

# COLLECTIVE TRADEMARKS AND BIOCULTURAL HERITAGE

Towards new indications of distinction for indigenous  
peoples in the Potato Park, Peru

Alejandro Argumedo – 2013

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SHAPING  
SUSTAINABLE  
MARKETS

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## ACRONYMS

BCH	biocultural heritage
BCHI	biocultural heritage indication
GI	geographical indication
IPR	intellectual property rights
IP	intellectual property
TK	traditional knowledge

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# SUMMARY

How can indigenous people and local communities protect their intellectual property, when it consists of collective, traditional knowledge? How can they best protect and promote market produce based on their own particular biocultural heritage?<sup>1</sup> Existing intellectual property tools tend to be unsuitable for this purpose: they protect individual rather than collective rights, prioritise economic over social or cultural benefits, and focus narrowly on protecting intellectual 'products' rather than knowledge systems and production processes as a whole (including their fundamental linkages with land and biodiversity). However, 'soft' intellectual property rights, such as geographical indications,<sup>2</sup> trademarks and design rights, can be collectively owned, link to a particular area or production process, and incorporate more self-determined rules in line with the customary laws that promote indigenous innovation. Collective trademarks, for example, pertain to a collective or group of persons such as associations or cooperatives, and are under the control and management of these formally recognised groups.

This paper presents the experience of the communities of the Potato Park in both applying for formal protection through a collective trademark, and in adopting an informal trademark for a range of biocultural heritage-based products and services. The communities designed a trademark and submitted an application for its formal recognition by INDECOPI,<sup>3</sup> the Peruvian intellectual property rights (IPR) authority. However, the mark was not approved because they did not submit the required paperwork within the timeframe of 60 days from the date of application. To register a collective trademark, the

group or association must submit its legal statutes of association. Although the Potato Park communities have a legally registered association, the composition of the Park and its leader had recently changed, and it was not possible to change the statutes of association to reflect these changes within 60 days. The formal process to make changes to statutes of association (under Peruvian law on indigenous governance) is very slow, and these changes have still not been made. This constraint has not been accounted for in the system for registering collective trademarks. A further complication for communities is that separate applications need to be made for each product category (e.g. soap, tea, bottled water).

Registration of a soft IPR is usually beyond the legal and financial capacity of remote rural communities, hence these systems remaining largely inaccessible. Geographical indications can promote indigenous products in global markets and support indigenous culture. However, in Peru, the state remains the rights holder, costs are prohibitive and procedures complicated, so many groups have opted for collective trademarks instead.

Given the difficulties with formal registration, from 2005 the Potato Park communities decided to use their collective trademark informally. A survey of the economic collectives in the Park (including for potato production, tourism, crafts and herbal medicines) was conducted in late 2010 to assess the economic, social and cultural impacts of the informal mark. The findings show that the collective mark has brought tangible monetary benefits. Most participants said it results in both higher prices and increased sales, and ensures

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1. See Box 1 for a definition of 'biocultural heritage'.

2. See Box 1 for a definition of 'geographical indications'.

3. 'The National Institute for the Defense of Competition and the Protection of Intellectual Property'

that products are better known for their quality and source, which contributes to higher sales.

Although it lacks formal recognition, the mark is now widely recognised as a distinctive symbol of the Park, and people associate products and services from the Park as having a particular quality, origin and distinctiveness. It serves not only a commercial purpose but helps to ensure social cohesion and broader recognition of the Potato Park's goods, culture, and biodiversity. It has made *campesinos* (the local indigenous farmers) proud of their heritage and thereby consolidates the goals of the Potato Park as an indigenous biocultural heritage area, which is sustainably and equitably managed. By enhancing the external recognition and reputation of the Potato Park and its products, the trademark is also helping to promote recognition of the rights of the communities over their biocultural heritage. Finally, it places commercialisation in the hands of indigenous peoples themselves, such as through the development of their own internal regulations for its use, and has built communities' capacity to develop marketing strategies and understand a broader set of market regulations (such as sanitary controls).

However, while the mark remains unregistered, other unauthorised users of the mark (or of a sign that is confusingly similar to it) cannot legally be stopped. As use and public recognition of the informal mark grows, the chances for misuse and misappropriation increases – successful marks are bound to attract those who would seek to misappropriate them. Being recognised through the formal legal system offers both protection and legitimacy to these products that cannot be achieved through informal recognition. Nevertheless, unfair competition law could be used to prevent such misuse.

The report concludes with a proposal for an alternative indigenous 'biocultural heritage indication': a hybrid system comprising elements from different soft IPR tools, such as trademarks, geographical indication law, design rights and unfair competition law. A biocultural indication could not only protect a novel product, but also its

distinct production process and associated culture, and link it to a particular area rich in biological and cultural diversity, drawing on the model of geographical indications. It could also draw on the positive aspects of collective trademarks, where communities can develop their own internal regulation which reflect and reinforce their collective rights, customary laws, cultural values and holistic worldviews, and enable them to exercise some control over market development. And critically, it would need to lower transaction costs for communities by minimising financial costs, simplifying bureaucratic procedures and ensuring the requirements can be met by the majority of indigenous peoples. In doing so, other laws that could hamper the ability of indigenous peoples to comply with the regulations would need to be identified, in order to promote coherence and address constraints.

Such a biocultural heritage indication (BCHI) could open up the current IPR system to millions of poor rural communities. However, for this to happen, policy makers would need to design an appropriate BCHI tool and system, including necessary laws and institutions, with the active participation of indigenous peoples. In the short term, IPR offices could consider establishing a tool that has low transaction costs to enable indigenous peoples and rural communities to make use of existing soft IPRs to register their unique products. Meanwhile, indigenous peoples and local communities could continue to develop and use soft IPRs informally to market and protect their biocultural products, and in doing so, establish practical models which are tailored to their needs and culture and have lower transaction costs. These models could inform the revision of existing application procedures, and the development of a new indigenous-friendly system of biocultural heritage indications. Such a system could strengthen market linkages for the poorest groups and alleviate poverty, while protecting their traditional knowledge from external commercialisation, and strengthening the biological and cultural diversity that underpins capacity for innovation and resilience to climate change.

# FOREWORD

Intellectual property rights are commonly assumed to be irreconcilable with indigenous peoples' worldviews and incapable of protecting their biocultural heritage. There are good reasons to believe this. Despite this, intellectual property rights *are* used by small producers around the world. This is because they can help to generate much needed income without necessarily clashing with deeply-felt cultural and spiritual values, or with long-established customary legal norms. The Potato Park communities, organised as an association, have adopted a pragmatic, albeit principled, approach to the use of those intellectual property rights which are best able to accommodate collective interests.

Specifically, this study points to the possibilities of using trademarks as means to generate income through trading in local products steeped in an area's biocultural heritage. This does not have to compromise local values which prioritise communal interests and aspirations; values, one should add, that do not deny the freedom of action of individuals and smaller groups within communities. The report shows that trademarks have genuine potential in this regard, more so, it is plausibly argued, than geographical indications.

A collective trademark has been designed and is being used with success in local markets. In this case, the benefits gained through enhanced sales revenues are not being shared by outsiders but are fully captured by the local communities. Besides vital income being generated, this approach is highly significant in that it challenges the general assumption that *benefit-sharing*

models, as opposed to *full-benefit-capture* ones, can best provide optimal solutions to economic insecurity, unequal exchange and misappropriation. Benefits do not always have to be shared if communities have the organisation, the legal support and the initiative to commercialise on their own terms rather than being left to respond to projects and activities that they have not themselves initiated or had any hand in designing. One should stress here that benefits do not have just to be material. The Potato Park communities' experience is that use of the mark has enhanced social cohesion.

The report also shows that the acquisition and use of intellectual property laws are fraught with challenges that may be impossible to overcome entirely within the existing types of right –including those that appear to be the most 'friendly'. In the present case, registering the trademark proved to be difficult and the choice was made not to pursue this. This did not preclude the Potato Park Association from using the mark; nor is it prevented from resorting to legal action in case there is misappropriation, an ever-present possibility where a mark has proven market value as is the case here. In Peru, as in many other countries, unfair competition law is available (just as the tort of 'passing off' exists in some common law nations). In short, the use of the mark has been highly worthwhile but the problem of inherent incompatibility has not been fully overcome. Consequently, the report suggests a better alternative in the form of a *sui generis* system: the 'biocultural heritage indication'.

More challenging still than registering a mark is that of expanding trade relations across international boundaries. The paper helpfully addresses some of the major complications and dangers. These are often overlooked in the wider literature on bioprospecting.<sup>4</sup> On finishing the report, the reader will be aware both of the many possibilities of using collective trademarks and the need to avoid unrealistic expectations of trading in one's own biocultural heritage.

Graham Dutfield

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4. Researching the use of biological species as a basis for commercially exploitable products.

# ONE INTRODUCTION

Debates over how best to use intellectual property rights (IPR) for the protection and promotion of indigenous people's traditional knowledge (TK) are often complex and contentious. This debate has continued to evolve in both academic and policy arenas over the last two decades. Problems with engaging intellectual property instruments to protect traditional knowledge include the preference towards private and individual ownership of property, in contrast to TK's collective and intergenerational nature; a prioritisation of economic over social or cultural values; and a narrow focus on the intellectual or intangible aspects of work, with little or no attention paid to how these are connected to more material aspects of knowledge (Desai, 2007; Dutfield, 2011; Munzer *et al.*, 2009).

However, one subset of IPR instruments has proven to be particularly important and useful in the protection of TK. These instruments are often referred to as 'soft IPRs' and include geographical indications, trademarks, and design rights. In Peruvian intellectual property right legislation these forms of IPR fall under the designations of *signos distintivos notoriamente conocidos* – distinctive signs (collective trademarks); and *indicaciones geográficas* – geographical indications. These soft IPR systems have proven to be indigenous-friendly for a number of reasons, including their capacity to be collectively owned, their link to a particular territory or area, and their incorporation of more self-determined frameworks and guidelines for their use (Cottier *et al.*, 2004; Van Overwalle, 2005).

Nonetheless, all current IPR frameworks, soft or hard,<sup>5</sup> present legal and economic challenges for indigenous communities when attempting to engage and protect their work through IPR regimes. The financial and legal capacities needed to engage with these systems of protection typically exceed that of indigenous communities. In addition, the institutions that regulate IPR regimes are often unaware of the challenges faced by indigenous peoples, and their values are incongruent with many of the values of indigenous communities. The tools themselves – in terms of design – are also unable to protect broader, more holistic forms of knowledge and 'biocultural heritage' that can exist within a community, as well as the interconnections between knowledge and other elements that sustain it (such as land, biological resources and cultural values).

