

## Marks Indicating Conditions of Origin in Rights-Based Sustainable Development

Nicole Aylwin and Rosemary J. Coombe

Forthcoming in Peer Zumbansen & Ruth Buchanan, eds., *Human Rights, Development and Restorative Justice: An Osgoode Reader* (Oxford: Hart Publishing, 2012).

### 1. Introduction

On September 3, 2010 the Registrar of Geographical Indications in India announced that the designation of Sandur Lambani had been granted the status of a geographical indication (GI), a form of intellectual property right (IPR) that recognizes that a good has a quality, reputation, or characteristic that is attributable to its geographical origin. The mark would attach to goods involving a unique form of traditional embroidery, distinctive by virtue of the darning, cross-stitching, mirror work and natural dyeing and printing techniques developed over many years by Lambani craftswomen. Recognizing the economic value that traditionally-made products may have in global specialty markets, Sandur Kushala Kala Kendra, a non-governmental organization (NGO), and the Karnataka State Handicrafts Development Corporation, worked with and on behalf of all 300 craftswoman of the Lambani tribe to secure GI protection for their embroidery, ensuring that they alone could market and advertise this unique traditional product under the name “Sandur Lambani”.<sup>1</sup>

These craftswomen are not alone. Sandur Lambani embroidery joins a growing group of traditional Indian products such as Darjeeling Tea, Mysore and Kancheerpuram silk that already enjoy GI protection. Writing in 2006 about a recent visit to India, legal scholar Madhavi Sunder noted that “GI fever” had overtaken India’s rural handicraft producers; in her own words, “Not

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<sup>1</sup> See, “Sandur Lambani embroidery gets GI tag,” *The Hindu*, September 30, 2010. Available at: <http://www.hindu.com/2010/09/30/stories/2010093051390500.htm>. (Last visited, November 24, 2010).

even the makers of the famous laddus in Tirupati, who prepare these sweets for worshippers to offer to God in this popular Hindu pilgrimage site, have been immune to the frenzy.”<sup>2</sup>

The intellectual property (IP) “frenzy” in India is indicative of a larger trend in developing countries. As these countries attempt to meet the demands of the new global economy, they are also asked to find new ways of combating poverty while simultaneously protecting their unique traditional knowledge and culture. Increasingly, intellectual property has been called on to serve these global development needs.<sup>3</sup> Intellectual property rights (IPRs) have simultaneously become important sources of capital accumulation and the subjects of intense controversy in the last two decades as their range, scope and length have increased, as evidenced by the pressure put on the World Intellectual Property Organization (WIPO) to embark upon a “development agenda”.<sup>4</sup> Efforts to make IP better serve the needs of the world’s more marginalised and vulnerable populations are often expressed in the vocabulary of international human rights norms. There is now a lively debate about the relationship between IP and human rights.<sup>5</sup> Moreover, academics and activists protesting the strength and reach of corporately-held

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<sup>2</sup> M Sunder, ‘IP3’ (2006) 59 *Stanford Law Review* 44.

<sup>3</sup> CIPR, *Integrating Intellectual Property Rights and Development Policy: Report of the Commission on Intellectual Property Rights*. London: Commission on Intellectual Property Rights, available at [www.iprcommission.org](http://www.iprcommission.org)

<sup>4</sup> N Netanel (ed), *The Development Agenda: Global Intellectual Property and Developing Countries* (New York, Oxford University Press, 2008); D Gervais, *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS Plus Era* (New York, Oxford University Press, 2007); C May, *The World Intellectual Property Organization: Resurgence and the Development Agenda* (London, Routledge, 2007), For an overview and assessment of this and other development agendas pertaining to IP recently promoted in various international fora, see P Yu, ‘A Tale of Two Development Agendas’ (2009) 35 *Ohio Northern University Law Review* 465.

<sup>5</sup> See for example AEL Brown, ‘Access to essential technologies: The role of the interface between intellectual property, competition and human rights’ (2010) 24.1 *International Review of Law, Computers and Technology* 51; AR Chapman, ‘The Human Rights Implications of Intellectual Property Protection’ (2002) 5 *Journal of International Economic Law* 861; RJ Coombe, ‘Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity,’ (1998) 6.1 *Indiana Journal of Global Legal Studies* 59, the essays in W Grosheide (ed), *Intellectual Property and Human Rights: A Paradox* (Cheltenham: Edward Elgar Press, 2010) and in M Sinjela (ed), *Human Rights and Intellectual Property Right: Tensions and Convergences* (Leiden: Martinus Nijhoff 2007).

IPRs more generally, now tend to frame their opposition in terms of countervailing rights such as those of consumers, patients, communities, farmers, indigenous peoples and users of cultural goods more generally.<sup>6</sup>

The intersection of IPRs with development and human rights suggests that IPRs are no longer regarded merely as tools to solve economic public goods problems and advance capitalist accumulation. Indeed, they are implicated and deployed in agendas as seemingly unrelated as identity politics, rural development, ethical consumption practices, the preservation of biological and cultural diversity, and indigenous self-determination. For example, as the tendency to treat all cultural forms as merely ‘information’ emerges as a social ethos, IPRs are employed (and rhetorically deployed) by indigenous groups to prevent the exploitation of their traditional knowledge, to protect the cultural and economic value of their knowledge, and to affirm the rights of their community to control their own cultural resources.<sup>7</sup>

Under conditions of globalization, the social justice norms of recognition, redistribution and respect for human dignity are now entailed in the discussion of IPRs’ legitimacy in the extended social domains in which IPRs now figure. We take no position on the larger issue of

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<sup>6</sup> See for example, C Borowiak, ‘Farmers’ Rights: IP Regimes and the Struggle over Seeds’ (2004) 32 *Politics & Society* 511; Y Chang, ‘Who should own access rights? A game-theoretical approach to striking the optimal balance in the debate over digital rights management’ (2007) 15.4 *Artificial Intelligence and Law* 323; P Cullet, ‘Patents and medicines: the relationship between TRIPs and the Human Right to Health’ (2003) 79.1 *International Affairs* 139; MG Hossain, ‘The Protection of Community Rights and Plant Varieties: The Experience of Bangladesh’ issue paper presented as part of an ICTSD Regional Dialogue on Asia, 18-21 April available at <http://www.ictsd.org>; P Jaszi, ‘Rights in Basic Information’ in R Melendez-Ortiz and P Roffe (eds), *Intellectual Property and Sustainable Development: Development Agendas in a Changing World* (Cheltenham, UK: Edward Elgar, 2009), 5-20; P Kameri-Mbote, ‘Community, Farmers’ and Breeders’ Rights in Africa: Towards a Legal Framework for *Sui Generis* Legislation’ (2003) 1 *University of Nairobi Law Journal* 1; P Kameri-Mbote and J Otieno-Odek, ‘Genetic Use Restriction Technologies and Sustainable Development’ in Melendez-Ortiz and Roffe, 209-234; M J Madison, ‘Rights of Access and the Shape of the Internet,’ (2003) 44 *British Columbia Law Review* 433; C Lombard and RRB Leakey, ‘Protecting the rights of farmers and communities while securing long term market access for producers of non-timber forest products: Experience in Southern Africa’ (2010) 19.3 *Forests Trees and Livelihood* 235-249; N Ndlovu, ‘Access to rock art sites: A right or a qualification?’ (2009) 64.189 *South African Archaeological Bulletin* 61.

<sup>7</sup> R Coombe & N Aylwin, Rethinking Cultural Heritage Ethics Using Human Rights Norms, (forthcoming) in Coombe, Wershler & Zeilinger (eds.), *Dynamic Fair Dealing: Creating Canadian Culture Online*.

whether IPRs should be considered human rights, generally.<sup>8</sup> Nonetheless, it seems clear that IP is one means by which societies have historically attempted to protect and safeguard the *cultural* rights found in Article 15 of the International Covenant on Economic, Social and Cultural Rights. Culture, we will show, is increasingly regarded as a development resource, a marker of social cohesion, evidence of social capital, the basis for investing in rural development, and a means to create symbolic distinction in global markets.<sup>9</sup> As cultural rights and cultural resources assume new significance in international development arenas, we argue, IPRs will be shaped to meet these objectives.

In this chapter we ask to what extent rights-based sustainable development objectives that capitalize upon cultural resources may be realized through the use of “marks indicating conditions of origin” (MICO for short). We suggest that the expansion of this area of IP in developing countries cannot be appropriately dismissed merely as another instance of IP expansionism; instead, its legitimacy needs to be evaluated in terms of the qualities of empowerment, governance, and the sustainability of local livelihood improvements MICO initiatives enable. In short, we argue that rights-based sustainable development indicia provide promising ways to evaluate MICO initiatives and that further promotion of MICOs for

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<sup>8</sup> For analysis see P Cullet, ‘Human rights and intellectual property protection in the TRIPS Era,’ (2007) 29.2 *Human Rights Quarterly* 403; P Yu, ‘Reconceptualizing Intellectual Property Interests in a Human Rights Framework’ (2007) 40 *UC Davis Law Review* 1039 and LR Helfer, ‘Toward A Human Rights Framework for Intellectual Property’ (2007) 40 *UC Davis Law Review* 971 as well as sources cited in note 2.

<sup>9</sup> See for example, R. Farhat, ‘Neotribal entrepreneurialism and the commodification of biodiversity: WIPO's displacement of development for private property rights’ (2008) 15.2 *Review of International Political Economy*, 206; L Han, ‘Cultural products, copyright protection and trade rules’ (2009) 4.2 *Frontiers of Law in China* 196; GC Pigliasco, ‘We branded ourselves long ago: Intangible cultural property and commodification of fujian firewalking’ (2010) 80.2 *Oceania* 161; AB Russell, ‘Using Geographical Indication to Protect Artisanal Works in Developing Countries: Lessons from a Banana Republic’s Misnomered Hat’ (2010) 19 *Transnational Law & Contemporary Problems* 705 and AK Sanders, ‘Incentives for the protection of Cultural Expression: Art, Trade and Geographical Indications’ (2010) 13 *The Journal of World Intellectual Property* 81;

development demands a commitment to rights-based criteria if it is to avoid reproducing old forms of privilege or perpetuating new forms of injustice.

