



Reuters/Luisa Gonzalez

# PROTECTION OF BIOCULTURAL PROPERTY OF INDIGENOUS COMMUNITIES: A COMPARATIVE OVERVIEW OF 9 COUNTRIES AROUND THE GLOBE

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TrustLaw



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PROPERTY OF INDIGENOUS  
COMMUNITIES:  
A COMPARATIVE OVERVIEW OF  
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# ABOUT

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## FUNDACIÓN NATIVO

Fundación Nativo is a non-profit organization dedicated to empower indigenous communities by promoting the conservation of their culture, defending the right to land and the preservation of their natural resources, promoting sustainable economic development in gender equality and sexual orientation, favouring access to communication channels and giving them a voice to demand their rights and denounce the abuses to which they are subjected.

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# FOREWORD

We tend to believe that if something does not have a limit at first sight, it has no owner; that if a plant grows in a place other than cropland, no one takes care of it; that if an item of clothing does not have a tag hanging from it, it is not of great value; that a drawing made on a stone or a clay jar made by an ancient culture can be appropriated.

If you recognize yourself in any of these, this guide is for you. No matter your race, creed or religion, you may be violating the biocultural property rights of an entire community without even realizing it.

For those who don't know the meaning, biocultural property of indigenous communities refers to the knowledge and practices of indigenous people and their bio-logical resources, from the genetic varieties of crops and medicine they develop, to the crafts they design.

This guide is also for those people who protect their community's biocultural property rights only through secrecy and silence.

And it is also for those people with knowledge of legislation on biocultural property, and those who want to introduce their own legislation for the protection of said property and need to know model legislation around the world.

The idea for this research project stemmed from the great need for knowledge that indigenous communities have about how our culture works. When I say our culture, I mean non-indigenous culture, regardless of the nationality of the non-indigenous person reading this. We have been trampling on the rights of indigenous communities for so many generations that they are unaware of the legal mechanisms they can use to demand the recognition and protection of their rights.

Moreover, sometimes we are not fully conscious of how much we mistreat indigenous communities, even today: We exploit them, study their customs as if they were laboratory animals (imagine how you would feel if a stranger came into your kitchen without saying a word and took notes and watched everything you do; that is how the members of a community feel when an anthropologist or sociologist arrives), we give them the message that their customs are savage, force them into transculturation, destroy their habitat, underestimate their language, and at the same time we appropriate their symbolism and way of life and copy their designs, selling them as if they were our own.

We objectify the indigenous communities' philosophy and culture and turn them into a commercially profitable object, the trend of the moment. Well, that object has an owner, and it is not us, the *tuponken*, the "dressed-up", as the indigenous Pemon in Venezuela would call us.

This comparative overview of legislation on the protection of biocultural property in different countries seeks to inform indigenous leaders about the ways in which they can protect the biocultural property of their communities and provide information and inspiration to organise themselves and advocate for new legislation that specifically protects these rights.

Sagrario Santórum  
Development Director  
FUNDACIÓN NATIVO"



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# 1. PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

## WE LOOKED AT LEGAL PROTECTION FOR INTELLECTUAL PROPERTY RIGHTS ACROSS EACH OF THE 9 COUNTRIES, WITH SPECIFIC FOCUS ON:

- The standard legal position for ownership
- Whether registration is needed in order to be able to enforce the rights
- What mechanisms are available to defend the rights if they are violated.

|            | Designs  | Crop modified developments   | Medicine  |
|------------|--|--|---|
| <b>Aus</b> | <ul style="list-style-type: none"> <li>• The creator of the design (designer);</li> <li>• The employer of the designer in the course of employment or contract and the assignee of the design rights. In case of death, the legal representative of the deceased would be protected by this statute.</li> </ul>  | <ul style="list-style-type: none"> <li>• The developer or creator of a new variety of plants can obtain a standard patent (or assign such patent to an assignee);</li> <li>• The original breeder of a new variety of plants (or the employer of the original breeder) may apply for a plant breeder's right, provided the applicant has an Australian address for service;</li> <li>• This patent might also be assigned to an assignee (an individual or a legal entity) who acquired it;</li> <li>• In the event of her/his death, the patent rights will be assigned to the representative of the deceased.</li> </ul> | <ul style="list-style-type: none"> <li>• The inventor;</li> <li>• The assignee appointed by the former and the grantee of title to the medicinal invention by either the inventor or the assignee;</li> <li>• The legal representative of a deceased person entitled to a patent.</li> </ul>  |
| <b>Bra</b> | <ul style="list-style-type: none"> <li>• Protection by trademarks or industrial designs;</li> <li>• The owner can be any individual or company;</li> <li>• Registration is required;</li> <li>• Violations can be taken to the National Intellectual Property Institute (INPI), and civil and criminal proceedings (judicial and administrative).</li> </ul> | <ul style="list-style-type: none"> <li>• The owner can be the individual or company that breeds a new variety typically from Brazil;</li> <li>• Registration is required;</li> <li>• Violations may be discussed through administrative proceedings before the National Intellectual Property Institute (INPI), and civil and criminal proceedings (judicial and administrative).</li> </ul>   | <ul style="list-style-type: none"> <li>• The owner can be the individual or company that is the author of the invention or utility model;</li> <li>• There is no specific protection or it, and it can be subject to copyright when related to scientific works. Patent may be required;</li> <li>• Unauthorized reproduction and/or distribution of copies may be taken to civil courts to be suspended and to claim for damages.</li> </ul> |
| <b>Bol</b> | <ul style="list-style-type: none"> <li>• Registration with the National Authority of Intellectual Property ("SENAPI") is required in order to enforce intellectual property rights related to designs.</li> </ul>  | <ul style="list-style-type: none"> <li>• Registration with the National Authority of Intellectual Property ("SENAPI") is required in order to enforce intellectual property rights related to crop modified developments.</li> </ul>   | <ul style="list-style-type: none"> <li>• Registration with the National Authority of Intellectual Property ("SENAPI") is required in order to enforce intellectual property rights related to medicines.</li> </ul>   |