The last few years have witnessed the emergence of an alternative, endogenous system of certification – an 'informal' collective trademark developed as a biocultural heritage indication system (BCHI), by Quechua communities in the Potato Park, Peru. This has emerged as a direct response to the current weaknesses of the conventional IPR system. Though such informal trademarks and BCHIs remain on the fringes of legal regimes, they have the potential to become legally recognised and thereby offer greater potential for the collective rights of indigenous communities to be recognised.

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5. Examples of 'hard' IPRs include copyrights and patents.



## BOX 1: EXPLAINING THE TERMS 'BIOCULTURAL HERITAGE' AND 'GEOGRAPHICAL INDICATIONS'

### What is biocultural heritage?

Biocultural heritage embraces 'not just knowledge, innovations, practices and technologies, but the biological, cultural and spiritual context from which these emerge and are continually renewed. This holistic context also incorporates the customary norms that regulate traditional knowledge. Divorcing traditional knowledge from this context will lead to its erosion and eventual disappearance' (Dutfield, 2011: 9).

The term 'Collective Biocultural Heritage' has been defined as: "Knowledge, innovations and practices of indigenous people and local communities that are collectively held and inextricably linked to traditional resources and territories, including the diversity of genes, species and ecosystems, cultural and spiritual values, and customary laws shaped within the socio-ecological context of communities" (IIED and ANDES, 2005).

The Convention on Biological Diversity (CBD) defines biocultural heritage as:

*The knowledge, innovations, and practices of indigenous and local communities which are often collectively held and inextricably linked to traditional resources and lands and waters traditionally occupied and used by indigenous and local communities; including the diversity of genes, varieties, species and ecosystems; cultural and spiritual values; and customary laws shaped within the socio-ecological context of communities. (CBD Secretariat, 2009:11)*

### What are geographical indications?

Geographical indications are defined in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement, Article 22, as 'indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin'.

This study presents the results of an assessment of the impacts of the informal collective trademark of the Potato Park, Cusco, Peru. The study demonstrates the challenges and shortcomings of conventional intellectual property regimes, specifically highlighting the challenges presented by the Peruvian intellectual property system for indigenous communities. These challenges have led to the consideration of the possibility of

exercising collective rights in the informal economy through the use of an informal collective trademark. Finally, we propose changes to the current IPR system in Peru and the development of a BCHI that would better suit the particular needs and values of indigenous communities, generate positive sociocultural and economic outcomes, and alleviate rural poverty.

## TWO

# THE POTATO PARK AND BIOCULTURAL HERITAGE

The Potato Park (*Parque de la Papa*) in Cusco, Peru, is an indigenous biocultural heritage area,<sup>6</sup> created in 2001 to protect and preserve the collective biocultural heritage and livelihoods of six Quechua communities in the Písaq district. It seeks to integrate landscape and ecosystems with culture and agro-biodiversity as a means of building sustainable livelihoods. Multiple players have a role in the Park's development: the land itself, '*Pachamama*';<sup>7</sup> cultivated, semi-cultivated species and wild relatives of certain crops; as well as Andean biodiversity and the cultural assets and spiritual expressions of local farmers (*campesinos* or *comuneros*). The Potato Park celebrates and protects a unique area with one of the richest levels of native potato diversity<sup>8</sup> in the world, an area considered to be a centre of origin of the potato. The potato is an Andean biocultural expression and was chosen as the 'flagship

species' at the forefront of efforts for local habitat and ecosystem restoration, cultural survival, and the promotion of local rights and development. The Park covers approximately 9000 hectares, spans an altitude of 3200 to 5000 metres above sea level, and is inhabited by almost 5000 *campesinos* who hold a collective land title. It is managed and governed by the communities themselves, in accordance with their customary laws, and with support from Asociación ANDES.

The Potato Park approach is based on the *ayllu*<sup>9</sup> system, an indigenous holistic territorial approach still thriving in the Andes, which allows dialogue and cooperative knowledge construction among members of indigenous communities who share the same history and a common vision of development: *sumaq causay*.<sup>10</sup> The result is a

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6. For further details see <http://www.parquedelapapa.org>

7. Meaning 'Mother Earth' or 'Mother World/Cosmos'; an earthly force revered in traditional Andean culture.

8. The Potato Park harbours six of the nine cultivated potato species that exist in Peru (*Solanum tuberosum* subsp *andigena*, *stenotomum* subsp *goniocalyx*, *S. curtilobum*, *S. x chaucha*, *S. x juzepczukii*, and *S. stenotomum*, subsp *stenotomum*), and two semi-cultivated species (*S. sparsipilum* – *Araq papa* and *S. bukasovii* -*Atoq papa*). The Park also protects six wild crop relatives (*Solanum acaule* bitt, *S. raphanifolium*, *S. bukasovii*, *S. sparsipilum*, *S. lignicaule* vargas and *S. Megistacrolobum* bitt). The Potato Park currently maintains a collection of (as per the biocultural database) 1430 cultivars of native potatoes. This total includes 410 repatriated potatoes from the International Potato Center (CIP) gene bank, 778 originating locally, 157 from the Indigenous Native Potato Network, 56 from donations originating in indigenous communities of the Ayacucho region, and 29 cultivars donated from the UNSACC Cusco University gene bank. Furthermore, the Park harbours other repatriated Andean tubers including 70 cultivars of oxalis, 20 of ollucus, and 4 of mashua.

9. Quechua view the community as the totality of existence, including the people, ruins, fields, sacred mountains, lakes, waterfalls, and the spirit of the forest, among others. Three interconnected and interdependent communities form the *ayllu*: the *runa ayllu* (the community of humans and domesticated species), the *sallka ayllu* (the community of the 'wild' and semi-domesticated species), and the *auki ayllu* (the community of the sacred and the ancestors). The goal of the *ayllu* is to achieve *sumaq causay* (holistic living) which requires collective exploration and creation of the material and spiritual conditions to build and maintain harmony among these three *ayllus*.

10. *Sumaq causay* (holistic living), is a local concept of self-determined development; it refers to the indigenous culture of nurturing life. *Sumaq causay* is achieved when the relationship of reciprocity among three *ayllus* is on balance. The basic exchange value of *sumaq causay* is *ayni*, or sacred reciprocity. *Ayni* defines the relations of

territorial development strategy that diversifies the range of values available to the development process, moving beyond strict market-based objectives to realise a diverse set of holistic values and relationships around indigenous identity, re-establishing and enhancing old and new biocultural networks of exchange. Guided by a rights-first approach,<sup>11</sup> the Potato Park has been able to give economic value to the links between biological and cultural diversity, creating a variety of landscape goods and services and traditional knowledge-based products derived from the local agricultural biodiversity.

The territory of this association of six communities has acquired an economic value based on the particularities of its biocultural diversity, successfully integrating product development with territorial development and combining indigenous knowledge with scientific knowledge to create new innovation-based local economic drivers. Biocultural heritage is being used to create a 'biocultural economy' and emerging bottom-up forms of 'community intellectual property' are allowing the local communities to impose some level of control over their social and economic development. Products derived from

the local biocultural heritage, such as handicrafts, and gastronomic, agricultural and natural products, have helped to protect the local biodiversity and have become an important source of income for the communities.

The Park has also increased the ecosystem services obtained by local residents – the provisioning of seeds, food, fuel, and medicines as well as crop yields, stability and resilience. It has reinforced cultural and spiritual values, identity and empowerment, as well as revival of the local cuisine. These benefits have been realised through the activities of a number of initiatives in the Potato Park, including the development of a culinary sanctuary, six traditional pharmacies, and a conservation strategy. The conservation strategy developed at the Potato Park has optimised the economic use of agro-biodiversity and landscape through agro-ecotourism, whilst mitigating the effects of climate change. Economic and social exchanges of biocultural products such as the sale of natural products based on potatoes and training and educational exchanges within and beyond the Park have also intensified, with fair trade<sup>12</sup> products entering formal agricultural markets and

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production, reproduction and cooperation within and between all the members of the communities. *Ayni* therefore provides the ethical and spiritual norms that regulate all exchanges between people and their environment, promoting the preservation of the integrity of ecological processes, which in turn ensure energy flows and the availability of biodiversity and ecosystem goods and services.

11. In comparison to income first, needs first or local first approaches to development, rights-first development 'emphasises relational as well as material components of wellbeing, particularly the struggle against injustice and the role of human rights discourse in mobilising poor and marginalised citizens. This acknowledges the importance of personal agency and social relationships to wellbeing and to its eudemonic aspect: freedom from domination by others and freedom to live a life that is meaningful in the sense of being consistent with personal goals and values. It allows for the influence of differences in cultural context and anticipates the likelihood of political conflict over wellbeing' (Copestake, 2009:5).

12. The indigenous communities have developed their own fair trade system, based on the principles of the global fair trade movement, and have incorporated these principles into their production systems.

## TWO THE POTATO PARK AND ITS BIOCULTURAL HERITAGE CONTINUED

increased value-adding activities taking place. Integrated ecosystem management strategies have been adopted, involving the integration of indigenous and scientific approaches, and the development of a customary law-based benefit-sharing agreement amongst local communities.<sup>13</sup> National and international policy proposals and implementation mechanisms have been developed, including dynamic ex-situ and in-situ conservation approaches, protection of farmers' rights, genetic resource repatriation agreements, access and benefit-sharing models, and support for diversified uses and marketing of native potatoes.

In order to promote diversified uses and marketing of native potato-derived biocultural products and to protect them from biopiracy,<sup>14</sup> the Potato Park communities chose to use 'soft' intellectual property tools. These tools recognise and support collective rights over novel products and services and affirm and protect the unique, collective nature of their creative and productive processes, which are valued forms of expression of their indigenous knowledge. However, the community faced a number of registration and bureaucratic obstacles in trying to use such an intellectual property tool formally, and have still not received formal protection (application took place in 2010). Consequently the community has designed and used their own informal (i.e. unregistered) collective trademark as a 'biocultural heritage indication' to commercialise products and services derived from their biocultural heritage.

FIGURE 1: LOCATION OF THE POTATO PARK (PARQUE DE LA PAPA), PERU



Source: Freedominfo.org, 2013; Vidiani.com, 2013; Asociación Andes, 2004.

