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Fostering Development of Local Communities Through the Protection of Traditional Knowledge and Origin Products

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Abstract

This paper is focused on the protection of traditional knowledge (TK), including origin products, as a means of fostering the development of local communities in developing countries. Based on case studies, it also proposes a methodological approach for structuring and organising foreign aid delivery and other form of international support for better impact on the ground. The analytical framework for the paper is based on Amartya Sen's elaboration of 'development as freedom', in which development is seen as a fundamental human rights issue encompassing protective security, the provision of economic facilities, political freedoms, social opportunities and transparency guarantees (Sen 1999). Context is provided by an analysis of the behaviour of multinational companies (MNCs) in developing countries, which has led to allegations of bio-piracy, unfair labour practices and misappropriation of TK and Genetic Resources (GR) from their owners, as well as the growing importance of corporate social responsibility as a business imperative for MNCs and civil society activism for human rights in north-south economic relations. Furthermore, owners and holders of TK and GR frequently have to contend with anti-democratic practices and exploitation by their own governments and local elites, thereby underlining the importance of international economic law (IEL) in protecting their interests. Two particularly relevant cases, namely argan oil from Morocco and rooibos from South Africa, are discussed in relation to Sen's 'development as freedom' framework. These contrasting experiences lead to conclusions being made on the need to strengthen international, regional and national protective legal systems and political freedoms while at the same time providing an appropriate level of developmental support in the establishment of 'economic facilities', 'transparency guarantees' and 'social opportunities' in Sen's terms, including value chain upgrading and well-designed technical assistance and organised and targeted foreign aid delivery.

JEL Classification: F13, F16, O13

Keywords: benefit sharing, development as freedom, economic facilities, geographical indications, intellectual property rights, protective security, social opportunities, traditional knowledge, transparency guarantees, foreign aid.

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Abbreviations and acronyms

ACP	Africa, Caribbean, Pacific
CSR	corporate social responsibility
EPA	Economic Partnership Group
EC	European Commission
EU	European Union
GIs	geographical indications
GVCs	Global Value Chains
IPRs	intellectual property rights
IEL	international economic law
ITC	International Trade Centre
LDCs	Least Developed Countries
MSG	Melanesian Spearhead Group
MNCs	multinational companies
SMEs	Small and medium-sized enterprises
ARIPO	The African Regional Intellectual Policy Organization
TCE	traditional cultural expression
TK	traditional knowledge
UCFA	Union of Women's Cooperatives of the Arganeraie
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

1. Introduction

The main aim of this paper is to assess current developments in the protection of traditional knowledge (TK) from developing regions and countries in terms of a broader perspective incorporating human rights and development concerns. In this regard, the political philosopher and economist Amartya Sen's concept of 'development as freedom' provides a framework for examining certain products from developing countries that are founded on TK and possess unique and distinctive aspects that are relevant in two emerging areas of Intellectual Property Rights, that is TK protection and geographical indications (GIs). The latter has been considered particularly important in the European Union (EU) and, by extension, in trade agreements negotiated with the European Commission (EC) (Sen 1999). In this sense, 'development as freedom' is used to provide a richer contextual understanding of the environment of human rights, social justice and economic fairness underlying product development and industry structures in developing countries. It is argued

that this provides an increasingly relevant combination of factors to study considering the emergence of increasingly popular products that include aspects of TK. In particular, Sen's notion of 'protective security' leads towards the study of agreements in international economic law (IEL) and regional and national legal systems that strengthen the hand of producers and other actors in global value chains from developing countries. New requirements of prior informed consent and benefit sharing are entering IEL and, with greater impact, in *sui generis* legislative frameworks and regional free trade agreements. This paper traverses some of the important developments in IEL, understanding these in terms of 'protective security', but also seeking to assess the potential from both human rights and developmental perspectives. The cases of argan oil and rooibos are relevant in that, apart from experiencing rapid recent product development, both possess aspects of TK and have faced threats of counterfeiting and misappropriation of intellectual property (IP).