We will first explore the conditions under which IPRs and development have become interrelated, the reasons that this interrelationship has put IPRs and their exercise into a rights-based normative framework, and the implications that this has for the future of IP policy and politics. We then explore the norm of sustainability that has become central to development theory and practice and its implications for the way we evaluate the successful use of IPRs in development practice. This leads us to an exploration of the increasing importance of cultural resources in sustainable development practices and the need to configure IP to value heritage resources and meet collective needs and aspirations. MICOs are then explored in terms of the qualities they have which make them appear promising for sustainable development, before we examine a few MICO-based endeavors to illustrate how these might be evaluated using rights-based indicators. Finally, we conclude on an optimistic but cautionary note, suggesting the great challenges that lie ahead if MICOs are to secure the promise they seem to offer for community sustainable development based upon cultural resources while fulfilling human rights norms in the process of securing improvements in livelihood.

## **2. Intellectual Property and Rights-Based Development**

Concerns about the negative consequences that might flow from higher levels of international IP protection and stricter IP enforcement motivated a group of developing countries to put forward proposals in support of a WIPO Development Agenda in 2004.<sup>10</sup> The proposals

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<sup>10</sup> This should be understood as a reminder rather than a new initiative. When WIPO became a UN agency in 1974 it bound itself to engage in measures to accelerate economic, social and cultural development. As a matter of public international law it is also bound to act in a fashion that enables member states to meet their international obligations.

sought to ensure that international IP policy took development objectives into account and was in compliance with state obligations, including those held under human rights treaties.<sup>11</sup> As a result of such proposals WIPO now has a strong development agenda and has a number of initiatives that corresponded with the UN Millennium Development Goals.<sup>12</sup> Ongoing efforts to incorporate development objectives at WIPO have also entailed more consideration of human rights, because development practice and theory have become human rights have been used to develop measurable standards for assessing development projects. Development is no longer understood merely as an economic process and human rights are no longer viewed exclusively as political objectives. The discourse surrounding development policy, funding, practice, and accountability is increasingly rights-based:

Rights-based development aspires to a more holistic integration of human rights as an ethical framework in the planning of projects designed for human improvement. Although the interdependence and indivisibility of human rights (civil/political and social/economic/cultural) has been much proclaimed, and internationally reaffirmed through the 1993 Vienna Declaration, this integration is perhaps most fully conceived in the emergence, content, and practice of rights-based development.<sup>13</sup>

As early as 1979, the Secretary General of the Commission on Human Rights represented, as a matter of general consensus, that:

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<sup>11</sup> 3D: Trade, Human Rights, Equitable Economy. (2006). *Policy Brief On Intellectual Property, Development And Human Rights: How Human Rights Can Support Proposals for a World Intellectual Property Organization (WIPO) Development Agenda*. Geneva: Author. Available online at [www.docs.google.com/gview?a=v&q=cache:X2sd9syjNTkJ:www.3dthree.org/pdf\\_3D/3DPolBrief-WIPO-eng.pdf+http://www.3dthree.org/pdf\\_3D/3DPolBrief-WIPO-eng.pdf&hl=en&sig=AFOjCNExgnPSO0ZTxLFDVBsWE4g2bOXsvg](http://www.docs.google.com/gview?a=v&q=cache:X2sd9syjNTkJ:www.3dthree.org/pdf_3D/3DPolBrief-WIPO-eng.pdf+http://www.3dthree.org/pdf_3D/3DPolBrief-WIPO-eng.pdf&hl=en&sig=AFOjCNExgnPSO0ZTxLFDVBsWE4g2bOXsvg).

<sup>12</sup> For instance, in an attempt to address Goal 1, “Eradicate Extreme Poverty and Hunger”, WIPOs work on the protection of traditional knowledge aims to “contribute to ensuring that local communities who conserve and maintain these resources and assets receive a fair share of economic benefits derived from their exploitation,” while ensuring that, “[c]ommunities can also be empowered to trade in culturally-distinct goods and services they derive from their knowledge systems and traditional creativity.” Clearly, there is now recognition within WIPO that IPRs have an important role to play in development and have functions that go beyond regulating the market of informational goods. For an overview of WIPOs work on the Millennium Development Goals, see: [http://www.wipo.int/ip-development/en/agenda/millennium\\_goals/prog](http://www.wipo.int/ip-development/en/agenda/millennium_goals/prog)

<sup>13</sup> J Ensor and P Gready (eds), ‘Introduction’ in *Reinventing Development: Translating Rights-Based Approaches From Theory into Practice* (London, Zed Books, 2005) 14.

. . . the central purpose of development is the realization of the potentialities of the human person in harmony with the community; the human person is the subject not the object of development; both material and nonmaterial needs must be satisfied; respect for human rights is fundamental; the opportunity for full participation must be accorded; the principles of equality and non-discrimination must be respected; and a degree of individual and collective self-reliance must be achieved.<sup>14</sup>

Accordingly, rights-based development takes seriously both social and economic rights as primary concerns.<sup>15</sup> It normatively shifts development assistance from a form of charity to a universal responsibility to provide peoples with an economic framework adequate to the pursuit of human dignity and social participation, an outlook now reflected in major NGO programs, bilateral aid programs, and the Millennium Development Goals.<sup>16</sup> The principles of a rights-based approach include equitable participation, accountability, non-discrimination, empowerment and linkage to international rights instruments.<sup>17</sup> Unlike traditional development strategies, issues of justice in administration, political participation in decision-making and cultural propriety in project creation and implementation are to be taken into account. Principles of equality, equity and non-discrimination in the planning of projects and the distribution of benefits are emphasized.

Although the principles of rights-based development are generally agreed upon, the best means to implement these principles in practice and to evaluate their success remain disputed.<sup>18</sup>

Human rights practitioners Mac Darrow and Ampars Tomas suggest that rights-based approaches to development derive their legitimacy from their success or failure in redressing the

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<sup>14</sup> Ensor and Gready, *Reinventing* 14.

<sup>15</sup> BI Hamm, 'A Human Rights Approach to Development' (2001) 23.4 *Human Rights Quarterly* 1006.

<sup>16</sup> G Shafir and A Brysk, 'The Globalization of Rights: From Citizenship to Human Rights' (2006) 10 *Citizenship Studies* 275.

<sup>17</sup> CG Mokhiber, 'Toward a Measure of Dignity: Indicators for Rights-Based Development' (2001) 18 *Statistical Journal of the United Nations ECE* 158.

<sup>18</sup> Hamm, 'A Human Rights Approach', 1010; P Gready. 'Reasons to Be Cautious about Evidence and Evaluation: Rights-based Approaches to Development and the Emerging Culture of Evaluation' (2009) 1 *Journal of Human Rights Practice* 380; AJ Rosga and ML Satterthwaite, 'The Trust in Indicators: Measuring Human Rights' (2009) 27 *Berkeley Journal of International Law* 253.

asymmetries of power normally found in and sometimes caused by development projects.<sup>19</sup> In other words, redressing existing discriminatory patterns and avoiding new forms of deprivation are fundamental criteria for evaluating whether a project has fulfilled human rights criteria. Political theorist Bridigitte Hamm provides four criteria for implementation and evaluation: projects must reference the human rights obligations of states, practice non-discrimination with a focus on empowering disadvantaged groups, place an emphasis on inclusive participation in project planning and implementation and comply with recognized principles of good governance.<sup>20</sup> As IP becomes implicated in development agendas, then, their bestowal, use and enforcement must be implemented in ways that meet these rights-based indicators. Human rights law, reporting, and accounting mechanisms are measures that might ensure the integrity of projects that use IPRs to achieve development objectives by:

...identifying which obligations States and other actors have in relation to members of society, including the most vulnerable and marginalized groups...helping to identify which strategies and measures are needed by States and other actors in order to realize human rights and support development and...providing mechanisms capable of holding public and private actors accountable. A rights-based approach to development therefore supports more transparent policy-making and greater assessment of the impact of policies on the poorest members of society.<sup>21</sup>

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<sup>19</sup> M Darrow and A Tomas, 'Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation' (2005) 27 *Human Rights Quarterly* 489. See also Reed, this volume.

<sup>20</sup> Hamm, 'A Human Rights Approach', 1011. Most good governance programs have as a core aim the entrenchment of the rule of law with an emphasis upon improving the capacities of governments to uphold it, but the rights-based approach recognizes a relationship between power, inequality, and rights, focuses on uncovering the power inequalities behind poverty to advocate for social change; the use of a rights vocabulary is believed to alter decision-makers' perceptions, creating new senses of obligation. A more radical rights based approach sees development interventions as requiring that subjects of development become citizen-like actors in the process, measuring transformations in terms of justice, participation, empowerment, and agency, which includes equity of access to processes of decision-making, participation that challenges established power and patronage structures, building capacities for purposive choice into the institutional contexts in which choice is made. Opportunities for forging new alliances at different scales to construct transnational forms of citizenship may be a further objective. See TD Davis, 'The Politics of Human Rights and Development: The Challenge for Official Donors' (2009) 44.1 *Australian Journal of Political Science* 173. For a succinct overview of the ways in which development NGOs began to frame needs and claims as simultaneously development and rights issues and discussions of the potential and limits of rights as a basis for development, see J Grugel and N Piper, "Do Rights Promote Development?" (2009) 9.1 *Global Social Policy* 79; and the papers in S Hickey & D Mitlin, *Rights-based approaches to development: exploring the potential and pitfalls* (London, Earthscan, 2009).

<sup>21</sup> 3D, *Policy Brief*, 2.

