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**Protection of Traditional Knowledge and Origin  
Products in Developing Countries: Matching Human  
Rights and IP Protection with Business Development  
Opportunities**

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# **Protection of Traditional Knowledge and Origin Products in Developing Countries: Matching Human Rights and IP Protection with Business Development Opportunities**

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## **Abstract**

This paper is focused on the links between the protection of Traditional Knowledge (TK), including origin products, and local economic development in developing countries. 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 criticism of the behavior of multinational companies (MNCs) in developing countries, including allegations of bio-piracy, unfair labor practices and misappropriation of TK and Genetic Resources (GR) from their owners in combination with the growing importance of Corporate Social Responsibility as a business imperative for MNCs as well as civil society activism for human rights in north-south economic relations. Furthermore, owners and holders of TK and GR frequently also 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). The paper assesses the current situation regarding the protection of TK in IEL, particularly regarding promising initiatives requiring compulsory benefit sharing and prior consultation, with specific reference to case studies of products from developing countries; notably, these products have become integrated into global value chains (which also include MNCs as lead actors). Two particularly relevant cases: argane 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 development 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.

## **Key Words**

Development as Freedom, Economic Facilities, Geographical Indications, Intellectual Property Rights, Protective Security, Social Opportunities, Traditional knowledge, Transparency Guarantees

## **Introduction**

The main aim of this paper is to assess current developments in the protection of Traditional Knowledge (TK) from developing regions and countries not just through the lens of international law, but also in terms of a broader perspective incorporating human rights and development concerns. In this regard, Amartya Sen's '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 have them relevant in two emerging areas of Intellectual Property Rights: TK protection and Geographical Indications; the latter having had considerable importance in the EU and by extension in trade agreements negotiated with the EC. 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 studying agreements in IEL, 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 argane and rooibos are interesting in that, apart from experiencing rapid recent product development, both possess aspects of TK and have faced threats of counterfeiting and misappropriation of IP.

## **Growing advocacy for human rights in international law, business and economic development**

The political philosopher and economist 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 (page 10). This view is not anti-free market, but places emphasis on the need for institutions that promote fairness and contribute to freedom. Political and social arrangements are needed to counteract the asymmetric advantages of the powerful. Contrastingly, with much more emphasis on the market than on public policy, William Easterly has argued that human rights, not technocratic planning, is 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 the rights of poor communities possessing TK in developing countries have received increasing attention. In many cases, the TK has been used in the manufacture of unique and distinctive products, including a variety of special pharmaceutical, cosmetic and health related products with interesting examples being rooibos from South Africa, shea from West Africa, argane oil from Morocco, kava from Fiji 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 due to concerns about liver toxicity.<sup>1</sup> All have had issues concerning the rights and viability of small producers in the face of over domination by powerful interests and corporations. These cases serve to highlight important links between industry structures, development incentives and protective securities. The latter strengthens not only the moral argument for legal systems that protect the intellectual property of owners of TK in the developing world, but also the case for less uneven economic development.

The emergence of corporate social responsibility (CSR) as a priority issue for business, particularly concerning the operations of multinational companies in developing countries, was in some part a result of persistent questioning from civil society groups – whose work has become increasingly influential – and media regarding the fairness of their labor 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 labeling as well as the establishment of partnerships with producer groups supported by value chain upgrading and capacity building activities in developing countries. Though 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 warrants study.

### **Protective security in international economic law for owners and producers of TK**

Intellectual Property Rights (IPRs) have attracted criticism for being seen to be associated with rich country interests: notably, the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS Agreement’) imposed on all countries, including Least Developed Countries (LDCs), IP rules which were formulated in developed countries. Article 7 of the TRIPS agreement, however did provide promise for developing countries in that technological innovation should be promoted to the mutual

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<sup>1</sup> The ban on Kava in Germany in 2002, affect the whole EU, has been 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 last 12 years.

advantage of TK producers and users. This potential was taken further at the Seattle Ministerial Conference by seven developing countries that sought an “appropriate means of recognizing and protecting TK as the subject matter of intellectual property rights.” Subsequently, at the Doha Ministerial in November 2001, the issue of TK as an intellectual property right 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 due to 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 “W 52 sponsors” a group of 109 countries, including a number of developing and least developed countries, countries have supported a proposal for modalities in negotiations on Geographical Indications (GIs) concerning extending the multilateral register beyond wines and spirits and also for a disclosure rules whereby patent applicants must 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 worth achieving 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 or a region’s real needs.

Developments concerning 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 in from the utilization 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...”

