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

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## TABLE OF CONTENTS

INTRODUCTION .....	753
I. INTELLECTUAL PROPERTY AND RIGHTS-BASED DEVELOPMENT..	757
II. SUSTAINABILITY IN DEVELOPMENT .....	765
III. CULTURE AND HERITAGE IN DEVELOPMENT .....	769
IV. MARKS INDICATIVE OF CONDITIONS OF ORIGIN (MICO) .....	772
V. SUBJECTING MICOS TO SUSTAINABILITY AND RIGHTS-BASED DEVELOPMENT INDICATORS.....	778
CONCLUSION.....	784

## INTRODUCTION

On September 3rd, 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 specific good has a quality, reputation, or characteristic that is attributable to its geographical origin. The mark would be attached to goods containing 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. Recognising the economic value that traditionally-made products may have in global speciality markets, *Sandur Kushala Kala Kendra*, a non-governmental organization (“NGO”), and the Karnataka State

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Handicrafts Development Corporation, worked with, and on behalf of, all 300 craftswoman of the Lambani tribe in order 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 Kancheerapuram silk which already enjoy GI protection.<sup>2</sup> 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 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>3</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, IP has been called upon to serve these global development needs.<sup>4</sup> 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>5</sup> Efforts to make IP better serve

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<sup>1</sup> *Sandur Lambani Embroidery Gets GI Tag*, HINDU (Sept. 30, 2010), <http://www.hindu.com/2010/09/30/stories/2010093051390500.htm>.

<sup>2</sup> For an overview of the growing use of GI protection in India, see generally Katsuri Das, *Prospects and Challenges of Geographical Indications in India*, 13 J. WORLD INTELL. PROP. 148, 148-49 (2010). An earlier overview of GIs in India is found in Shivani Singhal, *Geographical Indications and Traditional Knowledge*, 3 J. INTELL. PROP. L. & PRAC. 732, 734-35 (2008).

<sup>3</sup> Madhavi Sunder, *IP*<sup>3</sup>, 59 STAN. L. REV. 257, 298 (2006) [hereinafter *IP*<sup>3</sup>].

<sup>4</sup> See COMM’N ON INTELL. PROP. RTS., INTEGRATING INTELLECTUAL PROPERTY RIGHTS AND DEVELOPMENT POLICY: REPORT OF THE COMMISSION ON INTELLECTUAL PROPERTY RIGHTS, at iii-iv (2002), [http://www.cipr.org.uk/papers/pdfs/final\\_report/CIPRcoverintrofinal.pdf](http://www.cipr.org.uk/papers/pdfs/final_report/CIPRcoverintrofinal.pdf).

<sup>5</sup> CHRISTOPHER MAY, WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO): RESURGENCE AND THE DEVELOPMENT AGENDA (2007); Margaret Chon, *Substantive Equality in International Intellectual Property Norm Setting and Interpretation*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 517 (Daniel Gervais ed., 2007); Carolyn Deere, *The Politics of Intellectual Property Reform in Developing Countries: The Relevance of the World Intellectual Property Organization*, in THE DEVELOPMENT AGENDA: GLOBAL INTELLECTUAL PROPERTY AND DEVELOPING COUNTRIES 127 (Neil Weinstock Netanel ed.,

the needs of the world's more marginalized 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>6</sup> Moreover, academics and activists protesting the strength and reach of corporately-held 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 the users of cultural goods in general.<sup>7</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.

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2009). For an overview and assessment of this and other development agendas pertaining to IP recently promoted in various international fora, see Peter K. Yu, *A Tale of Two Development Agendas*, 35 OHIO N.U. L. REV. 465 (2009).

<sup>6</sup> See, e.g., Abbe E. L. Brown, *Access to Essential Technologies: The Role of the Interface Between Intellectual Property, Competition and Human Rights*, 24 INT'L REV. L. COMPUTERS & TECH. 51 (2010); Audrey R. Chapman, *The Human Rights Implications of Intellectual Property Protection*, 5 J. INT'L ECON. L. 861 (2002); Rosemary J. Coombe, *Intellectual Property, Human Rights and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59, 59 (1998); Geertrui Van Overwalle, *Human Right's Limitations in Patent Law*, in INTELLECTUAL PROPERTY AND HUMAN RIGHTS: A PARADOX 241 (Willem Grosheide ed., 2010). See generally HUMAN RIGHTS AND INTELLECTUAL PROPERTY RIGHT: TENSIONS AND CONVERGENCES (Mpazi Sinjela ed., 2007).

<sup>7</sup> See, e.g., Craig Borowiak, *Farmers' Rights: Intellectual Property Regimes and the Struggle over Seeds*, 32 POL. & SOC'Y 511, 513 (2004); Yu-Lin Chang, *Who Should Own Access Rights?: A Game-Theoretical Approach to Striking the Optimal Balance in the Debate over Digital Rights Management*, 15 ARTIFICIAL INTELLIGENCE & L. 323 (2007); Philippe Cullet, *Patents and Medicines: The Relationship Between TRIPs and the Human Right to Health*, 79 INT'L AFF. 139, 160 (2003); Peter Jaszi, *Rights in Basic Information*, in INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD 5 (Ricardo Melendez-Ortiz & Pedro Roffe eds., 2009); Patricia Kameri-Mbote, *Community, Farmers' and Breeders' Rights in Africa: Towards a Legal Framework for Sui Generis Legislation*, 2003 U. NAIROBI L.J. 1, 1 (2003); Patricia Kameri-Mbote & James Otieno-Odek, *Genetic Use Restriction Technologies and Sustainable Development in Eastern and Southern Africa*, in INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD 209, 209 (Ricardo Melendez-Ortiz & Pedro Roffe eds., 2009); Cyril Lombard & Roger R. B. 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*, 19 FORESTS TREES & LIVELIHOOD 235 (2010); Michael J. Madison, *Rights of Access and the Shape of the Internet*, 44 B.C. L. REV. 433, 436 (2003); Ndukuyakhe Ndlovu, *Access to Rock Art Sites: A Right or a Qualification?*, 189 S. AFR. ARCHAEOLOGICAL BULL. 61 (2009); M. Gul Hossain, *The Protection of Community Rights and Plant Varieties: The Experience of Bangladesh* (2002), <http://ictsd.org/dlogue/2002-04-19/Hossain.pdf>.

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.<sup>8</sup> For example, as the tendency to treat all cultural forms as merely “information” emerges as a social ethos, IPRs are employed (or 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>9</sup>

Under conditions of globalization, the social justice norms of recognition, re-distribution, 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 whether IPRs should be considered as human rights, generally.<sup>10</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 of creating symbolic distinction in global markets.<sup>11</sup> As cultural rights and cultural resources assume new

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<sup>8</sup> See LAURENCE R. HELFER & GRAEME W. AUSTIN, *HUMAN RIGHTS AND INTELLECTUAL PROPERTY: MAPPING THE GLOBAL INTERFACE* 432-502 (2011).

<sup>9</sup> Rosemary J. Coombe & Nicole Aylwin, *Rethinking Cultural Heritage Ethics Using Human Rights Norms*, in *DYNAMIC FAIR DEALING: CREATING CANADIAN CULTURE ONLINE* 201 (Rosemary Coombe, Darren Wershler & Martin Zeilinger eds., 2013).