13. All benefits to the Potato Park are distributed based on the Intercommunity Agreement on Benefit Sharing, which was guided by Quechua customary laws and norms. For further information see <http://pubs.iied.org/G03340.html>.

14. Commercial exploitation of natural organisms without fair compensation to or recognition of the peoples on whose land they were found.

# THREE

## ‘SOFT’ IPRS AND COLLECTIVE TRADEMARKS

It has been argued that intellectual property (IP) instruments, in general terms, are unsuitable for safeguarding the complex and holistic collective interests of indigenous peoples (Posey and Dutfield, 1995; Davis, 1997; Mugabe, 1999). Nevertheless, certain so-called ‘soft’ or ‘indigenous-friendly’ IP instruments such as geographical indications, collective trademarks or even unfair competition laws can, under certain circumstances, serve to protect innovations and products developed by indigenous peoples and traditional societies, such as food crops and medicines (Dutfield, 2011).

A trademark is a sign that distinguishes a good or service offered by a company and enables it to differentiate its products and services from those offered by competitors in the market.<sup>15</sup> In contrast to copyright or patents, trademarks are registered initially for a period of ten years from the date they are granted. They can be renewed again for periods of ten years at a time,<sup>16</sup> as long as the initial conditions under which the trademark was granted are maintained. From the perspective of indigenous peoples, the indefinite renewal of protection is an advantage as it allows a long-term control over their products.

A collective trademark is an IP instrument recognised in legislation as a special form of trademark but which fulfils similar roles.<sup>17</sup> It is a sign or symbol which distinguishes the origin or specific features of goods or services which pertain to a collective or group of persons such as associations or cooperatives, and are under the control and management of these formally recognised groups. These features may, for example, refer to the *geographical* origin of goods and services or the *techniques* and *materials* used in their production, or even their *quality*. The collective trademark is owned by the group as a whole and only its members are authorised to use it, according to an agreed internal regulation, which defines how and under what conditions the collective trademark can be utilised (Dutfield, 2011).

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15. Article 134 of Andean Community Decision 486 on a Common Regime on Industrial Property (2001) establishes that ‘any sign that is capable of distinguishing goods and services on the market shall constitute a trademark’. Decision 486 is the framework legislation addressing IP rights (Patents, Trademark, etc.) applicable to Andean Community members – Bolivia, Colombia, Ecuador and Peru (Comunidad Andina, 2000).

16. As provided under the 1994 Trademark Law Treaty, Art. 13(7), which Peru is a party to.

17. Article 180 of Title VIII (On Collective Trademarks) of Andean Community Decision 486, recognises collective marks as ‘any sign that serves to distinguish the origin or any other characteristic common to goods or services from different businesses that use the sign under the owner’s control’ (Comunidad Andina, 2000).



# FOUR

## COLLECTIVE TRADEMARKS: THE LEGAL FRAMEWORK IN PERU AND ITS APPLICATION IN THE POTATO PARK

To apply for a collective trademark in Peru, the association, cooperative, group of producers or the collective in general are required to develop written 'internal regulations for the use of the collective trademark', to be approved by the National Institute for the Defense of Competition and Intellectual Property (INDECOPI). This internal regulation determines the exact conditions under which members of the collective can make use of the collective trademark. It defines:

- what products or services may be covered
- how the collective trademark must be presented
- the rights assigned to the members of the collective
- under what circumstances members may be impeded from using the collective trademark, among others (Dutfield, 2011).

INDECOPI is the national competent authority which manages the IP system operations in Peru. It is also responsible for enforcing IP laws and regulations. Intellectual property rights (such as patents, plant breeders' rights, trademarks, and so on) are granted and registered by INDECOPI. Collective trademark applications are made to and, if all formal requirements are met, granted by INDECOPI.

The creative economy is one of the pillars that underpin the Potato Park as an indigenous biocultural heritage area. The Potato Park communities have undertaken a series of economic and commercial activities through their different associations and collectives, including *Sipas Warmi* (natural products), *Qachun Waqachi* (gastronomy), *Pachamamanta Sumaq*

*Llankarij* (crafts and ceramics), *Ñaupá Away* (textiles), and *Papa Arariwa* (potato guardians). These activities enable a continued interaction with local and regional markets and are an important source of income. Their products include: agricultural food products (potatoes, other Andean tubers and roots, and food products based on these crops), medicinal plants, herbs, new natural products (such as for personal care), crafts, ceramics and textiles. Services include: agro-ecotourism (guided tours, homestay), hiking activities, local restaurant services (based on local produce), and educational services.

In the case of the collective trademark designed (and now adopted informally) by the Association of Communities of the Potato Park, its purpose was not only to distinguish the geographical origin of these goods and services, but also their very special features and the unique nature of their underlying knowledge and innovation systems, which reflect the interconnectedness between people and the land. The obvious question is, why was a collective trademark designed, applied for and then adopted informally? The communities of the Park, very generally, and with no in-depth marketing or focus group analysis, decided that a brand was a good option to market their products and services. Several reasons to apply for a collective trademark were identified:

- First, the collective trademark would give the group of communities a sense of pride and create social cohesion by presenting their products as having one origin, to the 'outside' world.

- Secondly, the internal regulation for the use of the collective trademark may be used to establish principles related to biocultural products and the management and use of their common biocultural heritage.
- Thirdly, the collective mark would help to integrate a new set of goods and services into regular market transactions, improving market linkages for the Park's biocultural products while building marketing and other commercial skills.
- Finally, although the different associations that are part of the Potato Park have very different economic activities, a common denomination would allow them to give a unique identity to all Potato Park products, differentiating them from others, while helping to cluster their microbusiness and fostering a closer integration of the communities through their common biocultural heritage.

In 2002, Asociación ANDES and the Communities of the Potato Park selected the best community design to identify the Potato Park's collective mark<sup>18</sup> (see Figure 2).

The Potato Park's mark has an *informative* nature through both the textual and symbolic representations that have been integrated into the label, which helps consumers in the choice and selection of goods and services. It includes distinctive biocultural features associated with traditional methods of production and processing, which in turn represent the unique identity of the Potato Park products, differentiating them from

others and – assuming customers value products from the area and that a good reputation is established – offering a valuable competitive advantage. These economic values have extended beyond the production of biocultural goods, and have further enabled a range of activities and services in the Park, including enhancements to the ecosystem, services and conservation efforts, which shows that such biocultural heritage indications can provide a broader range of values and activities than traditional IPRs. The mark has helped to build the reputation of the Park and attract visitors to engage in other services and activities. The mark – though it has not yet achieved formal recognition – is therefore already operating commercially as an independent, niche brand.

The informal mark is already being used for a range of products and services from the Park (including for toiletries, natural health and food products). The Association of Communities decided to start the procedure for the formal recognition of the collective mark by INDECOPI for the herbal tea only. Thereafter, formal applications would be made to cover other goods and products of the Potato Park. Only herbal tea was chosen initially to test whether and to what extent government administrative procedures (centralised in Lima) can be useful and respond specifically to the Potato Park's interests and needs. Additionally, herbal tea already has a fully functional and well-organised production process, and was regarded as ready for application for a collective trademark.

FIGURE 2: THE COLLECTIVE TRADEMARK OF THE POTATO PARK



Source: Mark as designed by Asociación ANDES and the Communities of the Potato Park, 2002

18. This competition was undertaken as part of a visit by international experts attending the second meeting of the Group of Like Minded Megadiverse Countries held in Cusco in 2002. The competition included selecting a winner (by international judges) from a set of signs and marks proposed by indigenous women, their children and families.

# FIVE

## THE PROCESS OF APPLYING FOR A COLLECTIVE TRADEMARK

The Potato Park followed the formal steps required for registering a collective trademark with the competent national authority (see Box 2 for INDECOPI requirements). The process involved the following steps:

1. Asociación ANDES and the Communities of the Potato Park, in 2002, selected the best design to identify the Potato Park Collective Mark based on a locally organised competition (see Figure 2).
2. Asociación ANDES and the Communities of the Potato Park developed an internal regulation for the use of the collective mark in 2009 (see Box 3 below for a summary of the regulation, and Annex 1 for the complete version, translated from Spanish).<sup>19</sup>
3. A formal application was prepared by the Association of Communities of the Potato Park and presented to INDECOPI in early 2010. This application was signed by five of the original six communities of the Potato Park.

- d) In parallel, formal searches in INDECOPI databases were undertaken regarding phonetic and figurative comparisons with other marks to ensure uniqueness of the Potato Park collective mark.

The Association of Communities of the Potato Park would be the collective owner of the collective mark and would be responsible for ensuring that its members comply with the conditions set in its internal regulations.

Despite being guided by the three fundamental Andean customary principles of equilibrium, reciprocity, and duality, further evaluations carried out by ANDES and the communities themselves, for this research, found that the original internal regulations developed to satisfy the INDECOPI requirements could have been improved, to better reflect the biocultural heritage of the communities.

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19. This internal regulation as required by national law was prepared as part of an intensive awareness and capacity building process among members of the Association of Communities of the Potato Park. This process included legal advice provided by a consultant in regular discussion meetings (to address the advantages and disadvantages of a collective mark) and a local workshop in mid 2008 to finalise preparation of the application, and its signing by community leaders.

## BOX 2: THE FORMAL PROCESS OF APPLICATION FOR A COLLECTIVE TRADEMARK IN PERU

### 1. Filing the application

The application for registration of a trademark needs to be filed with the competent national office. It can only cover a single category of goods or services, meaning that an application has to be filed for every one of the different types of goods and services that communities provide. The application form needs to include:

- a request for registration, stating that the applicant is filing for registration of a trademark
- the name and address of the applicant to enable the competent national office to communicate with that person
- the nationality of the applicant and, should the applicant be a legal entity, the place of incorporation
- the trademark for which registration is being made; a list of the specific goods or services for which the trademark registration application is being filed; and a statement of the category to which the products or services correspond
- a reproduction of the trademark
- the powers of attorney as needed (name and address of the applicant's legal representative)
- proof of payment of the prescribed fees
- the signature of the applicant or the applicant's legal representative.

In the case of a collective trademark, the application also has to be accompanied by a copy of the statutes and articles of association of the organisation applying for registration of the collective trademark; the membership list; and the internal regulation for the use of the collective mark.

The date of its receipt by the competent national office is regarded as the application filing date, provided that the application contained the minimum requirements set out above. Failure to provide any of these requirements would cause the competent national office to reject the application for processing and no filing date would be assigned to it.

