomacy Campaigns*, 9 *INT’L J. OF COMMC’N* 568 (2015) (comparing and evaluating state campaigns to market national foods internationally, with specific reference to Korean Kimchi, discussed in section IV(b), *infra*).

#### 4.2 *Kimjang, Making and Sharing Kimchi in the Republic of Korea*

The problems noted above with regard to the ICH inscription of the *Mediterranean Diet* as far as the protection and promotion of cultural diversity are concerned may be in significant part attributed to the highly, indeed overgeneralized and diluted nature of the inscription itself. What, then, of more specific and specialized culinary inscriptions that address particular foods? *Kimjang, Making and Sharing Kimchi in the Republic of Korea* is a noteworthy example. It was inscribed on the Representative List in 2013,<sup>91</sup> at the nomination of the Republic of Korea (South Korea).<sup>92</sup> Kimchi, as a distinct type of food, is defined (indeed, much more specifically than the *Mediterranean Diet*) as “Korean-style<sup>93</sup> preserved vegetables seasoned with local spices and fermented seafood.”<sup>94</sup> Notably, the inscribed item reflects both a culture of production (the making of Kimchi) and a culture of consumption (its sharing). Kimchi serves as an omnipresent side-dish in Korean cuisine, and the Nomination File expounds on the long-lasting and pervasive tradition of making Kimchi.<sup>95</sup>

Beyond consumption and production, the ICH item of *Kimjang*, the traditional making of Kimchi, claims to reflect a culture of identity that is much more pronounced than the *Mediterranean Diet*. In Korean eyes, Kimchi is utterly Korean, reflective of a constructed “national spirit.” The typical Korean *Kimjang* narrative refers to the geographical seclusion of the Korean peninsula and evokes its long winters and harsh terrain, its twentieth-century poverty, its reliance on the fruit of the sea, and its people’s resilience.<sup>96</sup> National pride in

<sup>91</sup> U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, December 7, 2013, U.N. Doc. ITH/13/8.COM/Decisions [hereinafter 8. COM, 2013].

<sup>92</sup> U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, December 2013, Nomination File No. 00881 [hereinafter Nomination File].

<sup>93</sup> The qualification *Korean-style* is important. On the one hand, it excludes foods that are not produced in a Korean fashion (as set out in more detail in the Nomination File; *see Id.*). On the other hand, while the inscription relates to *Kimjang* in the Republic of Korea, the qualification recognizes the practice of *Kimjang* outside of South Korea, such as by Korean diasporas; on the importance of kimchi in Korean ethnic communities in Germany, *see* Gin-Young Song, *Kimchi – Geschmack und Migration: Zur Nahrungskultur von Koreanern in Deutschland* (Studien und Materialien des Ludwig-Uhland-Instituts der Universität Tübingen, 2012).

<sup>94</sup> Nomination File, *supra* note 92, at 3. <sup>95</sup> *Id.*, at 3–4.

<sup>96</sup> *See* Suk-Heung Oh, Kye Won Park, James W. Daily III & Young-Eun Lee, *Preserving the Legacy of Healthy Korean Food*, 17 J. OF MEDICINAL FOOD 1 (2014).

the purported uniqueness of Kimchi and its effects has even led to the establishment of a governmental “World Institute of Kimchi” that presents an ethos whereby “Kimchi is the soul of Korean cuisine.”<sup>97</sup> Outsiders acknowledge Kimchi as “the nearest thing to a culinary national treasure[.]”<sup>98</sup> And there are other talking points, relating to society, health, and gender. Traditional Kimchi-making is praised as “familial and emotionally resonant[.]”<sup>99</sup> Moreover, Kimchi has been associated with positive health effects, including the relative absence of obesity among Koreans,<sup>100</sup> although causality in this respect is uncertain. In social terms we are told that “[A]ll Koreans are [thus] part of one large [K]imjang community, which transcends regional and socio-economic boundaries within Korean society[.]”<sup>101</sup> National pride in Kimchi and its making has gone a long way – indeed as far as outer space.<sup>102</sup> Notably, in the ICH Nomination File, South Korea only applied two ICH domains (“social practices,” etc., and “practices concerning nature”) – leaving out “traditional craftsmanship” – thus, perhaps, emphasizing the social aspects of *Kimjang* rather than the specificities of traditional production. Driving home the importance of *Kimjang* in Korean society, the Nomination File cites a survey according to which “95.7 percent of Koreans reported regularly eating homemade kimchi either prepared within their households, or supplied by other family members or acquaintances. Only 4.3 percent acknowledged purchasing factory-made kimchi[.]”<sup>103</sup>

<sup>97</sup> See *World Institute of Kimchi as Leading Global Institute of Fermented Foods*, 8 BIOTECHNOLOGY J. 759, 760 (2013).