<sup>10</sup> For examples of these arguments see *INTELLECTUAL PROPERTY AND HUMAN RIGHTS* (Laurence Helfer, ed., 2012); Philippe Cullet, *Human Rights and Intellectual Property Protection in the TRIPS Era*, 29 *HUM. RTS. Q.* 403, 404 (2007); Das, *supra* note 2, at 180; Laurence R. Helfer, *Toward A Human Rights Framework for Intellectual Property*, 40 *UC DAVIS L. REV.* 971, 976-77 (2007); Singhal, *supra* note 2, at 732-33; Peter K. Yu, *Reconceptualizing Intellectual Property Interests in a Human Rights Framework*, 40 *UC DAVIS L. REV.* 1039 (2007).

<sup>11</sup> See, e.g., Rayyar Farhat, *Neotribal Entrepreneurialism and the Commodification of Biodiversity: WIPO’s Displacement of Development for Private Property Rights*, 15 *REV. INT’L POL.* 206 (2008); Liyu Han, *Cultural Products, Copyright Protection and Trade Rules*, 4 *FRONT. L. CHINA* 196 (2009); Guido Carlo Pigliasco, *We Branded Ourselves Long Ago: Intangible Cultural Property and Commodification of Fijian Firewalking*, 80 *OCEANIA* 161 (2010); Alexandra Basak Russell, *Using Geographical Indication to Protect Artisanal Works in Developing Countries: Lessons from a Banana Republic’s Misnomered Hat*, 19 *TRANSNAT’L L. & CONTEMP. PROBS.* 705 (2010); Anselm Kamperman Sanders, *Incentives for and Protection of Cultural Expression: Art, Trade and Geographical Indications*, 13 *J. WORLD INTELL. PROP.* 81 (2010).

significance in international development arenas, we argue, IPRs will be shaped to meet these objectives.

In this Article, 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”). 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 that MICO initiatives enable. In short, we argue that rights-based sustainable development indicia provide promising ways to evaluate MICO initiatives. We also suggest that further promotion of MICOs for 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 address the conditions under which IPRs and development have become inter-related, the reasons that this inter-relationship 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 consider the norm of sustainability that has become central to development theory and practice, and its implications for the way in which we evaluate the successful use of IPRs in development practice. This leads us to explain the increasing importance of cultural resources in sustainable development practices and the need to configure IP in order to value heritage resources and meet collective needs and aspirations. MICOs are then explored in terms of the qualities that they have, which make them appear as 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, by suggesting that great challenges lie ahead if MICOs are to secure the promise they seem to offer for community-sustainable development.

#### I. 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>12</sup> The proposals

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<sup>12</sup> This should be understood as a reminder rather than a new initiative. When

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>13</sup> As a result of such proposals, WIPO now has a strong development agenda and a number of initiatives that correspond with the UN Millennium Development Goals.<sup>14</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 and 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 exclusively viewed 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

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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.

<sup>13</sup> Davinia Overt, *Policy Brief on Intellectual Property, Development and Human Rights: How Human Rights can Support Proposals for a World Intellectual Property Organization (WIPO) Development Agenda*, (2006), [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=AFQjCNExgnPSO0ZTxLFDVBSWE4g2bOXsvg](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=AFQjCNExgnPSO0ZTxLFDVBSWE4g2bOXsvg).

<sup>14</sup> For instance, in an attempt to address Goal 1, “Eradicate Extreme Poverty and Hunger,” WIPO’s 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.” *Millennium Development Goal 1*, WORLD INTELL. PROP. ORG., [http://www.wipo.int/ip-development/en/agenda/millennium\\_goals/millennium\\_goal\\_1.html](http://www.wipo.int/ip-development/en/agenda/millennium_goals/millennium_goal_1.html) (last visited Sept. 14, 2013). WIPO now recognizes 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 WIPO’s work on the Millennium Development Goals, see *id.*

conceived in the emergence, content, and practice of rights-based development.<sup>15</sup>

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

[T]he 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>16</sup>

Accordingly, rights-based development takes seriously both social and economic rights as primary concerns.<sup>17</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. This outlook is now reflected in major NGO programs, bilateral aid programs, and the Millennium Development Goals.<sup>18</sup> The principles of a rights-based approach include equitable participation, accountability, non-discrimination, empowerment, and linkage to international rights instruments.<sup>19</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 of implementing these principles in

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<sup>15</sup> Paul Gready & Jonathan Ensor, *Introduction*, in *REINVENTING DEVELOPMENT?: TRANSLATING RIGHTS-BASED APPROACHES FROM THEORY INTO PRACTICE* 1-44 (Paul Gready & Jonathan Ensor eds., 2005).

<sup>16</sup> *Id.* at 18.

<sup>17</sup> Brigitte I. Hamm, *A Human Rights Approach to Development*, 23 *HUM. RTS. Q.* 1006, 1006 (2001).

<sup>18</sup> Gershon Shafir & Alison Brysk, *The Globalization of Rights: From Citizenship to Human Rights*, 10 *CITIZENSHIP STUD.* 275, 280 (2006).

<sup>19</sup> Craig G. Mokhiber, *Toward a Measure of Dignity: Indicators for Rights-Based Development*, 18 *STAT. J. U.N. ECE* 155, 158 (2001).

practice and evaluating their success remain disputed.<sup>20</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 asymmetries of power normally found in, and sometimes caused by, development projects.<sup>21</sup> In other words, redressing existing discriminatory patterns and avoiding new forms of deprivation are fundamental criteria for evaluating whether a project has fulfilled the human-rights criteria. Political theorist Brigitte Hamm provides four criteria for implementation and evaluation: projects must (1) reference the human-rights obligations of states, (2) practice non-discrimination with a focus on empowering disadvantaged groups, (3) place an emphasis on inclusive participation in project planning and implementation, and (4) comply with recognized principles of good governance.<sup>22</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

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<sup>20</sup> See Paul Gready, *Reasons to be Cautious about Evidence and Evaluation: Rights-based Approaches to Development and the Emerging Culture of Evaluation*, 1 J. HUM. RTS. PRAC. 380 (2009); Hamm, *supra* note 17, at 1007; AnnJanette Rosga & Margaret L. Satterthwaite, *The Trust in Indicators: Measuring Human Rights*, 27 BERKELEY J. INT'L L. 253, 256-57 (2009) (analyzing indicators in the human rights context).

<sup>21</sup> See Mac Darrow & Amparo Tomas, *Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation*, 27 HUM. RTS. Q. 471, 489 (2005).