If rights-based development brings two prominent areas of normative practice into a new relationship, it also reconfigures the political field in so doing. Rights-based development conceives of human rights in a fashion that speaks to the changes associated with economic globalization, decentering the state and distributing its powers and responsibilities. The vertical pole of rights (state-individual) is not replaced but complemented with more horizontal relationships and networks of organizations acting to influence policy. In many cases, NGOs work with local producers, community established collectivities and associations, local businesses and national regulators to help create development initiatives that eschew purely legalistic interpretations of rights in favor of activism based upon *securing* rights in political and social practices and extending claim-duty relationships to subjects at household, community, regional, national and international levels.<sup>22</sup>

Building the capacities of rights holders to make claims and duty-holders to fulfill responsibilities involves multiple agencies at diverse scales.<sup>23</sup> The expanding role of non-state actors and the increasing importance of decisions made in transnational fora have been described by political theorists as the emergence of a “global public domain”<sup>24</sup>. This is a domain in which ‘the public’ involves not just state governments, but corporations, international inter-governmental organizations, civil society organizations (CSOs), citizen’s movements and multilateral institutions in dialogue and deliberation. As they pertain to IP, these deliberations

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<sup>22</sup> Using MICOs to help small producers to secure global markets for their locally made or traditionally produced goods is an excellent example of horizontal rights and development networking. In the case of Poronguito Cheese, an example that is elaborated below, NGOs helped traditional cheese producers in Cajamarca secure a collective mark for their cheese by coordinating with local producers and businesses as well as national institutions. By securing this collective mark, local producers were able to secure economic benefits for themselves and the community and were also able to ensure that they remained in control of their own working conditions and traditional modes of production.

<sup>23</sup> Hamm, ‘A Human Rights Approach’, 5.

<sup>24</sup> JS Ruggie, ‘Reconstituting the Global Public Domain – Issues, Actors and Practices’ (2004) 10 *European Journal of International Relations* 499. For a discussion of the growing role of NGOs in IP policy making see D Matthews, ‘The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions’ (2007) 82 *Chicago-Kent Law Review* 1369.

will include transnational dialogue, both about new entitlements and new exemptions (such as we have seen with respect to traditional environmental knowledge). The term ‘global public sphere’ might better capture the deliberative, multi-sectoral nature of these new decision-making processes.<sup>25</sup>

In this field of politics, rules that favor global market expansion, such as the trade-based extension of IPRs, come up against a new advocacy that aims to promote, ensure and fulfill not just civil and political, but economic, social and cultural rights as well.<sup>26</sup> IP agendas such as those advanced by the WTO may be quite detrimental to development and human rights, particularly given the perceived inflexibility of the obligations imposed by multilateral and bilateral trade agreements and the harm inflicted on human rights by instrumentalist policies. Nonetheless, human-rights based development and IP are potentially complementary regimes.<sup>27</sup> Human rights, at their most basic level, are concerned with securing and promoting human

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<sup>25</sup> The term “global public domain” is likely to confuse IP scholars for whom the public domain has a status due to the lack of IP claimants and freedom of access to creative or innovative works as public goods. To some degree, these meanings overlap; political deliberations around the assertion that certain pharmaceuticals be freely available in the presence of catastrophic health needs, for example, is one that involves both an enhanced range of actors (civil society movements, NGOs and corporations) and a potential widening of public goods. However, the term ‘global public sphere’ seems better to capture the deliberative, multi-sectoral nature of these new decision-making processes. Although these *may* involve considerations of public goods, they also include deliberations around new entitlements and new exemptions in a transnational field of dialogue where the constitution of the public domain itself comes under scrutiny.

<sup>26</sup> As U.N. Secretary-General Ban Ki-Moon noted in the opening session of ECOSOC in April 2007, “the rules of intellectual property rights need to be reformed, so as to strengthen technological progress and to ensure that the poor have better access to new technologies and products.” UNCTAD, *The Least Developed Countries Report 2007*. Available at [www.unctad.org/en/docs/ldc2007\\_en.pdf](http://www.unctad.org/en/docs/ldc2007_en.pdf). The Commission on Economic, Social and Cultural Rights has also asserted the social function of IP and the necessity of states’ preventing IP from being used for purposes contrary to human rights and dignity.

<sup>27</sup> R Okediji, “Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations,” in M E. Salomon, A Tostensen and W Vandenhole (eds) *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Mortsel, Intersentia, 2007) 242. For proposed action towards this end see the studies in J de Beer (ed), *Implementing the World Intellectual Property Organization’s Development Agenda* (Waterloo, Wilfrid Laurier University Press, 2009).

dignity and ensuring human flourishing; there is no reason why intellectual property rights could not offer vehicles to support these pursuits.<sup>28</sup>

Rights-based development aspirations, while most prominent in the work of bilateral development aid donors, also influence the work of NGOs and social movements, and is so doing, change the character of human rights struggles.

Prevailing models for understanding NGOs as political actors are inspired largely by civil and political human rights and environmental advocacy, and characterize NGO advocacy as a process of building international support in order to force changes in individual states' behavior. But in a growing number of movements, especially involving economic and social rights, international actors play fundamentally different roles. Here, NGOs often work to weaken the roles of some international organizations, notably the International Monetary Fund (IMF) and the World Trade Organization (WTO) to alter the foreign and economic policies of powerful states, and to protect and broaden the options of national governments.<sup>29</sup>

At both the Convention on Biological Diversity and the WIPO meetings in recent years, for example, a more diverse range of IP options for developing country governments have been championed by environmental, indigenous, development and health-oriented NGOs, many of whom receive funding from aid organizations with social justice agendas.<sup>30</sup> These politics go beyond targeting single states as duty-bearers to their own citizens by focusing upon economic actors (including powerful governments) who are viewed as posing obstacles to the realization of economic, social and cultural rights in other areas of the world. Traditional tensions between international NGOs and poor country governments are altered and *sometimes* reversed, "as

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<sup>28</sup> The Commission on Economic, Social and Cultural Rights has also asserted the social function of IP and the necessity of states' preventing IP from being used for purposes contrary to human rights and dignity. General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He is the Author (Article 15, Paragraph 1 © of the Covenant, 35 U. N. Doc. E/C.12/GC/17 (Jan. 12, 2006).

<sup>29</sup> E Dorsey and P Nelson, 'New Rights Advocacy in a Global Public Domain' (2007) 13 *European Journal of International Relations* 190. See also E Dorsey and P Nelson, 'At the Nexus of Human Rights and Development: New Methods and Strategies of NGOs' (2003) 31 *World Development* 2013.

<sup>30</sup> C Deere, *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries* (New York, Oxford University Press, 2009); AK Menescal, 'Changing WIPO's Ways? The 2004 Development Agenda in Historical Perspective' (2005) 8 *Journal of World Intellectual Property* 761.

NGOs support and cooperate with governments and work against the constraining effects of trade rules, economic policy conditionality and corporate leverage”.<sup>31</sup>

This new brand of advocacy brings human rights standards to bear upon the practices of international financial institutions, trade regimes, and corporations, as well as governments. Since the frontiers of commodification today involve cultural intangibles protected as informational goods, it is not surprising that much of this advocacy involves IP. Mobilizing human rights principles as leverage against norms of liberalization and privatization and assigning accountability beyond the violating state, these struggles confront the IP privileges held by corporate rights holders. The campaign for essential medicines and global HIV/AIDS treatment is perhaps the best known,<sup>32</sup> but it is not singular.<sup>33</sup> Rights of governments to refuse to patent or admit genetically modified foods and citizen rights to refuse the commodification of life-forms are championed by a new range of advocates,<sup>34</sup> access to knowledge and open research networks are viewed as entitlements,<sup>35</sup> the rights of farmers to save

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<sup>31</sup> Deere, *The Implementation Game* 190. See also K Raustiala and D Victor, ‘The Regime Complex for Plant Genetic Resources’ (2004) 58 *International Organization* 277.

<sup>32</sup> E Dorsey and P Nelson, ‘New Rights’, 187. See also SK Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge, Cambridge University Press, 2003); E ‘t Hoen, ‘TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha’ (2002) 3 *Chicago Journal of International Law* 27; P Roffe et al (eds), *Negotiating Health: Intellectual Property and Access to Medicines* (London, Earthscan, 2005); L Helfer, ‘Regime Shifting: The TRIPs Agreement and the New Dynamics of Intellectual Property Making’ (2004) 29 *Yale Journal of International Law* 1; L Helfer, ‘Regime Shifting in the International Intellectual Property System’ (2009) 7 *Perspectives on Politics* 39; SK Sell, ‘Cat and Mouse: Industries’, States’ and NGOs’ Forum - Shifting in the Battle Over Intellectual Property Enforcement’ (2009) available at SSRN: <http://ssrn.com/abstract=1466156>.

<sup>33</sup> See L Bernier, *Justice in Genetics: Intellectual Property and Human Rights from a Cosmopolitan Liberal Perspective* (Cheltenham: Edward Elgar, 2010) and more generally D Halpert, *Resisting Intellectual Property* (New York: Routledge, 2005).

<sup>34</sup> S Safrin, ‘Hyperownership in a Time of Biotechnological Promise: the International Conflict to Control the Building Blocks of Life’ (2004) 98 *American Journal of International Law* 641; B Amani and RJ Coombe, ‘The Human Genome Diversity Project: The Politics of Patents at the Intersection of Race, Religion, and Research Ethics’ (2005) 27 *Law and Policy* 159; D B Resnik, *Owning the Genome: A Moral Analysis of DNA Patenting* (Albany: State University of New York Press, 2003); D Harry, ‘High-Tech Invasion: Biocolonialism’ in J Mander & V Tauli-Corpuz (eds), *Paradigm Wars: Indigenous Peoples’ Resistance to Globalization* (Sierra Club Books, 2006) 81.

<sup>35</sup> A Kapczynski, ‘The Access to Knowledge Mobilization and the New Politics of Intellectual Property’ (2008) 117 *Yale Journal of International Law* 804.

seed over and above patents and plant breeders' rights are linked to food sovereignty<sup>36</sup> and asserted as aspects of self-determination, while states are provided with new legal resources to resist international trade pressures.<sup>37</sup> IP issues are thereby immersed in larger political conversations about livelihood sustainability.

