TRADITIONAL KNOWLEDGE UNDER INTERNATIONAL HUMAN RIGHTS LAW: APPLYING STANDARDS OF COMMUNITARIAN PROPERTY OVER ANCESTRAL LANDS TO TRADITIONAL KNOWLEDGE-RELATED CLAIMS

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The article intends to explore the possibility of protecting intellectual property right of indigenous peoples over their traditional knowledge under the existing norms and jurisprudence on the right to communitarian property to ancestral land, as developed by international human rights law, and in particular, the jurisprudence of the Inter-American System of Protection and Promotion of Human Rights. To do so, the article will explore the inadequacy of the currently existing Intellectual Property Regime to protect the rights of indigenous peoples over their traditional knowledge, the existing international standards and jurisprudence on Intellectual Property Rights and International Human Rights Law, and the available legal norms that protect and ensure the rights of indigenous peoples. The author will then analyze the standards created by the Inter-American Court of Human Rights on the right to communitarian property, and attempt to apply them to the realm of Traditional Knowledge, in order to suggest an alternative to entertain the claims of indigenous peoples on this matter before international tribunals.

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I. INTRODUCTION

In the last decades, the international community has become aware on the particularities of indigenous peoples groups and how the distinctive characteristics of their way of living and thinking sometimes conflict with International Human Rights Law as we know it now. In a continuous effort to ensure that indigenous peoples worldwide enjoy their fundamental rights without renouncing to their traditions and worldview, several normative bodies have been adopted in order to find a common ground between the Western concept of Human Rights, and the diverse conceptions of humanity, rights and community that lead indigenous peoples’ way of perceiving the world.

As globalization spreads and humanity can access to diverse cultures, religions and perceptions of the world, it has become evident that certain groups of individuals, such as indigenous groups, do not necessarily share the same views and conceptions of the Western World. In order to ensure that they enjoy the advantages of globalization without losing their ancestral traditions, special norms must be adopted so that their own beliefs can subsist in a world ruled mostly by the norms and standards set by the West, particularly when it comes to Human Rights Law.

While most of the adopted international norms regarding the fundamental rights of Indigenous Peoples are of a non-binding nature\(^1\), there are certain international treaties of a general nature that impose specific obligations to State Parties towards indigenous communities residing within their territories, even though they do refer to indigenous rights specifically. In particular, regional instruments of protection and promotion of Human Rights in the Americas, Africa and Europe embody norms that are equally applicable to indigenous peoples, which have been interpreted by regional tribunals in conjunction with the particularities and beliefs of such groups, thus creating standards that serve to apply the existing human rights norms to indigenous peoples. While there are still many gaps to close in Indigenous Peoples Human Rights Law, the aforementioned efforts constitute significant advances on the creation of an international corpus iuris that protects the rights of Indigenous Peoples.

One of the current issues regarding the fundamental rights of indigenous peoples in the midst of globalization has to do with the protection of traditional knowledge (TK) as intellectual property (IP), and the adequacy of the existing international IP regime to protect the rights that these communities have over their intellectual creations.

\(^1\) For instance, the Declaration on the Rights of Indigenous Peoples, perhaps the most comprehensive legal framework on the subject, is nevertheless, a non-binding instrument.
The growing awareness on this issue responds several reasons. First, the underlying principles of the existing IP regime fail to consider Human Rights standards, let alone the rights of indigenous peoples. Moreover, its basic principles largely conflict with the worldview and beliefs of these communities. Also, the framework of protection under international IP norms may even exclude certain types of traditional knowledge that do not meet the required standards that entitle protection.

The need to create norms that fully ensure the protection and respect of the rights over intellectual and scientific creations of indigenous communities has become more evident as third parties seek to learn and use traditional knowledge to expand scientific research. The knowledge that indigenous peoples have on the medicinal uses of plants found in their territories can save years of research to pharmaceutical companies in improving existing products or creating new cures to certain diseases. In fact, it is estimated that when scientific use traditional knowledge as a starting point for their research, they can save around 400% of the time they would normally spend in it. Nevertheless, the process of obtaining and using such knowledge entails an appropriation of the intellectual and scientific creations of a whole community during its history. In many cases, the peoples that welcome scientists and researchers are little aware of the contribution they are doing to the development of science, let alone are informed or participated with the millionaire revenues that further development of such knowledge may entail. As companies and third parties gain large sums of money with the commercialization of new medicines, indigenous communities remain marginalized and poor, even though they are the rightful owners of such knowledge. The experience of the indigenous groups of the South American Amazon with the patent concession of the medicinal plant “Ayahuasca” in the United States is one of many examples of how corporate biopiracy can illegally extract traditional knowledge and profit from it in spite of its rightful owners.

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3 Rodrigo de la Cruz. Conocimientos Ancestrales, Biodiversidad y Derechos de Propiedad Intelectual/Patentes. Available at: http://www.docentes.unal.edu.co/gramocemas/docs/10_Cruz_tr.pdf.
4 Rodrigo de la Cruz. Conocimientos Ancestrales, Biodiversidad y Derechos de Propiedad Intelectual/Patentes. Available at: http://www.docentes.unal.edu.co/gramocemas/docs/10_Cruz_tr.pdf.
5 In 1994, some indigenous peoples from the Amazon found out that an American citizen intended to patent a variety of plant, the “ayahuasca”. Not only that the plant was not a recent discovery, since indigenous peoples had been using it throughout centuries, but entailed one of the sacred plants in indigenous customs and traditions. The incident generated a heated debate about the adequacy (and even the moral rightfulness) of granting intellectual property rights to plants or proceedings that indigenous peoples had used for centuries. Ultimately, the patent was revoked, but the debate on biopiracy and traditional knowledge still prevails. See Coordinator for the Indigenous Organizations of the Amazon Basin. Developments Regarding the Patent of the “Ayahuasca”. Available at: http://www.coica.org.ec/sp/ma_documentos/ayahuasca_sp01.html
In other cases, the application of traditional knowledge outside the communities that own it may conflict altogether with their particular beliefs. It may also entail an intrusion of third parties in the lands of indigenous peoples or the use and extraction of natural resources found in such territories. These activities jeopardize their traditions and customs of indigenous peoples, as well as the integrity of their ancestral lands. The protection available under the existing IP regime falls short in addressing these issues, even though they are closely related to the scientific and intellectual creations of indigenous peoples.