### 2. Examination of compliance with the formal requirements

If a filing date is assigned, INDECOPI has 15 days to conduct an examination to determine whether the application complies with the requirements specified. If it does not comply with these conditions, INDECOPI will give the applicant 60 days (following notification) to remedy those defects. If the applicant fails to fulfill the requirements by the end of the term, the application is rejected and loses its position within the order of priority.

If the application meets the conditions (or if the applicant remedies the defects), the competent national office will order the publication of the requested trademark. Within 30 days following such publication, any person having a legitimate interest may file a valid objection to the registration of the trademark. If any opposition has been presented, INDECOPI will request the submission of arguments and evidence within 30 days following that notification.

### 3. Examination of registrability

If this time expires, or no objections have been filed, INDECOPI will perform the examination of registrability. Should any opposition have been presented, the competent national office shall rule on those objections and on the granting or refusal of registration of the trademark and inform the parties of its decision.

### BOX 3. THE INTERNAL REGULATION OF THE POTATO PARK'S COLLECTIVE TRADEMARK

Though the official application was made for herbal teas, the Potato Park's regulations for use of the collective mark contain separate regulations for the following product categories: soaps and shampoos; native potatoes and tea extracts of aromatic native potatoes; artisanal products, such as ceramics, textiles and jewellery; and bottled water, in anticipation of making applications for the other products. As these regulations are very similar, only the first is provided in Annex 1. Key features of the internal regulation include:

- The collective trademark is the property of the Association of Communities of the Potato Park.
- It follows the basic Andean principles of equilibrium, reciprocity and duality (see Article 5 on 'basic principles', and Article 17 on 'obligations of the person or group authorised to use it', Annex 1).
- It establishes a procedure to authorise the members of the communities to use the collective trademark.
- It establishes the standards for quality control of the products.
- It creates a communal fund into which a percentage of the profits generated from products using the mark are paid. At the end of each year, the profits are shared amongst the communities as a whole to strengthen the collective biocultural heritage from which they are derived, and with the most vulnerable groups (such as orphans and widows).

Although an application was ready in early 2010, its submission to INDECOPI was delayed due to the particularities of the formal indigenous governance system in Peru and other issues related to the legal constitution of the Potato Park, including the need to acquire appropriate prior informed consent and participation of all communities involved according to customary laws and practices. The hurdles and challenges can be summarised as follows:

- Firstly, for a collective trademark to be registered, the application has to be accompanied by a copy of the statutes of association of the organisation. The Association of Communities of the Potato Park was registered in Cusco having as original members the *campesino* communities of Sacaca, Amaru, Cuyo Grande, Pampallacta, ParuParu and Chahuaytire. However the community of Cuyo Grande is no longer a member of the Association and therefore the original registered constitution statute of the Association has to be modified accordingly. Due to state legislation that dictates the status and rights of indigenous peoples, registering legal changes concerning indigenous governance is lengthy, costly and cumbersome; a simple notary-led administrative procedure in the Public Register of Cusco is still pending.



- Secondly, the new President of the Association of Communities of the Potato Park, as elected by the communities' governing body every two years, has not been formally recognised as the lead representative of the park because his name has not been added to the public registry in Cusco. INDECOPi requires that a request for registration of a collective trademark bear the name and address of the applicant (in this case the President of the Association of Communities of the Potato Park) to enable the competent national office to communicate with that person. As changes to the original constitution of the Potato Park are, again, lengthy, costly and cumbersome, the new lead representative of the Association<sup>20</sup> was not formally registered in time in the statutes of the Park.
- Finally, the official address (in the registered statutes) of the Association of Communities of the Potato Park was the *campesino* community of Cuyo Grande, which, as mentioned before, is no longer a member of the Association of the Potato Park.

As the statutes of association of the Potato Park could not be amended to accommodate these changes within the window of 60 days for the correct documentation to be submitted, INDECOPi could not proceed to process the collective trademark application. Based on these experiences and continued challenges the Potato Park decided to forgo the formal application process for their collective trademark. The communities could reapply in the future but are currently focussed on using and developing alternative tools that do not have such challenging requirements, and which are better at promoting and protecting biocultural heritage and recognising the dynamism of alternative knowledge systems.

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20. According to Peruvian law indigenous communities must have elections every two years; this means that to comply with INDECOPi requirements, the Potato Park must register the new head representative, i.e. the new president of the Association of Communities of the Potato Park, in the public registry.







## Map Symbol Leyenda

- Potato Park Boundary  
Limite del Parque de la Papa
- Qochas Trail  
Ruta Qochas
- Pukara Trail  
Ruta Pukara
- Pukara Trail alternative  
Ruta Pukara alternativa
- Potato Trail  
Ruta de la Papa
- Paved Road  
Via asfaltada
- Unpaved Road  
Via afirmada
- Town  
Centro poblado
- Camping Area  
Campamento
- Cascade  
Cascada
- View Point  
Mirador
- Birdwatching  
Aves
- Kilometer  
Kilometraje
- Pass  
Abra
- Beginning of trail  
Inicio de Ruta
- End of trail  
Fin de Ruta
- Native Potato Fields  
Cultivos de Papa Nativa
- Handicraft Workshop  
Taller de Artesanía
- Medicinal Plants  
Plantas Medicinales
- Sacred Sites  
Sitio Sagrado
- Restaurant  
Restaurante
- Medicinal Plants Center  
Centro de Plantas Medicinales



Sources: Andes Association 2006, National Geographical Institute 2004  
Digital processing GeoGraphos 2006 Group

Fuentes: Asociación Andes 2006, Instituto Geográfico Nacional 2004  
Elaboración digital Grupo GeoGraphos 2006

Proyección UTM Mercator

# SIX

## CRAFTING SOLUTIONS: AN INFORMAL COLLECTIVE TRADEMARK

Despite the problems encountered with the formal application process, since 2005 the Potato Park has been using, and will continue to use, its collective trademark informally for personal care, food and natural health products. A small participatory survey was undertaken in December 2010 to evaluate the social, cultural and economic impacts of the Potato Park's informal collective trademark. Ecological impacts were not assessed, as this is being undertaken through a biocultural climate change assessment.<sup>21</sup> Representatives of the Potato Park Economic Associations (collectives)<sup>22</sup> were selected and interviewed individually. 20 community members (12 men and 8 women) participated in this survey. The survey methodology itself was designed and facilitated by local community technicians, who are trained representatives of each of the communities within the Potato Park, to guarantee the best possible participation. This participatory approach is used for all activities in the Park to build community capacity – in this case, capacity for using the trademark and engaging with markets. The specific questions asked and responses received can be seen in Annex 2.

A consumer survey addressing the demand for Potato Park products would also have proven useful in highlighting the impact of the collective trademark in terms of reputation, but such a study was outside the scope of this research. However

it is useful to note that the sale of Potato Park products has been growing.

Analyses of the responses from the survey reveal that the collective mark has brought tangible monetary benefits. 70 per cent of participants said that the mark results in both higher prices and increased sales. 60 per cent of participants noted that the mark allows for market differentiation and ensures that products are better known for their quality and source, which contributes to higher sales.

From the experience of applying for a collective trademark it became clear that formal, administrative and regulatory frameworks often run contrary to indigenous peoples' interests and capacities, despite their significant efforts to comply with these frameworks and requirements. As discussed above, even in the case of a collective trademark – referred to as a 'friendly' IP instrument – indigenous peoples face difficulties and challenges in obtaining intellectual property protection. The fact that the administrative procedures are managed in Lima by INDECOPI, who are typically unaware of indigenous issues and concerns, is one of these barriers. Policymakers should consult with indigenous communities when drafting policy in order to simplify processes and requirements to better meet the particular needs of indigenous communities. They should acknowledge and

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21. See [www.ipcca.info](http://www.ipcca.info)

22. The economic collectives are groups of community members who manage and direct specific economic activities and ventures in the Potato Park. There are six collectives: *Sipas Warmi* (natural products), *Qachun Waqachi* (gastronomy), *Pachamamanta Sumaq Llankarij* (crafts and ceramics), *Ñaupa Away* (textiles), *Arariwa* (potato guardians) and local technicians. Members of the different communities of the Potato Park participate in each of these collectives.

address the incompatibility between intellectual property application processes, state legislation on indigenous governance, and indigenous governance attributes or principles.

The Potato Park's informal collective trademark has undergone its own social and economic dynamic and gained its own momentum, outside of the formal IPR legal framework. The Potato Park collective trademark is being used without formal recognition, yet is now widely recognised as a distinctive symbol of the Park (because people associate products and services from the Park as having a particular quality, origin and distinctiveness). The label shown in Figure 3 adorns all of the products from the Park. It serves not only a commercial purpose but helps to ensure inter-community cohesion and broader recognition of the Potato Park's goods, culture, and biodiversity. The mark has made *campesinos* proud of their heritage and thereby consolidates the goals of the Potato Park as an indigenous biocultural heritage area, which strengthens and sustains both biological and cultural diversity. It has helped to promote social and cultural values and community management of natural resources. By enhancing the external recognition and reputation of the Potato Park and its products, the trademark is helping to promote recognition of the rights of the communities over their biocultural heritage. It also places commercialisation in the hands of indigenous peoples themselves, such as through the development of their own internal regulations for its use. They are now in a position to carefully consider and assess marketing strategies and approaches to the market.

Through improved marketing, the collective mark has increased sales and revenues. Though the majority of sales have remained within the Cusco region, there have been attempts to sell these products more widely – including through fairs and festival stands, which has seen some success. Tourists in the Park have been the largest category of buyer – and some have become return customers. In 2012 the Potato Park had 271 visitors. Whenever the mark is used

and sold, a portion of revenues are put into an inter-community fund.<sup>23</sup>

The development, use and formal application for the informal trademark has had broader benefits in terms of learning about market requirements. It has helped the community to better understand how formal requirements – such as a sanitary registry,<sup>24</sup> and rules concerning content, production methods, packaging and/or tariffs – are necessary, but extend the economic and social demands placed on production collectives, and make exporting complex, risky and expensive. Communities need to consider these issues before engaging in new markets.

While the adoption of an informal trademark has provided numerous opportunities for the Potato Park communities, there are also a number of disadvantages to not having obtained formal recognition within the legal system. While the mark remains informal and unregistered, other unauthorised users of the mark (or of a sign that is confusingly similar to it) cannot legally be stopped. Informal collective trademarks are not afforded the same level of legal protection as formal tools, leaving them more exposed to misappropriation and misuse. They lack effective regulations and means of enforcement or punishment. As use and public recognition of the informal mark grows, the chances for misuse and misappropriation increases: successful marks are bound to attract those who would seek to misappropriate them. Being recognised through the formal legal system offers both protection and legitimacy to these products that cannot be achieved through informal recognition.

