

# 40 Years of Struggle to Protect Te Tiriti, Te Taiao, Taonga and Mātauranga

NGĀ TOKI  
WHAKARURURANGA





*Back L-R Phillip Murray (Te Rarawa) Huhana Lyndon (Ngāti Wai), Aperehama Edwards (Ngāti Wai), Joanie Wilson (Ngāti Koata), Justin Carter (Ngāti Koata), Rāhui Katene (Ngāti Koata), Walter Wells (Ngāti Kuri), Te Warahi Hetaraka (Ngāti Wai), Justice Hetaraka (Ngāti Wai).*

*Front L-R Ngatai Huata (Ngāti Kahungunu), Sheridan Waitai (Ngāti Kuri), Hori Parata (Ngāti Wai), Hema Wihongi (Te Rarawa), Ammon Katene (Ngāti Koata), Jenny-Nelson Smith (Ngāti Kahungunu)*

*Absent: Selwyn Parata, Tina Porou & Meipara Poata (Ngāti Porou) Haami Piripi (Te Rarawa), Ngahiwi Tomoana (Ngāti Kahungunu)*

As part of Ngā Toki Whakarururanga's mandate to bring a te Tiriti o Waitangi lens to the international trade and investment space, we have commissioned Maui Solomon to write a paper on the struggles Māori have faced in recent decades in relation to ensuring their rights and responsibilities are recognised and protected in the development by New Zealand's of laws and policies for Intellectual Property Rights, international trade, Te Taiao and Mātauranga Māori. Ngā Toki Whakarururanga gratefully acknowledges funding from the Michael and Suzanne Borrin Foundation to support the research and publication of this work. The views expressed are those of Ngā Toki Whakarururanga and not of the Borrin Foundation.

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## Purpose of this Paper

The primary purpose of this paper is to examine the various challenges that have been faced by Māori and the efforts that have been made over the past 40-plus years to articulate and argue for their cultural rights and obligations to be recognised, respected and protected with Aotearoa New Zealand's legal and political system. A particular focus will be on the interface and conflicts between the intellectual property rights system, New Zealand's trade policies and the rights and obligations of Māori and other Indigenous Peoples, including Te Tiriti o Waitangi, Wai 262 Claim, GATT/WTO TRIPs, WIPO, WTO, CBD, UNDRIP, Mataatua Declaration and related initiatives at both the national and international levels.

## Te Taiao, Tangata Whenua and the Western System of Intellectual Property Rights

Moriori Imi from Rēkohu and Māori Iwi from Aotearoa are as equally concerned with their *obligations* to one another and to the natural world at large, as they are concerned with asserting their *cultural* rights. Without access to their rights, they are inhibited from fulfilling their obligations as kaitiaki. This is fundamental to the holistic relationship of respect and reciprocity that exists between Indigenous Peoples and te taiao. The notion that Indigenous rights and obligations can be 'protected' within a western capitalist model of intellectual property rights is not only contrary to this holistic relationship between Indigenous Peoples and te taiao, but is contrary to what Māori and other Indigenous Peoples have been saying for the past 50 years. Despite these very clear and often loud messages to both national and international governing bodies, there has been a concerted and consistent effort on the part of the 'powers that be' to concertina Indigenous Cultural Rights within the existing intellectual property rights (IPR) system. You may well ask, why? This question will be addressed more fully in the following pages, but in summary it suits the economic (and also political) interests of those who control the levers of power to maintain the status quo.

The IPR system was designed by capitalists, for capitalists and it is they who control the majority of the world's intellectual property rights, which are extremely valuable forms of capital that sit at the heart of the western capitalist model. Many of these IPRs, such as patents relating to genetic resources, have been acquired by multi-national companies exploiting the trust, traditional knowledge and natural resources of Indigenous Peoples without their consent and without sharing any of the commercial benefits from those patents with these communities. As Māori and Indigenous Peoples have found out to their detriment over the past 50 years, the rhetoric of 'recognising and protecting' Indigenous Peoples rights to their cultural and intellectual heritage is only matched by their unwillingness of those who benefit to do so.