### 3. Sustainability in Development

Just as rights-based norms have been deployed to counter trade-dominated understandings of IP, the concept of sustainability has provided policymakers and community activists with alternative ways of thinking about economic development, resource use, and social relations. Sustainability extends the time horizons in which actors conceive and evaluate projects and promotes greater equity between social groups through new forms of governance that challenge narrow principles of market efficiency. The foundations of the sustainability movement sit uneasily with neoliberal, trickle-down economics in which development capacities are to be maximised with no necessary regard for participation, redistribution or social justice. Like neoliberalism, sustainable development seeks to open up (state-dominated) economic systems, but it does so to encourage the engagement of a wider variety of actors in the politics of development.<sup>38</sup> Sustainability has been suggested as a valuable conceptual framework for considering IP because it acknowledges the integrated importance of social, environmental, and

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<sup>36</sup> AA Desmarais, *La Via Campesina: Globalization and the Power of Peasants* (London, Pluto Press, 2007); V Menotti, 'How the World Trade Organization Diminishes Native Sovereignty' in J Mander & V Tauli-Corpuz (eds), *Paradigm Wars*, 59; K Aoki, 'Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars' (2003) 11 *Cardozo Journal of International and Comparative Law* 247; C Oguamanam, 'Agro-Biodiversity and Food Security: Biotechnology and Traditional Agricultural Practices at the Periphery of International Intellectual Property Regime Complex' (2007) 2007 *Michigan State University Law Review* 215; T Van Dooren, 'Inventing seed: The nature(s) of intellectual property in plants' (2008) 26 (4) *Environment and Planning D: Society and Space* 676.

<sup>37</sup> B Amani, *State Agency and the Patenting of Life in International Law: Merchants and Missionaries in a Global Society* (Ashgate Publishing, 2009); P Drahos, 'Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines' (2007) 28 *Liverpool Law Review* 11.

<sup>38</sup> M Raco, 'Sustainable Development, Rolled Out Neoliberalism and Sustainable Communities' (2005) 37 *Antipode* 324, 330.

economic issues.<sup>39</sup> One initiative of this type involved Oxfam's efforts to increase consumption of Fair-trade certified coffee for the benefit of small farmers and producer cooperatives by encouraging cooperation between NGOs and corporations, educating consumers, and building new forms of social solidarity.<sup>40</sup>

The successful implementation of a certification scheme involves the deployment of IP (usually with a form of trademark) towards new ends. Marks certifying sustainability standards are only one part of a transnational commodity-chain of assurance, governance, and accountability linking actors and practices, but without this final indication the whole system would fail. The success of such projects depends upon a market for global social responsibility and the responsible exercise of the exclusive right to mark goods with indicia that confirm to the consumer that clear standards have been met. Marks that distinguish goods and services which have been certified to meet certain standards appear to be proliferating.<sup>41</sup> Although these certification programs are privately operated, they often claim to promote the public interest and may be shaped by the motivation to restructure market incentives in order to achieve environmental and social aspirations.<sup>42</sup> Fair trade and sustainable forestry certifications are but

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<sup>39</sup> D Marinova and M Raven, 'Indigenous Knowledge and Intellectual Property: A Sustainability Agenda' (2006) 20 *Journal of Economic Surveys* 587, 592. More generally, see P Cullet, *Intellectual Property and Sustainable Development* (New Delhi: Butterworths, 2005); for an extensive discussion of the history of fair-trade coffee, the fair-trade labeling organization (FLO), and the benefits this moral economy of alternative globalization has provided to many communities in the Global South see G Fridell, *Fair Trade Coffee: The Prospects & Pitfalls of Market Driven Social Justice* (Toronto, University of Toronto Press, 2007). For a discussion of Oxfam's rationale, see SH Holcombe and RC Offenheiser, 'Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam American Perspective' (2003) 32 *Nonprofit and Voluntary Sector Quarterly* 2, 268. The relevance of fair trade certification for food security and environmental sustainability is also addressed in D Jaffe, *Brewing Justice: Fair Trade Coffee, Sustainability, and Survival* (Berkeley, University of California Press, 2007).

<sup>40</sup> Brysk and Shafir, 'The Globalization of Rights', 275, 284.

<sup>41</sup> M Chon, 'Marks of Rectitude' (2008-9) 77 *Fordham Law Review* 2311; M Agdomar, 'Removing the Greek from Feta and Adding Korbek to Champagne: The Paradox of Geographical Indications in International Law' (2008) 18 *Fordham Intellectual Property Media, and Entertainment Law Journal* 541.

<sup>42</sup> E Mendiager, 'Law Making by Global Civil Society: The Forest Certification Prototype' (2001 Working Paper) Available at: [www.law.buffalo.edu/homepage/eemeid/scholarship/GCSEL.pdf](http://www.law.buffalo.edu/homepage/eemeid/scholarship/GCSEL.pdf), 16; E. Mendiager, "Multi-Interest Self-Governance through Global Product Certification Programs" (July 2006). Buffalo Legal Studies Research

the best known of MICOs linking environmental and equity concerns under the rubric of sustainability.

Indigenous peoples have made an ethos of environmental sustainability central to their global political platform and this ethos has been evoked in many international policy negotiations to find new means to protect traditional knowledge (TK).<sup>43</sup> It is generally acknowledged that “new intellectual property protection should allow for maintaining the social, political, cultural and physical environment where indigenous knowledge is created”.<sup>44</sup> A “one size fits all” model for IP is arguably inappropriate in an ethos of sustainability that emphasizes the maintenance of diversity in ecosystems, values and social systems. From a sustainability perspective, advocates argue, we need alternative approaches to allow for an ethic of environmental care, for preservation of languages, for improved health and living standards, and for better political representation and participation to support a “people-culture-country continuum”.<sup>45</sup>

Interestingly, what economists Marinova and Raven offer as an example of one means of protecting indigenous knowledge “outside” of an IP system (and as an alternative means of sustainable indigenous development) is a protocol that contractually reproduces the mechanisms of a collective certification mark for local communities. They point to a partnership involving the multinational corporation Aveda, an Australian exporter (Mount Romance) and a collective

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Paper No. 2006-016 Available at SSRN: <http://ssrn.com/abstract=917956> ; E Mendiager, ‘Private Environmental Law Regulation, Human Rights and Community’ (1999) 7 *Buffalo Environmental Law Journal* 123.

<sup>43</sup> The number of international instruments that refer to the protection of TK is now quite large. See RJ Coombe, ‘First Nations’ Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law’ in C Bell and R Patterson (eds), *Protection of First Nations’ Cultural Heritage: Laws, Policy and Reform* (Vancouver: University of British Columbia Press, 2008) 313. RJ Coombe, ‘Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right or Claims to an Alternative Form of Sustainable Development?’ (2005) 17.1 *Florida Journal of International Law* 115.

<sup>44</sup> Marinova and Raven, ‘Indigenous Knowledge’, 592.

<sup>45</sup> Marinova and Raven, ‘Indigenous Knowledge’, 593.

made up of indigenous elders (the Songman's Circle of Wisdom certify that proper protocol is observed in collecting), that collectively ensure that an aboriginal community receives funds for the provision of sandalwood oil using their traditional knowledge of its properties.

The World Perfumery Congress was alerted to the indigenous protocol in Cannes in 2004. The protocol establishes sourcing standards for sandalwood in Australia and provides a model for international Indigenous leaders to practice sustainable business across their own communities. It is the first protocol of its type in the world. Under the protocol, Aveda now sources its sandalwood in the Western Australian desert, led by Aboriginal wood harvesters from the camp at Kutkububba. Aveda pays a premium on top of the state controlled price which goes to the community. However, only a fifth of West Australian sandalwood harvesting is done by Indigenous communities. The money contributed by Aveda and Mount Romance, will therefore form part of a working capital fund to assist Aboriginal communities to bid more effectively for the limited sandalwood licenses (the collection of sandalwood is conducted via a strict government licensing system). It is envisaged that the protocol will facilitate the development of other relationships between Indigenous people and multinational corporations like Aveda.<sup>46</sup>

To the extent that standards are maintained over local sourcing and the sandalwood oil has particular properties because of its area of origin, methods of location, collection, or extraction, this "accreditation" has all of the qualities of a MICO. Significantly, the protocol is based upon local cultural norms.

#### **4. Culture and Heritage in Development**

"[C]ulture has recently acquired a new visibility and salience in development thinking and practice."<sup>47</sup> The incorporation of 'culture' into development agendas appears to have been prompted by UNESCO's expressed concern in the World Culture Report of 1998 that a 'crippling lack of basic indicators of culture' amongst member states, made the relationship

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<sup>46</sup> *Agreements, Treaties and Negotiated Settlements Project*, available at [www.atns.net.au/](http://www.atns.net.au/) (Melbourne, University of Melbourne, 2007).

<sup>47</sup> S Radcliffe (ed), 'Culture in development thinking: Geographies, actors and paradigms' in *Culture and Development in a Globalizing World: Geographies, Actors, and Paradigms* (New York, Routledge, 2006) 1.

between culture and development difficult to evaluate.<sup>48</sup> Cultural rights, that is rights to take part in cultural life, to enjoy the benefits of progress in the arts and sciences, to have minority and indigenous cultures protected, and to preserve and protect cultural heritage are receiving new attention.<sup>49</sup> Evoking culture in development circles indexes concerns about maintaining cultural diversity, respecting local value systems, ensuring social cohesion and ending discrimination against the socially marginalized.<sup>50</sup> It is widely recognized, however, that there is no simple way of 'preserving culture'. As folklorist Kelly Feltault recalls:

A fisherman asked me, "How are you going to preserve my culture if you don't save my right and ability to fish?" His question brought together issues of public policy, culture, human rights, environmental management, and global capitalist economics – the precise location of his traditions [...] His question required another form of development, one based in political, economic and cultural rights and human security, rather than preservation and economic growth through the presentation of traditional culture.<sup>51</sup>

Cultural rights, particularly those that embrace identity claims, are an area of enhanced human rights concern.<sup>52</sup> They are exemplified by, but by no means limited to, indigenous rights, and may pertain both to individuals and to collectivities. These rights are increasingly recognized in national constitutions, as well as in regional and international legal instruments, shaping the practices of lending institutions as well as development agencies and NGOs who increasingly view culture as a resource. Although, culture as an asset is often framed in purely economic terms, culture conceived as resource puts greater value on social cohesion, community

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<sup>48</sup> CG Mohkiber, 'Toward a Measure of Dignity: Indicators for Rights-Based Development' (2001) 18 *Statistical Journal of the United Nations ECE* 155, 159.

<sup>49</sup> J Symonides, 'International Implementation of Cultural Rights by the International Community' (1998) 60 *International Communication Gazette* 7; R Albro and J Bauer (2005) 'Introduction' to special issue titled 'Cultural Rights: What They Are, Why They Matter, How They Can be Realized' (2005) 2 *Human Rights Dialogue* 2.

