

August 2015

# Designing an effective biocultural heritage indication labelling system

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Consultation document

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By Graham Dutfield, Alejandro Argumedo and Krystyna Swiderska

## Contents

<b>Summary</b>	<b>3</b>
<b>Why is a biocultural heritage indication scheme needed?</b>	<b>4</b>
<b>How can a biocultural heritage indication scheme benefit indigenous people?</b>	<b>7</b>
<b>What can the scheme borrow from existing labelling and certification schemes?</b>	<b>9</b>
<b>What would the Biocultural Heritage Indication look like?</b>	<b>13</b>
<b>How should the scheme be managed?</b>	<b>15</b>
<b>How to enforce rights and prevent misuse?</b>	<b>17</b>
<b>What are the next steps?</b>	<b>19</b>
<b>Glossary</b>	<b>20</b>
<b>References and further reading</b>	<b>21</b>

## Summary

Biocultural heritage is crucial to many indigenous peoples' livelihoods, identities and self-esteem. Products and services based on biocultural heritage – such as traditional foods and drinks, personal care products, crafts and guided tours - can provide a source of income for indigenous people, while promoting incentives to sustain biocultural heritage. Tourists and local people with disposal income are often willing to pay a premium for high quality local products provided they carry a guarantee of origin and authenticity. But such guarantees are often lacking. While labelling and certification schemes exist for ecological and fair trade products, it seems that there is no such scheme that specifically seeks to protect biological and cultural diversity. Some existing intellectual property tools such as collective trademarks and geographical indications could be used to protect collective rights over biocultural products, but they are largely inaccessible to indigenous peoples as registration procedures are bureaucratic, designed for businesses, and they can be costly and difficult to enforce. Furthermore, they focus strongly on promoting trade, rather than protecting biocultural diversity.

IIED, the University of Leeds and Asociacion ANDES (Peru) have therefore initiated a process to design a new labelling or 'Biocultural Heritage (BCH) Indication' scheme for biocultural heritage-based products, which aims to be easily accessible to indigenous peoples.

Building on the experience of an informal trademark developed by the Potato Park communities in Peru, the Biocultural Heritage Indication seeks a culturally appropriate approach to marketing that harnesses goodwill towards indigenous peoples and their "traditional lifestyles". It will emphasise and authenticate the way that cultural and spiritual values, local knowledge, innovations and practices, and the local environment including ecosystems, biodiversity and landscapes are all closely linked. Together, they imbue products with a unique character. However, to harness this goodwill, consumers need to be aware of what biocultural heritage means – hence the concept needs to be actively promoted alongside the Indication.

The Indication will be a graphical sign containing the term 'Biocultural Heritage', which is accompanied by the name of the relevant indigenous group, community or territory. It could be applied to goods and services which embody or express biocultural heritage and to those which may not do so, but whose sale supports biocultural heritage or at least does no harm. The aim of the scheme would be to ensure that as much of the market value as possible is captured locally, through "full benefit capture", rather than "benefit-sharing". Well-made local goods that are trusted as being authentic or are imbued with positive associations are likely to attract good prices and decent revenues can flow from the sale of quite small volumes.

This consultation document identifies 19 questions to assist with the design of the new scheme. We are seeking feedback from indigenous organisations in particular, to ensure that the scheme is accessible and useful for as many indigenous peoples as possible, and that it builds on experience with similar schemes. The consultation ends on 30 December 2015, and the feedback will be used to develop a proposal for a Biocultural Heritage Indications scheme.

How can the majority of indigenous communities in rural areas access the scheme? Would an internet-based application system in local/indigenous languages facilitate access? Should the scheme be a label or a certification? While certification gives firmer guarantees for consumers, complying with detailed requirements is likely to be burdensome for small organisations, especially for a range of products. Labelling may be more appropriate in this case, as it places more responsibility on the producers to ensure compliance, although some independent oversight would still be needed.

Should the label be trademark protected? A collective trademark can be owned by a community-based organisation which is legally recognised. This would provide stronger protection against unauthorised copying or sale of products through trademark infringement remedies, but trademarks would need to be acquired in each country where indigenous communities use the indication and renewed at least every seven years. Which organisation should manage, monitor and review the scheme and could apply for trademarks? It could be an indigenous organisation or one which is trusted by indigenous peoples or which directly involves them (e.g. on a steering committee or board).

## Why is a biocultural heritage indication scheme needed?

Biocultural heritage (Box 1) is the inter-linked knowledge, biodiversity, landscapes, cultural and spiritual values and customary laws of indigenous peoples and local communities. It is crucial to many indigenous peoples' livelihoods, identities and self-esteem. Biocultural heritage-based products and services can provide a source of income for indigenous people, which can encourage its promotion and protection. While biocultural heritage is of enormous value to indigenous peoples, it is also valuable to others: many people around the world consider the existence of indigenous peoples' traditional lifestyles as necessary because they offer an authentic alternative to their own resource-intensive high-consumption lifestyles which are unsustainable in the long term, or are otherwise unsatisfying in some important respects. The Convention on Biological Diversity (CBD) requires countries to "respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles" because of their importance for biodiversity conservation (article 8(j)). Indigenous knowledge, crops and livestock diversity also provide important resources for climate resilience and adaptation, as recognised by the IPCC (the Inter-governmental Panel on Climate Change).