|            | Designs   | Crop modified developments  | Medicine   |
|------------|---|---|--|
| <b>Can</b> | <p>1) TRADEMARKS:</p> <ul style="list-style-type: none"> <li>Any person; lawful trade union; lawful association; administrative authority of any country, state, province, municipality or other administrative area; and two or more persons (including informal associations), do not have the right to use the trademark in Canada except on behalf of both or all of them (jointly).</li> <li>Trademarks do not need registration in order to be protected, but if unregistered, the owner will need to prove the validity and scope of the unregistered trademark;</li> <li>Civil claim against the infringing parties for the common law tort of "passing off"; Owners of trademarks registered under the Trademarks Act may also bring claims in relation to the statutory causes of action set out in the Trademarks Act, including passing off, infringement, and depreciation of goodwill.</li> </ul> <p>2) COPYRIGHT:</p> <ul style="list-style-type: none"> <li>The creator of the design, the employer of the creator, or a thirdparty who has come to own the design by assignment or any other means;</li> <li>Registration is required;</li> <li>Actions for infringement pursuant to s. 15 of the IDA, claiming for damages, lost profits, disposal of the infringing article or its components, injunctive relief, among other things.</li> </ul> | <ul style="list-style-type: none"> <li>The actual breeder of a new variety, the breeder's employer (if the breeder developed the new plant in the course of their employment), or the breeder's legal representative. The applicant may be an individual, company, partnership, or any association of persons created for a common purpose, has an operational structure, and holds itself out to the public as an association of persons. The applicant also must be a citizen or resident of, or have an establishment or registered office in, Canada or a country party to the International Convention for the Protection of New Varieties of Plants of December 2, 1961.</li> <li>Registration is required;</li> <li>Civil action of infringement, claiming for recovery of damages, profits or injunctive relief, among other things.</li> </ul> | <ul style="list-style-type: none"> <li>Legal person, such as an individual or corporation;</li> <li>Patent is required;</li> <li>Civil action for the infringement of the patent, claiming for recovery of damages, profits or injunctive relief, among other things.</li> </ul> |
| <b>Mex</b> | <ul style="list-style-type: none"> <li>Inventors, that can be either individual or entities;</li> <li>Registration is required;</li> <li>Administrative actions as a first instance. It is possible to request the imposition of precautionary measures, even before initiating a formal infringement action. It is also possible to claim damages and lost profits compensation through a civil action. For initiating such action, it is necessary that the resolution whereby the infringement action is declared turns into definitive (non-contestable).</li> </ul>  | <ul style="list-style-type: none"> <li>Depends on license stage;</li> <li>Depends on license stage;</li> <li>There are no mechanisms available.</li> </ul>  | <ul style="list-style-type: none"> <li>Inventors, that can be either individual or entities;</li> <li>Registration is required;</li> <li>There are no mechanisms available.</li> </ul>   |