<sup>50</sup> Radcliffe, 'Culture in development', 1.

<sup>51</sup> K Feltault, 'Development Folklife: Human Security and Cultural Conservation' (2006) 119 *Journal of American Folklore* 90..

<sup>52</sup> B Robbins and E Stamatopolou, 'Reflections on Culture and Cultural Rights' (2004) 103 *South Atlantic Quarterly* 419; Brysk and Shafir, 'The Globalization of Rights', 275; R Albro, 'Managing Culture at Diversity's Expense? Thoughts on UNESCO's Newest Cultural Policy Instrument' (2005) 29 *Journal of Arts Management, Law and Society* 1; R Albro and J Bauer, 'Introduction', 12.

autonomy, political recognition, local pride and cross-generational communications, and brings new issues such as cultural misrepresentation, loss of languages and preservation and valuation of local knowledge to the fore. These concerns are integrally related to neoliberalism, the growth of the ‘knowledge economy’ and the spread of new communications technologies that have enabled cultural forms to be reproduced and publicized at a speed and velocity never before experienced. Digitalization, for example, has accelerated processes of social decontextualization while simultaneously heightening awareness of the exploitation of cultural heritage resources and enhanced political consciousness about the injuries that may thereby be effected.<sup>53</sup>

We have witnessed a growing possessiveness in relation to cultural forms at exactly the same time that culture is being revalued; not only by indigenous peoples<sup>54</sup> but by communities, regions, and national governments, who see cultural expressions, cultural distinctions and cultural diversity as sources of both meaning and income.<sup>55</sup> IPRs are figure centrally in these efforts to revalue traditions and revive heritage in a political terrain that involves many new stakeholders (individuals and governments certainly, but also businesses and archaeologists, curators and communities, development banks and universities). Cultural heritage protection, for example, links the preservation of natural and cultural environments to sustainability objectives that reconcile conservation and development goals. If IPRs have traditionally focused more on encouraging development in narrowly economic terms than on conservation functions, they are increasingly implicated in these new agendas in which “culture and local specificity are

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<sup>53</sup> RJ Coombe, ‘The Expanding Purview of Cultural Properties and their Politics’ (2009) 5 *Annual Review of Law and Social Sciences* 393.

<sup>54</sup> M Brown, *Who Owns Native Culture?* (Cambridge, Harvard University Press, 2003); M Brown, ‘Heritage Trouble: Recent Work on The Protection of Intangible Cultural Property’ (2005) 12 *International Journal of Cultural Property* 40; E Coleman and R Coombe, ‘A Broken Record: Subjecting ‘Music’ to Cultural Rights,’ in JC. Young and C Brunck, eds., *Ethics of Cultural Appropriation* (London: Blackwell, 2009) 179.

<sup>55</sup> M Ahmed, RJ Coombe, and S Schnoor ‘Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property’ (2007) 40.3 *University of California-Davis Law Review* 891; RJ Coombe, ‘Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference’ (2005) 1.1 *Law, Culture and the Humanities* 32.

integral,<sup>56</sup> communities are “empowered”<sup>57</sup>, and human rights are interpreted through vernacular structures of meaning.<sup>58</sup> Many of these projects make use of local knowledge and insist upon community participation while emphasizing that cultural heritage is dynamic, flexible and adaptive. There appears to be a widespread belief that IPRs should be shaped to encourage this endorsement of cultural value through the use and development of TK innovations and practices (an agenda that WIPO has arguably embraced) but there are great challenges before us.

Current methods of protecting IP are often too limited for recognizing peoples’ rights in relation to indigenous knowledge (IK) for instance, and thus far so called *sui generis* (unique) rights have been no more effective in terms of addressing social and livelihood needs without compromising the capacities of future generations to meet their obligations. Indigenous knowledge is more readily conceived of as capital when it is protected as IP because most forms of IP serve as mechanisms for creating market-based values that may provide the equity necessary for some communities to create wealth and perhaps break cycles of poverty.<sup>59</sup> A rights-based approach to the issue, moreover, would insist that opportunities be widely shared and efforts made to distribute benefits equitably. A sustainability perspective would suggest that the development of indigenous or traditional knowledge requires maintaining the social relations and practices through which a natural environment and its diversity is maintained and reproduced. To the extent that biological and cultural diversity are regarded as interrelated,<sup>60</sup> IP

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<sup>56</sup> Ensor and Gready, *Reinventing*, 11.

<sup>57</sup> For a critical understanding of this process see RJ Coombe, ‘Owning Culture: Locating Community Subjects and their Properties’ in M Busse and V Strang (eds), *Ownership and Appropriation* (Oxford: Berg Publishers, 2010) 105 and RJ Coombe, ‘Cultural Agencies: ‘Constructing’ Community Subjects and their Rights’ in M Biagioli, P Jaszi, and M Woodmansee (eds), *Making and Unmaking Intellectual Property* (Chicago, University of Chicago Press, 2010) 79.

<sup>58</sup> Ensor and Gready, *Reinventing*, 17.

<sup>59</sup> Marinova and Raven, ‘Indigenous Knowledge’, 587, 591.

<sup>60</sup> See discussion in SJ Zent and EL Zent, ‘On Biocultural Diversity from a Venezuelan Perspective: Tracing the Interrelationships among Biodiversity, Culture Change and Legal Reforms’ in CL MacManus (ed), *Biodiversity and the Law: Intellectual Property, Biotechnology and Traditional Knowledge*, (London: Earthscan, 2007) 91.

as we know it is far too limited. It promotes ‘development’ perhaps, but does nothing to ensure the sustainability of culture, not as a field of static works and practices of production, but as a way of living that shapes people’s aspirations for improved livelihoods of their own design.<sup>61</sup>

As the fisherman’s comment reminds us, the transformation of culture into an export commodity as part of a service industry that focuses on the past as simply an asset of economic value may depoliticize the processes that force people to rely upon their traditions when their traditional livelihoods have been destroyed and they have no alternative futures. Moreover, it discounts the capacity of tradition to serve as a dynamic resource for shaping peoples futures. Development divorced from self-determination fails to meet rights-based indicators because it doesn’t consider the ends as well as the means of development. Within a human rights framework that values sustainability in other words, community security must be addressed as a social good. Development projects and practices need to involve community members in decision-making about how reproductions of their heritage will be controlled, for what purposes, and to achieve what kind of futures. Sustaining livelihoods, communities, and traditions tied to resources requires a holistic, rights-based approach — whose legitimacy requires wide participation and democratic deliberation.

## **5. Marks Indicative of Conditions of Origin (MICO)**

Are IPRs capable of becoming more flexible so as to address these newly linked economic, social, cultural, and environmental objectives? Geographical indications (GIs) are one means by which local conditions of production are maintained, and traditional methods and

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<sup>61</sup> RJ Coombe, ‘Protecting Traditional Environmental Knowledge.’

practices recognized and valued through the exploitation of niche markets.<sup>62</sup> Used historically to protect the rural traditions of European elites, they are now favourably considered as vehicles to promote the development of others whose collective rights, traditions and cultural resources may thereby assume new value.<sup>63</sup> Indications of source, appellations of origin and geographical indications are unique in the field of IP protections; they are used to protect place-based distinctions in the market and they are, in significant ways, inalienable, unlike the vast majority of IPRs which act primarily to promote alienability. Appellations of origin refer to geographical names that designate the origin of a good where “the quality and characteristics exhibited by the product are essentially attributable to the geographical environment, including natural and human factors.”<sup>64</sup> Goods that have a quality, reputation, or characteristic that is attributable to their geographical origin are covered by the TRIPS Agreement.<sup>65</sup>

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<sup>62</sup> See D Rangnekar, ‘The Socioeconomics of Geographical Indications: A Review of Evidence from Europe, 2004’ UNCTAD/ITSD Capacity Building Project on Intellectual Property Rights and Sustainable Development, Geneva, available at [iprsonline.org](http://iprsonline.org).

<sup>63</sup> L Bentley and B Sherman, *Intellectual Property Law*, 2nd ed. (Oxford, Oxford University Press, 2009) 976; D Gervais, ‘Traditional Knowledge: Are We Closer to the Answer(s)? The Potential Role of Geographical Indications’ (2009) 15 *ILSA Journal of International & Comparative Law* 551; AK Sanders, ‘Incentives for and Protection of Cultural Expression: Art, Trade and Geographical Indications’ (2010) 13 *The Journal of World Intellectual Property* 81; M Sunder, ‘IP3’ (2006) 59 *Stanford Law Review*, 300; M Sunder, ‘The Invention of Traditional Knowledge’ (2007) 70.2 *Law and Contemporary Problems* 97; B Sherman and L Wiseman, ‘Toward an Indigenous Public Domain?’ in L Guibault and PB Heugenholtz (eds), *The Future of the Public Domain* (Kluwer Law International, 2006) 259.

<sup>64</sup> M Gueze, ‘Let’s Have Another Look at the Lisbon Agreement: Its Terms in their Context and in Light of its Object and Purpose’ Paper prepared for the International Symposium on Geographical Indications jointly organized by the World Intellectual Property Organization and the State Administration for Industry and Commerce of the People’s Republic of China, Beijing, WIPO/GEO/BEI/O7/10 (June 26-28 2007) available at [www.wipo.int/edocs/mdocs/geoind/en/wipo\\_geo\\_bei\\_07/wipo\\_geo\\_bei\\_07\\_www\\_81756.doc](http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bei_07/wipo_geo_bei_07_www_81756.doc). Many countries use the legal instrument “denomination of origin” to add value to goods whose distinctive qualities are due to geographic conditions that include natural and human, or cultural factors.

<sup>65</sup> M Hopperger, ‘Geographical Indications in the International Arena: The Current Situation’ Paper prepared for the International Symposium on Geographical Indications jointly organized by the World Intellectual Property Organization and the State Administration for Industry and Commerce of the People’s Republic of China, Beijing, WIPO/GEO/BEI/O7/07 (June 26-28 2007). [www.wipo.int/edocs/mdocs/geoind/en/wipo\\_geo\\_bei\\_07/wipo\\_geo\\_bei\\_07\\_www\\_81753.doc](http://www.wipo.int/edocs/mdocs/geoind/en/wipo_geo_bei_07/wipo_geo_bei_07_www_81753.doc), 3.