### Box 1. What is biocultural heritage?

The concept of biocultural heritage is gaining common currency. 'Collective biocultural heritage' has been defined as: "Knowledge, innovations and practices of indigenous and local communities that are collectively held and are inextricably linked to: traditional resources and territories, local economies, the diversity of genes, species and ecosystems, cultural and spiritual values, and customary laws shaped within the socio-ecological context of communities".<sup>1</sup>

According to the website developed by IIED and ANDES ([www.bioculturalheritage.org](http://www.bioculturalheritage.org)), biocultural heritage is:

*held collectively, sustains local economies and transmitted from one generation to the next. It includes thousands of traditional crop and livestock varieties, medicinal plants, wild foods and wild crop relatives. These precious resources have been conserved, domesticated and improved by communities over generations — and sometimes millennia.*

The types of goods or services that may constitute expressions of biocultural heritage include food and drinks, medicinal preparations, personal care products, handicrafts, artworks, textiles and clothing, other manufactured goods, audio and audio-visual recordings, publications and services such as restaurants, guided tours and live cultural performances.

However, biocultural heritage faces many threats which are leading to its erosion. UNESCO has estimated that 50-90% of all languages (an indicator of cultural diversity) will be lost by the end of this century;<sup>2</sup> while the FAO estimates that 75% of crop diversity has been lost since the 1900s.<sup>3</sup> Indigenous knowledge and genetic resources are also threatened by biopiracy, despite the CBD and Nagoya Protocol's requirements for benefit-sharing from their use. These regulations do not cover much indigenous knowledge and many genetic resources which have already been documented or collected, and misappropriation can occur through the acquisition of patents or plant breeders' rights (which do not require benefit-sharing).

Many indigenous peoples are seeking to harness elements of their biocultural heritage in order to generate income. Regulations for Access to genetic resources and Benefit-Sharing (ABS) are unlikely to bring many benefits for indigenous peoples, as they view genetic resources and traditional knowledge as raw inputs into commercial research and development programmes that lead to high-value products like pharmaceuticals. Thus, however “fair and equitable” the benefits for providers may be, these will inevitably comprise a tiny proportion of total sales revenues, assuming that there will be any revenues - usually there are none.

How can indigenous peoples seeking to conserve and promote their biocultural heritage earn income in ways that allow them to claim more than a small share of the proceeds? How can they prevent misappropriation of their biocultural heritage? How can they respond to the value-destroying saturation of markets by mass-produced and poor quality “knock-offs”<sup>4</sup> made in distant factories and sold in many souvenir shops? And how can they compete against similar but badly made goods produced locally without sensitivity to their biocultural heritage?

Selling products in local markets may be the best approach as it allows “full benefit capture” (rather than benefit-sharing). People are often willing to pay a premium for high quality local products provided they carry a guarantee of origin and authenticity. While labelling and certification schemes exist for ecological and fair trade products, it seems that there is no such scheme that specifically seeks to protect both biological and cultural diversity. Some existing intellectual property tools such as collective trademarks and geographical indications can be used to protect group rights, but they are largely inaccessible to indigenous peoples as they are highly bureaucratic and costly to acquire and enforce.<sup>5</sup> Furthermore, they focus strongly on trade promotion objectives and do not specifically seek to protect biological and cultural diversity.

IIED, the University of Leeds and Asociacion ANDES (Peru) have therefore initiated a process to design a new labelling or ‘Biocultural Heritage (BCH) Indication’ scheme for biocultural heritage-based products, which aims to be easily accessible to indigenous peoples.

Building on the experience of an informal trademark developed by the Potato Park communities in Peru<sup>6</sup>, it seeks a culturally appropriate approach to marketing that harnesses goodwill<sup>7</sup> towards indigenous peoples and their “traditional lifestyles”.

### What is an “Indication”?

This refers to a graphical sign or label to indicate that a product or service is derived from biocultural heritage, guaranteeing its origin and authenticity. The sign should be clearly visible and placed on the product itself, the packaging, a label attached to the package or product, or in advertising or other published literature. It may comprise one or more words, an illustration or abstract design, or any combination of these.

The Biocultural Heritage Indication will aim to enhance the capacity of indigenous and other traditional communities to generate income from biocultural heritage-based products and to promote incentives to sustain biocultural heritage and traditional lifestyles. Beyond this, there could be other benefits, such as enhancing recognition and protection of indigenous peoples’ rights over their traditional knowledge and biocultural heritage, and strengthening local innovation.

This consultation document is the first step in the process to design the new Biocultural Heritage Indications scheme. It:

- presents options for the design of the scheme;
- offers suggestions for how it could be implemented effectively;
- asks a series of questions at the end of each section to launch discussion and obtain feedback.

The document does not provide definitive answers to all of the questions identified above. It also seeks to avoid being overly prescriptive at this stage. However, it is hoped that the analysis will advance the discussion and that the practical approaches suggested should at least be given serious consideration. Detailed feedback is being sought from indigenous peoples' organisations and others to take the scheme further.

## The consultation process: please give us your views and ideas

We are seeking feedback from indigenous peoples in particular, but also from NGOs, practitioners, researchers, governments and UN agencies. We would like to ensure that the new scheme is accessible for indigenous peoples around the world, and that it builds on experience with similar schemes.

Inputs are requested by 30th December 2015. There are several ways to respond to the 19 questions posed in this document:

1. Write them in the boxes provided in this paper and email the paper to: [krystyna.swiderska@iied.org](mailto:krystyna.swiderska@iied.org)
2. Complete the survey monkey questionnaire here: <https://www.surveymonkey.com/r/BCHIsurvey>
3. Request a hard copy of this document and a list of questions by post, and return the completed form to IIED.
4. Email Krystyna Swiderska at [krystyna.swiderska@iied.org](mailto:krystyna.swiderska@iied.org) to arrange a discussion by phone/skype.