<sup>98</sup> See *The Kimchi Wars*, THE ECONOMIST, November 17, 2005.

<sup>99</sup> See Laurel Kendall, *Introduction: Material Modernity, Consumable Tradition*, in CONSUMING KOREAN TRADITION IN EARLY AND LATE MODERNITY: COMMODIFICATION, TOURISM, AND PERFORMANCE 14 (Laurel Kendall ed., 2010) [hereinafter Kendall, CONSUMING KOREAN TRADITION] (referring to Kyung-Koo Hang, *The “Kimchi Wars” in Globalizing East Asia: Consuming Class, Gender, Health, and National Identity*, in Kendall, CONSUMING KOREAN TRADITION, at 149).

<sup>100</sup> See Oh et al. *supra* note 96; see Kun-Young Park, Ji-Kang Jeong, Young-Eun Lee & James W. Daily III, *Health Benefits of Kimchi (Korean Fermented Vegetables) as a Probiotic Food*, 17 J. OF MEDICINAL FOOD 6 (2014); Meizi Cui, Hee-Young Kim, Kyung Hee Lee, Ji-Kang Jeong, Ji-Hee Hwang, Kyu-Young Yeo, Byung-Hee Ryu, Jung-Ho Choi & Kun-Young Park, *Antiobesity Effects of Kimchi in Diet-Induced Obese Mice*, 2 J. OF ETHNIC FOODS 137 (2015).

<sup>101</sup> Nomination File, *supra* note 92, at 2.

<sup>102</sup> See Choe Sang-Hun, *Kimchi Goes to Space, along with First Korean Astronaut*, NEW YORK TIMES (February 22, 2008), [www.nytimes.com/2008/02/22/world/asia/22iht-kimchi.1.10302283.html?\\_r=0](http://www.nytimes.com/2008/02/22/world/asia/22iht-kimchi.1.10302283.html?_r=0).

<sup>103</sup> Nomination File *supra* note 92, at 8.

This is all very impressive from social, cultural, and culinary perspectives, and on the record of these facts there should be little doubt that *Kimjang* is indeed worthy of ICH inscription. More worryingly, however, there is also little doubt that traditional kimchi-making is under threat and in need of safeguarding. In fact, the Nomination File belies the current crisis of Korean kimchi, which is characterized by significantly reduced consumption,<sup>104</sup> and a huge rise in the importation of commercially produced kimchi made in China.<sup>105</sup> The survey data cited in the Nomination File<sup>106</sup> do not take into account the large amounts of kimchi eaten in restaurants, which is often Chinese industrial kimchi. Whereas the Nomination File cites a 2011 study by the Korea Rural Economic Institute (KREI), according to which only 6.8 percent of kimchi consumed in Korea is commercially produced,<sup>107</sup> more recent data from the World Kimchi Institute suggest that Chinese commercially produced kimchi alone accounts for as much as 13 percent of national consumption.<sup>108</sup> Moreover, the KREI itself suggests a much higher proportion of industrial kimchi in overall consumption, both at the Korean household level and in the catering and restaurant industry (including governmental and military).<sup>109</sup> This is borne out by earlier studies as well.<sup>110</sup>

<sup>104</sup> “ ‘Domestic consumption has dropped dramatically’ Why? People are eating out more, are eating less salty foods, and have developed a taste for Western foods. ‘[P]eople don’t tend to eat kimchi with spaghetti.’ ” See Lucy Williamson, *Kimchi: South Korea’s Efforts to Boost Its National Dish*, BBC NEWS (February 4, 2014), [www.bbc.com/news/world-asia-25840493?ocid=socialflow\\_twitter](http://www.bbc.com/news/world-asia-25840493?ocid=socialflow_twitter). According to one source, kimchi consumption in Korea has dropped over the last decade from 100 grams a day (per person) to only 60 grams. See Jonah M. Kessel, *Preserving Korea’s Kimchi*, NEW YORK TIMES (July 29, 2015), [www.nytimes.com/video/business/100000003736899/kimchi-identity-crisis.html?action=click&type=vhs&version=vhs-heading&module=vhs&region=title-area](http://www.nytimes.com/video/business/100000003736899/kimchi-identity-crisis.html?action=click&type=vhs&version=vhs-heading&module=vhs&region=title-area).