2. Growing advocacy for human rights in international law, business and economic development

Amartya Sen has articulated a comprehensive argument linking development and human rights in his book *Development as Freedom* (Sen 1999). Sen's instrumental perspective sees 'economic facilities' as a distinct type of freedom that helps to advance human capabilities; crucially, public policy is used to foster human capabilities and substantive freedom in general, including not only the provision of economic facilities, but also political freedoms, social opportunities, transparency guarantees and protective security (Sen 1999:10). This view is not anti-free market, but places emphasis on the need for institutions that promote fairness and contribute to freedom. In contrast, with much more emphasis on the market than on public policy, William Easterly has argued that human rights, not technocratic planning, are a necessary pre-condition for

development. Given a free democratic environment and safeguarding of human rights, spontaneous innovation can flourish without the hindrance of authoritarian regimes and the activities of development planning 'experts' (Easterly 2013). Like Sen, Easterly's concern is for development and both agree that development is retarded in the absence of political freedoms and human rights.

In recent years, as the development dimension has become more prominent, the rights of poor communities possessing TK in developing countries have received increasing attention. In many cases, TK has been used in the manufacture of unique and distinctive products, including a variety of special pharmaceutical, cosmetic and health-related products, such as rooibos from South Africa, shea from West Africa, argan oil

from Morocco, kava from Fiji Islands and Vanuatu, and hoodia from Southern Africa. What all these products have in common is that they originate from TK in developing regions. Their product and business development cycles, including diversifications and innovations, have been varied and not untroubled; for example, kava has been subject to bans in certain European countries owing to concerns over liver toxicity.¹ All above mentioned products have had issues concerning the rights and viability of small producers in the face of domination by powerful interests and corporations. These cases serve to highlight important links between industry structures, development incentives and protective securities.

The emergence of corporate social responsibility (CSR) as a priority issue for business, and in particular for the operations of multinational companies (MNCs) in developing countries, was in part a result of persistent questioning

from civil society groups, whose work has become increasingly influential, and media regarding the fairness of their labour practices and extractive exploitation of locally owned TK and GR without adequate compensation. Indeed, the increased scrutiny of business activities, combined with fear of the adverse effects of consumer activism, has strengthened CSR and promoted business involvement in such development-friendly actions as fair trade and other forms of labelling, as well as in the establishment of partnerships with producer groups supported by value chain upgrading and capacity-building activities in developing countries. Although there is a moral dimension to the enlightened self-interest in these business initiatives, protective security arrangements have been relatively unregulated. Nevertheless, nascent national and regional TK protection initiatives show promising results and warrant further study.

3. Protective security in international economic law for owners and producers of traditional knowledge

Intellectual property rights (IPRs) have attracted criticism for being seen to be associated with rich country interests. Notably, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS Agreement') imposed on all countries, including Least Developed Countries (LDCs), IP rules that were formulated in developed countries. Article 7 of the TRIPS Agreement, however, did show promise for developing countries in that technological innovations should be promoted to the mutual advantage of TK producers and users. This potential was taken further at the Seattle Ministerial Conference by a number of developing countries that sought an acknowledgment and recognition in international economic law that TK should be protected as an IPR. Subsequently, at the Doha Ministerial Conference in November 2001, the issue of TK as an IPR again came to the fore. As Clause 19 of the Doha Declaration spells out:

the Council for TRIPS, in pursuing its review programme 'to examine, *inter alia*, ... the protection of traditional knowledge' and to be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and ... take fully into account the development dimensions.

Although the so-called Doha Development Round has proved to be a disappointment, largely as a result of the continuing failure to reach agreement on agricultural tariffs and export subsidies, developing countries have increasingly asserted their offensive trade interests in the WTO. Notably, the 'W52 sponsors' a group of 109 countries, including a number of developing countries and LDCs, have supported a proposal for modalities in negotiations on GIs to extend the multilateral register beyond wines and spirits and also for disclosure rules whereby patent applicants must

¹ The ban on kava in Germany in 2002, which affects the whole EU, was overturned by a German Federal Court in June 2014; however, technical barriers to trade remain and the kava industry's infrastructure and viability has been set back over the past 12 years.

disclose the origin of GR and TK used in the inventions. These developments at least show that IPRs are not the exclusive domain of rich corporations and developed country interest groups but are seen to have economic potential and are worthy of a higher level of protection in IEL. The notion that GIs can be used to protect TK is controversial and the subject of debate between IP scholars, but as will be further explored in this paper, certain products have both the aspect of 'tradition' and the aspect of 'geographical specificity'. Therefore, the real questions may be how best to provide protective security on a case-by-case basis and how best to design legal systems that best serve a country's or a region's real needs.