<sup>22</sup> Hamm, *supra* note 17, at 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, and 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 Thomas W. D. Davis, *The Politics of Human Rights and Development: The Challenge for Official Donors*, 44 AUSTL. J. OF POL. SCI. 173, 180-84 (2009). See generally RIGHTS-BASED APPROACHES TO DEVELOPMENT: EXPLORING THE POTENTIAL AND PITFALLS (Sam Hickey & Diana Mitlin eds., 2009) (discussing rights-based development's potential and its limits); Jean Grugel & Nicola Piper, *Do Rights Promote Development?*, 9 GLOBAL SOC. POL'Y 79 (2009) (providing a succinct overview of the ways in which development NGOs began to frame needs and claims as simultaneously development and rights issues).

mechanisms are measures that might ensure the integrity of projects that use IPRs to achieve development objectives by:

[I]dentifying 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>23</sup>

If rights-based development brings two prominent areas of normative practice into a new relationship, it also re-configures the political field. Rights-based development conceives of human rights in a fashion that speaks to the changes associated with economic globalization and the de-centring of the state and the redistribution of its powers and responsibilities. The vertical pole of rights (state-individual) is not replaced, but is 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 helping to create development initiatives that eschew purely legalistic interpretations of rights. Instead 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 is the primary goal.<sup>24</sup>

Building the capacities of rights-holders to make claims and duty-holders to fulfil responsibilities involves multiple agencies that work across diverse scales.<sup>25</sup> The expanding role of non-state actors and the increasing importance of decisions made in transnational *fora* have

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<sup>23</sup> See Ovett, *supra* note 13, at 2.

<sup>24</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 co-ordinating 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 ensure that they remained in control of their own working conditions and traditional modes of production.

<sup>25</sup> Hamm, *supra* note 17, at 1015-16.

been described by political theorists as the emergence of a “global public domain.”<sup>26</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 will include transnational dialogue, both about new entitlements and new exemptions (as we have seen with regard to traditional environmental knowledge). The term “global public sphere” might better capture the deliberative, multi-sectoral nature of these new decision-making processes.<sup>27</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 only civil and political, but also economic, social and cultural rights as well.<sup>28</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

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<sup>26</sup> See, e.g., John G. Ruggie, *Reconstituting the Global Public Domain — Issues, Actors and Practices*, 10 EUR. J. INT’L REL. 499, 499 (2004). See generally DUNCAN MATTHEWS, *INTELLECTUAL PROPERTY, HUMAN RIGHTS AND DEVELOPMENT* (2011) (discussing the growing role of NGOs in IP policy-making); Duncan Matthews, *The Role of International NGOs in the Intellectual Property Policy-Making and Norm-Setting Activities of Multilateral Institutions*, 82 CHI.-KENT L. REV. 1369 (2007).

<sup>27</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>28</sup> 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.” The Commission on Economic, Social, and Cultural Rights 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. U.N. CONF. ON TRADE & DEV., *THE LEAST DEVELOPED COUNTRIES REPORT 2007*, at i, ix-x (2007), available at [http://www.unctad.org/en/docs/ldc2007\\_en.pdf](http://www.unctad.org/en/docs/ldc2007_en.pdf).

development and IP are potentially complementary regimes.<sup>29</sup> Human rights, at their most basic level, are concerned with securing and promoting human dignity and ensuring human flourishing; there is no reason why IPRs could not offer vehicles to support these pursuits.<sup>30</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, in 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>31</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>32</sup> These politics go beyond targeting single

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<sup>29</sup> Ruth L. Okediji, *Securing Intellectual Property Objectives: New Approaches to Human Rights Considerations*, in *CASTING THE NET WIDER: HUMAN RIGHTS, DEVELOPMENT AND NEW DUTY-BEARERS* 211, 242 (Margot E. Salomon, Arne Tostensen & Wouter Vandenhole eds., 2007). For proposed action towards this end, see generally *IMPLEMENTING THE WORLD INTELLECTUAL PROPERTY ORGANIZATION'S DEVELOPMENT AGENDA* (Jeremy de Beer ed., 2009); *INTELLECTUAL PROPERTY AND HUMAN DEVELOPMENT: CURRENT TRENDS AND FUTURE SCENARIOS* (Tzen Wong & Graham Dutfield eds., 2011).

<sup>30</sup> See generally Comm. on Econ., Soc. & Cultural Rights, Rep. on its 35th Sess., Nov. 7-25, 2005, U.N. Doc. E/C.12/GC/17 (Jan. 12, 2006).

<sup>31</sup> Paul Nelson & Ellen Dorsey, *New Rights Advocacy in a Global Public Domain*, 13 *EUR. J. INT'L REL.* 187, 190 (2007) [hereinafter *New Rights Advocacy*]. See generally Paul Nelson & Ellen Dorsey, *At the Nexus of Human Rights and Development: New Methods and Strategies of NGOs*, 31 *WORLD DEV.* 2013 (2003) (discussing the potential and limitations of global NGOs' efforts to link development and human rights).

<sup>32</sup> See CAROLYN DEERE, *THE IMPLEMENTATION GAME: THE TRIPS AGREEMENT AND THE*

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 NGOs support and cooperate with governments and work against the constraining effects of trade rules, economic policy conditionality and corporate leverage.”<sup>33</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. By mobilizing human-rights principles as leverage against the norms of liberalization and privatization and by assigning accountability beyond the violating state, these struggles confront the IP privileges held by corporate rights-holders. The campaign for essential medicines and global Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome (“HIV”/“AIDS”) treatment is, perhaps, the best known,<sup>34</sup> but it is not singular.<sup>35</sup> The rights of governments to refuse to patent or to admit genetically-modified foods, and the rights of citizens to refuse the commodification of life-forms, are championed by a new range of

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GLOBAL POLITICS OF INTELLECTUAL PROPERTY REFORM IN DEVELOPING COUNTRIES 123-28 (2009); cf. Andréa K. Menescal, *Changing WIPO's Ways? The 2004 Development Agenda in Historical Perspective*, 8 J. WORLD INTELL. PROP. 761 (2005).

<sup>33</sup> DEERE, *supra* note 32, at 190. See, e.g., Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT'L ORG. 277 (2004).

<sup>34</sup> See Dorsey & Nelson, *New Rights Advocacy*, *supra* note 31, at 203; see also SUSAN K. SELL, PRIVATE POWER, PUBLIC LAW: THE GLOBALIZATION OF INTELLECTUAL PROPERTY RIGHTS 155 (2003); Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of Intellectual Property Making*, 29 YALE J. INT'L L. 1, 4-5 (2004); Ellen F. M. Hoen, *TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha*, 3 CHI. J. INT'L L. 27, 27 (2002); Pedro Roffe et al., *From Paris to Doha: The WTO Doha Declaration on the TRIPs Agreement and Public Health*, in NEGOTIATING HEALTH: INTELLECTUAL PROPERTY AND ACCESS TO MEDICINES 9, 12 (Pedro Roffe, Geoff Tansey & David Vivas-Eugui eds., 2005). See generally Laurence R. Helfer, *Regime Shifting in the International Intellectual Property System*, 7 PERSPECTIVES ON POL. 39, 42 (2009); Susan K. Sell, *Cat and Mouse: Forum-Shifting in the Battle Over Intellectual Property Enforcement* (Am. Pol. Sci. Ass'n Meeting 2009), available at <http://ssrn.com/abstract=1466156>.

<sup>35</sup> See for example, LOUISE BERNIER, JUSTICE IN GENETICS: INTELLECTUAL PROPERTY AND HUMAN RIGHTS FROM A COSMOPOLITAN LIBERAL PERSPECTIVE 1-3 (2010); DEBORA J. HALBERT, RESISTING INTELLECTUAL PROPERTY (2005).

advocates.<sup>36</sup> Access to knowledge and open research networks are viewed as entitlements,<sup>37</sup> the rights of farmers to save seed over and above patents and plant breeders' rights are linked to food sovereignty<sup>38</sup> and asserted as aspects of self-determination, and states are provided with new legal resources to resist international trade pressures.<sup>39</sup> IP issues are thereby immersed in larger political conversations about livelihood sustainability.