In Peru, legislative decree 1044, and specifically Article 9,<sup>25</sup> which took effect in 2008, is intended to suppress unfair competition. Though unfair competition laws are more open to interpretation than IPRs themselves (Dutfield, 2011), they do provide a space in which to begin to protect these informal, soft IPRs. However, as biocultural heritage indications systems extend and expand, a broader range of policies and laws will be required to protect them.

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23. See <http://pubs.iied.org/pdfs/G03168.pdf> for more information.

24. A sanitary registry is a set of national standards, regulations, and documents that certify the health and quality of a product for entering regional, national or international trade..

25. Article 9 states that 'acts of confusion' '...consist of performing acts which have the effect, actual or potential, to mislead other agents in the market for the commercial origin of the activity, the establishment, the services or the products themselves, so that it is considered that they have a different commercial origin than they really have' (9.1). 'The acts of confusion can be realised by the misuse of property protected by intellectual property rules' (9.2).



# SEVEN

## ‘SOFT’ INTELLECTUAL PROPERTY TOOLS AND INDIGENOUS COMMUNITIES

Over the past few years, close attention has been given in Peru to intellectual property rights like collective trademarks, geographical indications (GIs), utility models and trade secrets.<sup>26</sup> It is argued that these ‘soft’ IP tools offer some degree of flexibility for indigenous and local communities and in particular ensure that the collective nature of community creative processes is respected. Some of the most notable examples are the collective trademark ‘Chirimoya Cumbe’ and geographical indications for Pisco and Maíz Gigante Blanco del Cusco, as well as a proposed collective trademark, ‘Café del Perú’. In 2010 alone, 20 applications for collective trademarks were made to INDECOPI, all of them for product names or graphics representing the quality and/or origin of various products.

The use of GIs has also increased in recent years, as recognition of their ability to promote products and services in global markets *and* support indigenous culture and economies has grown. But for GIs to be effective tools for indigenous communities, a sympathetic government institution is needed that allows the communities autonomy in drawing up their own internal production rules and standards; one that makes it easy for the community to have the regulations modified in order to respond to changing market conditions; and that is willing and able to police the market and assist in the prevention of misuse by third parties.

Furthermore, the declaration of a GI in Peru does not confer ownership of the intellectual property

rights to the people, but rather maintains the state as the rightholder (according to article 2181 of Legislative Decree 823 (AIPPI, 2012)); and due to the prohibitive cost and complicated bureaucratic procedures of the Peruvian GI application process, groups that originally wanted to register GIs are opting instead for formal collective trademarks. In the case of Chirimoya Cumbe, for example, producers from the geographical area of origin did not want to work with GIs because it granted no ownership to them. The community took up a formal collective trademark instead, that allowed them to internally determine the use and circulation of the mark<sup>27</sup> and express their right to self-determination.

In the case of the Potato Park collective trademark, the registration was made impossible by the cumbersome, complicated and costly nature of the registration process, as well as the time it takes to register changes in indigenous governance. The application process presented a series of inconsistencies and hurdles, demonstrating that the state’s inadequate understanding of indigenous development and values does not serve indigenous peoples’ cultural and economic interests. States are more often preoccupied with facilitating the modernisation process of such communities, with little sensitivity or concern for their holistic, biocultural values. For example, the fact that indigenous communities require a rotation of their leaders every two years is incompatible with the requirement that an intellectual property right

26. See: [http://en.wikipedia.org/wiki/Trade\\_secret](http://en.wikipedia.org/wiki/Trade_secret)

27. For a more in-depth report see: [www.wipo.int/sme/en/case\\_studies/chirimoya.htm](http://www.wipo.int/sme/en/case_studies/chirimoya.htm)

application must bear one name for a period of many years. For all of these reasons, the application process for a formal collective trademark was finally abandoned.

Nonetheless, the Potato Park's informal collective mark, though not legally registered, has been operating commercially as an independent niche brand. The mark has impacted entire supply chains of the Park's products and services, fostering the clustering of their microbusinesses, in turn establishing economies of scale, from local to national, and the closer integration of the communities that make up the Potato Park. Moreover, by promoting collective management systems for protecting traditional knowledge and biocultural heritage, the Potato Park's informal collective mark has circumvented the legal framework established by INDECOPI, and has evolved to cover the unique qualities of the interconnectedness between people and the land. By doing so it has opened up the possibilities of alternative tools that respond to the particular needs of indigenous people.

The mark has helped to give economic value to the linkages between biological and cultural diversity, creating a range of landscape-based goods and services and novel traditional knowledge-based local products. Examples of these include a landscape-based culinary sanctuary; potato walking trails; and novel products such as *chocopapa* (a mixture of chocolate paste and dark potato), potato-based soaps, shampoos, and so on.

A fundamental part of the right to self-determination is a people's exercise of permanent sovereignty<sup>28</sup> over the natural resources within their territory. This case demonstrates how communities can develop and use their own instruments, based on their own customary laws,

to manage natural resources and associated knowledge. However, indigenous people must also accept that they are entering into a legal jurisdiction on IPRs that is unfamiliar to them, and that this jurisdiction may circumvent their exercise of permanent sovereignty (Harry and Kanehe, 2005); it can also be employed by others to secure commercial control over genetic resources, and so alienate them from their own indigenous resources.

There is an urgent need for political action to protect and promote the social value of traditional knowledge (TK) and promote its integration into domestic and international trade regimes while respecting and preserving local autonomy and cultural values. Interest in the protection of TK is rooted in the goal of promoting social, economic, and ecological development of rural areas. It should respond therefore to concerns about fairness and equity in international economic relations affecting the livelihood of rural communities that form the bulk of the world's population.

As currently structured and governed, formal markets offer more challenges and risks than opportunities for indigenous peoples' biocultural heritage-derived products, as such products face distortions when entering national and international markets. These include subsidies for industrial agriculture production; IPRs such as patents that allow the misappropriation and privatisation of indigenous knowledge and associated genetic resources; and the promotion of large agribusiness ventures at the expense of indigenous peoples' ancestral lands and livelihoods and the ecosystem services they sustain. The promotion and protection of biocultural heritage requires another kind of institutional and legal framework.

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28. Permanent sovereignty of natural resources is 'rooted in the right of self-determination and with the primary aim of enabling economic development for developing states, the principle of PSNR [permanent sovereignty of natural resources] builds on traditional state prerogatives such as territorial sovereignty and sovereign equality of states. This permits states to freely determine and apply laws and policies governing their people and territory under their jurisdiction and choose their own political, social and economic systems' (Hofbauer, 2009).

# EIGHT

## ‘BIOCULTURAL HERITAGE INDICATIONS’: A POSSIBLE WAY FORWARD?

‘Biocultural heritage indications’ are proposed as a novel or *sui generis*<sup>29</sup> legal regime that protects and promotes biocultural expressions and is sensitive to the local customary laws and practices that sustain biocultural heritage. Such indications would focus on protecting and promoting not only final products but also distinct socio-cultural production processes, including networks of cultural, socioeconomic and ecological relationships and values, and people-land interconnections. The ‘biocultural grouping’ or collective rights-holder can be defined by a ‘community of practice’ embedded in shared institutions, relationships and rituals which are inextricably linked to their cultural identity, and in their experiences with their natural environment, and hence with their territorial and cultural rights.

The development of a new tool – a biocultural heritage indication – would differentiate indigenous peoples’ biocultural heritage-based products in local, national and international markets. It would promote and strengthen *local* markets for biocultural products, while addressing the existing limitations they face, and it would take advantage of the products’ unique qualities when entering national and international markets. These biocultural heritage indications could be framed as a hybrid system comprising the most appropriate conceptual and practical elements from trademarks, unfair competition law, biocultural design<sup>30</sup> and geographical indications law.

The concept of biocultural heritage (BCH; see Box 1) provides a framework to guide the design of such an appropriate tool to holistically protect and promote indigenous and traditional knowledge. Combining the BCH concept with property rights tools could help to protect the creative processes of designing new products and services, the geographic uniqueness of their territoriality, traditional landscapes as a reservoir of resources and know-how needed to create value-added products, and unique indigenous cultures.

For example, combining ‘biocultural designs’ (as opposed to ‘industrial designs’) and GIs could capture both the process and outcome of innovation. While designs bring a focus on creativity and innovation, GIs can serve as indications of the richness of cultural and biological diversity that products are derived from and help to sustain. They can satisfy consumer desires for easily recognised qualities, while also helping to maintain local traditions of production through quality controls (Aylwin, Coombe and Chan, 2012). As such, GIs provide an opportunity for biodiversity (Larson, 2007) and local knowledge (Bérard *et al.*, 2006) to enter the value chain of product development, and hence provide opportunities for developing biocultural heritage indications (BCHI) systems (Rangnekar, 2010).

Following such a proposed combination, the BCHI would effectively protect the indigenous

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29. *Sui generis* means ‘of its own kind’ or ‘unique in its characteristics’.

30. A ‘design’ is the appearance of a product, in particular, the shape, texture, colour, materials used, contours and ornamentation. To qualify as a new design, the overall impression should be different from any existing design. A ‘design right’ is owned by the creator or commissioner of a design. ‘Biocultural’ design is a design that takes biocultural heritage as the main site of creative impetus, and is attentive to holistic and communal considerations when developing innovations. See Davidson-Hunt *et al.*, 2012.

names (such as Tarahumara, Q'ero, Apache, and so on), and the reputation of a product linked to an indigenous biocultural region or territoriality (such as the Potato Park in Peru, or the Comarca de Kuna Yala, in Panama), thus supporting the production and marketing of products based on emblematic qualities. Indigenous peoples have domesticated, bred and cultivated a large array of plant species and continue to inhabit important centres of diversity; therefore, a great number of important plants and crop varieties still retain native names that undeniably refer to an indigenous identity and thus provides the product with emblematic qualities associated to their cultural identities. Indigenous peoples can prove that their products are distinct preserves of unique genetic diversity, linked with a territory with specific characteristics, and that the specific characteristic and quality of a product is determined by the territoriality.