There is a growing international consensus on the inadequacy of the existing IP regime to protect traditional knowledge, and the need to either reform it or create a sui generis regime that can better address the issues in an integral fashion. While this seems like the most logical solution, in practice such normative reforms will require years of treaty drafting, international discussions, and ultimately, States’ consensus and commitment. The increasing intrusion of third parties in the territories of indigenous peoples, and the illegal appropriation of traditional knowledge, require more effective mechanisms to ensure that the rights over scientific and intellectual creations of indigenous peoples are fully respected.

In general, International Human Rights Bodies deny that IP rights are Human Rights, but recognize the impact that they have in the exercise of fundamental rights such as culture and property. Moreover, regional tribunals like the European Court on Human Rights have recognized that certain IP rights generate fundamental property rights. While this is true, this classification has problems in its definition and in its scope of protection. Accordingly, defining IP solely to a cultural human right leaves out the property aspect of IP, an important concept when it comes to determining ownership, revenues, trespassing of ownership and State limitations. It also entails an impossibility to access to international justice in case of a violation, since most Human Rights Tribunals cannot entertain individual claims on from States’ violations of cultural rights. In this article, I intend to demonstrate how IP in general (and IP rights over traditional knowledge) can be considered as a form of exercising the human right to property, and how under this classification, IP rights over TK can be better protected in the international and national spheres. I will base my arguments on the jurisprudence of the European Court of Human Rights (ECHR) regarding IP rights and the right to

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8 Authors like Mary W.S. Wong and Chidi Oguamanam have suggested the need to create a “sui generis” framework to protect traditional knowledge. See Mary W.S. Wong. Toward Alternative Normative Framework for Copyright: From Private Property to Human Rights. 26 Cardozo Arts & Ent. L.J. 775 2008-2009. See also, Oguamanam. Protecting indigenous knowledge in international law: Solidarity beyond the nation-state. 8 Law Text Culture 191 2004.


property. Regarding indigenous peoples in particular, the latter is possible applying the existent norms and jurisprudence on Human Rights Law that address the Human Right to Communitarian Property of Indigenous Peoples over ancestral lands.

While regional tribunals (in particular, the Inter-American Court of Human Rights) have recognized the existence of an indigenous communitarian right to property only in cases related to land disputes, it is plausible that these standards may also serve to protect intellectual property rights over traditional knowledge. Until the international community comes up with a different IP regime that truly protects and ensures the rights of indigenous peoples over their scientific and intellectual creation, the possibility of seeking international protection under the right to property seems like an efficient mechanism to prevent and remedy any violations on this regard.

This article intends to explore the developments of international standards on the fundamental rights of indigenous peoples, particularly those referring to the communitarian right to property, and how these standards can be applied to protect the rights of indigenous peoples over TK. While the paper will address intellectual property issues, its purpose is to provide an interpretation to the Human Right to Property in which IP is also included, and to provide a possible interpretation that may serve to protect indigenous people's intellectual property rights. Therefore, it does not intend to explain or modify traditional concepts, theories or norms of the subject of IP, but to interpret already existing norms and standards within Human Rights Law.

This article is divided in six sections. The introduction will explain the need to create legal norms that adequately protect intellectual property, and the growing need of the international community and indigenous peoples to achieve such norms in the midst of globalization.

The next section briefly states general concepts of Intellectual Property, and the inadequacy of this regime to protect the rights of indigenous peoples over their traditional knowledge, due to the inconsistencies between the two concepts. The next section will describe how international organizations and regional tribunals of protection of human rights have understood the growing tension between intellectual property and human rights, in particular, the General Comment No. 17 of the UN Committee on Economical, Social and Cultural Rights, and the jurisprudence of the European Court of Human Rights.

The following section describes the existing legal developments to protect the rights of indigenous peoples. The section will briefly explain both the general and the specific instruments on human rights, and other instruments that incorporate provisions referring to the rights of indigenous peoples over their traditional knowledge.
The article addresses the development of the jurisprudence of the Inter-American Court on Human Rights on communitarian rights of indigenous people and will then attempt to apply these standards to traditional knowledge, in order to suggest a possible mechanism to protect and ensure the human rights of indigenous peoples before international tribunals.

The concluding section will summarize the concepts developed throughout the article, and will stress comments and suggestions.

II. Intellectual Property: General Concepts and the Inadequacy of the Existing Regime to Protect the Rights of Indigenous Peoples over Traditional Knowledge.

In broad terms, IP is a branch or national or international Law that protects the rights which result from intellectual activity in the industrial, scientific, literary and artistic fields. IP Law intends to provide the inventors and creators of artistic work with safeguards that will ensure they receive economical compensation for such work, and to create a mechanism of incentives to foster and encourage innovation and creativity.

The modern notions of IP started to develop in the 19th Century, but it was not until the year 1967 that the international community addressed the need to create a comprehensive framework of norms to regulate IP Worldwide. That year, during the Stockholm Conference, the Convention Establishing the World Intellectual Property Organization (WIPO) was adopted (The Stockholm Convention).

Regarding the fields that may be subject to protection under IP Law, Article 2 of the Stockholm Convention states that:

“Intellectual property” shall include the rights relating to: literary, artistic and scientific works, performances of performing artists, phonograms, and broadcasts, inventions in all fields of human endeavor, scientific discoveries, industrial designs, trademarks, service marks, and commercial names and designations, protection against unfair competition, and all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.

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16 Stockholm Convention, Article 2.
According to WIPO, the aforementioned definition creates 3 main branches of IP Law: 1. Industrial Property (referring to patents for inventions, trademarks, industrial marks, commercial names and designations); 2. Copyright Law (referring to literary, artistic and scientific works) and 3. Related Rights (performances of performing artists, phonograms and broadcasts). A fourth category may include fair trade competition\(^{17}\).

For purposes of this article, it is important to mention that under the Stockholm Convention, inventions and scientific discoveries are not the same thing. Accordingly, a scientific discovery is the recognition of phenomena, properties or laws of the material universe not hitherto recognized and capable of verification\(^{18}\), whereas inventions are new solutions to specific technical problems, relying on existing natural properties or laws, whether they were previously recognized or not\(^{18}\). Nevertheless, it must be stressed that biopiracy may entail an illegitimate appropriation of either a scientific discovery (for instance, a variety of plant), or seek a patent right over a particular process (synthesizing a plant to obtain certain medicinal benefits that can be commercialized in the market).