## Whakapapa and the Māori View of The Natural World

Māori origins are traced back to the beginnings of creation - *Te Kore* (total darkness). There was no life, only potential. *Papatuanuku*, the Earth Mother and *Ranginui*, the Sky Father were clasped together stifling all growth. Their children, desperate for light, devised a plan whereby one of them, *Tane Mahuta*, God of the Forests would separate his parents. Binding to his mother below, he pushed upwards with his legs with all his strength and pushed his father apart from the earth.<sup>1</sup>

Into the light sprang the raging winds of *Tawhirimatea* (God of the Winds), the swirling seas of *Tangaroa* (God of the Sea) and the towering forests of *Tane Mahuta*. *Tane Mahuta* fashioned the first human, *Hine-ahu-one* from the clay of his mother; and so developed the spiritual home of Māori, the home of their gods and of creation.

The Māori name for indigenous peoples is *Tangata Whenua* - the 'peoples of the land' and for Moriori is *Waina Pono*. The Moriori people of Rēkohu (Chatham Islands) claim to have sprung from the earth (no ro whenua ake). Legends tell of waka (canoes) arriving on Rēkohu and Aotearoa from ancient homelands in the Pacific Islands.



*The Tutarā, an ancient species of Aotearoa and a taonga claimed by Ngāti Koata as part of their Wai 262 claim. (Photo credit: Hema Wihongi)*

Like other indigenous peoples, Māori have a unique relationship with their natural world. They view themselves as one with the natural world. The people, the land, the sea, the forest and all living creatures, are all members of the same family. Māori have a direct *whakapapa* (genealogical) connection through their ancestors. Western science is only now beginning to catch on to this notion of inter-connectedness of all things through the unravelling of the human genome project which revealed how genetically close human and other species are related to one another and the more recent discoveries by quantum physics<sup>2</sup> that there is a 'Universal Life Force' or what Māori describe as 'Io Matua Kore', Native Americans call the 'Great Creator' and Aboriginal Australians describe as the 'Dreamtime'.

In order for Māori and Moriori to survive and prosper from the land and sea, complex rituals and protocols were developed to regulate the behaviour between people and their natural world. Ritual obligations of reciprocity and respect were observed before accessing and utilising any resource. Karakia (blessings) for instance, were spoken before cutting down a tree to build a waka (canoe). Acknowledging the spiritual dimension of their universe and respecting the mauri (central life force) of every living thing was fundamental to Māori and Moriori. Reciprocity of obligations are balanced against the right to use and exploit, but must always take precedence. In this way a balance between respecting and exploiting Mother Nature is maintained.

Whakapapa and tino rangatiratanga are at the heart of the relationship that Māori have with te taio. Whakapapa is what connects the claimants to their taonga, and tino rangatiratanga (in all its dimensions of control, rights and obligations) is what enables them to give full expression to their relationships with these taonga. These are essential to the claimants' culture and identity.<sup>3</sup>

<sup>1</sup> Maui Solomon, 'Intellectual Property Rights vs Indigenous Peoples Rights and Obligations', 2000. Available at: <https://inmotionmagazine.com/ra01/ms2.html>

<sup>2</sup> See, for example, Alexis Karpouzou, *Universal Consciousness: The bridges between science and spirituality*, 2020 and Christopher Thomas, *This Incredible Universe*, e-book, 2012.

<sup>3</sup> Wai 262 Closing Submissions for Te Tai Tokerau Claimants September 2007. On file with author.



*Moriori Tuahu or altar upon which offerings to the Etchu' or Atua were made during seasonal harvest of fruit or when fishing (photo credit: Maui Solomon). In this way respect was paid to the deities who in turn provided bounty from the land and sea to feed the people.*

From whakapapa comes the rights and responsibilities of being *tangata whenua* – *people of the land*. Those rights and responsibilities are encompassed in a world view, a way of existing according to tikanga, customs and laws, which include the following key concepts: kaitiakitanga, tapu, manaakitanga, mana, aroha, whanaungatanga, wairua and mauri.

The authority to live according to that world view is tino rangatiratanga, which was guaranteed under Te Tiriti o Waitangi 1840. Te Tiriti was a constitutional guarantee that tangata whenua would be able to live in accordance with their world view, and exercise rights of ownership, control and decision making over ngā taonga katoa which were essential to fulfill their obligations of *kaitiakitanga* (guardianship and protection) and *manaakitanga* (sharing and providing for others). That guarantee placed necessary limits and restrictions on the authority on the Crown in the exercise of kāwanatanga in relation to its own people, and imposed obligations to actively protect the rangatiratanga, rights and responsibilities of tangata whenua.