The existing legal regime of unfair competition at national and international level could also be considered to provide the framework for developing a BCHI to protect creativity and innovation, therefore protecting rights over knowledge, technologies and cultural expressions while promoting endogenous development. This BCHI would differentiate and protect BCH products beyond the specific distinctness of the geographic qualities of the indigenous product.

The BCHI system would provide indigenous peoples with an appropriate tool for the management of biocultural heritage, and the protection and commercialisation of biocultural resources linked to indigenous knowledge and ecosystems. The recognition of the BCHI would provide a sign of authenticity to the identity of indigenous cultures and would guarantee that traditional knowledge is recognised.

This in turn would promote the development of markets for quality products or services based on innovations derived from the inextricable links between knowledge, resources and territories. Promoting endogenous development and inclusion for poverty alleviation requires guaranteeing exclusive rights to indigenous peoples' biocultural heritage, as well as commercial and legal mechanisms to provide incentive tools in accordance with market differentiation.

What we are proposing here is still conceptual in nature. We certainly are not suggesting that it is a process that all communities would find useful in all situations. However, it could provide a useful starting point for those communities already engaged in innovation that is rooted in biocultural heritage. Biocultural heritage indications could be useful in situations where communities are looking to develop new economic opportunities – including commercial products or services – that both reflect cultural values and use biocultural heritage in sustainable and innovative ways.

# NINE CONCLUSION

As the Potato Park's experience shows, 'soft' IPRs such as collective trademarks can enable indigenous communities to increase sales and revenues of biocultural heritage-based products, while also strengthening social cohesion, economic integration and environmental stewardship. Collective trademarks allow communities to develop the internal regulations for the use of the mark themselves, drawing on their own customary laws and practices. However, this case also highlights the difficulties that indigenous peoples face in registering their products through existing application procedures, and the need for procedures to take into account other legal requirements for indigenous peoples which could prevent them from applying in time.

Despite not having been formally registered, informal use of the collective trademark by the communities of the Park has brought a number of benefits – not only economic, but also cultural and ecological – that stem from improved external and internal recognition of their collective 'brand' identity. While these informal tools will not be subject to the same degree of formal protection, there are still gains to be made in terms of reputation building, marketing (and sales) and social cohesion.

Successful marks are bound to attract those who would seek to misappropriate them. While not being legally registered will make it more difficult to prevent unauthorised use of the mark (or of a sign confusingly similar to it), it may still be possible to do so through unfair competition laws.

This research has demonstrated that there is a real need for formal IPRs that are able to recognise and place value on the unique and diverse forms of biocultural heritage that exist within indigenous communities. New forms of IPRs are needed that reflect the customary laws

that sustain biocultural heritage, and can protect the process of production as well as the intellectual product, and hence can help to sustain distinct indigenous cultures and their critical links with biodiversity and landscapes. When considering the development and application of such IP tools it is important not to focus on one or two existing tools, but to consider combining elements from a range of IP tools. The combination of soft IPR instruments such as trademarks and GIs with designs and unfair competition law, offer stronger possibilities for indigenous communities to value their traditional knowledge, and protect their cultural property from external commercial exploitation.

However, in designing a new tool – or biocultural heritage indication – complicated and resource-intensive procedures involved in making applications must be avoided, as they often render IPR tools inaccessible to indigenous communities. Thus, the design and selection of the particular IP tools for TK protection or promotion has to take into account the broader context and limitations of indigenous communities as part of the decision criteria, and look beyond the needs of conventional business applicants.

The development of biocultural heritage indications tailored to the needs of indigenous peoples offers an opportunity to address these bureaucratic problems and reimagine a grassroots form of IPRs. A new biocultural heritage indications system would empower marginalised peoples to be included within the current international IP system, rather than isolated from it, while addressing increasingly pertinent issues of fairness in IPRs. A BCHI can be described as a collective management system for protecting traditional knowledge holders and grassroots innovators, and if institutionalised, it could make the IP system accessible to large



number of indigenous communities which are poor and marginalised.

The use of informal indications such as the Potato Park's collective trademark shows that there is potential at the national level for development of legislation for biocultural heritage indications. This will require capacity building in indigenous communities that national governments should support, along with internal capacity building of government institutions that would enable them to understand and support the needs of indigenous communities. Establishing a national registry to provide a facility that has low transaction costs for short-term protection of traditional knowledge and innovations (through current legislation) may also be a way of 'formalising' the BCHI. It could be a free on-line system with simple requirements. This would not only reduce the transaction costs for the innovators, but also for potential community entrepreneurs and investors who may like to join hands with the innovators to complete the value chain. Unless such intellectual property protection is also provided to small-scale innovators, the legitimacy of the IPR system will become suspect.

While the existing IPR system can indeed help to some extent, there is a need for considerable modification to make it accessible to the dispersed, disadvantaged traditional knowledge holders in remote rural areas. In the absence of such a system, informal trademarks such as the BCHI are a good alternative. This will allow for experimentation with different institutional structures and mechanics that may provide models for BCHI systems that have low transaction costs.

Finally, the development and application of BCHIs also provide indigenous communities with an opportunity to further articulate and exercise their collective rights. As has been recognised by such intergovernmental institutions as the International Labour Organization, 'the right to organise is an enabling right in that it paves the way for the exercise of a range of other rights at work. However, the right to freedom of association is often denied – *de jure* or *de facto* – to those in the informal economy' (Bennett, 2003). The adoption of a BCHI system allows indigenous communities to bridge these two different forms of rights. On the one hand the development of informal collective trademarks offer indigenous communities the right to autonomously organise and be recognised within informal economies, and strengthen their rights to freedom of association within the market. At the same time, as these forms of informal IPRs become increasingly recognised within the formal IPR system, indigenous communities can begin to substantiate greater formal legal and economic protection and rights. As such, the exercise of collective rights within the informal system has the capacity to generate social and economic benefits that exceed the possibilities presented by the current formal system of property rights.

## REFERENCES

- AIPPI (International Association for the Protection of Intellectual Property) (2012). Relationship between trademarks and geographical indications. Summary report, Question Q191. See <https://www.aippi.org/download/comitees/191/SR191English.pdf>
- Asociación ANDES (2004). Map of the Potato Park.
- Aylwin, N., Coombe, R.J., Chan, A. (2012). Intellectual Property, Cultural Heritage and Rights-Based Development: Geographical indications as vehicles for sustainable livelihoods. Submitted to Willem Grosheide ed., for publication in *Intellectual Property: The Human Rights paradox*. Edward Elgar, Cheltenham. See [www.yorku.ca/rcoombe/forthcoming\\_articles/GI\\_Human\\_Rights\\_Development\\_Paper.pdf](http://www.yorku.ca/rcoombe/forthcoming_articles/GI_Human_Rights_Development_Paper.pdf).
- Bennett, M. (2003). *Organizing in the Informal Economy: A case study of the clothing industry in South Africa*. Seed Working Paper No. 37. International Labour Organization, Geneva.
- Bérard, L., Cegarra, M., Djama, M., Louafi, S., Marchenay, P., Roussel, B., Verdeaux, F. (eds) (2006). *Biodiversity and Local Ecological Knowledge in France*. Agricultural Research for Development (Cirad), The Institute for Sustainable Development and International Relations (Iddri), Institut Français de la Biodiversité (IFB), French National Institute for Agricultural Research (Inra). See [www.idri.org](http://www.idri.org).
- Comunidad Andina (Andean Community) (2000). *Decision 486 Regimen comun sobre propiedad industrial*. See [www.comunidadandina.org/normativa/dec/D486.htm](http://www.comunidadandina.org/normativa/dec/D486.htm).
- Copestake, J. (2009). Wellbeing and Development in Peru: Global and local views confronted. Paper presented at the 2009 Congress of the Latin American Studies Association, Rio de Janeiro, 11–14 June 2009. See <https://lasa.international.pitt.edu/members/congress-papers/lasa2009/files/CopestakeJames.pdf>.
- Cottier, T., Panizzon, M. (2004). Legal Perspectives on Traditional Knowledge: The case for intellectual property protection. *Journal of International Economic Law* 7(2), 371–99.
- Davidson-Hunt, I.J. et al. (2012). Biocultural Design: A New Conceptual Framework for Sustainable Development in Rural Indigenous and Local Communities. *Surveys and Perspectives Integrating Environment and Society* 5: 2.
- Davis, M. (1997). *Indigenous Peoples and Intellectual Property Rights*. Research Paper 20 1996–97. Parliament of Australia. See [www.aph.gov.au](http://www.aph.gov.au).
- Desai, P.N. (2007). Traditional Knowledge and Intellectual Property Protection: Past and future. *Science and Public Policy Journal*. 34(3) 185–97.
- Dutfield, G. (2011). *Intellectual Property Tools for Products Based on Biocultural Heritage*. Shaping Sustainable Market Papers. International Institute for Environment and Development, London. See <http://pubs.iied.org>.
- Fay, F. (2011). Creating Value through Geographical Labelling and Indications: The power of origin. Presentation made at the African Union – European Union Joint Workshop, Kampala, 10–11 November 2011. See [http://ec.europa.eu/agriculture/events/2011/gi-africa-2011/fay\\_en.pdf](http://ec.europa.eu/agriculture/events/2011/gi-africa-2011/fay_en.pdf).
- Freedominfo.org. (2013). Peru map. See <http://freedominfo.org/wp-content/uploads/maps/peru-map.gif>. Accessed January 2013.
- Harry, D., Kanehe L.M. (2005). Protecting Indigenous Knowledge in a Globalized World. Paper presented at the World Indigenous Peoples' Conference on Education, 27 November 2005, Hamilton, New Zealand.
- Hofbauer, J.A. (2009). The Principle of Permanent Sovereignty over Natural Resources and its Modern Implications. Master thesis. University of Iceland. See [http://skemman.is/stream/get/1946/4602/13279/1/Jane\\_Hofbauer.pdf](http://skemman.is/stream/get/1946/4602/13279/1/Jane_Hofbauer.pdf).
- IIED and ANDES (2005). Research Planning Workshop (Cusco, 2005). Protecting community rights over traditional knowledge: Implications of customary laws and practices. <http://pubs.iied.org/pdfs/G01090.pdf>
- International Association for the Protection of Intellectual Property. Relationship between trademarks and geographical indications. Summary Report, Question Q191 (2012). See <https://www.aippi.org/download/comitees/191/SR191English.pdf>