IP has also been regulated at a regional level. The Andean Community of Nations (CAN) has developed a comprehensive set of norms that define the scope of Intellectual Property Law in the Region, under Decisions 486 and 351. Considering the importance of the biopiracy problem in the Amazonic Region, this article will also mention the existing regulations in this jurisdiction\(^{19}\).

On Copyright, Decision 351 defines the author as “the person whose name, pseudonym, or other identifying sign appears on the work\(^{20}\). That person has the right to keep the work unpublished or to disseminate it, to claim the authorship of the work at any time, and to oppose any distortion, mutilation or change that may jeopardize the integrity of the work or the author's reputation (moral right). The author also has property rights over the protected work that entitles him to the exclusive right to carry out,


\(^{19}\) Rodrigo de la Cruz. Conocimientos Ancestrales, Biodiversidad y Derechos de Propiedad Intelectual/Patentes. Available at: http://www.docentes.unal.edu.co/grmamon/docs/10_Cruz_tr.pdf.

authorize, and prohibit the reproduction, marketing, translation, or arrangement of the work, or any other change in it”

A patent, on the other hand, is “a document, issued, upon application, by a government office (or a regional office acting for several countries), which describes an invention and creates a legal situation in which the patented invention can normally only be exploited (manufactured, used, sold, imported) with the authorization of the owner of the patent. The protection conferred by the patent is limited in time (generally 20 years)”

Decision 486 of the Andean Community (Decision 486) indicates that “the Member Countries shall grant patents for inventions, whether goods or processes, in all areas of technology, to creations that are new, involve an inventive step, and are industrially applicable”. Decision 486 further stresses that “An invention may be deemed new when not included in the state of the art, which comprises everything that has been made available to the public by written or oral description, use, marketing, or any other means prior to the filing date of the patent or, where appropriate, of the priority claimed”.

According to the aforementioned definitions, we may broadly conclude that: 1. both Copyright Law and patent rights over inventions or procedures require conditions of novelty to grant protection: an undiscovered natural phenomenon or specie in the case of copyright law, and an innovative creation or procedure in the case of patent law. Accordingly, novelty or originality is a constitutive requirement for IP protection in these fields. 2. Both copyright protection and patent law provide the authors or inventors, to obtain pecuniary revenues for the use of protected material by third parties (economic rights); and 3. Both copyright and patent protection entitles the author or inventor with the right to exclude the use, dissemination or diffusion by third parties of the protected material.

A. Inconsistencies between the Existing IP Regime and Traditional Knowledge.

While the aforementioned definitions seem to suffice the need for protection of discoveries and inventions as conceived in the Western World, they seem inadequate to protect traditional knowledge of indigenous peoples. This is a conclusion reached by international organizations, academics and human

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24 Decision 486, Art. 115

rights representatives, who recognize that the underlying principles of IP Law is not broad enough to provide protection to the right holders of traditional knowledge, due to its particularities.

In general, the existing IP regime has been largely criticized because it seems to focus only on the economic aspect of intellectual property protection, ignoring other important aspects such as development or human rights. As Mary W.S. Wong states, IP Law must adopt a framework that more easily assimilates social and cultural norms and that considers needs and interests that have hitherto not been made explicit in international copyright law. She further proposes that the system should place greater emphasis on human rights objectives and norms than it has to date.26

For indigenous peoples, the existing IP system legitimizes the usurpation of knowledge and natural resources solely for commercial purposes. Such practice, they say, is “a racist form of theft that ignores the close links between traditional knowledge, ancestral lands and biodiversity”27.

In order to better understand the inconsistencies between IP and TK, we must now stress a definition of TK and compare it with the requirements set forth in the IP regarding protection requirements. As the Indigenous Regional Group on Biodiversity in the Andean Community has defined, “traditional knowledge refers to all ancient wisdom and knowledge that indigenous and afro-descendant people’s posses in an integral and communitarian fashion. Such knowledge is based on millenary practices and the interaction between man and Nature, and is transmitted between generations, usually orally.”28

The Convention on Biological Diversity, which to date is perhaps the international treaty that better protects traditional knowledge defines it as “knowledge, innovations and practices of local and indigenous communities that embody traditional lifestyles for the sustainable conservation and utilization of biological diversity”.29 The Convention further states the State Parties obligation to protect and encourage the consuetudinary usage of biological resources, in accordance with the traditional cultural practices, provided that these are compatible with sustainable conservation.

WIPO, on its part, indicates that traditional knowledge” comprises: tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols;
undisclosed information; and, all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields”

While some the aforementioned provisions refer to “innovations” of indigenous peoples, these concepts principally enshrine the historic nature of traditional knowledge as part of the culture of an indigenous group. Therefore, the basis of the existence of TK is the development of the practices and knowledge throughout history, not the novelty, originality or creativity behind them. Arguably, a knowledge that is new to an indigenous community and is not been embedded as part of its historic development and culture could hardly be considered “traditional”. In this regard, the very essence of TK seems to conflict with the existing IP requirements for protection, particularly in the field of patents, since they do not entail novelty or creativity in the traditional sense of such terms. Therefore, under the existing IP regime TK may not even be subject of protection.

Another important conflict between TK and the existing IP regime has to do with the nature of the rightholder. As in many other legal institutions of the Western society, IP grants rights to individuals rather to groups made of several individuals. While IP rights can be granted to juridical persons, who are usually comprised by many individuals, the nature of the right is to grant the benefits and protection to one entity so that it can use such rights as it may see convenient while the benefits last. In contrast, the worldview of indigenous peoples is generally based on the existence of communitarian rights to and from the community, which must be exercised collectively. The existent IP regime fails to recognize such collective rights, and therefore, cannot provide an adequate protection for TK so that the customs and beliefs of indigenous peoples are respected.

Finally, while the existing IP regime establishes economical compensations for the use of the protected goods by third parties (thus, valuating IP protected goods only through an economical perspective), the

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31 Nevertheless, authors like Daniel Gervais suggest that for knowledge to be considered traditional it does not need to be “ancient or static”, therefore allowing that certain new customs of certain peoples to be protected as TK. However, it seems difficult to define as “traditional” something that has not been a constitutive part of the development of a certain group. This becomes more evident as the importance of TK relies on the fact that it carries along part of the history, culture and customs of peoples.