If we take ‘geographical origin’ here to extend to natural and human factors (as it did historically and indeed, did in earlier drafts of the TRIPs Agreement<sup>66</sup>) then it is possible for marks of origin to designate a wide range of reputational characteristics. For example, certain agricultural goods from the Indian state of Kerala might bear an emblem of origin that indicates that they were produced in a ‘GMO Free Zone,’ or by manufacturers committed to affirmative action for persons of castes traditionally discriminated against. In other words, although the goods might have no specific characteristics due to these conditions of origin, they may have a reputation essentially attributed to salient human factors attributable to the geographical region. Nonetheless, it might be argued that the same objectives could be accomplished in a less complicated way through the use of more traditional categories of trademark such as certification and collective marks.

As economists Bramley and Kirsten remind us, although most trademark laws prohibit the use of geographical terms or indicia that have not acquired secondary meaning because they are descriptive, this is not a bar to certification and collective marks.<sup>67</sup> *Owners* of certification marks cannot use them, however, because their holders must constitute an independent certifying authority required to ensure that all who use the mark are providing the good with the certified quality. Collective marks held by associations on behalf of their members are also usually bound to certain quality and cultivation controls within the area of production.

To avoid having to list all of these legal vehicles at each reiteration of this range, we have coined the term “marks indicating conditions of origin” (MICOs) to indicate the larger field throughout this essay. Different countries use different vehicles to accomplish similar things; a jurisdiction without a history of recognizing geographical indications may have a well developed

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<sup>66</sup> D Zografos, *Intellectual Property and Traditional Cultural Expressions* (Cheltenham: Edward Elgar, 2010) 176-7.

<sup>67</sup> C Bramley and JF Kirsten, ‘Exploring the Economic Rationale for Protecting Geographical Indicators in Agriculture’ (2007) 46 *Agrikon* 74.

range of collective marks, collective marks may function as certification marks in jurisdictions which lack the latter and a distinct category of certification marks in one country may more approximate a specific group of trademarks in another. A more encompassing term like MICOs both enables us to refer to a more jurisprudentially diverse terrain and affirms legal pluralism. In international and transnational arenas, more and more institutions have focused on the potential of MICO as possible tools for local and rural development.<sup>68</sup>

MICOs are seen as especially promising in sustainable development and rights-based development because the use of the legally protected name is not limited to a single producer but to all producers within the designated area who adhere to the code of practice; product reputation is the result of the activities of different agents active in the same area of production, projected through traditions of practice over time.<sup>69</sup> The distinguishing resources of a region, which will usually include terrain and climate, may also be cultural and historical in nature. As one author

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<sup>68</sup> M Blakeney, 'Protection of Traditional Knowledge by Geographical Indications' (2009) 3 *International Journal of Intellectual Property Management Issues* 357; DR Downes and SA Laird, 'Innovative Mechanisms for sharing benefits of biodiversity and related knowledge. Case studies on geographical indications and trademarks' (1999) Paper prepared for the UNCTAD Biotrade Initiative. Available at [www.ciel.org](http://www.ciel.org). S. Escudero, F Addor and A Grazioli, 'Geographical Indications beyond wines and spirits. A roadmap for better protection for geographical indication in the WTO TRIPS Agreement' (2002) 5 *Journal of World Intellectual Property* 865-98; A Berenguer 'Geographical origins in the world' Paper presented at the workshop Promoting Agricultural Competitiveness through Local Know-how' (2004). Proceedings of the Montpellier Workshop. Washington D.C. World Bank Group, Washington, DC; MAAPAR, Paris; CIRAD, Montpellier; B Sylvander, 'Concerted Action: DOLPHINS final report, synthesis and recommendations' (2005) Development of Origin Labelled Products: Humanity, Innovation, and Sustainability. INRA-UREQUA, France. Available at [www.origin-food.org/pdf/wp7/dol\\_d8.pdf](http://www.origin-food.org/pdf/wp7/dol_d8.pdf); GE Evans and M Blakeney, 'The Protection of Geographical Indications After Doha: Quo Vadis?' (2006) 9 *Journal of International Economic Law* 3; P van de Kop, D Sautier, and A Gertz (eds), *Origin-based Products: Lessons for pro-poor market development* (Amsterdam, Royal Tropical Institute, 2006). For examples of regional studies see CM Correa, 'Protection of geographical indications in Caricom Countries' (2002) Paper prepared for CARICOM, available at [www.cnm.org/documents/studies/geographical%20Indications%20%20Correa.pdf](http://www.cnm.org/documents/studies/geographical%20Indications%20%20Correa.pdf); E Mendes, 'An investigation into the potential for products of origin in the Western Cape, South Africa' (2001) Western Cape Department of Agriculture Report 154; D Sautier and C Sarfati, 'Indications geographiques en Afrique francophone: rapport 2004 des actions d'appui INAO-CIRAD aupres de l'OAPI' (2005) Montpellier, Cirad-Tera/Inao. 2 vols.; D Rangnekar, 'Indications of geographical origin in Asia: legal and policy issues to resolve' in Melendez-Ortiz and Roffe, 273; S Wagle, 'Geographical Indications as Trade-Related Intellectual Property: Relevance and Implications for Human Development in Asia-Pacific' (2007) Discussion Paper, UNDP Asia-Pacific Trade and Investment Initiative.

<sup>69</sup> F Marty, 'Which are the ways of innovation in PDO and PGI products? Typical and Traditional Products: Rural Effect and Agro-industrial Problems' in F Arfini and C Mora (eds), *52nd European Association of Agricultural Economics Seminar Proceedings* (Parma, Italy, June 19-21 2008).

summarizes, “GIs have features that respond to the needs of indigenous and local communities and farmers . . . [they] are based on collective traditions and a collective decision-making process; reward traditions while allowing for continued evolution; emphasize the relationship between human efforts, culture, land, resources; and environment; and - are not freely transferable from one owner to another”.<sup>70</sup> As another asserts GIs “can present long term benefits as they create value, enhance the marketability of goods and give an edge to developing countries to promote exports and rural development, thus generating sustainability and inter-generational equity”.<sup>71</sup> The capacity to implement collective control over these marks is especially attractive to development practitioners and NGOs concerned to avoid creating new forms of inequality and hoping to encourage greater social cohesion. Moreover, MICOs are of interest to cultural heritage practitioners because they can be used with respect to products derived from the traditional practices of communities and have a history of being used to protect traditional cultural expressions.<sup>72</sup>

Creating an exclusive right to a link between a product and its origin establishes a proprietary right for those who are entitled to use it.<sup>73</sup> However, unlike other IPs such as privately held trademarks, MICOs are uniquely apt for supporting local collectivities because of the public nature of the rights that flow from their use.<sup>74</sup> Using a GI as a means to support local collectivities is nonetheless controversial; some critics argue that such a use is nothing more than

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<sup>70</sup> F Addor and A Grazioli, ‘Geographical Indications beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/ TRIPS Agreement’ (2002) 5 *Journal of World Intellectual Property* 865.

<sup>71</sup> D Zografos, ‘Geographical Indicators and Socio-economic Development’ (2008) 4th *European Intellectual Property Institutes Network Conference*, Zurich, April 2008. Online at <http://www.iqsensato.org/wp-content/uploads/2009/02/iqsensato-wp-3-zografos-dec-2008.pdf>.

<sup>72</sup> Zografos, *Intellectual Property*, 103.

<sup>73</sup> Addor and Grazioli, ‘Geographical Indications’, 183.

<sup>74</sup> I Calboli, ‘Expanding the Protection of Geographical Indications of Origin under TRIPS: Old Debate or New Opportunity?’ (2006) 10 *Marquette Intellectual Property Law Review* 181,182.

a thinly veiled protectionist measure that can be used to undermine competition<sup>75</sup> and that many countries, and the United States in particular, already offer adequate, TRIPS-level protection of domestic and foreign GIs through the trademark system.<sup>76</sup> Such an argument seems to presuppose that GIs constitute a wholly new regime of rights, rather than encompass the use of older forms of MICOS, such as certification and collective marks, which are well known forms of trademark in most jurisdictions. The argument also overlooks the geopolitics of trade which ensure that developing countries are often forced to compete in the global market without the protection and agricultural subsidies provided in developed countries. Finally, WTO Member states have long made commitments to ensuring that developing countries could gain *enhanced* access to global markets and it is only reasonable to expect that developing countries should seize upon one of the very few areas of TRIPS-protected IPRs that might provide them with some competitive advantage.<sup>77</sup> Consumer interests in securing knowledge about conditions of origin for goods as well as states' commitments to human rights principles are also, moreover, relevant considerations that militate against such purely economic arguments.<sup>78</sup>

As a tool in rights-based development practice, the introduction of GIs can aid in forging collective rights that are indivisible from locality. Ecosystem specificities and local practices are maintained by turning these into symbolic differentiations that yield rents for those whose activities enrich and reproduce these distinctions. Communities and collectivities should thus benefit directly from the use of the GIs, but, as we shall see, these are often promoted by states,

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<sup>75</sup> Calboli, 'Expanding the Protection', 186.

<sup>76</sup> For examples of this argument see, I Shalevick, 'Protection of trademarks and Geographical Indications' (2008) 6 *Buffalo Intellectual Property Law Journal* 67; J Hughes, 'Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications' (2008) 58 *Hastings Law Journal* 299.

<sup>77</sup> Agdomar, 'Removing the Greek'.

<sup>78</sup> For studies advocating the extension and development of MICO protections that make cultural and human rights arguments for the projection of local identity-based products, see DE Long, 'Is Fame All There Is? Beating Global Monopolists At Their Own Marketing Game' (2008) 40 *George Washington International Law Review* 123 and RL Okedji, 'The International Intellectual Property Roots of Geographical Indications' (2007) 82 *Chicago-Kent Law Review* 1329.

who may be more interested in increasing foreign exchange than in fostering community security. Creating sustainable livelihoods for more secure communities does, of course, contribute to the overall development of the nation-state, but from a sustainability and rights-based perspective it should do so in a way that emphasizes community participation, governance and capacity building.