## II. SUSTAINABILITY IN DEVELOPMENT

Just as rights-based norms have been deployed to counter trade-dominated understandings of IP, the concept of sustainability has provided policy-makers 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

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<sup>36</sup> See, e.g., DAVID B. RESNIK, *OWNING THE GENOME: A MORAL ANALYSIS OF DNA PATENTING* (2003); Bita Amani & Rosemary J. Coombe, *The Human Genome Diversity Project: The Politics of Patents at the Intersection of Race, Religion, and Research Ethics*, 27 *LAW & POL'Y* 159 (2005) (discussing emergence of social movements seeking to reposition IP issues in debates on human rights, social justice, and distributional equalities); Debra Harry, *High-Tech Invasion: Biocolonialism*, in *PARADIGM WARS: INDIGENOUS PEOPLES' RESISTANCE TO GLOBALIZATION* 71 (Jerry Mander & Victoria Tauli-Corpus eds., 2006) [hereinafter *PARADIGM WARS*] (discussing Indigenous People's rejection of the patenting of genetic resources as conflicting with their values); Sabrina Safrin, *Hyperownership in a Time of Biotechnological Promise: The International Conflict to Control the Building Blocks of Life*, 98 *AM. J. INT'L L.* 641 (2004) (discussing the collateral damage caused by "hyperownership" of genetic material).

<sup>37</sup> Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L. J.* 804, 806 (2008).

<sup>38</sup> ANNETTE A. DESMARAIS, *LA VIA CAMPESINA: GLOBALIZATION AND THE POWER OF PEASANTS* (2007). See generally Keith Aoki, *Weeds, Seeds & Deeds: Recent Skirmishes in the Seed Wars*, 11 *CARDOZO J. INT'L & COMP. L.* 247 (2003) (discussing ownership of IP rights over germplasm); Victor Menotti, *How the World Trade Organization Diminishes Native Sovereignty*, in *PARADIGM WARS*, *supra* note 36, at 59 (discussing Indigenous Peoples' conflict with the WTO over the control of natural resources); Chidi Oguamanam, *Agro-Biodiversity and Food Security: Biotechnology and Traditional Agricultural Practices at the Periphery of International Intellectual Property Regime Complex*, 2007 *MICH. ST. L. REV.* 215 (analyzing the role of IP in relation to agricultural biotechnology and traditional agricultural practices); Thom Van Dooren, *Inventing Seed: The Nature(s) of Intellectual Property in Plants*, 26 *ENV'T & PLANNING D: SOC'Y & SPACE* 676 (2008) (exploring agricultural IP patent law and what counts as "nature" and what counts as "invented" within that law).

<sup>39</sup> See generally BITA AMANI, *STATE AGENCY AND THE PATENTING OF LIFE IN INTERNATIONAL LAW: MERCHANTS AND MISSIONARIES IN A GLOBAL SOCIETY* (2009); Peter Drahos, *Four Lessons for Developing Countries from the Trade Negotiations over Access to Medicines*, 28 *LIVERPOOL L. REV.* 11 (2007).

social groups through new forms of governance that challenge the narrow principles of market efficiency. The foundations of the sustainability movement sit uneasily with neo-liberal, trickle-down economics in which development capacities are to be maximized with no necessary regard for participation, re-distribution or social justice. Like neo-liberalism, sustainable development seeks to open up (state-dominated) economic systems, but it does so as a means to encourage the engagement of a wider variety of actors in the politics of development.<sup>40</sup> Sustainability has been suggested as a valuable conceptual framework for considering IP because it acknowledges the integrated importance of social, environmental, and economic issues.<sup>41</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 co-operatives by encouraging co-operation between NGOs and corporations, educating consumers, and building new forms of social solidarity.<sup>42</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, which links 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 that have been certified to meet certain standards appear to be proliferating.<sup>43</sup> Although these

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<sup>40</sup> Mike Raco, *Sustainable Development, Rolled-out Neoliberalism and Sustainable Communities*, 37 *ANTIPODE* 324, 330-31 (2005).

<sup>41</sup> Dora Marinova & Margaret Raven, *Indigenous Knowledge and Intellectual Property: A Sustainability Agenda*, 20 *J. ECON. SURV.* 587, 592 (2006). See generally PHILIPPE CULLET, *INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT* (2005); GAVIN FRIDELL, *FAIR TRADE COFFEE: THE PROSPECTS & PITFALLS OF MARKET DRIVEN SOCIAL JUSTICE* (2007) (discussing the history of fair-trade coffee, the Fairtrade Labelling Organisation ("FLO"), and the benefits this moral economy of alternative globalization has provided to many communities in the Global South); DANIEL JAFFE, *BREWING JUSTICE: FAIR TRADE COFFEE, SUSTAINABILITY, AND SURVIVAL* (2007) (discussing the relevance of fair trade certification for food security and environmental sustainability); Raymond C. Offenheiser & Susan H. Holcombe, *Challenges and Opportunities in Implementing a Rights-Based Approach to Development: An Oxfam American Perspective*, 32 *NONPROFIT & VOLUNTARY SECTOR Q.* 268 (2003) (discussing Oxfam's rationale).

<sup>42</sup> Shafir & Brysk, *supra* note 18, at 281.

<sup>43</sup> Michelle Agdomar, *Removing the Greek from Feta and Adding Korbel to*

certification programs are privately operated, they often claim to promote the public interest and may be shaped by the motivation to re-structure market incentives in order to achieve environmental and social aspirations.<sup>44</sup> Fair trade and sustainable forestry certifications are but the best known of the MICOs that link 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 in order to find new means of protecting traditional knowledge (“TK”).<sup>45</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>46</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 the preservation of languages, for improved health and living standards, and for better political representation and participation to support a “people-culture-country continuum.”<sup>47</sup>

Interestingly, what economists Dora Marinova and Margaret Raven offer as an example of one means of protecting indigenous knowledge

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*Champagne: The Paradox of Geographical Indications in International Law*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 541, 545-46 (2008); Margaret Chon, *Marks of Rectitude*, 77 FORDHAM L. REV. 2311, 2332 (2009).

<sup>44</sup> Errol E. Mendieger, *Law Making by Global Civil Society: The Forest Certification Prototype* 16 (Baldy Center for Law and Social Policy, State Univ. of N.Y. at Buffalo, Working Paper, 2001), available at <http://web2.law.buffalo.edu/faculty/meidinger/scholarship/GCSEL.pdf>; Errol E. Mendieger, *Multi-Interest Self-Governance through Global Product Certification Programs* 28-29 (Buff. Legal Stud. Res., Paper No. 2006-016, 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=917956](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917956); Errol E. Mendieger, “Private” Environmental Law Regulation, *Human Rights and Community*, 7 BUFF. ENVTL. L.J. 123, 125 (1999).

<sup>45</sup> The number of international instruments that refer to the protection of TK is now quite large. See Rosemary J. Coombe, *First Nations’ Intangible Cultural Heritage Concerns: Prospects for Protection of Traditional Knowledge and Traditional Cultural Expressions in International Law*, in PROTECTION OF FIRST NATIONS’ CULTURAL HERITAGE: LAWS, POLICY AND REFORM 311, 313 (Catherine Bell & Robert Patterson eds., 2008); Rosemary J. 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?*, 17 FLA. J. INT’L L. 115, 115-16 (2005) [hereinafter *Protecting Traditional Environmental Knowledge*].