Developments concerning the protection of GR have provided further incentive and

encouragement to the development cause. The Nagoya Protocol on Access and Benefit Sharing, adopted by the Conference of the Parties to the Convention on Biological Diversity on 29 October 2010, aims to share benefits from the use of GR in a fair and equitable way. Article 16 of the Nagoya Protocol instructs that:

each party shall take appropriate, effective and proportionate legislative, administrative or policy measures, as appropriate, to provide that traditional knowledge associated with genetic resources utilized within their jurisdiction has been accessed in accordance with prior informed consent or approval and involvement of indigenous and local communities ...

4. Protective security in regional and national *sui generis* legal frameworks

Notwithstanding current initiatives on protecting TK and traditional cultural expressions (TCE) in IEL, progress is slow and the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is still working towards an international agreement after 10 years of operation. Therefore, there is growing interest in *sui generis* measures at national level and in the form of regional legal frameworks. Although conventional wisdom holds that the correct approach starts with national policy and national legislation, there have been increasing developments at regional level among developing countries. These agreements can serve to strengthen the hands of developing countries working together to provide protective security and model approaches for national laws. The African Regional Intellectual Property Organization (ARIPO), consisting of 16 member countries, is a case in point. ARIPO has undertaken, with support from the World Intellectual Property Organization (WIPO), a number of initiatives aimed at the protection of GR, TK and TCE. These have included an inventory of TK, the development of a legislative framework and a regional legal instrument

for the protection of TK and TCE: the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore was adopted by the ARIPO diplomatic conference at Swakopmund, Namibia, on 9 August 2010. Its purpose is to protect TK holders against any infringement of their rights and to protect expressions of folklore against misappropriation, misuse and unlawful exploitation beyond their traditional context. Article 9.1 of the Protocol further instructs that the protection to be extended to traditional TK holders shall include the fair and equitable sharing of benefits arising from the commercial or industrial use of their knowledge, to be determined by mutual agreement between the parties.

The Pacific region has been a pioneer in the protection of TK and TCE. The first regional instrument dealing with the protection of TK was the Suva Declaration issued by the Regional Consultation on Indigenous Peoples' Knowledge and Intellectual Property Rights in 1995. Following extensive consultations at local level and subsequent policy deliberations, the Melanesian Spearhead Group (MSG), a sub-regional economic grouping in the Pacific, developed a similar draft regional TK

enforcement treaty partly based on learning from the ARIPO experience. The signing of this treaty marked a symbolic and historic development for the MSG members, as it attempts to protect TK holders and owners against any infringement of their rights and to protect Melanesian expressions of culture against misappropriation, misuse and unlawful exploitation. The declarants committed themselves to raise public awareness of the dangers of expropriation of indigenous TK and GR; to encourage chiefs, elders and community leaders to take a leadership role in the protection of indigenous peoples' knowledge and resources; and to acknowledge the concerns of indigenous peoples to protect their knowledge and resources in legislation by including 'prior informed consent or no consent' procedures and excluding the patenting of life forms.

In the absence of a multilateral agreement, *sui generis* legal systems aimed exclusively at addressing the characteristics of TK seem to provide a viable protective security and opportunity for further development and technological innovation. If full advantage is taken, legal protection will need to work in combination with efforts to set up and strengthen economic

facilities; these include incentives for producers and processors and other economic policies, such as the promotion of small businesses, which will strengthen the business enabling environment. The key point is that protective security by itself is not enough; as shown by cases from developing countries, it needs to be buttressed by development activities such as awareness raising, basic business skills the establishment of co-operatives, international partnerships, training of producers and processors, and, not least, the setting and maintenance of quality standards. Benefit sharing supports 'social opportunity' and arguably provides some degree of 'transparency guarantee'. Put differently, equitable benefit-sharing arrangements cannot succeed only on the basis of a sound protective legal framework, particularly when TK holders are from marginalised rural communities lacking in financial means and knowledge of global markets. In this way, the livelihoods of TK/GR holders and communities are enhanced. Policy and legislation that enforces benefit sharing and prior consultation creates freedom for owners of TK and GR, but this is foundation freedom and, therefore, is not the only form of freedom.