Written responses can be provided in English, Spanish, French or Quechua. Your views and experiences will then be compiled and used to develop a proposal for a Biocultural Heritage Indications scheme which will be published online. The actual graphical sign (logo) will then be designed and the Indication will be tested by the indigenous communities involved in IIED's SIFOR project (Smallholder Innovation for Resilience) for feedback and improvement. Funding will then be sought to support the administration of the scheme by a suitable organisation (either an indigenous organisation, or one which is trusted by and actively engages indigenous people).



## How can a biocultural heritage indication scheme benefit indigenous people?

Deep-rooted cultural and spiritual values underpin biocultural heritage, which embodies bundles of rights and duties going well beyond the merely economic. But this does not preclude the possibility of indigenous communities seeking to derive income from their biocultural productions and expressions, and doing so need not compromise these values. Indeed, many of them already do and the worldwide market is potentially quite substantial.<sup>8</sup>

Market-driven modes of valorisation have many pitfalls, but indigenous peoples need sources of income. It is certainly more convenient and certainly practically easier if they find ways of making a living within or near to the regions they inhabit, as opposed to distant urban areas with which they are less familiar.<sup>9</sup> However, selling in urban areas where tourists congregate, including the capital city, may also be worthwhile. Many tourists, travellers as well as local people with disposable income want to support local high-quality food and crafts production by purchasing indigenous peoples' goods and services. Often they are prepared to pay premium prices as long as there is the assurance of a guarantee of both origin and authenticity. Such guarantees are often not present.

There is a market for "handicrafts" that are openly made elsewhere (such as China), often in highly-mechanised factories using synthetic materials, yet these provide no benefits for indigenous peoples. Airport shops around the world, for example, sell many such goods, as do many local markets and souvenir shops. But buyers cannot be sure of the origins of these goods and are reluctant to take the risk of being ripped off. Well-made locally-produced goods that are trusted as being authentic or that are imbued with positive associations (such as 100% local ingredients, organic production, sustainability, etc.) are likely to attract far better prices and decent revenues can flow from the sale of quite small volumes.

The aim of the scheme would be to ensure that as much of the market value as possible is captured locally. Arguably, the best way to do this is to focus mainly on trading locally. The idea of "full benefit capture" is that producer communities should seek to take full control of the benefits by localising product value chains to the greatest extent. In other words, as much as possible of the sourcing of ingredients, cultivation, production, distribution, marketing and sale should be done and controlled locally without the use of intermediaries. This may not always be feasible or even desirable so compromise may sometimes be necessary. But reducing outside support and engagement to the minimum necessary helps to ensure that as much as possible of the income generated stays with the communities.

In the early years of using BCH Indications it would be better to focus mainly on selling in local and national markets, which are easiest to access. Overseas trade is likely to require the involvement of intermediaries who understand foreign market conditions and regulations to help ship the goods and distribute them to wholesalers and retail outlets. These intermediaries will of course take a large cut of the final proceeds. Thus the Indication should ideally not be transferrable to other traders or retailers so that indigenous community producers can be the exclusive users.

Can indigenous peoples harness potential and actual goodwill in goods and services that embody or else promote their biocultural heritage through the use of a graphical sign that indicates such an essential and appealing characteristic? Can such a sign also help to strengthen biocultural heritage amongst indigenous communities? The Potato Park's informal collective trademark for products and services has increased sales and revenues of biocultural heritage-based products, including soaps and shampoos; native potatoes; tea extracts of aromatic potatoes; artisanal products, such as ceramics, textiles and jewellery; and bottled water. It has also strengthened social cohesion and environmental stewardship. Its benefits have not only been economic, but also cultural and ecological, due to improved internal and external recognition of their collective 'brand' identity.<sup>10</sup>

## Questions for further discussion: share your thoughts

**Question 1.** Do you think there is a need for a new type of labelling or certification scheme that specifically aims to protect biocultural heritage-based products and that is easily accessible to indigenous communities?

**Question 2.** How will the scheme ensure that it contributes to sustaining and enhancing biological and cultural diversity?

**Question 3.** What benefits should the scheme bring other than income generation and sustaining biocultural heritage (e.g. enhancing social cohesion; promoting innovation; enhancing recognition of rights over BCH)? Can an indication scheme realistically achieve these objectives, and if so, how?

**Question 4.** What kinds of consumers would your community target, and what would be the best way to raise their awareness of the value of biocultural heritage?

**Question 5.** Should the scheme be used for products sold in local and national markets, rather than foreign markets, in the first few years, to avoid the use of intermediaries?

**Question 6.** What kind of application system would be accessible for most indigenous communities in your country? Should it be a simple internet based application system in your local language?

## What can the scheme borrow from existing labelling and certification schemes?

The idea of using written information or logos on products, product packaging or advertising materials to highlight special characteristics or aspects attractive to many consumers is not new. Eco-labelling is a good example. Others include the European Union's official marks on goods whose names are protected as geographical indications or designations of origin (see next section).