<sup>105</sup> Alexandra Stevenson, *Uncertain Trade Path for South Korea’s Kimchi*, NEW YORK TIMES (July 29, 2015), [www.nytimes.com/2015/07/30/business/international/chinese-trade-rules-put-south-koreas-kimchi-industry-in-a-pickle.html](http://www.nytimes.com/2015/07/30/business/international/chinese-trade-rules-put-south-koreas-kimchi-industry-in-a-pickle.html).

<sup>106</sup> Nomination File, *supra* note 92. <sup>107</sup> *Id.*

<sup>108</sup> See Gwynn Guilford, *The Kimchi War between South Korea and China is Getting Extra Spicy*, QUARTZ (February 5, 2014), <http://qz.com/173722/the-kimchi-war-between-south-korea-and-china-is-getting-extra-spicy/>. In financial terms, Chinese imports constitute about 5 percent of the Korean market for kimchi, indicating the relatively low cost, and the wholesale nature of the market for Chinese imports. See Yusun Lee, *Kimchi – No Longer Solely Korea’s*, 51 FIN. & DEV. 32 (2014).

<sup>109</sup> See Yong-Sun Lee et al., *Survey and Research on the Consumption of Kimchi by Households and Foodservice Industry*, Korea Rural Economic Institute (December 30, 2011), [http://library.krei.re.kr/dl\\_images/001/034/C2011\\_50.pdf](http://library.krei.re.kr/dl_images/001/034/C2011_50.pdf).

<sup>110</sup> See Kun-Young Park & Hong-Sik Cheigh, *Kimchi*, in HANDBOOK OF FOOD AND BEVERAGE FERMENTATION TECHNOLOGY 714, 747 (Y.H. Hui et al., eds., 2005) (referring to data from 1997 showing that 27.1 percent of Korean kimchi consumption was sourced from commercial production).

These trends and their influence on *Kimjang* raise fears relating to erosion of cultural diversity. In this chapter, my concern, however, is with the effectiveness of international legal measures, such as GIs and ICH, that purport to directly protect and promote cultural diversity. More specifically, the question is whether from a legal perspective the ICH inscription or anything within it has the potential to safeguard traditional *Kimjang* in the face of commercial pressures and political interests abound with respect to kimchi.

In addressing this question, it is important to first recognize that the ICH inscription is not kimchi's first engagement with international law, and that South Korea has in fact been employing international legal measures to influence kimchi's domestic and international position for the last two decades, in ways that are more related to trade interests than to cultural diversity. In the second half of the 1990s, South Korea became troubled by the rising popularity of a Japanese, nontraditional version of Kimchi (called "Kimuchi," as a pronunciation of kimchi), which typically does not involve fermentation processes.<sup>111</sup> This led South Korea to campaign for the adoption of an international *Codex Alimentarius* standard for kimchi, which was ultimately approved in 2001.<sup>112</sup> The *Codex* standard emphasizes that kimchi must be fermented. It has, however, another interesting qualification that is far less traditional. Under the *Codex* standard, kimchi must be based on Chinese cabbage.<sup>113</sup> Cabbage kimchi (*paechu*) is indeed probably the most popular type of kimchi in South Korea, but it is rivaled by Daikon (*mu*) radish kimchi (*Kkakdugi*); moreover, kimchi, as a cultural culinary product, is highly diverse, with hundreds of types of kimchi utilizing many different basic ingredients, with numerous regional (Korean) styles.<sup>114</sup> Yet the *Codex Alimentarius* promoted by South Korea requires, as an exclusive basis, Chinese cabbage. The *Kimjang* Nomination File also refers many times to