5. Protective security and economic facilities in trade agreements

The current trend of accelerating bilateral trade agreements as new global agreements remains out of reach, in tandem with the engagement of regional blocs in multilateral and bilateral trade negotiations, has seen interesting developments regarding the protection of TK and GR. The CARIFORUM–EU Economic Partnership Agreement (EPA), for example, provides a particularly relevant case study since IP, including the question of GIs, TK and TCE, as a key trade issue was put squarely on the negotiation agenda. Article 145(4) of the agreement provides for a rendezvous clause whereby the CARIFORUM countries would draw up a GI protection plan by 2014, when negotiations on a comprehensive GI agreement commenced. *A priori* GIs and TK and TCE are offensive interests for Africa, Caribbean, Pacific (ACP) countries, although it has been

argued that the EPA is biased towards the EU, which has an elaborate and well-defined system for granting GIs that favour its own enterprises (Masungu 2009). Furthermore, there could be significant disadvantages and challenges, including legal actions and the substantial costs in administering the system.

Article 164 of the CARIFORUM–EU EPA includes a specific sub-paragraph on GIs that has a particular bearing on arguments that make a natural linkage between GIs and TK. Article 164(2)(c) refers to the:

Identification of products that could benefit from protection as geographical indications and any other action aimed at achieving protection as geographical indications for these products. In so doing, the EC party

and the Signatory CARIFORUM States shall pay particular attention to promoting and preserving local traditional knowledge and biodiversity through the establishment of geographical indications.

The recently completed EU–Southern African EPA negotiations have similarly reached an agreement to protect a shortlist of 251 EU GIs in South Africa and 105 South African GIs in the EU. Each party's GIs will benefit from high-level protection while allowing co-existence for trademarks that are already registered. South Africa trade negotiators succeeding in protecting the names of distinctive local products, including rooibos tea, honey bush tea and Karoo lamb. These products, apart from their unique aspects, are also characterised by relatively well-developed institutional frameworks, including certification systems, industry councils, and, in the case of rooibos tea, a heritage aspect of indigenous knowledge. South Africa's

Intellectual Property Laws Amendment Act of 2013 made provision for the legal protection of indigenous knowledge using the existing IP system, which includes copyright and related rights, trademarks and designs, as well as the introduction of the concept of GIs. An established national treatment for GIs, together with quality standards, was a pre-requisite for the recognition of South African GIs in the EU. The South African policy towards TK protection differs from the *sui generis* model and, as such, has been subject to criticism. However, the important challenge for South Africa was the protection of its valuable IP and recognised names, especially since rooibos had gained in popularity. For example, a French company, 'De Trucy', had tried to register the name 'rooibos' as a trademark for a beverage. This was strongly opposed by the South African Department of Trade and Industry and the newly obtained GI registration in the EU will strengthen such protective security.

6. Human rights and transparency guarantees

Thus far, the discussion in this paper has centred largely on questions of protective security. The cases of rooibos tea in South Africa and argan oil in Morocco, do, however, raise important questions about justice and human rights that evidence suggests are not being adequately addressed by improved protective security. Bramley et al. (2013) have referred to unequal power relationships in the rooibos industry, which are characterised by the dominance of individual players in the value chain, producer–processor relationships that favour the producers and South Africa's historical agricultural duality whereby racially based patterns of ownership and dependency have not fundamentally altered the deprived situation of traditional communities. The rooibos tea industry is dominated by 'Rooibos Limited', an unlisted private company that controls 70 per cent of the market for processing and supplying rooibos. In 2010, the South African Competition Commission made a case against the company for entering into exclusive supply agreements with packers. Although the company made certain concessions and technical undertakings in

response, there was no penalty and the fundamental power structure in the industry remains unchanged (Payne 2009). Without analysing the Competition Commission's decision, the case nevertheless shows that the promotion of fair competition has a human rights dimension and that competition law and competition tribunals can be important cogs in the machine of protective security.