<sup>46</sup> Marinova & Raven, *supra* note 41, at 592.

<sup>47</sup> *Id.* at 593.

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“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 — The Sandalwood Factory*) and a collective made up of indigenous elders (the *Songman’s Circle of Wisdom*, a non-profit aboriginal organization, certify that proper protocol is observed in collecting) that collectively ensure that an aboriginal community receives funds for the provision of sandalwood oil.

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>48</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.

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<sup>48</sup> *Songman Circle of Wisdom Indigenous Plant Certification Protocol*, AGREEMENTS, TREATIES & NEGOTIATED SETTLEMENTS PROJECT (Jan. 1, 2004), <http://www.atns.net.au>.

## III. CULTURE AND HERITAGE IN DEVELOPMENT

[C]ulture has recently acquired a new visibility and salience in development thinking and practice.<sup>49</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 between culture and development difficult to evaluate.<sup>50</sup> Cultural rights, that is, the 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 renewed attention.<sup>51</sup> Evoking culture in development circles indexes the concerns about maintaining cultural diversity, respecting local value systems, ensuring social cohesion and ending discrimination against the socially marginalized.<sup>52</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>53</sup>

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<sup>49</sup> Sarah A. Radcliffe, *Culture in Development Thinking: Geographies, Actors and Paradigms*, in *CULTURE AND DEVELOPMENT IN A GLOBALIZING WORLD: GEOGRAPHIES, ACTORS, AND PARADIGMS* 1, 1 (Sarah A. Radcliffe ed., 2006).

<sup>50</sup> Craig G. Mohkiber, *Toward a Measure of Dignity: Indicators for Rights-Based Development*, 18 *STATISTICAL J. U.N. ECE* 155, 159 n.24 (2001).

<sup>51</sup> See Robert Albro & Joanne Bauer, *Introduction, Cultural Rights: What They Are, Why They Matter, How They can be Realized*, 2 *HUM. RTS. DIALOGUE* 1, 2 (2005); Janusz Symonides, *The Implementation of Cultural Rights by the International Community*, 60 *GAZETTE* 7, 8-9 (1998).

<sup>52</sup> See Radcliffe, *supra* note 49, at 1.

<sup>53</sup> Kelly Feltault, *Development Folklife: Human Security and Cultural Conservation*, 119 *J. AM. FOLKLORE* 90, 90-91 (2006).

Cultural rights, particularly those that embrace identity claims, are an area of enhanced human-rights concern.<sup>54</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, which have adopted the view that culture is a resource. Although culture as an asset is often framed in purely economic terms, culture conceived as a resource puts greater value on social cohesion, community autonomy, political recognition, local pride, and cross-generational communications, and brings new issues such as cultural misrepresentation, the loss of languages, and the preservation and valuation of local knowledge to the fore. These concerns are integrally related to neo-liberalism, 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 de-contextualization, while simultaneously heightening the/our awareness of the exploitation of cultural heritage resources and has thus enhanced political consciousness about the injuries that may thereby be effected.<sup>55</sup>

We have witnessed a growing possessiveness in relation to cultural forms at exactly the same time that culture is being re-valued, not only by indigenous peoples,<sup>56</sup> but also by communities, regions, and national governments, which see cultural expressions, cultural distinctions, and cultural diversity as sources of both meaning and income.<sup>57</sup> Efforts to re-value traditions and revive heritage take place

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<sup>54</sup> See Robert Albro, *Managing Culture at Diversity's Expense?: Thoughts on UNESCO's Newest Cultural Policy Instrument*, 29 J. ARTS MGMT. L. SOC'Y 247, 247 (2005); Albro & Bauer, *supra* note 51, at 12; Bruce Robbins & Elsa Stamatopolou, *Reflections on Culture and Cultural Rights*, 103 S. ATLANTIC Q. 419, 419 (2004); Shafir & Brysk, *supra* note 18, at 280-83.

<sup>55</sup> Rosemary J. Coombe, *The Expanding Purview of Cultural Properties and their Politics*, 5 ANN. REV. L. SOC. SCI. 393, 394 (2009).

<sup>56</sup> See Michael F. Brown, *Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property*, 12 INT'L. J. CULTURAL PROP. 40, 40 (2005); Elizabeth B. Coleman & Rosemary J. Coombe, *A Broken Record: Subjecting 'Music' to Cultural Rights*, in *ETHICS OF CULTURAL APPROPRIATION* 173, 179 (James O. Young & Conrad G. Brunck eds., 2009). See generally MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? 1-7 (2003).

<sup>57</sup> See Rosemary J. Coombe, *Legal Claims to Culture in and Against the Market: Neoliberalism and the Global Proliferation of Meaningful Difference*, 1 L. CULTURE & HUMAN. 32, 42, 50 (2005). See generally Mohsen Ahmed, Rosemary J. Coombe &

on 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 integral,”<sup>58</sup> communities are “empowered,”<sup>59</sup> and human rights are interpreted, through vernacular structures of meaning.<sup>60</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 sense 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 the WIPO has, arguably, embraced) but over a decade of global deliberations on this front suggest that it is an enormous challenge.

Current methods of protecting IP are often too limited to recognize peoples’ rights in relation to indigenous knowledge (“IK”) for instance, and, to date, the 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. IK 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>61</sup> A rights-based approach to the issue, moreover, would insist that opportunities be widely shared and efforts made to distribute

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Steven Schnoor, *Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property*, 40 UC DAVIS L. REV. 891, 891-917 (2007) (demonstrating that governments, regions, and local communities have started valuing cultural differences).

<sup>58</sup> Gready & Ensor, *supra* note 15, at 11.

<sup>59</sup> Rosemary J. Coombe, *Cultural Agencies: ‘Constructing’ Community Subjects and Their Rights*, in *MAKING AND UNMAKING INTELLECTUAL PROPERTY* 79, 85 (Mario Biagioli, Peter Jaszi & Martha Woodmansee eds., 2010). For a critical understanding of this process, see generally Rosemary J. Coombe, *‘Possessing Culture’: Political Economies of Community Subjects and Their Properties*, in *OWNERSHIP AND APPROPRIATION* 105, 105-21 (Mark Busse & Veronica Strang eds., 2010).

<sup>60</sup> See Gready & Ensor, *supra* note 15, at 17.

<sup>61</sup> Marinova & Raven, *supra* note 41, at 591.

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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 both maintained and reproduced. To the extent that biological and cultural diversity are regarded as being inter-related,<sup>62</sup> IP, 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>63</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 the rights-based indicators because it does not consider the ends as well as the means of development. In other words: within a human-rights framework that values sustainability, 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.