- Larson, J. (2007). *Relevance of Geographical Indications and Designations of Origin for the sustainable use of genetic resources*. Global Facilitation Unit for Underutilized Species, Rome. See [www.underutilized-species.org/documents/publications/gi\\_larson\\_lr.pdf](http://www.underutilized-species.org/documents/publications/gi_larson_lr.pdf).
- Mugabe, J. (1999). Intellectual property protection and traditional knowledge. *World Intellectual Property Organization. Intellectual Property and Human Rights*. Geneva, WIPO, 97–125.
- Munzer, S.R., Raustiala, K. (2009). The Uneasy Case for Intellectual Property Rights in Traditional Knowledge. *Cardozo Arts and Entertainment Law Journal*. 27, 37–97.
- Posey, D. and Dutfield, G. (1995). *Beyond Intellectual Property: Toward traditional resource rights for indigenous peoples and local communities*. International Development Research Centre, Ottawa. See [www.mtnforum.org/sites/default/files/pub/1393.pdf](http://www.mtnforum.org/sites/default/files/pub/1393.pdf).
- Rangekar, D. (2010). The Law and Economics of Geographical Indications: Introduction to special issue of the Journal of World Intellectual Property. *The Journal of World Intellectual Property*, 13(2) 77–80.
- Van Overwalle, G. (2005). Protecting and Sharing Biodiversity and Traditional Knowledge: Holder and user tools. *Ecological Economics* 53(4), 585–607.
- Vidiani.com (2013). Maps of Peru. See [http://www.vidiani.com/maps/maps\\_of\\_south\\_america/maps\\_of\\_peru/detailed\\_physical\\_map\\_of\\_peru\\_with\\_roads\\_and\\_cities.jpg](http://www.vidiani.com/maps/maps_of_south_america/maps_of_peru/detailed_physical_map_of_peru_with_roads_and_cities.jpg). Accessed January 2013.

# ANNEX 1

## INTERNAL REGULATIONS FOR THE USE OF THE COLLECTIVE BRAND “PARQUE DE LA PAPA” SOAPS AND SHAMPOOS



### CHAPTER I – GENERAL PROVISIONS

#### Article 1: OBJECTIVES

The present Regulations have the following objectives:

1. To regulate the use and administration of the Collective Brand which constitutes a mixed sign consisting of the denomination ‘Parque de la Papa’ and a logo (henceforth ‘Collective Brand’) for products consisting of soaps and shampoo.
2. To establish the criteria by which the use of the Collective Brand will be granted to members of the Asociación de Comunidades del Parque de la Papa (Association of Communities of Parque de la Papa).
3. To establish the criteria by which the termination or permanent withdrawal of the use of the Collective Brand can be implemented, in case of non-compliance with the conditions and criteria established in the present Regulations.

#### Article 2: DESCRIPTION OF THE COLLECTIVE BRAND

The Collective Brand constitutes a logo. This consists of a red rectangle within which there is an Andean landscape with people working the land, coloured in green.

On the horizon are two mountains from which a river flows and forms a lake. The sun is rising behind the mountains

The name ‘**Parque de la Papa**’ appears at the base of the image in red letters with a yellow outline. Cusco, Peru is below in small white letters.

#### Article 3: OWNERSHIP OF THE BRAND

The Collective Brand is owned by the Asociación de Comunidades del Parque de la Papa (henceforth ‘the Asociación’), entered in registration record number 11011824 of the Juridical Entities Registry Office, Inka, dated 22nd of April 2002.

#### Article 4: DOMICILE OF THE RIGHT HOLDERS

The Asociación’s registered address is Comunidad de Sacaca s/n, Distrito Pisac, Provincia de Calca, Departamento de Cusco.

#### Article 5: BASIC PRINCIPLES

The use of the Collective Brand is governed by the present Regulations of Use and all applicable legal provisions, together with Common Law applicable in the Parque de la Papa, according to the principle of Duality established in paragraph 5.3 of the present Regulations.

The present Regulations invoke the Andean legal principles that rule the Andean worldview, which forms the basis of behaviour and the Common Law that regulates the Andean world, namely, the principles of i) Balance, ii) Reciprocity and iii) Duality.

**5.1** The principle of Balance implies taking an action based on balance and harmony, to achieve what is just, whilst acknowledging the proportionality of capacities, needs and efforts of each member of the community.

**5.2** The principle of Reciprocity implies mutual and reciprocal support regarding the receipt of work, services, goods and/or resources, whilst committing to returning them in equal measure, quality and opportunity.

**5.3** The principle of Duality implies an understanding of the world in which all concepts, objects and natural elements have an opposite that is diametrically opposed but also complementary. For this reason, behaviour cannot be individualistic.

#### Article 6: PERSONS AUTHORISED TO USE THE BRAND

By applying the Andean legal principle of Balance, the ultimate purpose of which is to achieve harmony among the members of the Asociación and the communities, the use of the Collective Brand will only be allowed to individuals and management groups belonging to the communities that make up the Asociación, and who possess formal authorisation of use as established in Chapter II of the present Regulations.

## **Article 7: LEGAL REPRESENTATIVE**

The legal representative of the Collective Brand is the Asociación's Board of Directors (henceforth 'Board of Directors'), represented by its President.

## **CHAPTER II – AUTHORISATION PROCEDURE**

### **Article 8: APPLICATION DOCUMENTS**

The individuals and/or management groups interested in using the Collective Brand will have to submit an application to the Board of Directors. Said document will contain the following information:

- a) applicant's details: name and surname, address and community to which he/she belongs, as well as DNI (National Identity Document) number if the applicant is an individual, or the name of the management group and its representative if the applicant is a management group.
- b) Likewise, the application has to include:
  1. data relevant to the product for which the applicant wishes to use the Collective Brand.
  2. an affidavit stating the obligation to provide the Asociación's trust fund with a percentage of the benefits obtained from marketing the products identified by the Collective Brand, as an application of the Andean legal principle of Reciprocity.

### **Article 9: QUALITY CONTROL**

The Board of Directors is in charge of verifying and controlling the quality expected of a product wishing to obtain the right of use of the Collective Brand. For this the Board will have the support of co-proprietors with wider experience in the field.

### **Article 10: GRANTING OF AUTHORISATION**

Once the requirements have been met and the applicant has accepted the terms and conditions, the Board of Directors will grant authorisation for the use of the Collective Brand.

The use of the Collective Brand will not be granted to individuals or groups that have previously misused it.

### **Article 11: VALIDITY OF AUTHORISATION**

The authorisation will be valid for two years.

### **Article 12: NEW APPLICATION**

A user whose authorisation has expired will be able to reapply for the use of the Collective Brand by following the above procedure.

## **CHAPTER III – TERMS OF USE**

### **Article 13: USE OF THE BRAND**

The Collective Brand shall only be used by individuals and/or management groups thus authorised, according to the conditions and specific terms shown in the authorisation, and for the products or services authorised. The terms of such authorisations must be interpreted in a restrictive way.

The composition of the Collective Brand, as relating to colour, denomination or distribution of its various elements, will not be modified during its use and marketing.

### **Article 14: PROHIBITION OF REGISTRATION AND EFFECTIVE BRAND USE**

1. Users of the Collective Brand will not be allowed to use or apply for the registration, in any country, of an identical or similar sign, that could in any way be misleading, cause confusion or take advantage of the Collective Brand's fame and reputation.
2. The Collective Brand should not be used in such a way as to cause discredit, damage the reputation or mislead consumers regarding the characteristics of the product or service bearing the Collective Brand.

### **Article 15: TRANSFER OR LICENCE**

The Collective Brand will only be used by the individual and/or management group thus authorised by the right holders. These individuals and/or groups will not have the power to transfer or license, in whole or in part, the rights derived from the authorisation.

### **Article 16: TERMINATION OF THE RIGHT OF USE**

The right of use of the Collective Brand will be terminated in the following cases:

1. by written express renunciation on the part of the user;
2. non-compliance with the obligations established in the present Regulations;
3. in the case of products which are not native to the Parque de la Papa and have been identified with the Collective Brand.

## CHAPTER IV – DUTIES

### Article 17: DUTIES OF THE AUTHORISED INDIVIDUAL AND/OR MANAGEMENT GROUP

According to the Andean legal principle of Balance, and in order to achieve harmony among the members of the Asociación and the communities, individuals or management groups authorised to use the Collective Brand assume the following duties:

1. to ensure the standard of quality – and if necessary the improvement – of products identified and marketed under the Collective Brand, according to the Andean legal principle of Balance
2. to ensure a fair commercialisation of products identified and marketed under the Collective Brand, by means of an equitable distribution of benefits among individuals and management groups authorised to use the Collective Brand, according to the Andean legal principles of Balance and Reciprocity
3. to comply with the contribution to the trust fund of the Asociación de Comunidades del Parque de la Papa, according to the Andean legal principles of Balance and Reciprocity
4. to comply with the charges and commissions established in regard to the use of the Brand
5. to use the Brand keeping in mind the application of the Andean principles established in the present Regulations.

### Article 18: RESPONSIBILITIES TOWARDS THIRD PARTIES

The authorised individual and/or management group will be held responsible for damages caused to the Asociación as right holders of the Collective Brand or to third parties in case of non-compliance with the duties established in the present Regulations. This duty will also apply to the individual or group after termination of the authorisation.

### Article 19: DUTIES OF THE COLLECTIVE BRAND RIGHT HOLDERS (THE ASOCIACIÓN)

1. The owner of the Collective Brand undertakes not to pass on to third parties any information gathered during the exercise of control measures.
2. The owner undertakes to maintain sound legal requirements for the registration and maintenance of the Collective Brand.

3. The owner undertakes to keep an updated list of individuals or management groups authorised to use the Collective Brand.
4. The owner undertakes to take the requisite measures to ensure best use of the Collective Brand.

## CHAPTER V – ABOUT BRAND MANAGEMENT

### Article 20: ON BRAND MANAGEMENT

The Board of Directors will be in charge of managing the income obtained from marketing products and services. Each authorised individual and/or management group will be accountable to said Board of Directors.

### Article 21: ON THE COMMUNAL FUND

The Communal Fund is a body to be created by decision of the General Assembly, and its purpose will be to receive contributions from authorised individuals and/or management groups. Said contributions will be distributed once a year among members of the Asociación.

## FINAL AND TRANSITIONAL PROVISIONS

### Article 22: BRAND PROTECTION

1. In case of any infringement regarding the Collective Brand, only the right holders will be able to exercise the relevant actions for its protection. Users are expressly prohibited from exercising any action in this regard.
2. If any authorised person knows of an infringement or unlawful use of the Collective Brand, he/she will have to immediately tell the Asociación, as owners of the Collective Brand, and provide the necessary data to facilitate any action the Asociación decides to undertake.