34 Chidi Oguamanam. Protecting indigenous knowledge in international law: Solidarity beyond the nation-state. 8 Law Text Culture 191 2004.
value of TK for indigenous people usually goes beyond the material aspects of the right to property, and embody also religious and cultural aspects.\(^\text{35}\)

Accordingly, the existing IP regime does not possess an adequate mechanism for transaction of the protected rights that will adequately reflect the value that TK has for indigenous communities beyond the material or economical aspects.\(^\text{36}\) Therefore, it fails to provide an adequate mechanism to ensure of the rights over TK that indigenous peoples possess in an integral fashion. Aware of this legal vacuum in the IP regime, many scholars have proposed the creation of a “sui generis” regime of protection for TK that will not replace IP Law but will rather coexist along with it.\(^\text{37}\)

This proposal, however, has some flaws. For one, creating a parallel normative framework for the protection of TK either at national and international level will take a considerable amount of time to create. The process of drafting, approving, ratifying and implementing international treaties takes years, if not decades to be completed. While lawyers, policy makers, and States representatives spend years negotiating the terms of this new “sui generis” framework, illegal appropriation of traditional knowledge, exploitation of biological resources belonging to indigenous peoples and illegitimate intrusions in ancestral lands will continue to happen. Perhaps in the in the long run such parallel regime may provide a more adequate protection to TK, but for the near future, this proposal seems useless to address the main concerns of indigenous peoples and the international community regarding protection to TK.

The former Special Rapporteur of the U.N. Working Group on Indigenous Populations, Erika Irene Daes has recognized the practical inconveniences of having a parallel regime to TK must also be considered. While a “sui generis” legal framework may address more adequately the particularities of TK and the needs of indigenous people, at the end of the day it will not be able to control actions of State parties or individuals acting in accordance with IP norms.\(^\text{38}\)

It seems that for the time being, the most viable way to protect the rights of indigenous peoples to TK is through a set of norms that already exist, that enjoy certain acceptance among the international

\(^{35}\) CIEL. *Genetic Resources, Traditional Knowledge and Intellectual Property Rights*: Available at: http://www.ciel.org/Publications/iprights.pdf.


community, and that are general enough to embody both IP and TK components. International Human Rights Law is therefore, the most suitable mechanism to protect TK nowadays.

III. INTELLECTUAL PROPERTY RIGHTS AND HUMAN RIGHTS

The progressive development of International Human Rights Law in the late 20 and 21 Centuries has brought a wide array of new circumstances to be protected under its spectrum. Accordingly, issues such as the right to access to water, the human right to development and the right to a clean environment are issues that have recently been addressed from a Human Rights Perspective.

The phenomenon of globalization, the entry into force of the TRIPS Agreement in 1995, and the impact these treaties had in the creation of national IP frameworks, have progressively raised awareness on the impact of the rather new international IP regime on the exercise of fundamental rights such as property, culture, freedom of expression and access to information. There are undoubtedly important individual interests involved in IP Law that have a strong impact in the freedoms, life and well being of both the people that are entitled with IP rights and for the other members of society. Therefore it is necessary to determine up to what extent IP could be considered a human rights or at least, a mechanism to exercise particular human rights.

Some scholars such as Prof. Peter Yu believe that “some attributes of IP Law are protected under international or regional Human Rights instruments, while others do not have a Human Rights implication”. In this view, IP in not considered as a Human Right per se, but as a field of the Law that embodies aspects that converge with Human Rights Law. Others, like Mary W.S. Wong, suggest that “insofar as IP is property and IP rights are property rights, it follows that IP rights are also human rights”.

A. IP and Cultural Rights: The approach adopted on ECOSOC’s General Comment No. 17.

International Organizations have attempted to respond to the question as to whether IP rights are Human Rights. In 2005, the Committee on Economical, Social and Cultural Rights (ECOSOC) of the

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United Nations (UN) delivered its General Comment No. 17 on “The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author”\(^{45}\), as enshrined in Article 15, paragraph 1 (c), of the Covenant of Economic, Social and Cultural Rights (The Covenant)\(^ {46} \).

The purpose of General Comment No. 17 is to “distinguishes article 15, paragraph 1 (c) [of the International Covenant on Civil and Political Rights ICCPR]\(^ {47} \) and other human rights from most legal entitlements recognized in intellectual property systems”\(^ {48} \).

The Committee starts by stressing the differences between IP and Human Rights\(^ {49} \):

“while under most intellectual property systems, intellectual property rights, often with the exception of moral rights, can be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person.”

The Committee further emphasized that “it is therefore important not to equate intellectual property rights with the human right recognized in article 15, paragraph 1 (c)\(^ {50} \), and recognized that the rights enshrined in such article have an impact in other rights, such as the right to have a remunerated work, the right to property, the right to freedom of expression, and cultural rights of certain groups\(^ {51} \).

The Committee recognized that Article 15(1)(c) provides protection to both individual or communities\(^ {52} \). It further stresses States’ obligations to adopt legal and other measures to ensure that every person has availability and accessibility to an adequate protection of these rights without discrimination\(^ {53} \),


\(^{46}\) International Covenant on Economic, Social and Cultural Rights. GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966); 993 UNTS 3; 6 ILM 368 (1967)

\(^{47}\) Article 15 (1)(c) reads as follows: 1. The States Parties to the present Covenant recognize the right of everyone: […]c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.


\(^{49}\) A detailed analysis on General Comment 17 and its implications was done by 3DThree Organization. See 3DThree Organization. *Intellectual Property and Human Rights: Is the Distinction Clear Now? (An Assessment on ECOSOC General Comment to No. 17 2005).* Available at http://www.3dthree.org/pdf_3D/3D_GC17_IPHR.pdf.


and indicates that while such rights are subject to certain limitations, a violation occurs “when a State is unwilling to use the maximum of its available resources for the realization of the right of authors to benefit from the protection of the moral and material interests resulting from their scientific, literary and artistic productions is in violation of its obligations under article 15”.