#### IV. MARKS INDICATIVE OF CONDITIONS OF ORIGIN (MICO)

Are IPRs capable of becoming more flexible in order to address these newly-linked economic, social, cultural, and environmental objectives? Geographical indications (“GIs”) are one means by which local conditions of production can be maintained, and traditional methods and practices recognized and valued through the exploitation

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<sup>62</sup> See generally Stanford Zent & Eglé L. Zent, *On Biocultural Diversity from a Venezuelan Perspective: Tracing the Interrelationships Among Biodiversity, Culture Change and Legal Reforms*, in *BIODIVERSITY AND THE LAW: INTELLECTUAL PROPERTY, BIOTECHNOLOGY AND TRADITIONAL KNOWLEDGE* 91, 91-109 (Charles R. MacManus ed., 2007) (discussing the relatedness of cultural and biological diversity).

<sup>63</sup> See Coombe, *Protecting Traditional Environmental Knowledge*, *supra* note 45, at 120-21.

of niche markets.<sup>64</sup> Used historically to protect the rural traditions of European élites, they are now favorably considered as vehicles to promote the development of others whose collective rights, traditions and cultural resources may thereby assume new value.<sup>65</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 that act primarily to promote alienability. Appellations of origin refer to geographical names that designate the origin of a good, in which “the quality and characteristics exhibited by the product are essentially attributable to the geographical environment, including natural and human factors.”<sup>66</sup> Goods that have a quality, reputation, or characteristic that is attributable to their geographical origin are covered by the Agreement on the Trade Related Aspects of Intellectual Property Rights (“TRIPs Agreement”).<sup>67</sup>

If we take “geographical origin” here to extend to natural and human factors (as it did historically as well as in earlier drafts of the TRIPs Agreement<sup>68</sup>), then it is possible for marks of origin to designate a wide range of reputational characteristics. For example, certain

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<sup>64</sup> See DWIJEN RANGNEKAR, U.N. CONF. ON TRADE & DEV. AND INT’L CTR. FOR TRADE & SUSTAINABLE DEV., *THE SOCIO-ECONOMICS OF GEOGRAPHICAL INDICATIONS: A REVIEW OF EMPIRICAL EVIDENCE FROM EUROPE* (2004), available at <http://www.iprsonline.org>.

<sup>65</sup> See LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* 963 (2d ed. 2009); Daniel Gervais, *Traditional Knowledge: Are We Closer to the Answer(s)? The Potential Role of Geographical Indications*, 15 *ILSA J. INT’L & COMP. L.* 551 (2009); Anselm Kamperman Sanders, *Incentives for and Protection of Cultural Expression: Art, Trade and Geographical Indications*, 13 *J. WORLD INTELL. PROP.* 81 (2010); Brad Sherman & Leanne Wiseman, *Toward an Indigenous Public Domain?*, in *THE FUTURE OF THE PUBLIC DOMAIN* 259 (Lucie Guibault & P. Bernt Heugenholtz eds., 2006); Sunder, *IP<sup>3</sup>*, *supra* note 3, at 300; Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 *LAW & CONTEMP. PROBS.* 97, 98-99 (2007) [hereinafter *The Invention of Traditional Knowledge*].

<sup>66</sup> Matthijs Gueze, World Intell. Prop. Org. [WIPO], *Let’s Have Another Look at the Lisbon Agreement: Its Terms in Their Context and in Light of its Object and Purpose*, INTERNATIONAL SYMPOSIUM ON GEOGRAPHICAL INDICATIONS, at 1, WIPO Doc. GEO/BEI/07/10 (June 18, 2007), available at [http://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>67</sup> See Marcus Hopperger, WIPO, *Geographical Indications in the International Arena: The Current Situation*, INTERNATIONAL SYMPOSIUM ON GEOGRAPHICAL INDICATIONS, at 1, WIPO Doc. GEO/BEI/07/7 (June 12, 2007).

<sup>68</sup> See DAPHNE ZOGRAFOS, *INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS* 176-77 (2010).

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 Cerkia Bramley and Johann 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>69</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 re-iteration of this range, we have coined the term “marks indicating conditions of origin” (“MICOs”) to indicate the larger field throughout this Article. Different countries use different vehicles to accomplish similar things; a jurisdiction without a history of recognizing geographical indications may instead have a well-developed range of collective or certification marks, that may look more like a conventional group of trademarks found elsewhere. A more encompassing term such as 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 MICOs as possible tools for local and rural development.<sup>70</sup>

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<sup>69</sup> See generally Cerkia Bramley & Johann F. Kirsten, *Exploring the Economic Rationale for Protecting Geographical Indicators in Agriculture*, 46 *AGREKON* 69, 74 (2007).

<sup>70</sup> For discussion of global approaches, see A. Berenguer, *Geographical Origins in the World*, in *PROMOTING AGRICULTURAL COMPETITIVENESS THROUGH LOCAL KNOW-HOW*, PROCEEDINGS OF THE MONTPELLIER WORKSHOP (2004); Michael Blakeney, *Protection of Traditional Knowledge by Geographical Indications*, 3 *INT'L J. INTELL. PROP. MGMT. ISSUES* 357 (2009); Rosemary J. Coombe, Sarah Ives and Daniel Huizenga, *Geographical Indications: The Promise, Perils and Politics of Protecting Place-Based Goods*, in *THE SAGE HANDBOOK ON INTELLECTUAL PROPERTY* (Deborah Halbert and David Matthew eds,

MICOs are seen as being 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>71</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 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>72</sup>

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2014); G. E. Evans & Michael Blakeney, *The Protection of Geographical Indications After Doha: Quo Vadis?*, 9 J. INT'L ECON. L. 3 (2009). For examples of NGO studies, see DAVID R. DOWNES & SARAH A. LAIRD, INNOVATIVE MECHANISMS FOR SHARING BENEFITS OF BIODIVERSITY AND RELATED KNOWLEDGE: CASE STUDIES ON GEOGRAPHICAL INDICATIONS AND TRADEMARKS 7 (1999), available at <http://www.ciel.org/Publications/InnovativeMechanisms.pdf>; PETRA VAN DE KOP, DENIS SAUTIER & ASTRID GERZ, ROYAL TROPICAL INST., ORIGIN-BASED PRODUCTS: LESSONS FOR PRO-POOR MARKET DEVELOPMENT 18-19 (2006); B. SYLVANDER, DEV. ORIGIN LABELLED PRODS. HUMAN. INNOVATION & SUSTAINABILITY [DOLPHINS], WP 7 FINAL REPORT, SYNTHESIS AND RECOMMENDATIONS 70 (2004), available at [http://www.origin-food.org/pdf/wp7/dol\\_d8.pdf](http://www.origin-food.org/pdf/wp7/dol_d8.pdf); Felix Addor & Alexandra Grazioli, *Geographical Indications Beyond Wines and Spirits: A Roadmap for a Better Protection for Geographical Indications in the WTO/TRIPS Agreement*, 5 J. WORLD INTELL. PROP. 865, 893 (2002). For examples of regional studies, see CARLOS M. CORREA, PROTECTION OF GEOGRAPHICAL INDICATIONS IN CARICOM COUNTRIES (2002), available at <http://www.iadb.org/intal/intalcdi/PE/2009/03454.pdf>; E. MENDES, W. CAPE DEP'T AGRIC. REP., AN INVESTIGATION INTO THE POTENTIAL FOR PRODUCTS OF ORIGIN IN THE WESTERN CAPE, SOUTH AFRICA 154 (2001); DENIS SAUTIER & C. SARFATI, INDICATIONS GÉOGRAPHIQUES EN AFRIQUE FRANCOPHONE: RAPPORT 2004 DES ACTIONS D'APPUI INAO-CIRAD AUPRÈS DE L'OAPI (2005); SWARNIM WAGLE, U.N. DEV. PROGRAMME, GEOGRAPHICAL INDICATIONS AS TRADE-RELATED INTELLECTUAL PROPERTY: RELEVANCE AND IMPLICATIONS FOR HUMAN DEVELOPMENT IN ASIA-PACIFIC (2007); Dwijen Rangnekar, *Indications of Geographical Origin in Asia: Legal and Policy Issues to Resolve*, in INTELLECTUAL PROPERTY AND SUSTAINABLE DEVELOPMENT: DEVELOPMENT AGENDAS IN A CHANGING WORLD 273 (2010).