This guarantee in Te Tiriti o Waitangi is central to the mauri (the life essence, survival, growth and well-being) of the culture, reo, matauranga and identity of whanau, hapu and iwi. Enhancing the well-being and mauri of tangata whenua has significant consequences for the well-being of all of the peoples of Aotearoa. Enhancing the well-being and mauri of tangata whenua has significant consequences for the mauri of all species of indigenous flora and fauna.

## Matāuranga Māori (Indigenous Knowledge) – what is it?

*Mātauranga ... can be simply expressed as the cultural knowledge system of Māori that is grounded within the values, beliefs, and practices of Māori and are fundamentally and inextricably linked. Without a direct link to that cultural system of values, beliefs, and practices the knowledge loses integrity...*

Usefully, the *Ko Aotearoa Tenei [Wai 262] Report*,<sup>4</sup> noted that mātauranga is derived from the verb ‘mātau’ – to describe knowing. With this understanding, you could say that mātauranga could be described as Māori epistemologies, i.e. not only ‘knowing’, but also ‘how something is known.’ Specifically, how Māori explain, make sense of, and codify phenomena and reality within the physical and metaphysical universe. Other terms such as kōrero, mōhiotanga, māramatanga, and wānanga are also synonymous with knowing and knowledge in certain contexts.



*L-R Hema-Nui-A- Tawhaki Witana or Dell Wihongi named claimant for Te Rarawa in Wai 262 and Haana (Saana) Murray, named claimant for Ngati Kuri in Wai 262. Photo taken overlooking Parengarenga Harbour, Te Hapua, 2006. (Photo credit, Maui Solomon).*

An important aspect of mātauranga is understanding that it is local and site-specific. [Sir Edward] Durie reinforces this point, “mātauranga is not owned equally by all Māori. While some knowledge is common to Māori people generally, much traditional knowledge is of tribal origin and ownership correspondingly lies with tribes, sometimes Iwi, sometimes hapū.

It is therefore important to distinguish mātauranga Māori from mātauranga-ā-Iwi (and in turn, mātauranga-ā-hapū), noting that, “while Māori core values and principles are located within mātauranga Māori, the application of these values and principles are filtered through mātauranga ā-Iwi.” Each Iwi has its own specific sense and use of these core values and principles that link them with their particular environment. This tribal application cannot be applied to another tribe, as they will have their own application that links them to their environment and Iwi.<sup>5</sup>

Māori have faced many threats to the continued use and also misuse of their mātauranga and tikanga over the past 180 years. The first major assault began with the passing of the Tohunga Suppression Act 1907 that was designed to eliminate the influence of tohunga in the practice of Māori healing techniques, rongoa, spirituality and tikanga. The colonial government and settlers viewed these practices and knowledge with deep suspicion viewing them, as they were, from an entirely mono-cultural and ignorant perspective. The legislation had a profound effect on Māori culture and identity with Tohunga and Māori elders being persecuted and ridiculed resulting in the suppression of mātauranga and Māori identity.

<sup>4</sup> The Six founding claimant tribes of the two hundred and sixty second claim to be filed with the Waitangi Tribunal (thus known colloquially as the ‘Wai 262 Claim’) are Ngati Kuri, Te Rarawa, Ngati Wai, Ngati Kahungunu, Ngati Porou, and Ngati Kuia. The claim was filed in 1991 and sought tino rangatiratanga over indigenous flora and fauna and associated mātauranga me o o ratou taonga katoa. It is discussed further below.

<sup>5</sup> Marcus-Rongowhitiao Shadbolt, Helen Potter, Te Puawai Wilson-Leahy, Shaun Ogilvie, ‘When the Crown Controls Matāuranga’, A Report on a Survey of Crown Policies, Legislation, Programmes, Legislation, Funding and Impact Assessment Relating to Matāuranga Māori, 2022, page 3.