The Biocultural Heritage Indication would emphasise and authenticate the way that cultural and spiritual values, local knowledge, innovations and practices, and the local environment including ecosystems, biodiversity and landscapes are all closely linked. Together, they imbue products with a unique character. The fact that values as well as technical knowledge are applied to give products special characteristics differentiates Biocultural Heritage Indications from other schemes such as Geographical Indications. The BCH Indications system is also somewhat novel in other respects:

1. Its recognition and usage will be international, by indigenous groups around the world, even if they are only trading in the domestic market.
2. It introduces a new concept – biocultural heritage – which needs to be actively promoted alongside the Indication. Biocultural heritage has to mean something appealing to the buyer otherwise it communicates very little that can be translated into monetary value. This point cannot be emphasised enough.
3. The scheme would be largely controlled by indigenous peoples and with a less formal structure than existing certification schemes (see below). Most tend to be managed by organisations that are completely separate from the producers and envisage a distant connection between production and sales.
4. It could cover a potentially wide range of products and services as opposed to a single product. This would distinguish it from geographical indications, trademarks and service marks.<sup>11</sup>

The scheme can learn from existing approaches – labelling, certification, trademarks and geographical indications (Box 2) – and pick and choose those aspects which are best suited to an indication of biocultural heritage. Existing schemes fall into two main types, with implications for their degree of legal protection, ease of management and consumer confidence: 1) those that are not *necessarily* based on intellectual property (certification and labelling schemes); and 2) those set up to protect intellectual property (trademarks and geographical indications). In reality there can be many overlaps between them.

Many indigenous peoples are suspicious of mechanisms for protecting intellectual property rights (see glossary). There are several reasons for this. First, there is a concern that broad-scope patents that incorporate traditional knowledge or elements of biocultural heritage give a stamp of legality to the piracy of their knowledge. Such piracy may be through direct misappropriation by the patent claims, or through the use of scientific language to describe existing traditional knowledge or genetic resources, rather than the invention of something new.<sup>12</sup> Second, compilations and recordings of indigenous knowledge and cultural works and expression, particularly audiovisual works, may be copyrighted by others, giving indigenous people very limited control over marketing and distribution, and therefore of income generating potential. For example, the copyright of a sound recording of a musical work or of the audiovisual recording of a performance is normally owned by the person who makes the recording or by the producer of the audiovisual work. The third ground for suspicion is that inappropriate trademarks obtained by others may reduce indigenous people's own marketing opportunities or else be culturally insensitive or offensive.<sup>13</sup> A good example is the various trademarks owned by the Washington Redskins American football franchise and containing the word "Redskins", which many Native Americans find insulting. The US trademarks were cancelled on the grounds of being disparaging under the relevant legislation, the Lanham Act.

## Box 2. Understanding the terms

**Geographical indications (GIs):** names that link a product to a particular geographical area or territory and production process. They usually consist of the actual name of the area or place. For example, Champagne, Sherry, Roquefort cheese, West Country Farmhouse Cheddar. Like trademarks, GIs focus strongly on trade promotion objectives.<sup>14</sup> Typically, GIs protect foods such as meat and dairy products, other processed agricultural or natural products, and beverages such as wines, spirits and mineral water. Some countries also allow small-scale and low-tech industrial products and hand-crafted goods to be protected.

**Trademarks:** are distinctive signs capable of being represented in graphical form which communicate information to consumers about a product such as their trade origin and characteristics. According to the TRIPS Agreement, such signs may include “personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs”. Nowadays, some countries allow shapes and sounds to be protected under trademark law. Trademarks can be collective or certification marks, and the distinction is important institutionally:

- **Certification trademark:** a kind of trademark which is owned by a legally-recognised organisation that is separate from the actual producers. The organisation has its own regulations concerning how the goods are produced including, typically, the quality and source of the ingredients, the production methods employed, and the location of production. It is for the organisation to consider changes to the regulations at any time. Normally the regulations should be submitted to the responsible government office where trademarks are registered, and the owner will also need to show how goods will be tested for compliance. Any producer who complies fully with the regulations is entitled to use the mark. A good example is the Rainforest Alliance certified seal which comprises a frog, the words Rainforest Alliance Certified, and other artistic elements.
- **Collective trademark:** a kind of trademark which is owned by a legally-recognised organisation set up by, and representing, producers. The organisation has its own regulations concerning how the goods are produced including, typically, the quality and source of the ingredients, the production methods employed, and the location of production. All producers who are members of the organisation are expected to comply fully with the regulations. It is for the organisation to consider changes to the regulations at any time. Normally the regulations should be submitted to the responsible government office where trademarks are registered, and the owner will also need to show how goods will be tested for compliance. Failure of any producer to do so may lead to withdrawal of their right to use the mark, and perhaps also their expulsion from the association, but this is a matter for the organisation.

While these concerns are legitimate, they need not preclude all possibility of using intellectual property rights, such as trademarks or geographical indications, to protect and promote biocultural heritage-based products.<sup>15</sup> The common ownership of a collective trademark could provide a sound legal means to protect the BCH Indication and the interests of the groups or communities. Ownership of the mark could be vested in a representative organisation, such as a community producers' association or a group of communities.

However, the application process required for collective trademarks is likely to be somewhat cumbersome and bureaucratic. Indeed, both acquiring and maintaining the legal rights to a trademark (see Box 3 below) may be more difficult for indigenous communities than for companies for whom trademark acquisition and management are integral to their business practices. The Potato Park's experience illustrates these difficulties, as well as the opportunities from branding products with a mark indicating origin.<sup>16</sup> The process for acquiring and enforcing GIs can be even more bureaucratic and costly,<sup>17</sup> and users do not normally own the indications anyway – instead they get the rights to use them.<sup>18</sup> In summary, while neither of these legal tools specifically seeks to protect biological and cultural diversity, they can potentially promote such diversity whilst generating much-needed income.