<sup>71</sup> Fabrice Marty, *Which are the Ways of Innovation in PDO and PGI Products? Typical and Traditional Products: Rural Effect and Agro-Industrial Problems*, in 52ND EUROPEAN ASSOCIATION OF AGRICULTURAL ECONOMICS SEMINAR PROCEEDINGS 41, 44-45 (1997).

<sup>72</sup> Addor & Grazioli, *supra* note 70, at 866.

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>73</sup>

The capacity to implement collective control over these marks is especially attractive both to development practitioners and to NGOs concerned with preventing 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 regard to products derived from the traditional practices of communities, and have a history of being used to protect traditional cultural expressions.<sup>74</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>75</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>76</sup> Using a GI as a means of supporting local collectivities is, nonetheless, controversial; some critics argue that such a use is nothing more than a thinly veiled protectionist measure that can be used to undermine competition,<sup>77</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>78</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,

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<sup>73</sup> Daphne Zografos, *Geographical Indicators and Socio-economic Development* 16 (IQsensato, Working Paper No. 3, 2008), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1628534](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1628534).

<sup>74</sup> See ZOGRAFOS, *supra* note 68, at 103.

<sup>75</sup> See generally Addor & Grazioli, *supra* note 70, at 867.

<sup>76</sup> See Irene Calboli, *Expanding the Protection of Geographical Indications of Origin Under TRIPS: Old Debate or New Opportunity?*, 10 MARQ. INTELL. PROP. L. REV. 181, 182 (2006).

<sup>77</sup> See *id.* at 186.

<sup>78</sup> See, e.g., Justin Hughes, *Champagne, Feta, and Bourbon: The Spirited Debate About Geographical Indications*, 58 HASTINGS L.J. 299 (2008); Inessa Shalevick, *Protection of Trademarks and Geographical Indications*, 6 BUFF. INTELL. PROP. L.J. 67 (2008).

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>79</sup> Consumer interests in securing knowledge about “conditions of origin” for goods as well as the commitments on the part of states to human-rights principles are also relevant considerations that militate against such purely economic arguments.<sup>80</sup>

As a tool in rights-based development practice, the introduction of GIs can aid the forging of 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. However, as we shall see, these are often promoted by states, which 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 MICO 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 with regard to their governance in assessing their capacities to serve as engines of rural development.<sup>81</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

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<sup>79</sup> Agdomar, *supra* note 43, at 548, 605.

<sup>80</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 Doris Estelle Long, *Is Fame All There Is?: Beating Global Monopolists at Their Own Marketing Game*, 40 GEO. WASH. INT'L L. REV. 123, 155-57 (2008); Ruth L. Okedji, *The International Intellectual Property Roots of Geographical Indications*, 82 CHI.-KENT L. REV. 1329 (2007).

<sup>81</sup> Elizabeth Barham, *Translating Terroir: The Global Challenge of French AOC Labelling*, 19 J. RURAL STUD. 127, 127 (2003).

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development perspective, careful attention to such indirect goals as biodiversity preservation, the protection of TK, 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>82</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.”<sup>83</sup> Instead, we argue that a consideration of their social function and consequence, their communicative objectives, their role in regional development policies for alleviating rural poverty, and their capacity to build social capital is necessary to truly measure their success. 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 MICOs will now be briefly summarised. A rights-based sustainable development framework assists us in evaluating these initiatives.

#### V. SUBJECTING MICOs 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>84</sup> Nonetheless, as Gerald Evans and Michael Blakeney have 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.<sup>85</sup> Similarly,

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<sup>82</sup> See Hughes, *supra* note 78, at 373-74.

<sup>83</sup> See, e.g., Stephen R. Munzer & Kal Raistala, *The Global Struggle over Geographical Indications*, 18 EUR. J. INT'L L. 337 (2007).

<sup>84</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 BENOIT DAVIRON & STEFANO PONTE, *THE COFFEE PARADOX: GLOBAL MARKETS, COMMODITY TRADE AND THE ELUSIVE PROMISE OF DEVELOPMENT* (2005).

<sup>85</sup> Evans & Blakeney, *supra* note 70 at 38.

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>86</sup> Empirical studies of appellations in Europe suggest that producers with the most secure marketing networks tend to secure the lion's share of the values these yield.<sup>87</sup> 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 *Appellation d'Origine Contrôlée* ("AOC") held in the commune of Cassis in Southern France<sup>88</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, evolved historically so as to eventually be controlled by an ever-smaller syndicate of producers. This small syndicate dictates the conditions of the appellation's deployment (routinely issuing dispensations to members when the weather does not easily enable these conditions to be met or profit margins to be sustained), limits the origins and the types of grapes/vines that can be used, and, thereby, both restricts the variety of wines produced in the region and the number of producers. They also prevent the tenants — who grow most of the grapes — from using the appellations, and prohibit the establishment of co-operatives that would benefit smaller producers by introducing economies of scale and new technology. Grapes must be picked by hand, ensuring the continuation of a pool of subservient manual labor, and ceilings are put on the wages of harvest workers in order to keep production-costs low.

Nonetheless, Gade believes that the vineyards would have been converted into residential developments 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 impact of flooding and fire while sustaining a local

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<sup>86</sup> Rangnekar, *supra* note 70, at 291.

<sup>87</sup> See RANGNEKAR, *supra* note 64, at 30-31.

<sup>88</sup> See Daniel W. Gade, *Tradition, Territory, and Terroir in French Viniculture: Cassis, France, and Appellation Contrôlée*, 94 ANNALS ASS'N AM. GEOGRAPHERS 848, 848 (2004); see also Warren Moran, *The Wine Appellation as Territory in France and California*, 83 ANNALS ASS'N AM. GEOGRAPHERS 694, 694 (1999) (criticizing the French wine appellation strategy's propensity to entrench privilege and solidify structures of inequality).