According to the South African Department of Agriculture, Forestry and Fisheries, most large-scale farms are owned by approximately 40,000 predominantly white farmers, whereas 1.29 million mainly black farmers conduct small-scale and subsistence farming (DAFF 2011). In the Cederberg mountains of the Western Cape – where *Aspalathus linearis* (rooibos) is an indigenous plant – small-scale farmers from disadvantaged communities produce only a very small percentage of the total crop. However, the increasingly complex rooibos industry was founded on the TK of the original indigenous people of South Africa, the Khoisan, and their traditions have continued into present day communities, eventually transforming

into a global industry. In elaborating the rationale for GIs based on their success in building community prosperity around origin products in many locations in the EU, the EC has placed a strong emphasis on the overall systemic and spill-over effects of a GI on community and rural development. It is stated that the GI brings together diverse actors, including farm unions, co-operatives, producers, processors, local authorities, marketing boards and traders under a single category. Moreover, the GI can help to maintain traditional processing systems, to preserve traditional farming methods and to protect the environment (European Commission 2013).² The EC's GI system that allows origin products from outside the EU to obtain GI registration in the EU should, in theory, be encouraging fairness and justice in the GI region – in this case the Cederberg mountains 'rooibos region' – but in practice may be strengthening the hand of the dominant player. It is still too early, however, to assess the impact of the GI on poor communities in the value chain.

One of the aims of a GI is to bind a product to its region of origin, to promote its development and to increase the socio-economic well-being of the people. A strong rationale for GI certification in developing countries is to prevent delocalisation and dominance by powerful lead actors. In the case of argan oil in Morocco, for example, locals from the 'Arganeraie' in the Souss region of Southern Morocco were becoming mere suppliers of seeds to new industrial companies based in Casablanca that were investing in mechanical expeller presses and equipment for solvent extraction. Therefore, the development of the Arganeraie, the TK itself and the quality of the product were all being undermined by the trend towards industrial consolidation and mechanisation. Only a small portion of the sales of argan oil benefited the Berbers, the true owners and holders of the original TK. Since 2005, however, there has been a partial change in the argan industry with the establishment of the Arganeraie as a protected biosphere reserve, a revival of the

traditional origin-based hand-pressing method, and, not least, public-private partnerships and technical assistance to strengthen and share the benefits of argan oil (discussed more fully in the next section). Finally, the efforts to develop a GI certification for the Arganeraie may have had some impact on the protective security in the region and advanced the human rights agenda, particularly concerning the gender dimension in the establishment of women's co-operatives.

Developing countries present often complex human rights pictures, with a lack of fairness and exploitative employment systems sometimes justified by the need to encourage investment. South Africa is even more problematic owing to the need to remedy the effects of institutional racism in the past. However, the post-apartheid era Constitution of South Africa contains a Bill of Rights, in effect a human rights charter that protects the civil, political and socio-economic rights of all people in the country. After 1997, the Bill of Rights was expanded to include socio-cultural and economic aspects. In addition, the Labour Relations Act and Basic Conditions of Employment Act entrench the rights of workers and employees and ensure the duties of employers. In theory anyway, the raft of protective security laws in South Africa's legislative framework should protect the human and economic rights of the disadvantaged peoples, but consideration of the rooibos tea case raises concerns about monopolistic practices and lack of transparency guarantees in the industry that arguably do not meet the requirements of 'development as freedom.' In Morocco, recent research on argan oil has shown that employees of a women-run co-operative are actually seen as independent nutcrackers, not employees, applying traditional techniques of obtaining the oil from the kernels (al Mansouri 2013). In this way, sub-contracting work can provide a way of getting around labour laws and codes. In this case, workers received a wage below the poverty line of US\$1,25 set by the International Labour Organization.

2 http://ec.europa.eu/agriculture/events/2013/giworkshops/common/training_brochure_en.pdf.

7. The GI–TK debate

Notwithstanding the established GI–TK/TCE linkages in the IEL as well as in the regional and national regimes discussed above, there is considerable debate over whether or not GI laws can be a means of protecting certain forms of TK, TCE and GR, given that the broad aims are to protect the rights of local communities and promote development. The reason for this is that GIs and other forms of TK protection aim to protect localised traditions that have resulting benefits to local communities. The situation concerning TK and TCE is more complex, although it has been argued that GIs are TK because of the uniquely traditional and heritage aspects associated with the particular name and region in question

(Blakeney 2009). TK and TCE, in contrast, have a broader meaning that focuses on the content or substance of TK, innovations, environmental knowledge and medicinal knowledge, as well as on TCEs such as cultural heritage, handicrafts, art, songs, dances, chants, narratives, motifs and designs. In this sense, TK and TCE, when applied to traditional communities, may indeed refer to traditionally made goods, but are also holistic and all-encompassing reflections of all aspects of life and society in such communities. Moreover, the commercial potential of TK- and TCE-derived products has been well demonstrated in important sectors such as medicine and agriculture as well as in the creative industries (Downes 2000).