|           | <b>Designs</b>   | <b>Crop modified developments</b>   | <b>Medicine</b>   |
|-----------|--|---|---|
| <b>Pe</b> | <p>1) TRADEMARKS:</p> <ul style="list-style-type: none"> <li>Any individual or company;</li> <li>Prior registration with the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) is required;</li> <li>Administrative claims for intellectual property infringement can be filed with INDECOPI. Court proceedings can also be brought.</li> </ul> <p>2) COPYRIGHT:</p> <ul style="list-style-type: none"> <li>Any individual or company;</li> <li>Prior registration with INDECOPI is required;</li> <li>Administrative claims for intellectual property infringement can be filed with INDECOPI. Administrative claims for copyright infringement of a design can be filed with INDECOPI. Court proceedings can also be brought.</li> </ul>  | <ul style="list-style-type: none"> <li>Representative organizations of the indigenous community (collective knowledge);</li> <li>National Public Register of Collective Knowledge/ National Confidential Register of Collective Knowledge/ Local Register of Collective Knowledge;</li> <li>Administrative claims for infringement of collective knowledge rights can be filed with INDECOPI. Court proceedings can also be brought.</li> </ul>   | <ul style="list-style-type: none"> <li>Representative organizations of the indigenous community (collective knowledge)/ any individual or company;</li> <li>Collective knowledge and/or patent registration;</li> <li>Administrative claims for intellectual property infringement can be filed with INDECOPI. Court proceedings can also be brought.</li> </ul>  |
| <b>SA</b> | <ul style="list-style-type: none"> <li>The owner in relation to a design is essentially the author or creator of the design. If only one member of the community is responsible for the design, that particular person becomes the author of the design and is entitled to apply for registration of a derivative indigenous design. If the author of the design is the community, they are, as a collective, entitled to apply for registration of an indigenous design. The National Trust will take ownership of the design if the author is unknown or cannot be established;</li> <li>Registration is required;</li> <li>A person whose rights have been infringed shall be entitled to relief by way of an interdict, an order to surrender any infringing product, damages, or instead of damages, reasonable royalties which would have been payable to such person by a licensee or sub-licensee. The IPLA Act also seeks to extend this protection to the use of traditional designs prior to the registration of the design.</li> </ul> | <ul style="list-style-type: none"> <li>The owner in relation to crop modified developments is the person to whom a plant breeder's right has been granted on application in terms of the Plant Breeders' Rights Act or who, according to an entry in the register, is the owner of the above mentioned right;</li> <li>Registration is required;</li> <li>A person whose rights have been infringed, is entitled to institute a claim for damages or, alternatively, to claim compensation in terms of the statutory remedy provided for in the Act. The statutory remedy provides a compensation that is restricted to a maximum amount of R10 000.</li> </ul> | <ul style="list-style-type: none"> <li>The owner in relation to medicine is the person primarily entitled to protection for an invention, and who is thus regarded as the owner of the invention. Inventions that result from publicly financed research and development belong to the person who undertook the research. Should a recipient not be interested in ownership of an invention resulting from public financing, the State shall consider taking over ownership;</li> <li>Registration is required;</li> <li>A final interdict can be obtained to prevent ongoing infringement of a patent. The plaintiff may in addition to the aforementioned institute file a claim for damages. The plaintiff may, instead of damages, at his or her option, be awarded an amount equal to a reasonable royalty which would have been payable by a licensee or sublicensee in respect of the patent concerned.</li> </ul> |

|            | <b>Designs</b>  | <b>Crop modified developments</b>  | <b>Medicine</b>  |
|------------|---|--|--|
| <b>USA</b> | <p>1) TRADEMARKS:</p> <ul style="list-style-type: none"> <li>Any person legally capable of owning property;</li> <li>Do not need registration;</li> <li>Challenging trademarks.</li> </ul> <p>2) COPYRIGHT:</p> <ul style="list-style-type: none"> <li>Any person legally capable of owning property;</li> <li>Do not need registration;</li> <li>Challenging copyright, cease and desist letter or civil lawsuit.</li> </ul> | <ul style="list-style-type: none"> <li>Individual, company, partnership, or any lawful association of persons;</li> <li>Required patent;</li> <li>May file a formal opposition.</li> </ul>   | <ul style="list-style-type: none"> <li>Individual, company, partnership, or any lawful association of persons;</li> <li>Required patent;</li> <li>May file a formal opposition.</li> </ul>   |
| <b>VZ</b>  | <ul style="list-style-type: none"> <li>Intellectual property rights, which can be owned by any legal or natural, national or foreign person, are generally protected under the Federal Law for the Protection of Industrial Property, either by (i) Copyright, (ii) Patents or (iii) Trademarks, provided that they are registered before the Autonomous Service of Intellectual Property (SAPI).</li> </ul>                  | <ul style="list-style-type: none"> <li>Intellectual property rights, which can be owned by any legal or natural, national or foreign person, are generally protected under the Federal Law for the Protection of Industrial Property, either by (i) Copyright, (ii) Patents or (iii) Trademarks, provided that they are registered before the Autonomous Service of Intellectual Property (SAPI).</li> </ul> | <ul style="list-style-type: none"> <li>Intellectual property rights, which can be owned by any legal or natural, national or foreign person, are generally protected under the Federal Law for the Protection of Industrial Property, either by (i) Copyright, (ii) Patents or (iii) Trademarks, provided that they are registered before the Autonomous Service of Intellectual Property (SAPI).</li> </ul> |