Evaluating the impact of the use of MICOs on rural development is complex. It might be argued that such a strategy risks fixing local practices rather than enabling their ongoing generativity (although in practice they have proven to be capable of adjusting to shifting local circumstance). Few proponents of MICO strategies promote their general applicability; most urge careful consideration to their governance in assessing their capacities to serve as engines of rural development.<sup>79</sup> In any case, their success should not be measured only by standard development assessment criteria such as higher employment and income levels. From a sustainable and rights-based development perspective, careful attention to such indirect goals as biodiversity preservation, protection of traditional knowledge, distributional equities and enhanced levels of social cohesion are also desirable.

The expansion of GIs to new forms of goods and services certainly has detractors.<sup>80</sup> It is not our intention to enter into this debate or to argue for or against GIs on absolute grounds. We would, however, argue that it is inappropriate to evaluate the use of MICOs in abstract economic and philosophic terms that view them primarily as properties and/or exclusive rights to ‘information’ without consideration of their social function and consequence, their communicative objectives, their role in regional development policies for alleviating rural

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<sup>79</sup> E Barham, ‘Translating *Terroir*: The Global Challenge of French AOC Labelling’ (2003) 19.1 *Journal of Rural Studies* 127.

<sup>80</sup> Hughes, ‘Chanpagne, Feta’.

poverty, and their capacity to build social capital.<sup>81</sup> As we will show, poorly implemented schemes to introduce MICOs are dangerous. They may give rise to new forms of local inequality, undesirable transformations of social relations and even further social disintegration if they are not adequately designed and regulated. However, they can also bear social dividends when they are well managed and adequately supported. Two studies of the consequences of using MICO will now be briefly summarized. A rights-based sustainable development framework assists us in evaluating these initiatives.

## 6. Subjecting MICO to Sustainability and Rights-Based Development Indicators

GIs have attracted great new interest in the past decade as developing countries seek new ways of competing in a global economy.<sup>82</sup> Nonetheless, as Gerald Evans and Michael Blakeney (2006) have recently argued, GIs may be ‘sold’ to third world countries (by NGOs, development aid agencies and lending institutions) without fair disclosure of the administrative costs involved, the technical expertise they require and the institutional investment they demand. Similarly, Dwijen Rangnekar argues that the simple introduction of GIs will not generate positive social and economic transformation without collateral institutions, supporting policy measures, and marketing strategies.<sup>83</sup> Empirical study of appellations in Europe suggests that producers with the most secure marketing networks tend to secure the lion’s share of the values these yield.<sup>84</sup>

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<sup>81</sup> For one such study see S Munzer and K Raistala, ‘The Global Struggle over Geographical Indications’ (2007) 18 *European Journal of International Law* 337.

<sup>82</sup> For an excellent overview of the prospects for using indicators of geographical origin to improve the livelihoods of coffee growers, which links certifications guaranteeing socio-economic and environmental quality content with specific places and explores their use in promoting broader territorial strategies constructed around tourism, handicrafts and other agro-food products, see B Daviron and S Ponte, *The Coffee Paradox: Global Markets, Commodity Trade and the Elusive Promise of Development* (London, Zed Books, 2005).

<sup>83</sup> Rangnekar, *Indications of Geographical Origin*, 291.

<sup>84</sup> D Rangnekar, ‘The socio-economics of geographical indications: A review of empirical evidence from Europe. UNCTAD/ICTSD Capacity building project on Intellectual property rights and sustainable development’ (October 2004) [www.iprsonline.org/unctadictsd/docs/GIS\\_Economics\\_Oct03.pdf](http://www.iprsonline.org/unctadictsd/docs/GIS_Economics_Oct03.pdf).

Building supply chains is no easy feat for small producers; public investment will be necessary to prevent the most powerful private actors from monopolizing the opportunities that MICOs afford.

Daniel Gade's study of the use and management of the AOC (Appellation d'Origine Contrôlée) held in the commune of Cassis in Southern France<sup>85</sup> might be used to caution against any simple enthusiasm over the use of MICOs for promoting local goods. He argues that the AOC for local wine, developed to restrict industrial and residential development in the area, historically evolved so as to be controlled by an ever-smaller syndicate of producers who dictate the conditions of the appellation's deployment (routinely issuing dispensations to members when the weather doesn't easily enable these conditions to be met or profit margins to be sustained), limit the origins and types of grapes that can be used and thereby restrict the variety of wines produced in the region and the number of producers. The syndicate also prevents tenants—who grow most of the grapes—from using the appellations, and prohibits the establishment of cooperatives that would benefit smaller producers by introducing economies of scale and new technologies. Grapes must be picked by hand, ensuring the continuation of a pool of subservient manual labour, and ceilings are put on the wages of harvest workers to keep producer costs low.

Nonetheless, Gade believes that vineyards would have been converted into residential development early on, had they been denied appellation status. The syndicate's control of the appellation has enabled the commune to maintain a viticultural landscape that mitigates the impacts of flooding and fire while sustaining a local tourist industry. Despite achieving some economic security for the region and some measure of regional ecoscape preservation, this is a

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<sup>85</sup> D Gade, 'Tradition, Territory, and Terroir in French Viniculture: Cassis, France, and Appellation Contrôlée' (2004) 94 *Annals of the Association of American Geographers* 848. Wayne Moran also criticizes the French wine appellation strategy's propensity to entrench privilege and solidify structures of inequality in W Moran, 'The Wine Appellation as Territory in France and California' (1999) 83 *Annals of the Association of American Geographers* 694.

use of MICO that would fail most rights-based criteria because of its lack of inclusiveness, transparency and accountability, as well as its poor governance. It exacerbates rather than mitigates local inequalities while reducing both biological and cultural diversity. Government failures to ensure that management of the MICO met basic standards of good governance (or even basic principles of administrative law), to insist either upon an arms-length relationship between those who govern the use of the mark and those who benefit from it or a democratic decision-making process, or to demand transparent standards of quality control are all obvious shortcomings. If we accept the veracity of Gade's observations and evaluations, this is an instance of MICO being used primarily as a protectionist measure to entrench the privileges of local elites.

Anthropologist Anita Chan's fieldwork in northern Peru shows how 'denominations of origin' have been encouraged in a government initiative that cynically valorizes 'tradition' while simultaneously promoting local industrialization. Ceramic production has expanded dramatically since 'Chulucanas' became a protected mark, but so too has income inequality, labor exploitation, and economic competition.<sup>86</sup> Traditional methods of production have actually been abandoned and collective intergenerational workshops replaced with individually owned factories due to the entrepreneurial efficiencies and unrealistic volume demands that national exporting strategies impose on those who seek to have their goods designated as "National Folkloric Products". These new standards were externally imposed, bore no relationship to existing social relations of production, decreased rather than increased social participation in the production of crafts and in the governance of their production. Moreover, nothing appears to have been done to educate consumers about the conditions of origin for these goods, or to

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<sup>86</sup> AS Chan, 'The Fortune of Networks: Neoliberal Seductions, Enterprising Artisans, and the Optimizing of Native Culture in Peru.' A paper presented at the American Anthropological Association Annual Conference, San Francisco, CA. November 21, 2008. On file with authors.

prevent their piracy abroad. Fewer people now are engaged in the industry (except as unskilled, low-paid laborers) and pieces of pottery bring in even less money to their producers, while envy, distrust and fear of misappropriation of design and know-how now characterize local social relations.

This Peruvian MICO initiative appears to meet none of the objectives of sustainability, social security or rights-based development we have considered. Nonetheless, it is a project that was commended to WIPO as indicative of ‘best practices’ of using IP to further rural development.<sup>87</sup> An examination of Peruvian national policy with respect to denominations of origin indicates that the government seeks to use place-based products as a means to reclaim ‘national’ products from foreign appropriation and to alleviate poverty.<sup>88</sup> To do so, however, the state has assumed legal entitlement to these denominations, privileging the prevention of exploitation of designated ‘national’ patrimony over considerations of local development, promoting modern industrial criteria rather than local norms and practices, and restricting rather than enhancing social inclusion in the management of MICOs and the allocation and extension of their benefits.

Peru is one of many developing countries that appears to have been “sold” on a GI strategy as a new means of competing in a global economy without fair disclosure of the administrative costs, technical expertise, and institutional investment such a strategy requires.<sup>89</sup> Where these strategies succeed, extensive cooperation between players in all parts of the commodity chain and new sources of support for local producers appear to be necessary. For example, soft cheeses made in the Department of Cajamarca in the northern Andes have been

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<sup>87</sup> Chan, ‘The Fortune of Networks’.

<sup>88</sup> MA Sanchez del Solar, ‘Denominaciones de origen en el Peru: desafios y oportunidades’ (2008) 4 *Revista de la Competencia y Propiedad Industrial* 6.

<sup>89</sup> Evans and Blakeney, ‘The Protection of Geographical Indications’.

targeted for development because these are considered “typical products: they are simple, attached to a territory, and the quality of the *mantecosa* is closely linked to the local soils and climate which determine the richness of the pastures and thus the quality of the milk.”<sup>90</sup>

*Mantecoso* relies upon specific local knowledge and traditional know-how, is a symbol of local identity, and involves the work of many small farmers producing milk in a particularly poor rural area. Although the product has evolved from a subsistence food to a commercial product only within the last thirty years, it has already achieved a national reputation for quality.<sup>91</sup>

Nonetheless, a failure to protect the product from adulteration and to ensure that use of the mark is linked exclusively to regional goods and tied to quality controls limits this MICO strategy. An association (the ADPL) of Cajamarca city cheesemakers was established in 1999 to improve quality controls and enhance the marketing of these products, while promoting synergies between cheese, other regional foodstuffs and landscape amenities which have the potential to further develop regional tourism. The Association has developed quality labels and has committed itself to the development of ‘Poronguito,’ a collective mark awarded in 2000.<sup>92</sup>

The extensive and expensive collective organization necessary to this endeavour has been aided by nongovernmental organizations (NGOs) that have facilitated dialogue between producers of *quesillo* (the curd used to make the cheese provided by generally poor livestock producers in mountainous regions), small scale cheese producers, speciality shops and the national institutions necessary to enable national marketing efforts. The latter are often distrusted in rural areas and amongst indigenous peoples. Still, even in this region further work must be done to promote a greater sharing of benefits with small producers of *quesillo* (who are often

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<sup>90</sup> F Boucher and A Gerz, ‘Mantecoso cheese in Peru: organizing to conquer the national market’ in P van de Kop, D Sautier, and A Gerz (eds), *Origin-Based Products: Lessons for pro-poor market development* (CIRAD Bulletin 372, Royal Tropical Institute, 2006).