8. The provision of economic facilities

‘Economic facilities’ are indeed an important component of the ‘development as freedom’ system. TK owners and holders are most likely to need assistance in obtaining access to market information, including the facilitation of business partnerships and linkages on fair and equitable basis. In this regard, ‘aid for trade’ – financial and technical support to assist developing countries to increase exports as well as implement increasingly complicated trade rules – should offer some opportunities provided that projects are well designed and based on the real needs and ownership of the local

communities. Since the development dimension has become more prominent, developing countries’ export performances have been hindered by technical barriers to trade in developed countries, including particular standards; a notable example, referred to earlier, being kava from the Pacific region. Trade-related technical assistance should aim to upgrade market access and value chains in a win–win approach to business partnerships. In the case of rooibos tea, for example, technical assistance has aimed to increase the quality of market information to farmers who have been adversely by volatile price fluctuations. The case

Box 1: Case study on facilities to improve the export competitiveness of rooibos products

In South Africa, steps have been taken to enhance the export competitiveness of the indigenous rooibos product. To this end, producers obtained a grant for a technical assistance project financed by the Dutch government that aimed to improve the quantity and value of rooibos exports. This was used for a detailed analysis of the way production data are collected, studied and disseminated in order to diminish excessive price fluctuations that cause problems for importers. The project was managed by the International Trade Centre (ITC) through the Netherlands Trust Fund II (NTF II). The initial phase of the project entailed a study of the German rooibos market and the potential for direct exports of value-added rooibos products, where tea is re-shipped from Germany, which is the world’s largest rooibos importer and accounts for about 40 per cent of total exports of 6,000 tons. Following the results of the study, the South African Rooibos Council has implemented a marketing campaign in Germany and has also developed an export development plan for new markets, notably Dubai and Taiwan.³

3 See <http://2013.intracen.org/news/Dutch-grant-to-help-expand-South-Africa-rooibos-exports/#sthash.PZ2tmzpf.dpuf>.

presented below details a technical assistance project that was designed around real needs and that achieved some tangible results that have been of benefit to the industry (see Box 1). The

attainment of GI registration in the EU, including the implementation of standards and the industry organisation required by the EC, will further strengthen the development of industry.

9. The provision of economic facilities and integration into global value chains

Participation in global value chains (GVCs) has presented opportunities for developing countries to develop comparative advantage through specialisation. According to Banga (2013), the share of all LDCs and developing countries in Africa, Latin America and other parts of the world in the distribution of value added created in GVCs has increased from 6 per cent to 8 per cent and, further, to 10 per cent between 1995 and 2009. Notwithstanding the steadily improving scenario, concerns remain as regards the ability of LDCs to deal with lead firms in GVCs that have advantages in organisational capacity and trade facilitation infrastructure. Therefore, local TK owners and co-operatives require help to comply with lead firms' and developed countries' standards. The case of argan oil presented below highlights the impact that value chain upgrading, including the formation of ethical partnerships, can have (see Box 2).

The argan tree now grows only in south-western Morocco – a geographical circumstance which, taken in combination with the TK involved in its production and cultural specificity, has resulted in the Moroccan government seeking protection for the argan tree as a GI. Consequently, an application was made in October 2011 with the EC for argan to become a protected GI within the EU regulatory framework. This will protect the argan name and support the local producers who will have the right to enter the EU market with the added benefits of protection, including in particular, production standards that would protect both consumers and producers from counterfeit and unofficial products. In Morocco, this has been an increasing problem as industrial processors have mixed argan with inferior oils, but marketed it as the genuine product. In this regard, the GI arguably has the potential not only to provide protective security, but also to raise