### **Protective security in regional and national *sui generis* legal frameworks**

Notwithstanding current initiatives on protecting TK and Traditional Cultural Expressions (TCE) in international economic law, progress is slow and the Intergovernmental Committee on Intellectual Property and Genetic Resources,

Traditional Knowledge and Folklore (IGC) is still working towards an international agreement after 10 years of operation. Hence there is growing interest in *sui generis* measures at both national level and in the form of regional legal frameworks. While conventional wisdom holds that the correct approach starts with national policy and national legislation, there have been increasingly developments at regional level among developing countries. These agreements can serve to strengthen the hands of developing countries working together on providing protective security and provide model approaches for national laws. The African Regional Intellectual Policy 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 August 9, 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 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 raising public awareness of the dangers of expropriation of indigenous TK and GR; the encouragement of chiefs, elders and community leaders to play a leadership role in the protection of indigenous peoples' knowledge and resources; and to incorporate the concerns of indigenous peoples to protect their knowledge and resources in legislation by including 'prior informed consent or no consent' procedures and exclude the patenting of life forms.

In the absence of a multilateral agreement, *sui generis* legal systems aimed exclusively at addressing the characteristics of the 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 cooperatives, 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 marginalized 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 enforcing benefit sharing and prior consultation creates freedom owners of TK and GR, but this is foundation freedom and not the only one.

### **Protective security and economic facilities in bilateral 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 protection TK and GR. The CARIFORUM-EU Economic Partnership Agreement (EPA), for example, provides a particularly relevant case study since IP as a key trade issue was put squarely on the negotiation agenda, including the question of GIs, TK and TCE. Article 145 (4) of the agreement provides for a rendezvous clause whereby the CARIFORUM countries will draw up a GI protection plan by 2014 when negotiations on a comprehensive GI agreement will commence. 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 that has an elaborate and well-defined system for granting GIs favoring 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 subparagraph on GIs that has particular bearing arguments making a natural linkage between GIs and TK. Article 164(2)(c) provides as follows:

“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 short list of 251 EU GIs in South Africa and 105 South African GIs on the EU. Each party’s GIs will benefit from high-level protection while allowing coexistence for already registered trademarks. South Africa trade negotiators succeeding in protecting the names of distinctive local products, including rooibos tea, honey bush tea and Karoo lamb. Apart from the unique aspects of these products, they



are also characterized 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, designs as well as introducing the concept of GIs. An established national treatment for GIs, together with quality standards, was a pre-requirement 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 certainly was protection of its valuable IP and recognized names, especially since rooibos had gained in popularity. In particular, 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 the protective security.

### **Human rights and transparency guarantees**

Thus far, the discussion in this paper has centered largely on questions of protective security. The cases of rooibos tea in South Africa and argane 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, Biénabe and Kirsten (2013), have referred to unequal power relationships in the rooibos industry characterized by the dominance of individual players in the value chain, producer-processor relationships that favor 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 which controls 70% 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. While the company made certain concessions and technical undertakings in response, there was no penalty and the fundamental power structure in the industry is unchanged (Payne, 2009). Without analyzing 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, while 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. Yet 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 strong emphasis on the overall systemic and spillover effects of a GI on community and rural development. It is stated that the GI brings together diverse actors, including farm unions, cooperatives, producers, processors, local authorities, marketing boards and traders under a common umbrella. Moreover, the GI can help to maintain traditional processing systems, to preserve traditional farming methods and to protect the environment (European Commission, 2013).<sup>2</sup> The EC's GI system that allows origin products from outside the EU to obtain GI registration in the EU, in theory should 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. At least 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, promote its development and increase the socio-economic well being of the people. A strong rationale for GI certification in developing countries is to prevent delocalization and over dominance by powerful lead actors. In the case of Argane 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 investing in mechanical expeller presses and equipment for solvent extraction and based in Casablanca. Thus, 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 mechanization. Only a small portion of the sales of argane oil benefited the Berbers, the true owners and holders of the original TK. Since 2005, however, there has been a partial change in the argane 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 benefits of argane (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 cooperatives.

Developing countries present often complex human rights pictures with lack of fairness and exploitative employment systems sometimes justified by the need to encourage investment. South Africa is even more problematic due 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 Labor 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,

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<sup>2</sup> [http://ec.europa.eu/agriculture/events/2013/giworkshops/common/training\\_brochure\\_en.pdf](http://ec.europa.eu/agriculture/events/2013/giworkshops/common/training_brochure_en.pdf)

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 argane oil has shown that employees of a women run cooperative 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 labor laws and codes. In this case, workers received a wage below the poverty line of \$1,25 set by the International Labor Organization (ILO).

### **The GI – TK debate**

Notwithstanding the established GI-TK/TCE linkages in the IEL as well as regional and national regimes discussed above, there is considerable debate as to whether 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 TK protection aim to protect localized 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 traditional knowledge because of the uniquely traditional and heritage aspects associated with the name and the region (Blakeney, 2009). TK and TCE, in contrast, has a broader meaning focusing on the content or substance of traditional knowledge, innovations, environmental knowledge, medicinal knowledge as well as 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 reflecting 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).