Certification and labelling schemes do not seek to protect intellectual property – instead they offer guarantees of certain production processes or other aspects that are important to consumers and which could attract a price premium. They allow informed consumers to choose products which satisfy their requirements, while also encouraging environmentally friendly or ethical production methods and economic relationships. Both use marks or logos that are based on text, images or both – but they also have some differences. Certification schemes are often used for producers and retailers that are far apart. They build trust in the genuine nature of what is being guaranteed through the role of a third party certifying organisation. Examples of such certifier organisations are Fairtrade International, Faire Collection, the Forest Stewardship Council, and Rainforest Alliance. These organisations are generally, though not always, quite large operations and have a great deal of capacity and experience. However, the roles they perform are likely to be burdensome for a small organisation, especially if they cover a range of products that must comply with detailed requirements.

Labelling schemes place more responsibility on the producer and typically provide less firm and specific promises. According to European Commission guidelines published in 2010, “while certification schemes by definition employ third-party attestation, there are other schemes in the market which operate on the basis of a label or logo ... without involving any certification mechanism. Adherence to these schemes is done by self-declaration *or through selection by the scheme owners*” (emphasis added). This may be preferable in the present context, but there must also be some institutional oversight with some independence from producers.

Which is better, labelling or certification? The EC guidelines suggest that “the use of certification is most appropriate when the undertakings made are complex, laid down in detailed specifications and checked periodically. Self-declaration is more appropriate for relatively straightforward (single-issue) claims” – that is to say, where only one quality or origin claim is being guaranteed to the purchaser. The guidelines also differentiate between business-to-business schemes and business-to-consumer ones depending on the target of the information conveyed by the pictorial mark or written information.

A certification trademark on the other hand, is an IPR which is protected under trademark law. This could offer stronger protection than certification or labelling, for which trademark infringement remedies may not be available (though other areas of the law may provide ways to respond to infringement such as unfair competition, passing off and laws protecting rights of consumers – see later section). However, it should be made clear that labels or certifications (e.g. those run by the Forest Stewardship Council, Rainforest Alliance, or Fairtrade), can also be trademark-protected. Indeed, the Marine Stewardship Council has trademarks not only on its name but also on its eco-label.

One way forward would be to register the Indication or label to give it the same legal protection as a collective trademark (see Box 3 below). The owner of the trademark – a legally recognised organisation representing producers - is required to produce regulations concerning production methods and content. Producers of goods and services must comply with these at all times otherwise they will lose their entitlement to use the mark. However, care is needed in designing these regulations to avoid imposing strict rules that differ significantly from current production practices, or unrealistic, time-consuming or costly top-down requirements based on external values that may not be compensated for by higher revenues. This is a criticism that has been made of Fair Trade.<sup>19</sup> Biocultural heritage is evolving. It accumulates over time. Innovation and change must be accommodated. When the Potato Park tried to formally register its collective trademark, the communities used customary laws to guide the development of the regulations for the use of the trademark for different products.<sup>20</sup>

The trademark will probably need to be renewed at least every seven years in each country or region in which the trademark is filed. The alternative is not to register the mark in countries with very onerous processes and take the risk that it will not be copied by others. However, there is a danger that common use by others will render the mark generic and thus no longer protectable. Furthermore, registering a trademark would provide a stronger legal basis for court action to protect traditional knowledge and biocultural heritage from misappropriation.

## Questions for further discussion: share your thoughts

**Question 7.** Should the Indication be a label or a certification? Certification provides an independent guarantee of quality but is likely to be burdensome for small organisations especially if a range of products have to comply with detailed requirements. Labelling typically provides less firm and specific promises but places more responsibility on the producers to ensure compliance (but would still require some independent institutional oversight).

**Question 8.** Should the Indication be a label (or certification) that is trademark protected? This would provide stronger protection (e.g. legal remedies for infringement) but the trademark would need to be filed in all countries where the indication is used, and renewed at least every seven years.

**Question 9.** What do you think are the pros and cons of each type of approach (label, certification, trademark protected label, GI) in terms of legal protection, cost, ease of access for indigenous peoples, cultural suitability etc.?

## What would the Biocultural Heritage Indication look like?

Marks, labels and Indications are designed to convey key information. What information is the BCH Indication intended to convey? To express this another way: what do we want consumers to understand about the relationship between biocultural heritage and these products? For example, we might want consumers to know that the goods and services embody or express biocultural heritage. Alternatively, we may wish consumers to believe that in purchasing the products they are supporting biocultural heritage by enabling communities to secure an income that supports their lifestyles and their relationship with nature. Accordingly, the products may not necessarily embody biocultural heritage in any explicit sense.

This need not be an either/or choice. The Indication can be defined in such a way that it may be used both on products embodying biocultural heritage and those which may not, but whose purchase enables income to flow back to communities so as to encourage practices that either promote, or at least do no harm to, biocultural heritage. Customers need to feel secure that this backward flow of income really will take place and will have the desired effect.

The Indication can be printed on product packaging or else printed or stuck on a label. It can also be used on websites and on printed matter such as brochures and leaflets advertising products and services such as tours of biocultural heritage areas. The Indication should be a distinctive, eye-catching abstract or representational design containing the full term “Biocultural Heritage” in the relevant language (not a meaningless abbreviation, such as BCH). It should also either incorporate, or be accompanied by, the name of the relevant indigenous group or community. Where there is space, it can be accompanied by a brief explanation of the meaning of the term. Ideally indigenous people themselves would create the design. One suggestion is to invite members of indigenous communities (e.g. those involved in IIED’s SIFOR project), perhaps children or young people, to come up with their own design for an Indication and select the best one. The Potato Park’s informal collective trademark was selected through a competition in which indigenous women, their children and families designed a set of signs and marks.<sup>21</sup>

### The Potato Park’s Collective Trademark



## Questions for further discussion: share your thoughts

**Question 10.** What information should the BCH Indication convey? What do we want consumers to understand about the relationship between biocultural heritage and these products?