As stated by the NGO 3Dthree, the Committee partially succeeded in solving the tension between IP and Human Rights. On one hand, it clarified the doubts as if IP rights are Human Rights, indicating that these are to different regimes. However, the analysis solely refers to Article 15 (1)(c) of the Pact, leaving out of the discussion the implications of Intellectual Property on other fundamental rights. While it recognizes the impact that Article 15 has in the exercise of other fundamental rights, it fails to provide a comprehensive approach on how other fundamental rights, such as the right to property, the right to freedom of expression, and the right to cultural participation may be affected by IP Law. This is particularly surprising considering that regional bodies (namely, the European Commission and European Court on Human Rights) had delivered significant jurisprudence that acknowledge that certain IP rights are indeed property rights, and thus subject to protection under the European Convention.

Finally, the General Comment constantly refers to IP Law as a mechanism to protect the rights enshrined in Article 15 of the Convention, and thus suggests that the existing IP regime may be enough protection of these rights, ignoring other sectors of the academia and civil society that have continuously complained about the inadequacy of IP regime to protect these other rights, especially when the people who are entitled to them belong to particular groups.


The European Court of Human Rights has also addresses the issue of protecting IP rights under Human Rights Law. While the jurisprudence on this matter is not vast, it has served to illustrate how IP can generate claims under the European Convention when holding that patents, trademarks, copyrights, and other economic interests in intangible knowledge goods are protected by the European Convention's right.


of property. The jurisprudence is particularly important because it sets standards that determine when a particular IP-related claim can raise to the level of a human right violation that entitle the applicant to a just reparation. To reach its decisions, the Court has frequently used the existing international IP norms as lex specialis to understand the State’s obligation under Article 1 of Protocol No. 1 to the European Convention, which protects the right to “the peaceful enjoyment of one’s possession”.

In the case of *Anheuser-Busch Inc. v. Portugal*, the European Court responded to the question as to whether trademark rights can be protected under the right to property enshrined in Article 1 of Protocol 1 to the European Convention.

The case involved “a dispute between an American brewer and its Czech rival, Bud&jovický Budvar, over the exclusive right to market "Budweiser" beer in Portugal. The applicant applied to the Portuguese National Institute for Industrial Property (INPI) to register "Budweiser" as a trade mark, but its application was denied on the grounds that "Budweiser Bier" had already been registered as a designation of origin on behalf of the Czechoslovak company. The applicants argued that the refusal to register the trademark had violated its right to the peaceful enjoyment of its possessions, under existing international legal instruments, “the right to protection of a trade mark was secured from the date on which the application to register it was made and that it had been deprived of that right without receiving any compensation, despite the fact that there had been no public-interest grounds to justify affording protection to a registered designation”.

The Court ruled that the provisions set forth in Article 1 of Protocol 1 are applicable to intellectual property “in general”, and went on to stress that:

“The applicant company's legal position as an applicant for the registration of a trade mark came within Article 1 of Protocol No. 1, as it gave rise to interests of a proprietary nature. […]The applicant company therefore owned a set of proprietary rights – linked to its application for the registration of a trade mark – that were

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60 Article 1 of Protocol No. 1 reads as follows: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”
recognised under Portuguese law, even though they could be revoked under certain conditions. This suffices to make Article 1 of Protocol No 1 applicable in the instant case and to make it unnecessary for the Court to examine whether the applicant company could claim to have had a “legitimate expectation”.

Based on prior cases, the Court set out general principles to determine when an IP related claim can be entertained as a possible violation to Article 1 of Protocol 1:

1. The concept of “possessions” referred to in Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as “property rights”, and thus as “possessions” for the purposes of this provision;
2. Article 1 of Protocol No. 1 applies only to a person's existing possessions. Thus, future income cannot be considered to constitute “possessions” unless it has already been earned or is definitely payable, and;
3. Where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a “legitimate expectation”, unless the applicant's submissions have been subsequently rejected by the national courts.

Just as the Committee, the European Court did not raised IP rights to the level of Human Rights. Nevertheless, it seems to be clearer on the fact that certain rights derived from the IP regime are rights protected under the European Convention, namely, the right to property. This concept is particularly useful when it comes to seek redress for copyright violations by State parties in Regional Tribunals, which have jurisdiction to entertain individual claims of violations to the rights to property, but may not be able to entertain claims on alleged violations to cultural rights.

For the time being, there seems to be an international consensus on the fact that IP rights cannot be considered Human Rights. The Committee stated in General Comment 17, as opposed to Human Rights, IP right are “are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities”, whereas “intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else”. Furthermore,
IP Law protects the interests of legal persons, while Human Rights Law basically protects the rights of individuals and identifiable groups of individuals. The decisions of the European Court demonstrate, on the other hand, that certain IP rights such as those derived from trademarks entails property rights subject to protection under the European Convention.

Regardless on the approach we may choose to follow, it is undeniable that IP rights at least serve to exercise many fundamental rights, as we have mentioned in this section. Therefore, while it may not be possible to entertain IP violations claims before international Human Rights Bodies, it is perfectly possible to protect the Human Rights components of IP through the available mechanism on international and regional Human Rights systems. The experience of the European Court on this matter may serve as example to other international courts to protect and promote the human rights derived from IP rights.

IV. PROTECTION OF INDIGENOUS RIGHTS IN INTERNATIONAL LAW

As mentioned earlier, in the last decades the international community has grown more aware on the need to create a comprehensive framework of norms to adequately protect indigenous peoples, and ensure that they fully enjoy and exercise fundamental rights without discrimination and in harmony with their particular customs and traditions.

Nowadays, it is estimated that around 370 million indigenous people live worldwide, constituting 75% of the world’s population. In certain regions of the world, such as Latin America, it is estimated that indigenous populations constitute the 10% of the entire population. The need to provide an effective mechanism of protection to this significant number of persons has become more evident as globalization, environmental impact and threats the integrity and the very existence of indigenous peoples worldwide.

Responding to this need, the international community has developed a small but specific corpus iuris that interprets general Human Rights Law Standards under the views and beliefs of most indigenous groups. These normative developments can be found in declarations (soft law norms), treaties (binding norms) and jurisprudence. With the intention to better monitor the adequate compliance of these norms by State parties, International and Regional Human Rights Organizations have also created specific bodies to

73 It must be noted, however, that the European Court on Human Rights entertains claims of violations of rights enshrined in the European Convention on the Rights to legal persons. Its pier in America, the Inter-American Court, and the Human Rights Committee of the UN on the other hand, cannot entertain claims on violations of the rights embodied in the American Convention or the Covenant of Civil and Political Rights respectively, towards legal persons. See for instance, Eur.Cour.H.R. Case of Anheuser-Busch Inc. v. Portugal [GC], no. 73049/01.2007.
75 Chidi Oguamanam. Protecting indigenous knowledge in international law: Solidarity beyond the nation-state. 8 Law Text Culture 191 2004.
monitor the state of the rights of indigenous peoples in the world. I will briefly mention a few of these mechanisms of protection.