*Teaching about the traditional use by Moriori of the Kopi Tree and its fruit to Rangatahi. L-R – Tamarau Solomon, Tom Lanuaze, Hinemata Solomon, Taz Forbes and Jasper Forbes, Hapupu Reserve, Rekohu 2007. (Photo credit: Maui Solomon)*

Much of this traditional knowledge and associated practices were forced underground and generations of Māori were deprived of learning about their own culture and identity. The Act was finally repealed in 1962, but the damage had been done. Māori (and Moriori) were being taught by Pakeha teachers and Pakeha society at large to leave behind their 'Māoriness' and focus on becoming good brown citizen in the newly minted Pakeha world. The author had direct experience of this general attitude growing up in 1960s and '70s in rural New Zealand.

The next major attack on matauranga Māori arrived in the 1980s and 1990s (at the same time as Māori were beginning to regain a measure of respect for and revival of matauranga) with New Zealand joining the new neo-liberal world of free trade and standardisation of intellectual property rights around the globe. This would have the effect of exposing matauranga and associated taonga to unauthorised commercial exploitation and the potential to erode the cultural values underlying this misappropriation of matauranga. How would Māori respond?

<sup>6</sup> See for full text <https://ngaaho.Māori.nz/cms/resources/mataatua.pdf>. The Mataatua Declaration was formerly registered with the United Nations in Geneva on 26 July 1993 (E/CN.4/Sub.2/AC.4/1993/CRP.5)

## The Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples<sup>6</sup>

One of the first and most important responses from Māori and other Indigenous Peoples was to meet in Aotearoa in 1993 to discuss and propound a declaration on Indigenous notions of intellectual property rights. In June 1993, the International Year of Indigenous Peoples, the nine tribes of Mataatua convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples. This hui was attended by over 150 delegates from fourteen countries, including indigenous representatives from Ainu (Japan), Australia, Cook Islands, Fiji, India, Panama, Peru, Philippines, Surinam, USA, and Aotearoa.

The Conference met over six days to consider a range of significant issues, including the value of indigenous knowledge, biodiversity and biotechnology, customary environmental management, arts, music, language and other physical and spiritual cultural forms. On the final day, a declaration was passed by the Plenary.

In its preamble, the declaration establishes the core objectives and values that the conference attendees considered were fundamental to preserving, protecting and promoting the rights of Indigenous Peoples in relation to their cultural and intellectual property:

*“Declare that Indigenous Peoples of the world have the right to self-determination and in exercising that right must be recognised as the exclusive owners of their cultural and intellectual property;*

*Acknowledge that Indigenous Peoples have a commonality of experiences relating to the exploitation of their cultural and intellectual property’;*

*Affirm that the knowledge of the Indigenous Peoples of the world is of benefit to all humanity;*

*Recognise that Indigenous Peoples are capable of managing their traditional knowledge themselves, but are willing to offer it to all humanity provided their fundamental rights to define and control this knowledge are protected by the international community;*

*Insist that the first beneficiaries of indigenous knowledge (cultural and intellectual property rights) must be the direct indigenous descendants of such knowledge;*

*Declare that all forms of discrimination and exploitation of indigenous peoples, indigenous knowledge and indigenous cultural and intellectual property rights must cease.*

These core principles have stood the test of time and after more than 30 years remain relevant and important to Māori and all Indigenous Peoples. It is worth noting that the Declaration also reflects the generosity that characterises and distinguishes Indigenous Peoples’ attitude to intellectual property, in that while acknowledging that Indigenous Peoples are the exclusive rights holders of their cultural and intellectual property they are nevertheless “willing to offer it to all humanity”. This notion of a willingness to share with ‘outsiders’ is also a theme that ran through the traditional evidence adduced by the Wai 262 claimant witnesses and is also a strong feature of Indigenous cultures all over the world. This is in stark contrast to the monopolistic, individualistic and economically focussed drivers of the western system of intellectual property rights.

<sup>6</sup> The Six founding claimant tribes of the two hundred and sixty second claim to be filed with the Waitangi Tribunal (thus known colloquially as the ‘Wai 262 Claim’), are Ngati Kuri, Te Rarawa, Ngati Wai, Ngati Kahungunu, Ngati Porou, and Ngati Kuia. The claim was filed in 1991 and sought tino rangatiratanga over indigenous flora and fauna and associated matauranga me o o ratou taonga katoa.