## 2. CONSTITUTIONAL PROTECTION

WE COMPARED THE CONSTITUTIONAL FRAMEWORK OF EACH COUNTRY TO DETERMINE IF PROPERTY RIGHTS OF INDIGENOUS COMMUNITIES ARE PROTECTED.

|             |   |
|-------------|---|
| <b>Aus</b>  | No.   |
| <b>Bra</b>  | Yes.<br>Article 5th, XXVII, XXVIII and XXIX.  |
| <b>Bol</b>  | Yes.<br>Articles 30, II; 42, II; and 100, II.   |
| <b>Can</b>  | Yes.<br>Section 35 of Constitution Act, 1982.   |
| <b>Mex</b>  | Yes.<br>Article 2nd.  |
| <b>Peru</b> | Yes.<br>Article 88 and 89.  |
| <b>SA</b>   | Yes.<br>Section 25.   |
| <b>USA</b>  | Yes.<br>Fifth Amendment.  |
| <b>VZ</b>   | Yes.<br>The Venezuelan Constitution protects<br>(i) the right to collective ownership of the lands in which the indigenous communities live;<br>(ii) the right to benefit of natural resources; and<br>(iii) the collective intellectual property of knowledge, technologies and innovations. |



## 3. RECOGNITION

WE ANALYSED WHETHER PROPERTY RIGHTS OF INDIGENOUS COMMUNITIES HAVE BEEN RECOGNISED THROUGH LOCAL CASE LAW.

|             |   |
|-------------|---|
| <b>Aus</b>  | Mabo & Others v Queensland (1992). This landmark judgement acknowledged the pre-existing native title rights and interests of the indigenous Meriam people in Murray Island.  |
| <b>Bra</b>  | Augusto Affonso Botelho Neto vs. União (Case of Raposa Serra do Sol - 2009).  |
| <b>Bol</b>  | <p>Constitutional Court Decision No. 0572/2014 ("Decision 572/2014"): recognized indigenous people's right to habitat and natural resources in territories traditionally occupied by them.</p> <p>Constitutional Court Decision No. 0014/2013 ("Decision 14/2013"): reintegrated native communities to their territories by nulifying a resolution issued by the Authority for the Control and Social Control of Forests and Land that had evicted them from their land.</p> <p>Constitutional Court Decision No. 1419/2012 ("Decision 1419/2012"): recognized a person's right to express his or her culture and to transmit its cultural identity.</p>  |
| <b>Can</b>  | Certain Indigenous groups in Canada have lands set aside for their use by federal legislation (the Indian Act) and regulations thereto. These lands are called "reserves" and form the land base of "bands," the basic federally-recognized unit of governance on the reserve. Title to reserve lands is held by the federal sovereign (Crown) and not by the bands themselves. Bands are statutory creatures that are rarely congruent with the Indigenous communities' own pre-existing governance structures, being administrative creations of the Canadian government. The ability of a band to hold title to land in its own name has not been dealt with consistently across Canadian provinces, although the general rule has been that bands are not able to do so, not being individuals or corporations. |
| <b>Mex</b>  | There is no local case law regarding the recognition of property of indigenous people due to the fact that no legal actions are carried out against unauthorized use and/or illegal copies.   |
| <b>Peru</b> | File No. 00024-2009-AI (2009).  |
| <b>SA</b>   | Alexkor vs The Richtersveld Community (2001);<br>Prinsloo vs Ndebele-Ndzundza Community and Others (2004);<br><b>Tongoane and Others vs National Minister for Agriculture and Land Affairs and Others (2010).</b>   |
| <b>USA</b>  | Harjo, et al. v. Pro-Football (2005).   |
| <b>VZ</b>   | There is no relevant case law on the matter.  |



## 4. BECOMING OWNERS

WE MADE A COMPARATIVE REVIEW OF LEGAL PROVISIONS IN EACH COUNTRY TO DETERMINE WHETHER THERE IS ANY SPECIFIC OR GENERAL PROCESS THAT INDIGENOUS COMMUNITIES CAN FOLLOW TO BECOME OWNERS OF INTELLECTUAL PROPERTY RIGHTS.