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tourist industry. Despite achieving some economic security for the region and some measure of regional ecoscape preservation, this is a use of a 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 meets the basic standards of good governance (or even the 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 a 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>89</sup> Traditional methods of production have actually been abandoned and collective inter-generational 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, and 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 prevent their piracy abroad. Fewer people are now 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

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<sup>89</sup> Anita Say Chan, *The Fortune of Networks: Neoliberal Seductions, Enterprising Artisans, and the Optimizing of Native Culture in Peru* (Nov. 21, 2008) (a paper presented at the American Anthropological Association Annual Conference, San Francisco, CA) (on file with the authors).

development that we have considered. Nonetheless, it is a project that WIPO commends as indicative of “best practices” of using IP to further rural development.<sup>90</sup> An examination of Peruvian national policy with regard 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>91</sup> To do so, however, the state has assumed legal entitlement to these denominations, privileging the protection of “national” patrimony over considerations of local development, thereby promoting modern industrial criteria, rather than local norms and practices, and restricting, rather than enhancing, social inclusion in the management of the 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 that such a strategy requires.<sup>92</sup> Where these strategies succeed, extensive co-operation between the players in all the 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 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>93</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>94</sup> Nonetheless, the

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<sup>90</sup> *Id.*

<sup>91</sup> See Miguel Angel Sanchez del Solar, *Denominaciones de Origin en el Peru: Desafios y Oportunidades*, 4 REVISTA DE LA COMPETENCIA Y PROPIEDAD INDUSTRIAL 50, 50, 73, 87 (2008).

<sup>92</sup> See generally Evans & Blakeney, *supra* note 70 (arguing that developing countries may be misled with respect to the benefits of protecting GIs and not adequately advised of the costs involved).

<sup>93</sup> François Boucher & Astrid Gerz, *Mantecoso Cheese in Peru: Organizing to Conquer the National Market*, in ORIGIN-BASED PRODUCTS: LESSONS FOR PRO-POOR MARKET DEVELOPMENT 41, 41, 43 (Petra van de Kop, Denis Sautier & Astrid Gerz eds., 2006) (emphasis added).

<sup>94</sup> *Id.* at 43.

failure to protect the product from adulteration and to ensure that the use of the mark is linked exclusively to regional goods and tied to quality controls limits this MICO strategy. An association (the Asociación de Productores de Derivados Lacteos Cajamarca) 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 that 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 the year 2000.<sup>95</sup> The extensive and expensive collective organization necessary to this endeavor has been aided by NGOs that have facilitated dialogue between producers of *quesillo* (the curd used to make the cheese, which is generally provided by poor livestock producers in mountainous regions), small-scale cheese producers, specialty 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 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. Nonetheless, 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 the MICOs and to 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-operative whose members farm cocoa beans and produce chocolate.<sup>96</sup> Since receiving its first funding from the Inter-

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<sup>95</sup> *Id.* at 48.

<sup>96</sup> KEVIN HEALY, LLAMAS, WEAVINGS, AND ORGANIC CHOCOLATE: MULTICULTURAL GRASSROOTS DEVELOPMENT IN THE ANDES AND AMAZON OF BOLIVIA 131 (2001). See generally AJ BEBBINGTON, TECHNOLOGY AND RURAL DEVELOPMENT STRATEGIES IN A BASE

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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 the positions of farmers 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 — and it now exports chocolate to the United States and 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>97</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 further serve to strengthen their market position as well as enhance their already strong reputation as an exemplar of fair-trade benefits and rights-based development.<sup>98</sup>

Maintaining a strong cultural identity has been an integral part of the *El Ceibo* strategy. Part of the success of the co-operative is credited to the use of indigenous models of community organization and self-management, which has also facilitated new forms of social ritual. Enthusiasm for participation in the project has been maintained through social festivities in which the cultural history and mythology of the tree after which the co-operative is named and the traditional

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ECONOMIC ORGANIZATION: ‘EL CEIBO’ LTD FEDERATION OF COOPERATIVES (1996) (providing a historical overview of the organization).

<sup>97</sup> HEALY, *supra* note 96, at 144.

<sup>98</sup> See *Fair Trade Farmers in Bolivia: El Ceibo*, GLOBAL EXCHANGE, <http://www.globalexchange.org/sites/default/files/CocoaBolivia.pdf> (last visited 17 December 2013) (describing *El Ceibo*'s methods of cultivation, and the benefits of both fair trade and organic certification status).

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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>99</sup>

The promotion of a strong cultural identity works in synchronicity with their MICO strategies, that is, the success of *El Ceibo's* cacao is dependent 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.

#### 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 the passive holders of an unchanging culture, but as actors capable of assuming agency in markets that value their efforts.<sup>100</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>101</sup> Indeed, it appears that many GIs have been registered for traditional weaving techniques and handicrafts.<sup>102</sup> Nonetheless, there are reasons to doubt the Indian

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<sup>99</sup> HEALY, *supra* note 96, at 147.

<sup>100</sup> Sunder, *The Invention of Traditional Knowledge*, *supra* note 65, at 103, 123-24. See generally POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES (J. Michael Finger & Philip Schuler eds., 2004) (describing case studies that reflect the use of knowledge and tradition as a tool for intellectual property in poor communities).

<sup>101</sup> See generally Singhal, *supra* note 2, at 734-35 (providing an overview of GIs in India).

<sup>102</sup> N. S. Gopalakrishnan, Prabha S. Nair & Aravind K. Babu, *Exploring the Relationship Between Geographical Indications and Traditional Knowledge: An Analysis of the Legal Tools for the Protection of Geographical Indications in Asia* 35, 38-41 (Int'l Ctr. for Trade & Sustainable Dev., Working Paper, 2007), available at <http://ciprs.cusat.ac.in/gopalgis.pdf>.

government's capacity and commitment to fully implementing this strategy as the Alternative Law Forum in Bangalore has found.<sup>103</sup> Although the Indian government has made impressive initiatives with regard to protecting and promoting new GIs for regional teas,<sup>104</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>105</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>106</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 solely the burden of the state; transnational networks involving private parties, NGOs and the development agencies of governments of developed countries may also be required to bear them.

The challenge in developing countries will be to ensure inclusive and 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 the co-operatives of smaller producers and workers collectives. We also need further empirical studies in order to understand how MICO efforts have tended to affect relations between communities and the state historically, and to consider what impact these strategies have upon local power relations, the distribution of wealth, and the availability of economic opportunity. More critical consideration of the role of NGOs in these processes is also desirable, in order to ascertain the circumstances under which they foster community autonomy, rather than promote community dependence. The resources offered by 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 the needs for collective rights, local autonomy, economic improvement, and entrepreneurship in a global environment, while

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<sup>103</sup> Praschant Iyengar, Alternative Law Forum, Bangalore, India, Presentation to the DFG-Forscherguppe Cultural Property Colloquium Series at the Institute for European Ethnology, Georg-August-Universität Gottingen (June 18, 2009).

<sup>104</sup> Rangnekar, *supra* note 70, at 284-88.

<sup>105</sup> See Singhal, *supra* note 2, at 736-38. See generally Das, *supra* note 2, at 148-201 (discussing the challenges of geographical indications in India).

<sup>106</sup> Sunder, *IP<sup>3</sup>*, *supra* note 3, at 300.

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promising enhanced social security through sustainable development and providing bases for cultural pride.<sup>107</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 in the distribution of benefits, the equality of access to local participants, the transparency of criteria for using marks, and accountability in maintaining and enforcing locally-developed standards, in order 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, by the vilification of new forms of property, or by narrow emphases on the 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 upon their social impact, 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 rights. Only then will we have a basis for evaluating these as strategies to achieve greater social justice.

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<sup>107</sup> See Rosemary J. Coombe & Nicole Aylwin, *Bordering Diversity and Desire: Using Intellectual Property to Mark Place-Based Products*, 43 ENV'T & PLAN. A 2027, 2028-30, 2035, 2037-39 (2011).