<sup>111</sup> See Calvin Sims, *Cabbage Is Cabbage? Not to Kimchi Lovers; Koreans Take Issue With a Rendition Of Their National Dish Made in Japan*, THE NEW YORK TIMES (February 5, 2000), [www.nytimes.com/2000/02/05/business/cabbage-cabbage-not-kimchi-lovers-koreans-take-issue-with-rendition-their.html?pagewanted=all](http://www.nytimes.com/2000/02/05/business/cabbage-cabbage-not-kimchi-lovers-koreans-take-issue-with-rendition-their.html?pagewanted=all). The Korea/Japan "kimchi/kimuchi" tension apparently arose from a Japanese proposal to designate kimuchi an official food of the 1996 Atlanta Olympics. See Agence France-Presse, *S.Korea, Japan in Struggle for Sovereignty over Pickled Cabbage* (March 16, 2000).

<sup>112</sup> See *Codex Standard for Kimchi* (Codex Stan 223–2001) (2001).

<sup>113</sup> *Id.*; see *Codex*, defining kimchi as the product "prepared from varieties of Chinese cabbage, *Brassica pekinensis* Rupr."

<sup>114</sup> See Mei Chin, *The Art of Kimchi*, SAVEUR (October 14, 2009). This principle is confirmed by the *Kimjang* Nomination File itself. See Nomination File *supra* note 92.

cabbage.<sup>115</sup> Although the Nomination File, as already noted, is much more particular and culturally sensitive than the superficiality of the *Mediterranean Diet*, a similar issue arises here. Can any legal, formal instrument, standard, item, capture the full richness of ICH without reducing and degrading it?

Furthermore, a relevant factor in understanding this incongruity is, perhaps, that Chinese cabbage is the predominant basis for *industrial* kimchi, and that South Korea is among the world's top five producers of Chinese cabbage, with the highest per capita production among the major producers.<sup>116</sup> South Korea also pursues simple trade policies to protect Chinese cabbage production, such as high tariffs and subsidies, within its generally protectionist agricultural policy. This clearly implicates economic and commercial interests, in this case perversely at the expense of cultural and culinary diversity. Protection has its cultural costs, of course – there have indeed been situations in which shortages on cabbage supply have harmed traditional *Kimjang*.<sup>117</sup>

South Korea has also had recourse to international law to protect its international export and import kimchi trade interests vis-à-vis China,<sup>118</sup> and this has predominantly related to industrial, wholesale kimchi.<sup>119</sup> Similarly, South Korea has attempted to promote legal protection through a very broad GI listing of “Korean Kimchi” in at least one bilateral trade agreement (with Chile),<sup>120</sup> with no notable effect. “Changnyeong Onion” – onions used in some localized kimchi-making, coming from a particular locale in South Korea – has reportedly been listed as a GI in South Korea, and recognized as a GI under the Korea-EU Association Agreement.<sup>121</sup>

<sup>115</sup> Nomination File *supra* note 92.

<sup>116</sup> See Food and Agricultural Organization of the United Nations statistical database, <http://faostat3.fao.org/home/E>.

<sup>117</sup> See Mark McDonald, *Rising Cost of Kimchi Alarms Koreans*, THE NEW YORK TIMES (October 14, 2010), [www.nytimes.com/2010/10/15/world/asia/15kimchi.html](http://www.nytimes.com/2010/10/15/world/asia/15kimchi.html).

<sup>118</sup> Both China and South Korea imposed restrictions on imports of kimchi having found parasite eggs in each other's kimchi products. See Scott Snyder & See-Won Byun, *China-ROK Disputes and Implications for Managing Security Relations*, 5 KOR. ECO. INST. – ACAD. PAPER SERIES (2010).

<sup>119</sup> See *The Kimchi Wars: South Korea and China Duel over Pickled Cabbage*, THE ECONOMIST (November 17, 2005).

<sup>120</sup> See *Protection of GIs in the Republic of Korea*, Italian Intellectual Property Rights DESK, 2010; Annex 16.4.3, *Free Trade Agreement between the Republic of Korea and the Republic of Chile*, signed February 15, 2003, entered into force April 1, 2004.

<sup>121</sup> See Annex 10-A, Part B, *Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part*, entered into force July 1, 2011.