## WTO: TRIPS – Challenges Faced and Responses Made by Māori

The General Agreement on Tariffs and Trade (GATT) had its origins in the post-World War II economic environment and subsequent evolution of international trade policy aimed at fostering export-based economic growth and reducing trade barriers. From 1987 to 1994 the ‘Uruguay Round’ of trade negotiations expanded the GATT from traditional trade in goods to other areas of commercial significance, especially to the US. That included a new agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which effectively standardised IPRs on a global basis to the high levels of protection that operated in the US.

The TRIPS was part of a package of agreements that would be overseen by a new World Trade Organization (WTO). Countries joining the WTO had to adopt the whole package. It was not possible to opt out of complying with the TRIPS or to enter reservations to some of its provisions. Compliance would be enforceable through the WTO’s own court system with potential penalties against exports if New Zealand was held in breach.

New Zealand signed on to that package of agreements in 1994. If it proceeded to ratify the WTO agreements, it would need to ensure that its domestic laws complied. That meant it had to reform its intellectual property rights laws to the higher standardised model dictated in TRIPS.

The government announced in 1994 that it would be introducing legislation to give effect to the results of the ‘Uruguay Round’, including the TRIPS. Māori groups, including Māori Congress and the Wai 262 Claimants vigorously opposed the introduction of any legislation to adopt the TRIPS agreement, which did not have adequate Te Tiriti o Waitangi protections to prevent misappropriation and biopiracy of matauranga Māori and indigenous flora and fauna.

## Indigenous objections to TRIPS

The problem for Indigenous Peoples (especially in developing countries of the Global South) was, and is, that many of these IP rights, such as patents, were held by corporations in the US and Europe over their traditional plants and medicines, and based on their traditional knowledge of those plants and medicines without seeking prior informed consent of those knowledge holders and without sharing any of the commercial benefits derived from those patents. This form of ‘biopiracy’ undermined traditional practices and led to loss of control over cultural and biological heritage within these communities.

Similarly, the new global IPR system enabled appropriation and commercialisation of traditional cultural expressions (TCEs) by companies and individuals outside of those Indigenous communities and without prior consent. One such example in Aotearoa was when LEGO released a range of ‘Bionicle’ toys in 2001 with Māori and Polynesian names, including ‘Tohunga’. The claimants<sup>7</sup> in the Wai 262 Waitangi Tribunal inquiry wrote to LEGO in Denmark objecting to the use of these names as it was culturally offensive to be using ‘tohunga’ for the name of a plastic toy and that there had been no prior consultation with Māori. Initially, LEGO refused to acknowledge any wrongdoing, claiming that there was no legal impediment to their using these names as they were in the ‘public domain’. LEGO even went further by suggesting that Māori should be grateful for a global company such as LEGO promoting their language to an international audience!

Eventually, however, the Wai 262 claimants were able to persuade them that what they were doing was morally wrong and culturally offensive and LEGO agreed to withdraw these offending products from the marketplace. They also expressed a willingness to develop with Māori a code of conduct for toy manufacturing companies wishing to use Indigenous names on commercial products, but as no other such companies were willing to participate, LEGO decided not to proceed.

## Efforts by Māori to Oppose TRIPS and Seek Te Tiriti o Waitangi Protections

As noted above, Māori Congress<sup>8</sup> and the Wai 262 Claimants both made extensive submissions to the select committee and vigorously lobbied politicians to have Te Tiriti protections included into the legislation giving effect to the TRIPS agreement. In a submission to the Commerce Select Committee dated 23 August 1994, Māori Congress submitted that:

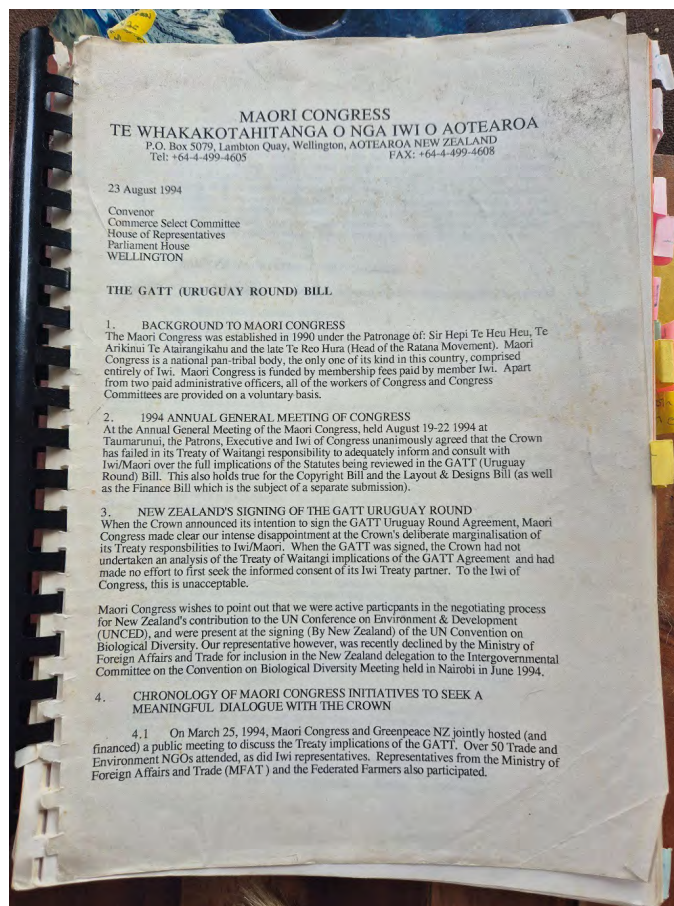
*... the Crown has failed in its Treaty of Waitangi responsibility to adequately inform and consult with Iwi/Māori over the full implications of the statutes being reviewed in the GATT (Uruguay Round) Bill....[When] the Crown announced its intention to sign the GATT Uruguay Round Agreement, Māori Congress made clear our intense disappointment at the Crown's deliberate marginalisation of its Treaty responsibilities to Iwi/Māori. When the GATT was signed, the Crown had not undertaken an analysis of the Treaty of Waitangi implications of the GATT Agreement and had made no effort to first seek the informed consent of its Iwi Treaty partner.<sup>9</sup>*

Māori Congress and Greenpeace NZ also jointly hosted a public meeting to discuss the Tiriti o Waitangi implications of the GATT Bill, which was attended by more than fifty Trade and Environment NGOs, representative of MFAT and Federated Farmers.<sup>10</sup>

The specific objections made in the Māori Congress submission included:

The patenting of human genetic resources;

The patenting of indigenous flora and fauna and their genetic resources;



The commercialisation of Iwi/Māori artforms, visual recordings, whakatauki and many other manifestations of our heritage, both tangible and intangible without the full and informed consent of the customary owners.

We consider all of these resources as TAONGA, guaranteed protection by the Crown in Article II of the Treaty of Waitangi.<sup>11</sup> The submission also noted that Māori Congress had made a statement to the 12th session of the UN Working Group on Indigenous Peoples, opposing New Zealand's ratification of the GATT (Uruguay Round) Agreement.<sup>12</sup>

<sup>8</sup> Māori Congress was a national Māori body set up in 1990 to represent all the tribes of Aotearoa and had as its patrons Sir Hepi Te Heu Heu (Paramount Chief of Tuwharetoa), Te Arikinui Te Atairangikahu (Māori Queen) and Te Hura Reo (Head of the Ratana Movement).

<sup>9</sup> Māori Congress Te Whakakotahitanga o Nga Iwi o Aotearoa, Submission to Commerce Select Committee, House of Representatives, Parliament House, Wellington, 23 August 1994, page 1, paragraphs 2 and 3.

<sup>10</sup> Ibid., paragraph 4.

<sup>11</sup> Ibid., Paragraph 5.

<sup>12</sup> Ibid., Paragraph 11.



*Alliance Minister Hon. Sandra Lee, Deputy Alliance Leader, Minister of Conservation, Minister of Local Government, Associate Minister of Maori Affairs, Speaking in the House of Parliament, 2000. (Photo credit: <https://www.scoop.co.nz/stories/HL0012/S00118/scoop-images-sandra-lee-in-the-house.htm>)*

The Wai 262 Claimants also made submissions opposing ratification of the GATT agreement and lobbied Northern Māori and New Zealand First MP, Tau Henare, to have a Treaty protection clause inserted into the ratification Bill. Speaking in the House in support of the Bill, Tau Henare said he did so only on the basis that a Treaty clause was contained “*somewhere in the Bill.*”<sup>13</sup> He went on to say that -