|             |  |
|-------------|--|
| <b>Aus</b>  | <ul style="list-style-type: none"> <li>Indigenous communities must follow the common procedures set out by the relevant intellectual property act in order to secure said rights.</li> </ul>   |
| <b>Bra</b>  | <p>Yes.</p> <ul style="list-style-type: none"> <li>Procedure provided by the Copyright Law for individual ownership;</li> <li>Indigenous people have the constitutional right to be assisted by the Federal Prosecution Service before Brazilian courts;</li> <li>In most cases, communities create their own associations or seek the assistance of NGOs to represent their interests in court.</li> </ul>  |
| <b>Bol</b>  | <ul style="list-style-type: none"> <li>For traditional medical knowledge and medicines: registry under the Regulation for the Unified Registry of Traditional Bolivian Ancestral Medicine (“RUMETRAB”);</li> <li>For plant breeders: registry in National Institute of Agricultural and Forestry Innovation (“INIAF”);</li> <li>For copyright: registry in the National Service of Intellectual Property (“SENAPI”);</li> <li>For Community Cultural Property: registry in the Plurinational System for the Registration of the Bolivian Cultural Patrimony;</li> <li>For collective and individual rights of native nations and indigenous peoples, intercultural and Afro-Bolivian communities: registry in the System of Registration of Mother Earth Components.</li> </ul>  |
| <b>Can</b>  | <ul style="list-style-type: none"> <li>Indigenous groups acquire intellectual property rights in Canada by meeting the same requirements as all other parties. There is no separate mechanism specific to Indigenous communities or groups that allows them to become owners of intellectual property rights;</li> <li>Canadian intellectual property rights and protection, other than for trademarks, are premised on novelty and only granted for a fixed and limited period of time. After that period, the protected information enters the public domain;</li> <li>Traditional Indigenous knowledge falls outside the protections offered by patents and PBRs, and more generally outside the protections of the Canadian intellectual property regime;</li> <li>Indigenous communities can prevent third-parties from monetizing and profiting from traditional medicines and plants by challenging patents and PBRs on the basis that the subject matter is not new or novel.</li> </ul> |
| <b>Mex</b>  | No.  |
| <b>Peru</b> | <p>Yes. There are three types of registers under the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI):</p> <ul style="list-style-type: none"> <li>For collective knowledge in the public domain: National Public Register of Collective Knowledge of Indigenous Peoples;</li> <li>For collective knowledge which has not yet been disclosed to third parties: National Confidential Register of Collective Knowledge of Indigenous Peoples;</li> <li>For registers organized by indigenous communities according to their customs and practice: Local Registers of Collective Knowledge of Indigenous Peoples.</li> </ul>  |
| <b>SA</b>   | <p>Yes.</p> <ul style="list-style-type: none"> <li>For intellectual property rights: registry under the Companies and Intellectual Property Commission (CIPC) that regulates the registration and maintenance of intellectual property rights – such as trademarks, patents, designs, and copyright – and ensures its effective and efficient enforcement.</li> </ul>  |
| <b>USA</b>  | No.  |
| <b>VZ</b>   | <ul style="list-style-type: none"> <li>There is no separate mechanism specific to indigenous communities or groups that allows them to become owners of intellectual property rights, but they may follow the usual procedure for the registration of intellectual property rights before the Autonomous Service of Intellectual Property (SAPI). The procedure initiates by the submission of an application, but the steps vary according to the type of protection required (Copyright, Patents or Trademarks).</li> </ul>  |



## 5. LEGAL REMEDIES

WE ANALYSED THE TOOLS INDIGENOUS COMMUNITIES HAVE TO RESTORE THEIR INTELLECTUAL PROPERTY RIGHTS.