A. General Human Rights Treaties Applicable to Indigenous Peoples

Since human rights must be exercised without discrimination by all human beings, the standards set in what I will call “general Human Rights Treaties” (because they do not address one particular issue) also serve to protect indigenous peoples as communities or individuals. These instruments can be of a compulsory (C) nature, or of a non-binding nature (NB).

Accordingly, the most important Human Rights instruments to date are: The Universal Declaration on Human Rights (NB)\(^ {77}\), the American Declaration on the Rights and Duties of Men (NB)\(^ {78}\), the International Covenant on Civil and Political Rights (C)\(^ {79}\), the International Covenant on Economic, Social and Cultural Rights (C)\(^ {80}\), The American Convention on Human Rights (C)\(^ {81}\), The Protocol of San Salvador to the American Convention on Human Rights on Economic, Social and Cultural Rights (C)\(^ {82}\) the European Convention on Human Rights and Fundamental Freedoms and its Protocols (C)\(^ {83}\) The International Convention on the Rights of the Child (C), among others.

These instruments include provisions that protect the rights to life, personal integrity, due process, property, and freedom of expression, freedom of religion, cultural rights, and environmental rights, among others. The International Convention on the Rights of the child includes special provisions to protect children and youngsters belonging to minorities, such as indigenous peoples.

B. Treaties Specifically Applicable to Indigenous Peoples

In response to the need to provide a protection more suitable to the particularities of indigenous peoples, the international community has developed norms that specifically protect and ensure the exercise

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of their fundamental rights, and impose particular obligations to States towards the indigenous peoples on their territories.

1. The UN Declaration on the Rights of Indigenous Peoples

In 1985, the recently created UN Group on Indigenous Peoples started to work on the draft for an international declaration that would embed the particular fundamental rights to which indigenous peoples worldwide are entitled to. Twenty years and many negotiations later, the Declaration on The Rights of Indigenous Peoples were adopted in 2007. To date, this non-binding instrument is “the most comprehensive statement of the rights of indigenous peoples ever developed, giving prominence to collective rights to a degree unprecedented in International human Rights Law”.

2. International Labor Organization Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169)

In 1989, the General Conference of the International Labor Organization adopted the International Convention Concerning Indigenous and Tribal Peoples in Independent Countries. To date, this is the only binding instrument in International Law that imposes specific obligations to State Parties to ensure, promote and assist indigenous and tribal peoples residing within its territories in the full realization of their civil, economical and cultural rights without discrimination. This is also the first international treaty to introduce obligation to observe the particular traditions and customs of indigenous peoples in applying those provisions or other provisions found in International Law. ILO 169 also establishes the obligation to consult indigenous peoples on matters of their interest, and sets out their rights over ancestral lands.

3. The Draft American Declaration on the Rights of Indigenous Peoples

Since 1982, the Organization of American States has been working on a Draft for an American Declaration on the Rights of Indigenous Peoples. While this instrument has not yet entered into force, the

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88 ILO 169, Arts. 2 and 3.
89 ILO 169, Art. 5
90 ILO 169, Arts. 6,7, 13-20.
text of the draft indicated that it will incorporate other rights additional to those enshrined in the UN
Declaration on the Rights of Indigenous Peoples. For the purposes of this article, it is important to stress
that the current version of Art. XX of the Draft recognizes the right to intellectual property of indigenous
peoples, and the States obligation to ensure such rights through IP regimes and other systems that may be
deem appropriate for such purpose:

“1. Indigenous peoples have the right to the recognition and the full ownership,
control and protection of their cultural, artistic, spiritual, technological and scientific
heritage, and legal protection for their intellectual property through trademarks, patents,
copyright and other such procedures as established under domestic law; as well as to
special measures to ensure them legal status and institutional capacity to develop, use,
share, market and bequeath that heritage to future generations.
2. Indigenous peoples have the right to control, develop and protect their sciences and
technologies, including their human and genetic resources in general, seed, medicine,
knowledge of plant and animal life, original designs and procedure.
3. The states shall take appropriate measures to ensure participation of the
indigenous peoples in the determination of the conditions for the utilization, both
public and private, of the rights listed in the previous paragraphs 1. and 2 (sic)”

C. Treaties that protect the Traditional Knowledge of Indigenous Peoples.

Besides the aforementioned instruments, there are some treaties that contain provisions tending
to protect the traditional knowledge of indigenous peoples, and their right to decide on the use of
the biodiversity existing in their ancestral lands. Here I will mention two important instruments that
address this issue.

1. Convention on Biological Diversity (CBD)\textsuperscript{93}
While the Convention Covers a wide array of issues relating to biological diversity, regarding traditional
Knowledge the State parties agreed to:

“(…)protect the innovations and traditional practices of local and indigenous
communities that embody traditional lifestyles related to the sustainable utilization
and conservation of biological diversity, and will foster their broadest application
with the approval of those who own such knowledge (…). They will encourage that
the benefits derived from the usage of such knowledge are shared equally.” \textsuperscript{94}

2. CAN Decision No. 391 On Access to Genetic Resources\textsuperscript{95}

\textsuperscript{93} Convention on Biological Diversity (CBD). 1760 UNTS 79; 31 ILM 818 (1992). Entry into force on December 29,

\textsuperscript{94} CBD, Art. 2. See also Rodrigo de la Cruz. Conocimientos Ancestrales, Biodiversidad y Derechos de Propiedad
Intelectual/ Patentes. Available at: http://www.docentes.unal.edu.co/grnemogas/docs/10_Cruz_tr.pdf.