### Article 23: LIABILITY FOR DEFECTS

1. The individuals and/or management groups authorised to use the Collective Brand will have sole responsibility for defects in their products. In no case will the right holders (Asociación) or the control body (Board of Directors) be held responsible.
2. In all cases, the user of the Collective Brand will indemnify and be responsible for damages suffered by third parties as a result of their actions or lack of action.

### Article 24: INFRINGEMENTS

For the purpose of the present Regulations, the following will be considered infringements:

1. non-compliance with the terms of the present Regulations



2. refusal to provide the necessary facilities for appropriate supervision and control of production and use of the Collective Brand
3. use of publicity regarding the Collective Brand in a way that could mislead consumers
4. unauthorised use of the Collective Brand or use that is done in such a way as to exceed what is intended in said authorisations
5. infringements of the standards of industrial property, unfair competition, publicity, consumer protection and other relevant rules.
4. termination of the right of the user, and all products in question to be withdrawn from the market, in those cases where it can be established that the products bearing the Collective Brand do not meet the criteria set in these Regulations.

#### **Article 26: AMENDMENT OF REGULATIONS**

Any amendments to the present Regulations of Use will be registered with the Distinctive Signs Office of INDECOPI. Likewise, they will be notified to the authorised individuals and/or management groups for their knowledge and acceptance, so that they can continue using the Collective Brand.

#### **Article 27: ENTRY INTO FORCE**

The present Regulations shall be effective as soon as INDECOPI issues the Resolution on Granting the Collective Brand.

#### **Article 28.**

Any questions not addressed within the present Regulations shall be settled by the General Assembly of the Asociación.

Cusco, 16th October, 2010.

#### **Article 25: PENALTIES**

The infringements, notwithstanding any pertinent civil or criminal proceedings, will result in the following penalties:

1. public admonition
2. suspension of the authorisation to use the Collective Brand for a period of up to six (6) months
3. revocation of the authorisation to use the Collective Brand. In this instance, the authorisation will be revoked automatically and the authorised individual or group will not be able to claim any compensation from the right holders

## ANNEX 2

### SURVEY TO ASSESS THE IMPACT OF THE POTATO PARK COLLECTIVE MARK

A small participatory survey was undertaken in December 2010 to evaluate the social, cultural and economic impacts of the Potato Park's informal collective trademark. Representatives of the Potato Park Economic Associations (collectives)<sup>31</sup> were selected and interviewed individually. 20 community members (12 men and 8 women) participated in this survey.

#### Question 01: What is the purpose of a collective trademark?

The question assesses participants' understanding of the general practical utility and value of the collective trademark as a management tool.

Results are shown below as percentages:

So products can be better priced	20%
So products can be better known and sales increase	60%
To enforce ownership rights	10%
So we <i>campesinos</i> can be identified with the Potato Park	10%

These answers demonstrate that 60 per cent of the participants place more value on the collective trademark as a tool that allows for market differentiation and ensures that products are 'better known' for their quality and source, all of which contributes to higher sales. There is a good understanding about the underlying rationale of a collective trademark, which is *not only* related to ensuring better prices.

#### Question 02: How do you feel about the collective trademark?

This question assesses the quality of satisfaction or dissatisfaction that participants may have about the use of the collective trademark in the Potato Park.

Results are shown below as percentages:

The mark is important for entering goods in the market	25%
We <i>campesinos</i> are glad and proud to make our work and culture known	60%
We <i>campesinos</i> are happy that the medicinal plants have a brand and distinguishing mark	10%
As well as medicinal plants, we want brands and marks for our other products	5%

These results show that 60 per cent of participants feel 'glad and proud' because their work and culture are now more visible as a result of the use of the collective trademark. A second group (25 per cent) is also satisfied because the collective trademark allows a better insertion in the market. Interestingly, 5 per cent of participants show their dissatisfaction and claim that there should be brands for a wider set of products.

#### Question 03: Do you feel that the creation of the Potato Park and the use of the collective trademark have brought any changes?

This question assesses how participants perceive any practical changes, compared to the time prior to the creation of the Potato Park and adoption of the collective trademark.

Results are shown below as percentages:

Nothing has changed	30%
The presentation of medicinal plants has changed	60%
There are changes compared to previous years	10%

Results indicate that 60 per cent of the participants perceived visible change compared with the situation prior to the creation of the Potato Park and the collective trademark. However, it is not clear if this perception refers to changes in product presentation, or in the actual effects of the collective trademark on their sale.

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31. The economic collectives are groups of community members who manage and direct specific economic activities and ventures in the Potato Park. There are six collectives: *Sipas Warmi* (natural products), *Qachun Waqachi* (gastronomy), *Pachamamanta Sumaq Llankarij* (crafts and ceramics), *Ñaupá Away* (textiles), *Arariwa* (potato guardians) and local technicians. Members of the different communities of the Potato Park participate in each of these collectives.

Furthermore, 30 per cent of participants emphasise that nothing has changed dramatically, which may indicate some disenchantment with the usefulness of the collective trademark.

**Question 04: What would you like the collective trademark to do for biocultural products from the Park?**

This question assesses participants' perception of what improvements are needed in the use of the collective mark.

Results are shown below as percentages:

I would like all products from the Park to have a logo and brands/marks	50%
A higher priority needs to be given to the commercialisation and promotion of biocultural products	30%
I would like more commercialisation of Potato Park products	20%

Results indicate that 50 per cent of participants claim the need for logos and brands for all products originating in the Park. At the same time, 30 per cent of participants indicate that promotion of products and ensuring better commercialisation of marketing strategies may be needed. Only 20 per cent of participants centre their attention on further and broader commercialisation of Park products. However, this could indicate a cautious stance towards trade and commerce as the only option to ensure livelihoods in the Potato Park.

**Question 05: Do biocultural products from the Park that use the collective trademark cost more than other products from the Park?**

This question assesses the perceived tangible monetary benefits brought by the use of the collective trademark.

Results are shown below as percentages:

Benefits have not been perceived yet	30%
Yes, and they sell more too	70%

This indicates that 70 per cent of the participants perceive that the products with the collective trademark cost more but at the same time sell more. The other 30 per cent of participants have not yet perceived any benefits in the form of higher prices.

**Question 06: Which products are commercialised with the collective trademark?**

Results are shown below as percentages:

Native potatoes, medicinal plants, crafts and food	70%
Others	30%

This indicates that 70 per cent of the participants know exactly what native products (potatoes, medicinal plants, crafts and food) are sold with the collective trademark. They are therefore familiar with the use and coverage of the collective trademark.

**Question 07: How do consumers or buyers react when they see the collective trademark?**

Results are shown below as percentages:

They see that medicinal plant products are natural and ecologically produced	30%
They prefer products with the collective trademark	60%
They expect high prices for goods with the collective trademark	10%

The results indicate that 60 per cent of participants perceive that consumers prefer the products with the collective trademark. 30 per cent of participants indicate that consumers prefer medicinal plants with the collective trademark because they are seen as a natural, ecological product. Finally, 10 per cent of participants indicate that the consumer associates the collective trademark with high prices, which is not in itself a problem.

**Question 08: Have there been efforts to promote and advertise (i.e. to market) biocultural products with the collective trademark?**

Results are shown below as percentages:

The products have been identified with the name of the Potato Park	10%
We are grateful to Asociación ANDES for its efforts in marketing on behalf of the collectives	60%
There have been efforts from the <i>campesinos</i>	30%

An overwhelming 90 per cent of participants perceive that there have been efforts to promote biocultural products with the collective trademark – either through Association ANDES or through

*campesinos* themselves. In addition, 10 per cent of participants indicate that producers and the products have identified the collective trademark with the Potato Park, which would show an appropriation process underway: the collective trademark and the Potato Park itself becoming part of a single package.

**Question 09: Has there been training in the use of the collective brand?**

Results are shown below as percentages:

The collective trademark can continue to strengthen its role over time with continued training	10%
We <i>campesinos</i> received training years ago	50%
Yes, there have been several courses on collective trademarks	40%

Results indicate that 90 per cent of participants have received training on collective trademarks in general, including through the competition to choose the logo as the sign for the collective trademark. 10 per cent of participants suggest continuing with the training to improve the implementation of the collective trademark.

**Question 10: What barriers are there to promoting the extended use of the collective brand?**

This question assesses what difficulties and limits are perceived by participants regarding the collective trademark.

Results are shown below as percentages:

None, because products from the Potato Park are already known through the Internet	25%
None. So far, 44 varieties of plants are informally registered by the Park; the collective trademark is important	50%
We <i>campesinos</i> don't have a health/ sanitary registration for the products	25%

These results indicate that 75 per cent of participants perceive no difficulties, and that the implementation of the collective trademark continues its expected progress. Meanwhile, 25 per cent of participants note that health or sanitary registers for their products are still pending and may be the cause of marketing problems in the future.



# COLLECTIVE TRADEMARKS AND BIOCULTURAL HERITAGE

## TOWARDS NEW INDICATIONS OF DISTINCTION FOR INDIGENOUS PEOPLES IN THE POTATO PARK, PERU

The indigenous farmers of the Potato Park in Cusco, Peru, produce goods drawn from their collective traditional knowledge, biodiversity and fundamental ties to the land: their 'biocultural heritage'. How can they promote these products, while also protecting their collective intellectual property? Existing intellectual property tools tend to be unsuitable for this purpose, and even 'soft' intellectual property tools such as collective trademarks and geographical indications can be beyond the legal and financial capacity of remote rural communities.

This paper presents the experience of the Potato Park communities in applying for formal protection through a collective trademark, and also in adopting an informal trademark for their products and services. The process of registering the collective trademark brought to light the incompatibility of the registration

requirements with Peruvian law on indigenous governance, and the application was unsuccessful. The Potato Park communities have instead opted to use their trademark informally, and it is now widely recognised as a distinctive symbol of the Park. A survey found that as well as raising prices and increasing sales, the mark has helped to ensure social cohesion.

However, while the trademark is informal, it lacks protection. This report concludes with a proposal for an alternative indigenous 'biocultural heritage indication' (BCHI) which could draw on geographical indications, design rights and unfair competition law. Such a tool could open up the current IPR system to rural communities, alleviating poverty while protecting traditional knowledge, and strengthening biological and cultural diversity.



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