**Question 11.** Should the Indication only be used on products and services derived from or embodying biocultural heritage? Or should it also be used on other products and services which may not be derived from biocultural heritage but which help to sustain their biocultural heritage?

**Question 12.** How should the Biocultural Heritage Indication's graphic sign be designed? Should indigenous peoples themselves create the design?

**Question 13.** Have similar initiatives been attempted? If so, how successful have they been in generating income and sustaining biocultural heritage? What lessons have been learned from them?



## How should the scheme be managed?

An organisation will be needed to manage the scheme. This organisation could be a new one set up for the purpose, or else an existing organisation. Of key importance is that indigenous people are directly involved in running the scheme – either by having it managed by an indigenous peoples’ organisation, or by an organisation which they trust, or by including indigenous people on the advisory board or steering committee. It is crucially important for indigenous peoples to feel that it is their scheme rather than one imposed by others. If a sense of alienation sets in, BCH Indications may come to be regarded as yet another unwelcome imposition. Obviously that is an outcome to be actively avoided.

The scheme must also be institutionally sustainable: in other words it should not be overly dependent on the active engagement of a small number of individuals working in a personal or voluntary capacity. It would also need to be financially stable, requiring continuous financial support to allow for monitoring, evaluation and review, site visits and field research.

What would the organisation do? Tasks would include administering, monitoring and reviewing the BCH Indication, managing payment of renewal fees (which are usually payable to keep registered trademarks in force), assessing its effectiveness, and monitoring markets, including to prevent improper use by third parties. A key question is whether or not it is feasible to have a single organisation entrusted with setting up and overseeing the scheme globally, which also monitors and reviews its implementation. If a legal trademark approach is chosen, another important role for the organisation would be to file trademark applications to officially register the Biocultural Heritage Indication (Box 3).

### Box 3. How to apply for a trademark

If the option of registering a mark is chosen, it is important to be aware that the mark must be distinctive enough to attract consumers to your specific products. If it is too generic or descriptive it will be difficult to distinguish from those of competitors. This usually means that geographical place names are not allowed. Second, the application will most likely need to be from a “legal person”; that is, either a natural person (i.e. a real human being), or a juristic person: a recognised corporate body such as a registered company, NGO or community association that is permitted to own property, sign contracts and is subject to many of the rights and duties that individual persons enjoy or are bound by. You need to state the classes of goods for which you intend the trademark to be used. National and regional trademark systems generally have to comply with the *International Classification of Goods and Services for the Purposes of the Registration of Marks* (“the Nice classification”).<sup>22</sup> The trademark then needs to be filed in all the territories where the relevant goods and services are to be traded.<sup>23</sup>

Legal protection is not available under trademark law until registration is completed. It is possible to initially register a mark for a limited number of product classes and at a later date register it for additional product classes (normally for a fee). It is also important to be aware that the trademark will probably need to be renewed at least every seven years in each country or region in which the trademark is filed. This would be done by the entity that owns the mark (e.g. an NGO or community association), not by the producers themselves. It is important for this organisation to keep records so that renewal deadlines are not missed – if they are the trademark will no longer be legally protected. In many countries it is possible to restore a lapsed trademark, but it is preferable not to let it lapse in the first place. Each national trademark system has its own (usually publicly available) rules for maintaining a trademark.

Who would have the right to use the Indication? So far we have used the term “indigenous peoples”. But we need to be clearer about this. Users may be a people as a whole, such as the Maori, the Quechua speaking people of Andean South America, the Inuit or the Maya. But it is more likely that users will be a single village community or group of neighbouring communities agreeing to collaborate, or a competent non-governmental organisation that either represents such communal entities or works closely with them and has their trust. Application of “biocultural heritage” is not confined to “indigenous peoples” in any strict sense. Therefore, any groups “embodying traditional lifestyles” can potentially be included.

### Questions for further discussion: share your thoughts

**Question 14.** What kind of institution should administer and monitor the scheme, including registration and renewal (if it is a trademark), assessing its effectiveness and monitoring markets to prevent improper use by third parties? Should it be an indigenous peoples’ organisation, or could it also be an organisation which is trusted by indigenous peoples or directly involves them (e.g. on an advisory board or steering committee)?

**Question 15.** Who should ‘own’ the Indication and have the right to use it - a specific community/group of communities, or an entire indigenous group in a country? Could any group or community ‘embodying traditional lifestyles’ use the Indication?

## How to enforce rights and prevent misuse?

There are two main threats to the success of the Indication:

- Unauthorised use of the Indication by a third party without consent of the permitted users or owners.
- Improper use by authorised users, such as using the Indication on products that have no connection with their biocultural heritage, or which may be detrimental to biocultural heritage, or which may mislead the well-intentioned buyer.

The responses to each of these depend on the legal status of the Indication. If it is officially registered as a trademark, its unauthorised use or use of a confusingly similar mark counts as infringement and legal action can be taken.<sup>24</sup> Where there is infringement, courts may impose damages or injunctions, fines and imprisonment, and/or order the seizure and destruction of the infringing goods. Legal action may also be possible under unfair competition laws or the common law tort of “passing off”, though the cost of litigation may be prohibitive. Arguably, unauthorised use or imitation are signs of the scheme’s success: if it is valuable in the marketplace, it is worth imitating.