<sup>91</sup> Boucher and Gerz, ‘Mantecoso cheese’ 43.

<sup>92</sup> Boucher and Gerz, ‘Mantecoso cheese’ 46, 48.

women, often isolated, often exploited by middlemen, and physically and culturally distant from the end product) as well as to reduce elite family control of direct marketing to consumers. Institutions for the governance of MICOs in this region must evolve in an inclusive and participatory fashion if they are to meet rights-based development indicators. Still, the growing links between local knowledge, social capital and collective action developing here make the project appear far superior to the exploitation of Chulucanas ceramics. In both instances, however, infrastructural support is necessary to enforce MICOs and prevent their infringement in wider markets.

Regionally based organizations that emphasize community building and democratic forms of governance have in some cases produced successful economies that turn on the identification and marketing of local product origins. A former staff member of the Inter-American Foundation, Kevin Healy identifies the El Ceibo Cooperative of Bolivia as a prime example of success in such an endeavor. El Ceibo is an agricultural co-op whose members farm cocoa beans and produce chocolate.<sup>93</sup> Since receiving its first funding from the Inter-American Foundation in 1978, it has grown from twelve members into a large and successful federation of over thirty-six co-operatives. Although the early objective was limited to improving farmers' positions within the national market place, the federation has extended its reach globally. Its major international client is a small Swiss firm based in Geneva -- that distributes Third World products to customers who are willing to pay a higher price for goods that come from sustainable and equitable Third World farming communities -- but it now exports chocolate to the US and

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<sup>93</sup> K Healy, *Llamas, Weavings, and Organic Chocolate: Multicultural Grassroots Development in the Andes and Amazon of Bolivia* (Indiana, University of Notre Dame Press, 2001). For a more in-depth history see, AJ Bebbington, *Technology and Rural Development Strategies in a Base Economic Organisation: "El Ceibo" Ltd Federation of Cooperatives* (London, Overseas Development Institute, 1996).

Japan. As the market for sustainable, fair trade and organic products has grown, so has El Ceibo's success; a wrapper from an Organic Swiss Chocolate bar now reads:

All Rapunzel products use ingredients purchased through the Eco-trade partners. For example, Rapunzel purchases cacao from a unique farmers co-operative in Bolivia. The El Ceibo co-op is a group of farmers that became world-class entrepreneurs to improve their quality of life.<sup>94</sup>

This Swiss chocolate company has clearly attempted to 'trade in' on the reputation of the El Ceibo farmers who continue to benefit from the popularity of sustainable and organic niche markets. El Ceibo works as a collective mark and could be registered as a denomination of origin. Further delineation of the social, ecological, and cultural dimensions of their cultivation methods could serve to further strengthen their market position as well as enhance their already strong reputation as an exemplar of fair trade benefits and rights-based development.<sup>95</sup>

Maintaining a strong cultural identity has been an integral part of the El Ceibo strategy. Part of the success of the cooperative is credited to the use of indigenous models of community organization and self-management that has also facilitated new forms of social ritual. Enthusiasm for participation in the project has been maintained through social festivities where the cultural history and mythology of the tree after which the cooperative is named and the traditional practice of its farming is celebrated through music, dance, and all-night vigils. A short editorial promotion for one of these events asserts:

Similar to the root of a tree is the culture of a people, a fact which is especially important in colonization zones. For when we leave behind our homelands and become involved in our new agricultural holdings as individual farmers, the risk of overlooking our rich traditions—the music, dance and our art forms—of our ancestors that mark us as distinct peoples become greater.<sup>96</sup>

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<sup>94</sup> Healy, *Llamas, Weavings*, 147.

<sup>95</sup> For a recent description of their methods of cultivation, and the benefits of their obtaining both fair trade and organic certification status see <http://www.globalexchange.org/campaigns/fairtrade/cocoa/CocoaBolivia.pdf>.

<sup>96</sup> Healy, *Llamas, Weavings*, 147.

The promotion of a strong cultural identity works in synchronicity with their MICO strategies, that is, the success of El Ceibo's cacao is dependant upon its ability to capitalize on the symbolic difference of the El Ceibo community. Moreover, while working to maintain its market share, El Ceibo builds a collective identity organized around markers of traditional culture and indigeneity.

## 7. Conclusion

Recognizing the contribution of poor peoples' knowledge to culture, technology and innovation is essential to development, as Madhavi Sunder argues. She notes that IP is a key vehicle for accomplishing this, provided that communities in developing countries are recognized not merely as passive holders of an unchanging culture, but as actors capable of assuming agency in markets that value their efforts.<sup>97</sup> As we saw, Sunder points to the creative use of GIs in India where it is hoped that the introduction of these new IPRs will allow cultural diversity to thrive and rural artisans to remain in their villages, resisting the pull of city industry.<sup>98</sup> Indeed, it appears that many GIs have been registered for traditional weaving techniques and handicrafts.<sup>99</sup> Nonetheless, there, are reasons to doubt the Indian government's capacity and commitment to fully implementing this strategy as the Alternative Law Forum in Bangalore has found.<sup>100</sup> Although the Indian government has made impressive initiatives with

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<sup>97</sup> M Sunder, 'The Invention of Traditional Knowledge', 103. See generally, JM Finger and P Schuler (eds), *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington: World Bank and Oxford University Press, 2004).

<sup>98</sup> A fuller overview of GIs in India is found in S. Singhal, "Geographical Indications and Traditional Knowledge," (2008) 3 *Journal of Intellectual Property Law and Practice* 732. doi: 10.1093/jiplp/jpn160.

<sup>99</sup> NS Gopalakrishnan, PS Nair and KB Aravind, *Exploring the Relationship between Geographical Indications and Traditional Knowledge: An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia*. ICTSD Programme on Intellectual Property Rights and Sustainable Development (Geneva: ICTSD, 2007) 33-41. Available at [www.ictsd.org](http://www.ictsd.org)

<sup>100</sup> Praschant Iyengar, Alternative Law Forum, Bangalore, India. Presentation to the DFG-Forschergruppe Cultural Property Colloquium Series, Institute for European Ethnology, Georg-August-Universitat Gottingen, June 18, 2009.

respect to protecting and promoting new GIs for regional teas,<sup>101</sup> it appears to have done little to develop local governance structures for new GIs for handicrafts. Without support for governance and enforcement, the mere possession of a GI is a poor vehicle for community livelihood security.<sup>102</sup> We have argued here that even if we were to agree that developing markets for third world cultural products is “perhaps the most effective way to protect their traditions” by encouraging tradition-based innovation,<sup>103</sup> this will only be the case where an effective, rights-based governance infrastructure can be established and commitments to sustainability realized. A rights-based sustainability perspective, however, suggests that these responsibilities are not the states alone to bear; they might also be met by transnational networks involving private parties, NGOs and the development agencies of developed country governments.

The challenge in developing countries will be to ensure inclusive and a representative governing bodies and industry organizations so as to avoid the dangers of larger entrepreneurs capturing the lion’s share of the economic benefits and further disadvantaging smaller producers’ cooperatives and workers collectives. We also need further empirical studies to understand how historically MICO efforts have tended to affect relations between communities and the state and to consider what impacts these strategies have upon local power relations, distributions of wealth, and availability of economic opportunity. More critical consideration of the role of NGOs in these processes is also desirable, to ascertain the circumstances under which they foster community autonomy rather than promote community dependence. The resources offered by

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<sup>101</sup> Rangnekar, ‘Indications of Geographical Origin’, 284-288.

<sup>102</sup> Praschant Iyengar, Alternative Law Forum, Bangalore, India. Presentation to the DFG-Forschergruppe Cultural Property Colloquium Series, Institute for European Ethnology, Georg-August-Universität Göttingen, June 18, 2009. For a longer discussion of the challenges in India, see K. Das ‘Prospects and Challenges of Geographical Indications in India’ (2010) 13 *The Journal of World Intellectual Property* 148–201,

<sup>103</sup> Sunder, ‘IP3’.

rights-based and sustainable development provide us with a significant matrix of principles to evaluate these strategies.

MICOs are amongst the few IP vehicles likely to simultaneously satisfy needs for collective rights, local autonomy, economic improvement, and entrepreneurship in a global environment, while promising enhanced social security through sustainable development and providing bases for cultural pride.<sup>104</sup> Their use, however, must be accompanied by new investments in infrastructure and the establishment of marketing channels that do not undermine local communities. Moreover, the use of MICOs must be accompanied by democratic governance structures that guarantee equity of distribution of benefits, equality of access to local participants, transparency of criteria for using marks, and accountability in maintaining and enforcing locally developed standards, to meet social as well as economic objectives.

The increasing use of MICOs in ethical marketing schemes, rural development projects, and cultural heritage industries poses distinct challenges. Evaluating these projects cannot be accomplished by any simple blanket denunciation of IP expansion, vilification of new forms of property, or narrow emphases on freedom of speech, which is, in any case, negligibly affected by these new forms of protection. Such new uses of IP should be subject to assessments based on their social impacts, their sustainability, and the quality of their governance structures. If IP becomes the basis for new forms of commodity production, “sustainable development,” and ‘fair trade’ because of the growing tendency to link territory, resources, know-how, and social capital, then it is imperative that we begin to subject IP management to new forms of scrutiny. We need to hold those who manage IP to enhanced standards of responsibility, in which the development of cultural, economic and social rights are truly integrated with respect for civil and political

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<sup>104</sup> See further, RJ Coombe and N Aylwin, ‘Bordering Diversity and Desire: Intellectual Property and Marking Place-based Products in Commerce’ (2011) *Environment and Planning A: Society and Space* (forthcoming).

rights. Only then will we have a basis for evaluating these as strategies to achieve greater social justice.