|             |  |
|-------------|--|
| <b>Aus</b>  | <ul style="list-style-type: none"> <li>• Civil Claim, generally before the Federal Court. Damages or Account of Profits: brings the possibility of (i) recovery of the losses suffered by the IP owner, as well as eventual additional damages, or (ii) an account of profits on the gains made by the infringing party, followed by the possibility of the IP owner legally claim such profits;</li> <li>• Injunctions and Other Court Orders In Case of IP Infringement: (i) injunctions, (ii) freezing orders, and (iii) search orders;</li> <li>• Conversion or Detention of Infringing Copies: action in which the IP owner seeks to gain the ownership over the infringing work and of any device used to make such work.</li> </ul> |
| <b>Bra</b>  | <ul style="list-style-type: none"> <li>• Administrative procedure: aims to nullify the improper registration of an industrial design or Cultivar Protection Certificate (crop modified development);</li> <li>• Judicial claim: aims to (i) nullify the improper registration, (ii) refrain violations by the infringing party, (iii) recover damages etc;</li> <li>• Class action (ACP): aims to ensure the intellectual property rights over traditional knowledge</li> </ul>  |
| <b>Bol</b>  | <ul style="list-style-type: none"> <li>• Administrative Claims: infringement process with SENAPI against third parties who are using a trademark, patent or a copyright without the owner's authorization;</li> <li>• Criminal Claim: the Public Ministry;</li> <li>• Civil Claim: lawsuit to request compensation from infringing parties;</li> <li>• Constitutional: a (i) Popular Action, related to collective rights, and/or (ii) Amparo Constitucional, related to any right protected by the Constitution</li> </ul>  |
| <b>Can</b>  | <ul style="list-style-type: none"> <li>• Biocultural property of Indigenous communities in Canada is protected by the Canadian intellectual property or ordinary property regime, or recognized as existing Aboriginal or treaty rights, rather than by a separate legal regime.</li> </ul>  |
| <b>Mex</b>  | <ul style="list-style-type: none"> <li>• In general terms genetic material, particularly regarding plant-life variations, is protected under the Federal Law for the Protection of Industrial Property and the Federal Law for Plant-life Variations with no special legal recourse included in either law;</li> <li>• Any person has access to the regular means of legal defense against authorities –whether federal or local- via amparo or nullity claim before the administrative Courts, or civil lawsuits against individuals or companies</li> </ul>  |
| <b>Peru</b> | <ul style="list-style-type: none"> <li>• Court proceedings: An action for constitutional relief (“amparo”) against the act or omission of any authority, provided that the indigenous community has previously registered its intellectual property rights with INDECOPI.</li> </ul>   |
| <b>SA</b>   | <ul style="list-style-type: none"> <li>• Restitution Claim (Civil): brings the possibility of restitution of rights for</li> <li>• (i) indigenous communities and (ii) individuals who have been dispossessed of their land rights as a result of past racially discriminatory laws or practices.</li> </ul>   |
| <b>USA</b>  | <ul style="list-style-type: none"> <li>• There are no protections for biocultural property of Indigenous communities in USA.</li> </ul>  |
| <b>VZ</b>   | <ul style="list-style-type: none"> <li>• Civil claim before any ordinary court; or request a constitutional remedy. Both mechanisms are appropriated regardless of whether the violation was committed</li> <li>• by a particular or by the government.</li> </ul>   |



## 6. UNAUTHORIZED COPYING

WE REVIEWED THE PROCEDURES INDIGENOUS COMMUNITIES SHOULD FOLLOW WHENEVER INDIGENOUS DESIGNS OR MEDICINES ARE COPIED WITHOUT AUTHORIZATION.

|            |   |
|------------|---|
| <b>Aus</b> | <ul style="list-style-type: none"> <li>• Possibility of court proceedings.</li> </ul>   |
| <b>Bra</b> | <ul style="list-style-type: none"> <li>• Initiate an administrative procedure before the National Institute of Intellectual Property, demanding the nullification of the patent that violates the Indigenous community's rights;</li> <li>• Initiate an administrative procedure before the Ministry of Agriculture, Livestock and Supply (MAPA) demanding the nullification of the Cultivar Protection Certificate that violates the Indigenous community's rights;</li> <li>• Initiate an individual judicial claim to nullify the improper registration, refrain violations by the infringing party, recover damages, and other possible claims;</li> <li>• Initiate a class action to ensure the protection of the Indigenous community's property rights;</li> <li>• In all scenarios above, the Indigenous community may either (i) seek for help from the National Foundation for Indigenous People (FUNAI), or (ii) create associations and/or cooperatives responsible for the defense of intellectual property rights. Both the FUNAI and the association/cooperative can represent the community's interests before the competent authorities (administrative or judicial).</li> </ul>   |
| <b>Bol</b> | <ul style="list-style-type: none"> <li>• Administrative Claims: have the intellectual property duly registered and file an infringement process with SENAPI;</li> <li>• Criminal Claims: have the intellectual property duly registered and file for (i) violation of copyright, and/or (ii) violation of patent privilege;</li> <li>• Civil Claims: have the intellectual property duly registered and file a civil procedure with a civil court against infringing parties;</li> <li>• Constitutional Claims: a (i) Popular Action may be filed when there is a violation or threat to collective rights and it is not necessary for parties to exhaust judicial or administrative remedies; an (ii) Amparo Constitucional may be filed when parties exhaust judicial or administrative remedies. Both remedies can be filed by any person, individually or in representation of a collectivity.</li> </ul>   |
| <b>Can</b> | <ul style="list-style-type: none"> <li>• Civil claims must be brought in order to obtain a remedy such as (i) an injunction (preventing the infringing use of their intellectual property) or (ii) damages (compensation for infringing use). or</li> <li>• For designs, plants, and/or medicines that are confidential within an Indigenous community, that community may have access to certain common law causes of action such as breach of confidence in cases where designs, plants, and/or medicines are confidential within the community.</li> </ul>   |
| <b>Mex</b> | <ul style="list-style-type: none"> <li>• Infringements or violation to designs and medicines may be challenged through administrative, civil and criminal procedures, including border measures;</li> <li>• In order to initiate any of the above actions, it is necessary to have a registered or granted right;</li> <li>• A decision by the MIIP may be appealed through an optional Revision Recourse before the MIIP or challenged through petition for annulment with the Federal Court for Administrative Justice. Decisions by the Federal Court for Administrative Justice may be challenged through a constitutional appeal before the Federal Collegiate Circuit Court;</li> <li>• Counterfeiting or "piracy" is prosecuted through criminal proceedings as a general rule. Lookalikes or similarities are subject to administrative rather than criminal proceedings. For criminal proceedings, the complaint is filed with the Attorney General's Office, as counterfeiting is considered a federal felony;</li> <li>• The section 30 of Bill C-69 provides that if the disclosure of any evidence or records would cause "specific, direct and substantial harm to a person or Indigenous group", the information must not be disclosed without the authorization of the person or the Indigenous group.</li> </ul> |