One key difference between GIs and TK as legal and economic constructs is that GIs protect names linked to a geographically designated products, while TK has wider applicability to a unique system of knowledge or way of doing things that may also be geographically determined; put differently, TK is not necessarily a tangible product associated with a geographical name, although in a number of cases it may well be, such as in the cases of argane and rooibos. Arguably, an advantage of GI protection for TK is that GIs can be held in perpetuity, for as long as a community maintains the practices that guarantee the distinctive quality of a local product. This overcomes the limited terms of protection conferred by other forms of IP protection. (Blakeney, 2010). Therefore the possible inclusion of products other than wine and spirits as GIs in the WTO has opened the way for GIs to be used to protect TK since other IP systems do not easily accommodate community ownership. In sharp contrast, Frankel has argued that the GI system is only superficially linked to TK and does not adequately meet the protection needs of TK owners from developing countries; while TK may be linked to the land, it differs significantly from the narrower definition of GIs that have been used by European farmers, in particular, to protect names associated with regions and the distinctive products produced there (Frankel, 2011). In this view there is danger in seeing GIs as a

protection mechanism for TK which is a much more diverse concept. Furthermore, GIs produce wealth mainly for existing businesses in the GI region, but do not create innovative opportunities within what is an essentially static system. While both arguments for and against using GIs to protect TK have their merits, it is argued that developing countries need to consider the best legal framework to protect their valuable resources and contribute to development.

### **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. In recent years, developing countries’ export performance have been hindered by technical barriers to trade in developed countries, including particularly 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 presented below details technical assistance project that was designed around real needs and that achieved some tangible results that have been of benefit to the industry. The attainment of GI registration in the EU, including the setup of standards and industry organization required, by the EC will further strengthen the development of industry.

### **Case: facilities to improve rooibos products' export competitiveness**

The South African Rooibos has taken steps to enhance the export competitiveness of the indigenous product. To this end, they obtained a grant to for a technical assistance project financed by the Dutch government aiming to improve the quantity and value of rooibos exports. This will be allocated to 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 is managed by the International Trade Center (ITC) though 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 the world largest rooibos importer accounting to about 40% of total exports of 6000 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.<sup>3</sup>

### **The provision of economic facilities and integration into Global Value Chains (GVCs)**

Participation in global value chains has presented opportunities for developing countries to develop comparative advantage through specialization. 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 in 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 exist about LDCs' abilities to deal with lead firms in GVCs that have advantages in organizational capacity and trade facilitation infrastructure. This includes helping local TK owners and cooperatives to comply with lead firms' and developed countries' standards. The case of argane presented below highlights the impact that value chain upgrading, including the formation of ethical partnerships can have.

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

### **Argane oil: partnerships and technical facilities**

In Morocco, the argane tree (*argania spinosa*), with all of its various uses and applications, has been an important part of the local Berber tribes' traditional knowledge and culture for generations. The most lucrative part of the tree, the oil, is found in the three kernels inside the nut. Argane oil has unique cosmetic, medicinal and culinary properties; producing oil is, however, a highly labor intensive process as the nuts are extremely hard and traditional methods of cracking between two stones remain the most effective.<sup>4</sup> Argan oil has become increasingly popular in cosmetic products leading to multinational companies, such as L'Oréal entering GVCs. The latter has gradually moved from buyer to lead to firm in the argane value chain and has established a partnership with GIE Targanine, a group of six cooperatives 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 argane 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, 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 argane oil in the European market as well as maintaining strict quality control and fair trade. Argane d'Or has also supported social opportunities the UCFA in the Arganeraie by investing in development and education.

The argane tree these days only grows in southwestern 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 of the argane tree as a GI. Consequently, an application was made in October 2011 with the European Commission for argane to become a protected GI within the EU regulatory framework. This will protect the argane name and support the local producers who will have the right to enter the EU market with the added benefits of protection, including especially, 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 argane 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 quality standards, strengthen innovation, and above all, promote the collective interests of value chain actors, including the most needy and vulnerable.

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

## 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 on top of the protective security. It should, however, be noted that the development of argane and rooibos has been quite rapid, the products are globally popular and, despite facing constraints discussed earlier, the industries are fairly mature and meeting with the organizational 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 localized 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 a 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 provided with protective security. They also need transparency guarantees, social opportunities and economic facilities. Concerning the latter, 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 argane and rooibos industries, including the facilitation of business partnerships and linkages on fair and equitable basis. Market access upgrading requires the organization of small-scale farmers and producers into cooperatives that would thus enable them to participate more effectively in export chains. Above all, upgrading efforts require a supportive government and business enabling environment which, 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 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. 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 cooperatives to comply with lead firms' and developed countries' standards

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