\textsuperscript{95} Andean Community of Nations CAN. Decision No. 391 On Access to Genetic Resources. Adopted during the 68th
Adopted in 1996\textsuperscript{96}, Decision 391 established that:

> “The Member States, in accordance to this treaty and their national legislation, acknowledge and value the rights of indigenous, afro-American and local communities to decide on issues that affect their knowledge, innovations and traditional practices associated with genetic resources and derivate products.”\textsuperscript{97}

The aforementioned instruments provide certain level of protection to the fundamental rights of indigenous peoples, and more specifically, to their rights over TK. Some of these instruments, like the UN Declaration, are non-binding instruments, and while they enshrine standards that the international community belief adequate for the protection of indigenous peoples, in practice, it is impossible to make them enforceable before the competent UN Bodies. Others, like ILO 196, CBD and Decision 391 are binding documents, nevertheless lack of an international mechanism to make their provisions enforceable.

The latter means that the only compulsory mechanisms available at the international level to protect and promote the rights of indigenous peoples that exist at the regional level, with the European and Inter-American Courts of Human Rights. The following sections will describe the standards that the Inter-American Court of Human Rights has created to protect the fundamental right to property over ancestral lands of indigenous peoples, and will further attempt to apply those standards to the rights over TK.

V. THE INTER-AMERICAN SYSTEM OF PROTECTION OF HUMAN RIGHTS AND THE DEVELOPMENT OF COMMUNITARIAN INDIGENOUS HUMAN RIGHTS: GENERAL STANDARDS THAT CAN BE APPLIED TO THE PROTECTION OF TRADITIONAL KNOWLEDGE

Perhaps the international tribunal that has contributed the most to the development of a comprehensive set of standards that protect the rights of indigenous peoples is the Inter-American Court of Human Rights, a special judicial body of the Organization of American States. While it is not necessary to describe in detail the work of the bodies of the Inter-American System of Protection of Human Rights\textsuperscript{98}, it will suffice to mention that both entertain cases of alleged violations to the fundamental rights enshrined in the American Convention on Human Rights\textsuperscript{99}. However, the judicial decisions adopted by the Inter-American Court are

\textsuperscript{96} Rodrigo de la Cruz. \textit{Conocimientos Ancestrales, Biodiversidad y Derechos de Propiedad Intelectual/ Patentes}. Available at: http://www.docentes.unal.edu.co/grmemogas/docs/10_Cruz_tr.pdf.

\textsuperscript{97} Decision 391, Art. 7.

\textsuperscript{98} The Inter-American System of Protection and Promotion of Human Rights is comprised of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

binding to those States that have ratified the Convention and accepted the compulsory jurisdiction of the Court\textsuperscript{100}.

Since 2001, the Court has adopted 6 decisions\textsuperscript{101} that address violations to the rights over ancestral lands under Article 21 of the American Convention, Right to Property\textsuperscript{102}. In this jurisprudence, the Court has developed standards and rules that serve to interpret the provisions of Article 21 under other international treaties that protect the rights of indigenous peoples (such as ILO Convention 169), and in harmony with the communitarian and holistic vision that indigenous communities have over their property rights over their ancestral lands and the resources found in them.

Having discussed article the possibility entertain international claims regarding IP rights under alleged violations to the right to property, will now describe the existing Inter-American standards on collective property over ancestral land rights to propose a mechanism to protect TK. By analogy, if regional tribunals can certain IP rights claims as alleged violations to the right to property, then it is possible that they can likewise provide a mechanism for protection to the rights to TK as a form of the right to communitarian private property. To this purpose, I will use the classification of the standards as enumerated by Prof. Jo Pasqualluti\textsuperscript{103}.

\textbf{A. Indigenous Peoples Maintain an Spiritual Relation with Their Land\textsuperscript{104}}

In the landmark case of \textit{Awas Tingi v. Nicaragua}, the Court has acknowledged that:

“[
]indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to

\textsuperscript{100} On more information on how the bodies of the Inter-American System of protection of Human Rights, please visit the website of the Inter-American Commission on Human Rights at www.cedh.org and the website of the Inter-American Court on Human Rights at www.corteidh.or.cr.


\textsuperscript{102} Article 21 of the American Convention reads as follows: Right to Property. 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.


the land are not merely a matter of possession and production but [have] a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.\[105\]

The latter implies that in applying any international or national norm that may affect indigenous peoples, States must keep in mind the special relation that they have with their land and the living things on it. For indigenous communities, property rights entail cultural and traditional aspects that serve to ensure their continuous existence in time. Under these premises, we could assume that property over traditional knowledge, which comprises customs and inventions applied to the use and conservation of the natural resources available on their land, must also be regulated under these standards.

B. Indigenous Peoples posses a communitarian right to property over the territories they have traditionally occupied.\[106\]

Since Awas Tigni, until the recently adopted decision on the Case of the Xákmok Kásek Indigenous Community. v. Paraguay, the Court has reiterated that the close relation that indigenous peoples have over the lands they occupy and the resources available in them, “creates a communitarian tradition of communal property of the land, in the sense that property rights are not centered in an individual but on the group and the community as a whole”.\[107\]

Furthermore, in the Case of the Sawhoyamaxa Indigenous Community v. Paraguay, the Court went on to stress that "traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title."\[108\] The Court acknowledges that the exercise of the communitarian right to property cannot be fully ensured without specific titling by the State, but recognizes such right as deriving from the traditional possession of the lands.

The communitarian property rights over the land derive from the tight links between indigenous peoples and the land they have historically occupied. The same principle than can be applied to affirm that indigenous peoples have a communitarian property over their traditional knowledge, which exists as a consequence of the relation with the biodiversity that surrounds them and the developing of their culture.

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through time, being a manifestation of such culture. Likewise, will a more effective protection to the right over traditional knowledge can be achieved through State recognition of such rights (perhaps by providing communities with certificates that recognize such rights) the communitarian right exists due to the traditional practice, and could be, under these standard, protected even though there was not a State’s recognition of such rights.

From here on, we should also assume that the protection available in regional courts will follow the same rationale as the protection provided under Article 21 to ensure and protect communitarian rights to ancestral lands.

C. States’ Obligation to recognize ownership and to provide a registration of title to ancestral lands, and to observe traditional forms of land tenure when granting such titles.

The Court has repeatedly recognized that the traditional ownership of ancestral rights has similar effects as a property title provided by the State, and that such rights impose on the States the obligation to limit and title ancestral lands, for the respective granting of a collective property title to the members of the Community. It has also created the obligation to provide such titles. Perhaps this is the most complicated standard to be applied to the protection of traditional knowledge. Unlike lands, knowledge cannot be measured or limited. Nevertheless, this does not prevent from both community members and States to identify those customs, traditions, and inventions that entail the conglomerated of TK. Accordingly, it is possible that States provide protection to traditional knowledge through the existent IP mechanisms while observing the standards here enumerated.