Misuse by authorised users needs to be regulated by the organisation managing the scheme. Misuse can be deliberate or inadvertent, so the first step on being made aware of the situation should be to take a non-confrontational approach and consult with the concerned community or group. However, continued misuse needs to be prevented because it will erode the credibility of the scheme and will be detrimental to all users. Arguably, a light touch monitoring of proper use of the Indication is preferable, and withdrawal of the right to use the mark should be seen as a last resort measure, with the option to appeal.

Another much wider concern is that the frequently invoked principle of “national patrimony” may justify the government’s assumption of powers to regulate the collection and distribution of monetary gains from the commercial exploitation of cultural expressions. This is not a matter that the Indications system is designed to deal with but nonetheless it is worthwhile to be aware of whether national laws provide for such state authority.

## Questions for further discussion: share your thoughts

**Question 16.** Is there a risk of improper/wrongful use of the Indication by authorised community members? How could improper use be prevented?

**Question 17.** What other factors might jeopardise the public's trust in the Indication and the credibility of the scheme? What responses and preventative actions are possible?

**Question 18.** What are the dangers of unauthorised use (i.e. misappropriation) of the Indication by a third party? What measures can be adopted to prevent these?

## What are the next steps?

We propose the following steps for moving forward:

1. Refine the proposal using the feedback from this consultation.
2. Design the Biocultural Heritage Indication graphical sign (logo).
3. Field-test the Biocultural Heritage Indication in the Potato Park and other indigenous communities participating in IIED's SIFOR project in India, Kenya, and China (see [www.bioculturalheritage.org](http://www.bioculturalheritage.org)).
4. Identify an institution which can manage the scheme; and raise funds for managing, monitoring and reviewing the scheme.
5. Promote the biocultural heritage concept and the scheme. IIED can use its well-established network of organisations around the world with whom it shares considerable goodwill to help explain the scheme, encourage its use, and assist in the sharing of ideas and experiences.

## Questions for further discussion: share your thoughts

**Question 19.** The Biocultural Heritage Indication will be tested in the Potato Park in Peru, Southwest China, Indian Himalayas, and coastal Kenya. Should the scheme also be tested in other indigenous communities? If so, which communities?

## Glossary

**Infringement** – Infringement of an **intellectual property right** is done by such acts as the unauthorised copying, reproduction, making, using, selling, offering for sale and importing the protected item, which might be an invention, artistic or literary work, mark, design etc. Some acts of infringement may be subject to criminal law including fines and imprisonment such as large-scale counterfeiting of trademarked goods and the sale of pirated film and music DVDs and CDs. With all intellectual property rights, certain acts that would otherwise infringe may be allowed on public interest or other grounds.

**Intellectual property rights** – These comprise a set of legal rights over inventions, artistic and literary works, distinctive marks, designs, place names, and other practical expression of mental outputs that have actual or potential commercial value. Owners of the legal rights, patents, copyright, trademarks, industrial designs or geographical indications, as the case may be, may be the actual creators. But frequently rights owners are others who control their production or distribution to the public. Intellectual property rights may be personal property but in the modern commercial world they typically serve as legal business assets that can be bought, sold and licensed.

**Knock-offs** – These are unauthorised copies of an original product that are often cheaper. They may be identical or merely similar. Usually they are of lower quality. Some knock-offs make claims to be the original product in which case their sale is deceptive and they may be classed as counterfeits. Others do not and may in fact be sold as “fakes”, in which case they may not necessarily harm the market in the original products. Consequently, not all knock-offs infringe rights, and they do not necessarily compete with original products.

**Legal person** – This is either a natural person (i.e. a real human being), or a juristic person. The latter is a recognised corporate body such as a registered company, NGO or community association that is permitted to own property, sign contracts and is subject to many of the rights and duties that individual persons enjoy or are bound by.

**Misappropriation** – In law, this is the intentional and wrongful taking of somebody else’s property or financial assets. In intellectual property law it would include using somebody else’s trademark for one’s own purposes or treating others’ protected goods as one’s own. Generally, its use in intellectual property law is for trade secrecy theft, but it is frequently applied to biopiracy and the unauthorised taking of traditional knowledge.

**The TRIPS Agreement** – The Agreement on Trade-related Aspects of Intellectual Property Rights is part of the Agreement Establishing the World Trade Organization (WTO). It is legally-binding on all members of the WTO, providing for a minimum set of standards for protection and enforcement of all the main intellectual property rights including patents, trademarks, geographical indications, copyright and industrial designs. Countries that consider another country is failing to meet the required standards can raise a complaint at the WTO which may lead to the establishment of a formal dispute settlement process. Most other multilateral treaties concerning protection of intellectual property rights are administered by the World Intellectual Property Organization, a United Nations specialised agency located in Geneva.