|             |  |
|-------------|--|
| <b>Peru</b> | <ul style="list-style-type: none"> <li>• Action for constitutional relief (“amparo”): An action for constitutional relief is appropriate when an individual or company violates or threatens constitutional rights, or when a government authority does so. The action must be filed within 60 business days from the time such violation or threat occurs;</li> <li>• Action for intellectual property infringement: INDECOPY can bring an action for intellectual property infringement on its own motion, and indigenous communities owning collective knowledge can commence the action through their representative organizations;</li> <li>• Administrative claim or court proceedings for intellectual property infringement: An administrative claim or court proceedings can be brought to protect a design registered with the Register of Industrial Designs under INDECOPi;</li> <li>• Administrative claim filed with INDECOPi or court proceedings for copyright infringement: An administrative claim or court proceedings can be brought to protect an unregistered design that is, however, personal, original and capable of being reproduced;</li> <li>• Administrative claim filed with INDECOPi or court proceedings for intellectual property infringement: An administrative claim or court proceedings can be brought to protect medicines.</li> </ul> |
| <b>SA</b>   | <ul style="list-style-type: none"> <li>• Seek representation by the Commission on Restitution of Land Rights, which will conduct a hearing if the following applies: <ul style="list-style-type: none"> <li>(a) if a complaint cannot be resolved by way of negotiation or mediation;</li> <li>(b) if a hearing will offer an appropriate solution regarding the complaint;</li> <li>(c) if it is in the public interest;</li> <li>(d) if the complaint cannot be fairly decided on the basis of documentary evidence or written statements submitted by the parties or any other person having information relevant to the complaint only; or</li> </ul> </li> <li>• (e) if a party requesting a hearing supplies reasonable grounds.</li> <li>• The rights will be restored once negotiated and reviewed by the dispute resolution committee.</li> <li>• The National Environmental Management ensures that there is fair and equal benefit sharing when it comes to indigenous biological resources.</li> <li>• Negotiation to use indigenous biological resources can be conducted and benefit-sharing agreements can be drafted.</li> </ul>   |
| <b>USA</b>  | <ul style="list-style-type: none"> <li>• Challenge copyright or trademark;</li> <li>• Cease and desist order;</li> </ul>   |
| <b>VZ</b>   | <ul style="list-style-type: none"> <li>• If the intellectual property is registered before the Autonomous Intellectual Property Service (SAPI): Opposition appeal before the SAPI;</li> <li>• If the intellectual property is not registered: (i) constitutional remedy; or (ii) regular lawsuit before any ordinary court.</li> </ul>   |

# 7. PRESENTING A BILL

WE REVIEWED THE STEPS INDIGENOUS COMMUNITIES SHOULD FOLLOW TO PRESENT A BILL TO ENACT A LAW ON THE PROTECTION OF BIOCULTURAL PROPERTY IN EACH COUNTRY.