*All [Māoridom]... is asking for is a decent treaty protection clause in this Bill, no more and no less. It does not hinder the whole Bill. It does not hinder free trade around the world. It protects the indigenous people's rights of this country in terms of intellectual property, flora and fauna, and the very life-being of Māoridom. That is what it protects--nothing more, nothing less.*

*The date the World Trade Organisation comes into force is 1 January 1995. That is far too soon. Issues associated with Māori rights and the Treaty of Waitangi must be discussed and debated only after Māori have had a chance to communicate these concerns.*<sup>14</sup>

Henare further argued in support of a Treaty clause that:

*There are international legal precedents for the protection and recognition of the rights of Māori. The rights of Māori as indigenous people to protection, use, ownership, guardianship, and development of their resources---tangible and intangible---are recognised pursuant to, first, agenda 21 at the United Nations Conference on Environment and Development, Brazil, June 1992. Principle 22 recognises the right to development based on traditional knowledge and practices. New Zealand is a signatory. Second, the United Nations Universal Declaration of Human Rights, article 17 prescribes arbitrary deprivation of property. New Zealand is a signatory.*

*Third, the draft Declaration on the Rights of Indigenous Peoples, articles 24, 26, 27, and 29. This declaration is still under negotiation at the United Nations but is likely to be ratified shortly. Perhaps the only country that will not sign*

*is Indonesia. Fourth, the United Nations Covenant on Civil and Political Rights. New Zealand is a signatory. Fifth, the Convention on Biological Diversity. New Zealand is a signatory but has not ratified it in domestic law.*<sup>15</sup>

Speaking in opposition to the Bill, Sandra Lee, MP for the Alliance Party, was critical of the lack of a transparent process in the negotiation of international trade agreements:

*I would like to raise some concerns about the constitutional procedure that has occurred in the way in which this process in relation to GATT has been dealt with. I am concerned that Parliament has not been given the opportunity to debate the agreement as a whole in this House, unlike the United States Congress, which is able currently to debate the agreement as well as legislation that would amend it.*

*That is important constitutionally but, more important, the Law Commission proposed in August 1993 that, for any treaty, Parliament should be consulted during the negotiation phase, the treaty should be tabled in the House, and a parliamentary debate should occur before ratification if MPs called for it. Our tangata whenua are only too well aware of the difficulty after the fact of separating treaties from the law and the law from treaties. None of those things recommended by the Law Commission has been done in the case of the GATT agreement. I believe that they should have been done. If there is confusion and a lack of information now it is precisely because Parliament has not been afforded that opportunity.*<sup>16</sup>

Lee was also especially critical of the lack of any recognition or protections in the Bill for rights of tangata whenua, the environment and social initiatives:

*Discussion of GATT in New Zealand has been almost completely focused on its impact on primary product exports. However, a number of serious concerns about the agreement have not been adequately debated or given the degree of public scrutiny that we believe they deserve. Many*

<sup>13</sup> Hansard Debate on GATT (Uruguay Round) Amendment Bill, Volume 545, Tau Henare page 111

<sup>14</sup> Ibid., Tau Henare page 112

<sup>15</sup> Ibid., Tau Henare, page 112

<sup>16</sup> Ibid., Sandra Lee, page 89

*of those concerns were very well articulated in front of the select committee by the Māori Congress, Treaty of Waitangi [Wai 262] claimants, the Forest and Bird Protection Society, Greenpeace, Trade Aid, the Environment and Conservation Organisations, and the trade union federation. Their concerns were clearly spelt out. They talked about the lack of protection of Māori intellectual property rights, the lack of environmental protections in GATT, the absence of social protections in GATT, the impact of further import access to the New Zealand market, and the restriction placed by the trade-related investment measures on Governments setting criteria for foreign investment.*<sup>17</sup>

The Treaty clause protection that Tau Henare was seeking to have inserted into the Bill by way of an amendment was similar to section 9 of the State Owned Enterprises Act 1986 that the legislation had to be interpreted in a manner not inconsistent with the principles of the Treaty of Waitangi:

*Treaty of Waitangi protection---Nothing in New Zealand's acceding to the General Agreement on Tariffs and Trade or New Zealand's membership of the World Trade Organisation shall permit the Crown to act in a manner that is inconsistent with the principles of the Treaty of Waitangi.*<sup>18</sup>