Against this backdrop, both the raw economic interests involved and the various international legal experiences and attempts, it is extremely difficult to seriously envision how ICH inscription would protect or promote traditional *Kimjang*. The only significant measures the inscription refers to are entirely domestically South Korean, and not contingent on the CSICH or on ICH inscription – including subsidized public festivals, school programs, agricultural land allocations in urban areas, research programs, financial support, and more.<sup>122</sup> Indeed, as evident from the inscription itself, these have all existed in South Korea well before inscription. Moreover, not all these domestic efforts are focused on traditional *Kimjang*. For example, the World Institute of Kimchi is mainly engaged in research and development of industrial kimchi products, with a view to exports and adjusting the product to foreign market preferences: “[t]he institute’s goal is to develop the domestic kimchi-making industry into the country’s strategic export market[.]”<sup>123</sup>

For good measure, a recent development in UNESCO itself is indicative of the risks of politicization of legalized cultural heritage also in culinary fields. Only two years after the nomination of *Kimjang* by South Korea, in 2015 the Democratic People’s Republic of Korea (North Korea) countered with a nomination of its own, the *Tradition of Kimchi-Making*.<sup>124</sup> At this point in time, it is unclear what the motivation of North Korea is, and whether this competing nomination will trigger debates about high politics, national prestige, cultural “authenticity,” or trade.<sup>125</sup> It does, however, demonstrate again that the politicization of culinary culture in the institutional and softly legalized setting of the CSICH does not necessarily hold cultural diversity in its sights. Interestingly, the North Korean Nomination File does not mention cabbage even once.

<sup>122</sup> Nomination File *supra* note 92, at 6–9.

<sup>123</sup> See *World Institute of Kimchi: Finding the Essence of Kimchi*, KOREA.NET (April 5, 2010) [www.korea.net/NewsFocus/Society/view?articleId=80769](http://www.korea.net/NewsFocus/Society/view?articleId=80769) (quoting Mr. Park Wan-soo, Director of the Institute).

<sup>124</sup> U.N. Educ., Sci., & Cultural Org., Convention for the Safeguarding of the Intangible Cultural Heritage, Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage, December 2015, U.N. Doc. ITH/15/10.COM/Decisions, Nomination File No. 01063.

<sup>125</sup> See Lucas Lixinski, *A Tale of Two Heritages: Claims of Ownership over Intangible Cultural Heritage and the Myth of “Authenticity,”* 11 *TRANSNAT’L DIS. MGMT.* 1 (2014) (providing a critical assessment of the concept of “authenticity” in cultural heritage, relating to not dissimilar circumstances (differences between China and South Korea over the “Dragon Boat Festival”). Lixinski concludes that authenticity is “a socially, historically and culturally contingent concept that should have no place in an international heritage system that seeks to enhance cross-cultural dialogue and promote the ‘common heritage of mankind’”).

## 5 CONCLUSION

The prospects of “safeguarding” cultural items, and the protection and promotion of cultural diversity, are extremely thorny, not only in legal terms, but especially in their political, social, and economic dimensions. There is more than a modicum of hubris – or naïveté – in the claims that international legal constructs such as GIs and ICH can have any structured normative and beneficial effects in this respect. The advent of culinary GIs and ICH, such as in the form of the inscriptions of the *Mediterranean Diet* and *Kimjang*, pushes the envelope and tests the internal and external boundaries of these legal concepts and their interactions with cultural diversity.

In this chapter, I have tried to show mainly that despite mounds of sociological, anthropological, and ethnographical knowledge and wisdom relating to culinary traditions, there appears to be little systematic understanding – or justification – for international legal intervention for the sake of cultural diversity in these fields. This has been borne out in the intellectual property area of GIs, and by analogy, extension, and specific analysis seems to apply to the soft, quasi-intellectual property concept of ICH. Indeed, as I have argued, the scope for political and commercial capture, as well as inconsistent, if not potentially negative or at least incoherent, effects on cultural diversity is significant, probably more significant than the benefits that such protection aims to achieve. In this context, the inscription of the *Mediterranean Diet*, as an early harvest of culinary ICH – and in that respect a genuine achievement for its proponents – seems to be a particularly problematic item, due to its generality and vagueness. The inscription of *Kimjang*, much more justified on its own cultural merits, is nevertheless problematic as well, given the complex of economic and political considerations relating to kimchi production that ultimately have nothing to do with culture. As with GIs, ICH stakeholders should avoid rushing toward new and additional inscriptions of culinary ICH, and carefully consider the definition and scope of what it is they would wish for.