|             |   |
|-------------|---|
| <b>Aus</b>  | <ul style="list-style-type: none"> <li>Engage in the democratic process, build a coalition of support around their proposed reform, and attempt to pass a bill through Parliament.</li> </ul>   |
| <b>Bra</b>  | <ul style="list-style-type: none"> <li>Popular initiative: the Federal Constitution requires the signatures of a minimum of 1% of Brazilian electors distributed among at least five Brazilian states.</li> <li>Committee on Participatory Legislation: any civil society entity may submit legislative suggestions to the Congress. The Indigenous community's may organize itself as an association/cooperative or seek for FUNAI's representation.</li> </ul>  |
| <b>Bol</b>  | <ul style="list-style-type: none"> <li>Citizens must collect a minimum number of signatures for a bill to be considered by the Chamber of Representatives. The bill will, then, undergo the legislative proceeding underlined in Bolivia's Constitution.</li> </ul>   |
| <b>Can</b>  | <ul style="list-style-type: none"> <li>Legislation for the protection of biocultural property would need to be passed at the federal level, which has a bicameral legislature. Generally, public bill will be introduced in the House of Commons by a Member of Parliament ("MP"). It must pass both the House of Commons and Senate in the same form. Only MPs, who can be: (i) a Minister of cabinet, or (ii) a private Member (who is not in cabinet), may introduce a bill in the House of Commons.</li> </ul>  |
| <b>Mex</b>  | <ul style="list-style-type: none"> <li>A "Legislative initiative", this is, the faculty to present a bill to enact a law, corresponds to the (i) president; (ii) deputies and senators of the National Congress; (iii) legislative bodies of the States and Mexico City; and (iv) citizens in an equivalent number of, at least, zero-point thirteen percent of the voters registration list.</li> <li>Every single bill or decree shall be discussed successively at both Houses (Deputies and senators).</li> <li>After being approved by the two Houses, the bill shall be submitted to the President of the Republic who, after deciding that no further corrections should be made, shall publish it without delay.</li> </ul> |
| <b>Peru</b> | <ul style="list-style-type: none"> <li>Section 107 of the Peruvian Constitution states that "the President of the Republic and Members of Congress are entitled to initiate a legislative process."</li> <li>Section 74 of the Regulations of the Peruvian Congress provides that "under the right of legislative initiative, the citizens and institutions set forth in the Constitution are entitled to introduce a bill in Congress."</li> </ul>   |
| <b>SA</b>   | <ul style="list-style-type: none"> <li>Initiate the Legislative Process by drafting of a Bill and obtaining approval by the Parliament;</li> <li>The Bill must be considered by both Houses of Parliament National Assembly (NA) and National Council of Provinces (NCOP);</li> <li>The President assents and signs the Act, which must be published in the Gazette to become binding on everyone, or it becomes binding on a date determined in the legislation.</li> </ul>  |
| <b>USA</b>  | <ul style="list-style-type: none"> <li>NATIONAL LEVEL: by a member of the House of Representatives or the Senate;</li> <li>STATE LEVEL: usually by a member of the legislature of such state.</li> </ul>  |
| <b>VZ</b>   | <ul style="list-style-type: none"> <li>Gather no less than 0,1% of people registered before the electoral registry; present a project to the Secretariat of the National Assembly, with an explanatory statement that identifies who proposed the bill of law, its objectives and the budget required. The bill of law will then follow the regular procedure for any other bill of law.</li> </ul>   |



## 8. APPLICABLE LAW

WE ANALYSED THE APPLICABILITY OF TREATIES, DECLARATIONS AND RELEVANT CASE LAW TO THE PROTECTION OF BIOCULTURAL PROPERTY OF INDIGENOUS COMMUNITIES IN EACH COUNTRY.

|             | United Nations Declaration on the Rights of Indigenous People | American Convention on Human Rights | Other  |
|-------------|---|-------------------------------------|--|
| <b>Aus</b>  | X   | NA                                  | NA   |
| <b>Bra</b>  | X   | X                                   | <ul style="list-style-type: none"> <li>• Case of the Xucuru Indigenous People and its members vs. Brazil (2017).</li> </ul>  |
| <b>Bol</b>  | X   | X                                   | <ul style="list-style-type: none"> <li>• Universal Declaration of Human Rights;</li> <li>• Indigenous and Tribal People Convention;</li> <li>• International Convention on the Elimination of All Forms of Racial Discrimination;</li> <li>• International Covenant on Economic, Social and Cultural Rights and its Optional Protocol;</li> <li>• American Declaration on the Rights of Indigenous People;</li> <li>• Discrimination (Employment and Occupation) Convention;</li> <li>• Agreement on Trade-Related Aspects of Intellectual Property Rights – TRIPS.</li> </ul> |
| <b>Can</b>  | NA  | NA                                  | NA   |
| <b>Mex</b>  | X   | X                                   | <ul style="list-style-type: none"> <li>• WIPO Copyright Treaty;</li> <li>• Berne Convention for the protection of literary and artistic works;</li> <li>• Convention on the Protection and Promotion of the Diversity of Cultural Expressions.</li> </ul>  |
| <b>Peru</b> | X   | X                                   | <ul style="list-style-type: none"> <li>• ILO Convention No. 169.</li> </ul>  |
| <b>SA</b>   | X   | NA                                  | <ul style="list-style-type: none"> <li>• The Ndebele-Ndzundza Community vs Pinsloo;</li> <li>• Alexkor vs Richtersved Community</li> </ul>   |
| <b>USA</b>  | NA  | NA                                  | NA   |
| <b>VZ</b>   | NA  | X                                   | <ul style="list-style-type: none"> <li>• Convention on the rights of the child;</li> <li>• Agreement establishing the fund for the development of the indigenous peoples of latin american and caribbean;</li> <li>• Convention on biological diversity;</li> <li>• Cartagena protocol on biosafety to the Convention on biological diversity.</li> </ul>  |



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