## References and further reading

- Argumedo, A. (2013) "Collective trademarks and biocultural heritage: Towards new indications of distinction for indigenous peoples in the Potato Park, Peru." International Institute for Environment and Development. <http://pubs.iied.org/16528IIED.html>
- Dutfield, G. (2011a) "A critical analysis of the debate on traditional knowledge, drug discovery and drug-based biopiracy". *European Intellectual Property Review* 33(4), 237-43.
- Dutfield, G. (2011b) "Intellectual property tools for products based on biocultural heritage: A legal review of geographical indications, trademarks and protection from unfair competition". IIED London. <http://pubs.iied.org/16506IIED.html>
- European Commission (2010) "Commission communication – EU best practice guidelines for voluntary certification schemes for agriculture products and foodstuffs". *Official Journal of the European Union* 16.12.2010 C 341/5-11.
- FAO (1999). "Women: users, preservers and managers of agrobiodiversity" (available at [www.fao.org/FOCUS/E/Women/Biodiv-e.htm](http://www.fao.org/FOCUS/E/Women/Biodiv-e.htm)).
- Finger, J.M. and P. Schuler (eds) (2004) "Poor People's Knowledge: Promoting Intellectual Property in Developing Countries". World Bank.
- IIED and ANDES (2005). Protecting community rights over traditional knowledge: Implications of customary laws and practices. Research Planning Workshop, Cusco, Peru, 20-25 May 2005. <http://pubs.iied.org/pdfs/G01090.pdf>
- ISEAL Alliance (2010) "Setting social and environment standards v5.0: ISEAL Code of Good Practice". ISEAL Alliance.
- ISEAL Alliance (2010) "Assessing the impacts of social and environmental standards systems v1.0". ISEAL Alliance.
- ISEAL Alliance (no date given) "Assuring compliance with social and environment standards: Code of Good Practice". ISEAL Alliance.
- Kyle, D. (1999) "The Otavalo trade diaspora: Social capital and transnational entrepreneurship". *Ethnic and Racial Studies* vol. 22(2):422-446.
- Moberg, M. (2014) "Certification and neoliberal governance: Moral economies of Fair Trade in the Eastern Caribbean". *American Anthropologist* vol. 116(1): 1-15.
- Pant, R. (2015). "Protecting and promoting traditional knowledge in India: What Role for Geographical Indications?" IIED, London. <http://pubs.iied.org/16576IIED.html>
- UNESCO (2003). "Language, vitality and endangerment". Document submitted by Ad Hoc Expert Group on Endangered Languages to the International Expert Meeting on UNESCO Programme on Safeguarding of Endangered Languages, UNESCO Paris, 10-12 March 2003.
- Zografos, D. (2010) "Intellectual Property and Traditional Cultural Expressions". Edward Elgar.

## Notes

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<sup>1</sup> IIED and ANDES, 2005.

<sup>2</sup> UNESCO, 2003.

<sup>3</sup> FAO, 1999.

<sup>4</sup> See the glossary for the definition of this term.

<sup>5</sup> Dutfield 2011b, Argumedo 2013, Pant 2015.

<sup>6</sup> For more information see <http://pubs.iied.org/pdfs/16528IIED.pdf>.

<sup>7</sup> The word “goodwill” is commonly used by trademark legal experts. According to the English judge Lord McNaughton in a historic court case, it means “the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings custom.” (IRC v Muller’s Margarine, 1901).

<sup>8</sup> Finger and Schuler, 2004.

<sup>9</sup> This is a logical point to argue but it should not be taken as precluding the possibility of trading over a much broader geographical area. For example, the indigenous population of Otavalo in Ecuador are well known for trading their hand-made goods around the world. The fact that they travel overseas to sell these goods directly to customers lends them an authenticity that might not be present were they retailed by third party businesses. Kyle, 1999.

<sup>10</sup> Argumedo, 2013.

<sup>11</sup> Service marks are marks used in relation to services as opposed to physical products. Since there is no tangible good attached to the mark, service trademark can only be used in publicity and advertising. As example of a service for which a mark could be applied for is ecotourism.

<sup>12</sup> Dutfield, 2011a.

<sup>13</sup> Some countries have provisions for opposing immoral or disparaging trademarks, but very few countries have measures explicitly allowing indigenous peoples to oppose culturally or spiritually offensive marks. New Zealand is one such country.

<sup>14</sup> The World Trade Organization’s Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS – see glossary) defines GIs 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 is a somewhat vague definition in that it allows countries to implement GI protection in a variety of different ways.

<sup>15</sup> See Dutfield, 2011b. Argumedo, 2013.

<sup>16</sup> Argumedo, 2013.

<sup>17</sup> Dutfield 2011b, Pant 2015.

<sup>18</sup> Dutfield, 2011b.

<sup>19</sup> Moberg, 2014.

<sup>20</sup> Argumedo, 2013.

<sup>21</sup> Argumedo, 2013.

<sup>22</sup> This system is provided under the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks. The Agreement is administered by the World Intellectual Property Organization. There are currently only 84 state parties, but most countries of the world use the Nice classification anyway. In all there are 45 classes (34 for goods and 11 for services).

<sup>23</sup> In the European Union it is possible to apply for national trademarks, or else obtain a Europe-wide mark through a single application filed with the Office for Harmonization in the Single Market. (OHIM). Once granted the latter has legal effect in all of the member states which together form a single legal territory. The West African l’Organisation Africaine de la Propriété Intellectuelle (OAPI) also provides a unitary trademark valid across the 16 member states.

<sup>24</sup> Dutfield, 2011b.





Biocultural heritage is crucial to many indigenous peoples' livelihoods, identities and self-esteem. Biocultural heritage-based products and services — such as traditional foods and drinks, personal care products, crafts and guided tours — can provide a source of income for indigenous people, while promoting incentives to sustain biocultural heritage. But it seems there is no certification scheme to guarantee the origin and authenticity of these products that seeks to protect both biological and cultural diversity.

IIED, the University of Leeds and Asociacion ANDES (Peru) have initiated a process to design a new labelling or Biocultural Heritage (BCH) Indication scheme for biocultural heritage-based products, which aims to be easily accessible to indigenous peoples.

With this consultation document, we are seeking feedback — from indigenous organisations in particular — to ensure the scheme is accessible and useful for as many indigenous peoples as possible, and builds on experience with similar schemes.



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## Project Materials

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### Agroecology, biodiversity

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*Keywords:*

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