Box 2: Argan oil – partnerships and technical facilities

In Morocco, the argan tree (*Argania spinosa*), with all of its various uses and applications, has been an important part of the local Berber tribes' TK and culture for generations. The most lucrative part of the tree, the oil, is found in the three kernels inside the nut. Argan oil has unique cosmetic, medicinal and culinary properties; producing oil is, however, a highly labour-intensive process, as the nuts are extremely hard and the traditional method of cracking the nuts between two stones remains the most effective.⁴ Argan oil has become increasingly popular in cosmetic products, which has led to MNCs, such as L'Oréal, entering GVCs. L'Oréal has gradually moved from buyer to lead to firm in the argan value chain and has established a partnership with GIE Targanine, a group of six co-operatives that has also received significant international assistance to expand its market outreach. According to al Mansouri (2013), the main benefits of this partnership have been the improved quality of argan oil, the traceability of products and the overall marketing through GIE Targanine. Another example combining donor support with technical assistance and international partnerships is that of the establishment of the Union of Women's Cooperatives of the Arganeraie (UCFA). In its early years, the UCFA relied on support from the German development agency, GTZ (Gesellschaft für Technische Zusammenarbeit); however, later, a partnership developed between German and Moroccan interests, resulting in the establishment of the company 'Argane d'Or' which concentrated on buying and marketing premium hand-pressed argan oil in the European market as well as maintaining strict quality control and fair trade. Argane d'Or has also supported social opportunities for the UCFA in the Arganeraie by investing in development and education.

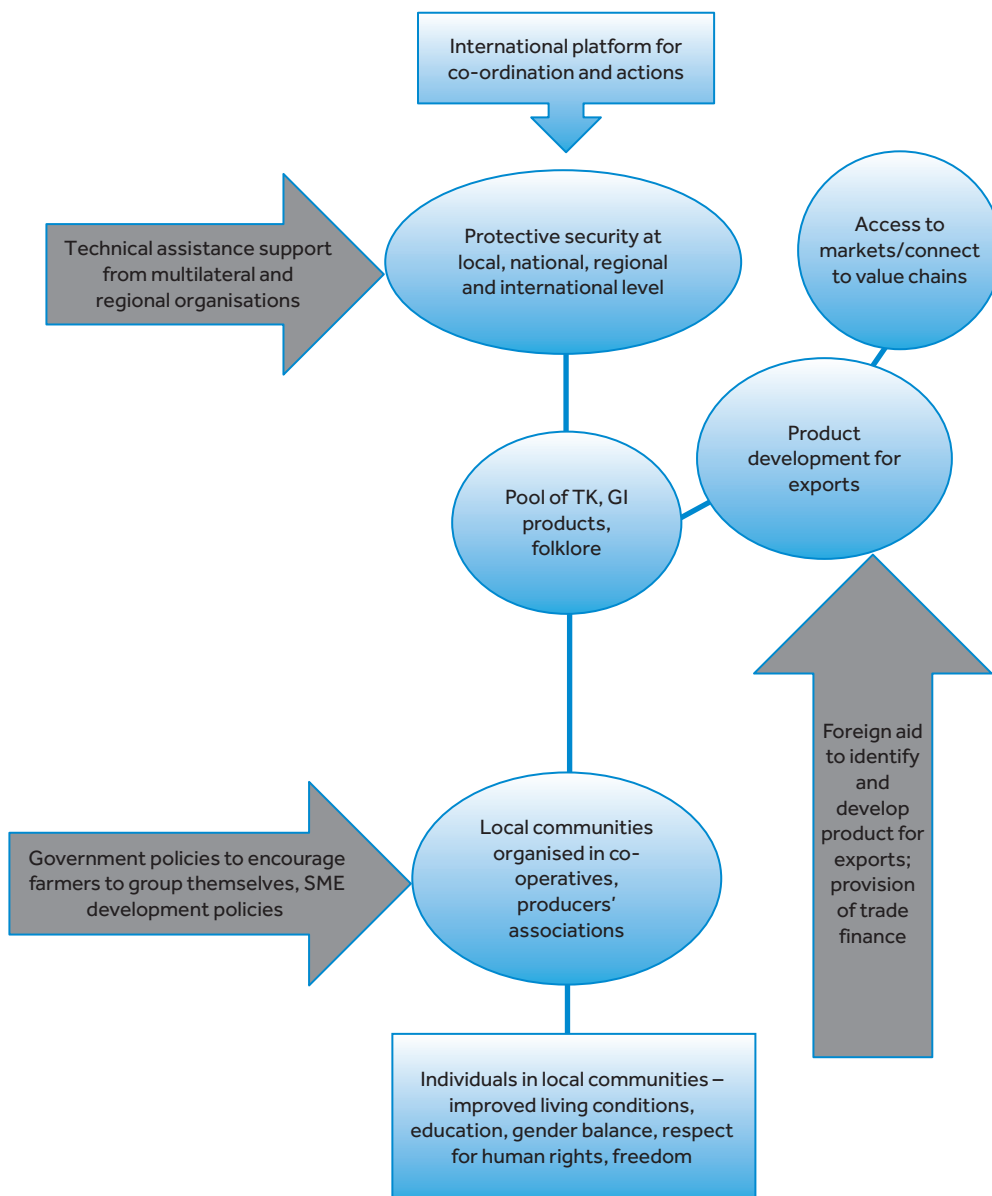
4 See <http://www.wipo.int/ipadvantage>.