However, the protection of traditional knowledge through a patent, for instance, would not be the origination of the property right, but a mere recognition of a previously existent right to which indigenous communities are entitled to due to the continuous presence of such knowledge in the cultural and historical life of the community. This last analysis certainly conflicts with the existing IP regime in which rights emerge from the concession of a copyright or patent. Nevertheless, since these standards would aim to protect the communitarian human right to property over traditional knowledge and not IP rights, these problems is not of great significance.

D. Restrictions on Indigenous Property should be carried out observing certain safeguards.\(^{112}\) In general, Article 21 of the American Convention established that the right to property can be subject to limitations provided that such limitations are:

“(1) previously established by law; (2) necessary; (3) proportionate, and (4) with the aim of achieving a legitimate objective in a democratic society. The Court clarified that "the restriction must be proportionate to the interest that justifies it."\(^{113}\)

Besides these requirements, the Court has established further safeguards to ensure that any limitation on the right to communitarian property does not affect their worldview and customs. Therefore, it has been emphatic in imposing the States’ additional obligations when carrying out projects that have an impact in the lives of indigenous communities. As Prof. Pascualutti indicates, “such safeguards require (1) the effective participation of the people in any development or investment plan on their territory, (2) benefit-sharing with the people, and (3) prior environmental and societal impact studies.”\(^{114}\)

The effective participation of indigenous peoples entails an obligation of State Parties to ensure that they are previously consulted before undertaking any project that may affect them. Prior to consultation, States are responsible to carry out environmental impact studies in an impartial manner. The results of such studies must be presented to the communities in a way that is easily understood and will lead to an informed decision on the matter. Since consultation must be made prior the adoption of the project, it may result on a denial on the part of the communities to continue with the project. While certain authors believe that such “veto power” is absolute,\(^{115}\) the Court has suggested that in certain cases, collective indigenous rights can be limited to respond to urgent interests of society.\(^{116}\)

The latter is particularly important when applied to the communitarian property rights over traditional knowledge. Indigenous peoples must participate in deciding if research should be carried out from such knowledge (and possibly within their territory). The impact of such research must be fully understood, and in cases in which it deeply conflicts with the beliefs and customs, the people may even refuse to allow the research.


In practice, two main problems arise from this issue. First, if the possibility to access to traditional knowledge depends solely on the permission of the indigenous communities, in certain cases they might deny access altogether, and deprive society of the possibility of making scientific improvements, particularly in the field of medicine. This scenario not only conflicts with the principles of intellectual property, but may constitute violations on the rights to health and physical integrity of other members of society.

Second, if knowledge was of such importance to society that forces a State to use it regardless the opposition of its owners, they would suffer a great damage to their cultural and spiritual integrity. Unlike lands which can be replaced, beliefs and customs cannot be traded by any sort of goods. Therefore, in these cases, there would not be an adequate mechanism to compensate the communities in cases in which States will have to limit their property rights over traditional knowledge to benefit society as a whole.

The obligation to ensure that the communities enjoy of the benefits of the economical activities carried out on their ancestral lands. This provision is enshrined in ILO 169, the UN Declaration on the Rights of Indigenous Peoples, among others. In the case of indigenous peoples, the right to be participated with the economical revenues of the activities carried out on their lands serves, as Prof. Pascualutti mentions, as a mechanism of compensation for the sacrifices that such projects entail to the members of these communities. While this is true in the case of land rights, when applied to the communitarian property over traditional knowledge, this right also responds to the need to provide the authors of scientific or artistic work with the just revenues for their work, as set forth in Article 15 of the Covenant on Economical, Social and Cultural Rights, mentioned earlier in this article. Benefit sharing with indigenous communities not only will palliate the poverty and marginalization in which they usually live, but will also encourage them to continue sharing their knowledge with the rest of society.

VI. CONCLUSION

In the past decades, the International Community has made significant efforts to develop a comprehensive corpus iuris to protect and ensure the rights of indigenous peoples. In particular, recent concerns have grown with regard of the rights over traditional knowledge of indigenous communities. This issue is closely related to the existing dichotomy between Intellectual Property and Human Rights.

Accordingly, International Organizations have attempted to respond to the questions generated around these areas. Within the United Nations, ECOSOC delivered General Comment No. 17, in which it stated that Intellectual Property Rights and Human Rights are two different things, but recognized the impact that IP has in the exercise of certain fundamental rights. The General Comment however failed to

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address the way in which Intellectual Property affects other fundamental rights. Also, it suggested that the adequate mechanism to protect fundamental rights derived from cultural and scientific creations is through the existing regime of IP. This affirmation ignored that the existing IP regime fails to protect traditional knowledge due to the inconsistencies among both subjects.

In a regional level, the European Court of Human Rights has recognized that certain IP rights are property rights subject to protection under the European Convention, under certain circumstances. Nevertheless, this approach falls short to protect other fundamental rights that are equally affected by IP norms.

When applying these concepts to traditional knowledge, it seems possible to ensure and protect the rights of indigenous peoples before regional tribunals of protection of Human Rights.

In order to acknowledge the special customs and worldview of indigenous peoples when protecting their fundamental right to property, the Inter-American System has developed several standards that serve to understand the way in which indigenous peoples understand and exercise their fundamental rights. Among these standards, the right to a communitarian property and the close relationship that indigenous peoples have with their lands and the natural resources available in them are a few examples of such standards. Furthermore, the Inter-American Court has developed case law that interprets the States ‘obligations towards indigenous peoples regarding their communitarian property rights, such as the obligation to obtain informed consent before undertaking development projects in their lands, the obligation to share benefits of natural exploitation with the communities and the right to respect the decisions of indigenous communities regarding such projects.

Since traditional knowledge is closely related to ancestral lands and the biodiversity, these standards can be applicable to provide international protection to TK in the international and regional arena. This may serve to overcome the inadequacy of Intellectual Property Law to protect traditional knowledge, at least until IP Laws are reformed or the international community creates a sui generis system that better protects the rights of indigenous peoples over their scientific innovations and traditions.