quality standards, strengthen innovation, and, above all, promote the collective interests of value chain actors, including the most needy and vulnerable.

10. A methodological approach to promote and develop traditional knowledge and geographical indications

Supporting the protection and development of TK and GIs in local communities is not an easy task. Owing to lack of financial, institutional, infrastructure and human capacities, most developing countries cannot undertake such initiatives without any external support. Interventions are required at various levels – local, national, regional and international – as well as in different forms. One level of intervention that is crucial is at the local level where foreign

Figure 1. Methodology to structure support for protecting and developing TK and GIs



aids can be packaged to help local communities develop products for exports. Local producers also need access to finance, such as trade finance, to be able to develop and produce their products for export markets.

The proposed methodology (see Figure 1) structures the support and other forms of assistance needed to protect and develop TK and GIs in a way that targets areas where they are really needed and are likely to be more effective. For example, at multilateral and regional level, the focus should essentially be in terms of providing the protective security needed. This will ensure that while these products move at a

global level they are protected and benefits are guaranteed to the local communities. At the same time, the productive capacity of these products can be strengthened by providing support for product and export development. This is where foreign aid can have a direct impact on the lives of the local communities. The role of local governments is crucial in providing the right policy measures for producers' groupings and development of small and medium-sized enterprises (SMEs). To facilitate coordination, it also proposed to have an international platform with the involvement of major stakeholders.

11. Concluding remarks

The central argument put forward in this paper has been that recent developments in IEL, national and regional legal frameworks treatments, including *sui generis* measures, and bilateral trade agreements have improved protective security for owners and holders of TK and GR in developing countries. The situation concerning origin-based products incorporating aspects of TK may be even more positive in light of the possibilities of obtaining GI certification and the resulting business development benefits that this can bring in addition to the protective security. It should, however, be noted that the development of argan oil and rooibos tea has been quite rapid, the products are globally popular and, despite facing constraints discussed above, the industries are fairly mature and conform with the organisational requirements for GI registration in the EU, for example. Therefore, they are exceptional products with established brand names; the GI is a logical progression in the product life cycle and brings with it an element of exclusivity and perhaps too narrowly localised benefits. Nevertheless, it is argued that GIs should be one option for protective security, depending on the nature of the product, while requirements for benefit sharing and informed prior consent can also be protected by other legislative frameworks.

Sen's notion of 'development as freedom' provides a framework for rights-based approach development, but it can also be understood as a

set of pre-conditions. Poor producers and processors of a valuable product cannot benefit if they are not afforded protective security. They also need transparency guarantees, social opportunities and economic facilities. Concerning such economic facilities, TK owners and holders, producers and processors need technical assistance in obtaining access to market information, as shown even in the case of the relatively well-developed argan and rooibos industries, including the facilitation of business partnerships and linkages on a fair and equitable basis. Market access upgrading requires the organisation of small-scale farmers and producers into co-operatives that would enable them to participate more effectively in export chains. Above all, upgrading efforts require a supportive government and a business-enabling environment that not only defends valuable IP and upholds fair and transparent competition rules but also guarantees human rights. Furthermore, 'aid for trade' – financial and technical support to assist developing countries in increasing their exports as well as in implementing increasingly complicated trade rules – should offer some opportunities, provided that projects are well designed and based on the real needs and ownership of the local communities. Trade-related technical assistance should aim to upgrade market access and value chains in a win-win approach to business partnerships. This includes helping local TK owners and co-operatives to comply with lead firms' and developed countries' standards.

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