Unfortunately, this proposed amendment to the Bill was lost by a narrow margin of only two votes: 40 in favour and 42 against.<sup>19</sup> Had the amendment been successful Māori would have been able to challenge in the domestic courts the prejudicial effects the WTO agreements and related legislation where they breached the “principles of the Treaty of Waitangi”. That included new intellectual property laws whose impacts rongoa, matauranga, and Māori rights and responsibilities as kaitiaki breached the principles of the Treaty. Based on the success that the New Zealand Māori Council and others achieved in challenging the sale of SOE assets under section 9 of the SOE Act during the 1980s and 1990s, the domestic courts may well have upheld at least some of those challenges.

This would also have posed a major conundrum for the Crown. In practice, New Zealand does not ratify a trade agreement

until domestic law has been brought into compliance. The amendment would have made that impossible. If it did proceed with ratification, New Zealand would have been in breach of its obligations under the TRIPS agreement, which would be enforceable through the WTO's distinct dispute settlement system. So the Crown would have had to choose between the trade rules and its obligations under the “Treaty principles”.

That dilemma is at the core of the challenge that underpins this paper. Ignoring its obligations under te Tiriti o Waitangi, the Crown excluded Māori and Moriori from negotiations on TRIPS and the other WTO agreements, and from decisions on whether to adopt them. It adopted binding and enforceable global IP rules that are based on a Western model that is incompatible with tikanga and mātauranga Māori and the exercise of rangatiratanga and kaitiakitanga. These rules then formed the basis for all subsequent free trade agreements, binding New Zealand ever more deeply into a model that is the antithesis of what Māori were guaranteed would prevail under te Tiriti and to obligations under various other international agreements, such as the UN Declaration on the Rights of Indigenous Peoples.

Recent moves in the WTO by India, Brazil and Peru,<sup>20</sup> and Bangladesh, Colombia, Egypt and India,<sup>21</sup> to address this contradiction by reviving promised discussions on “mutual supportiveness” of TRIPS and the Convention on Biological Diversity (CBD) have attracted support little support, including from New Zealand. So the TRIPS and its successor FTAs continue to pose a major barrier to moves by Māori, and other Indigenous Peoples, to develop a system that protects Indigenous rights over mātauranga.

This paper adds to demands to amend these global ‘trade’ rules by documenting a number of initiatives in other international institutions, such as the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge, Traditional Cultural Expressions and Folklore (IGC)<sup>22</sup>, and the adoption of domestic IP laws, such as a *sui generis* law.<sup>23</sup> The long, hard road to develop these initiatives has consistently confronted the same interests that sponsored the TRIPS. But the evidence also shows that Indigenous Peoples do not give up.

<sup>17</sup> Ibid., Sandra Lee, page 90

<sup>18</sup> Ibid., Hansards Debate, page 116

<sup>19</sup> Ibid., page 116

<sup>20</sup> Communication from Brazil, India and Peru, ‘Reviving discussions on the Relationship between the TRIPS Agreement and the Convention on Biological Diversity’, 18 March 2025, IP/C/W/719.

<sup>21</sup> Communication from Bangladesh, Colombia, Egypt and India, ‘TRIPS for Development: Post MC-13 Work on TRIPS-related Issues’, 8 March 2024, IP/C/W/708.

<sup>22</sup> The WIPO IGC process was established in 2000 to investigate mechanisms for accommodating, incorporating and “protecting” traditional knowledge within the existing system of intellectual property rights.

<sup>23</sup> *Sui Generis* is a Latin phrase meaning “of its own kind” or “unique in its characteristics”

## Wai 262 challenge to TRIPS at the Waitangi Tribunal

The narrow loss of the amendment to the Uruguay Round Bill was the catalyst for the Wai 262 Claimants seeking and obtaining urgency for the hearing of their claims before the Waitangi Tribunal in 1995, as an important aspect of the claim was the lack of engagement by the Crown and its various agencies, including MFAT, with Māori in the negotiation of international instrument, including TRIPS, the Convention on Biological Diversity, the Draft Declaration on the Rights of Indigenous Peoples<sup>24</sup>, and many others. As noted in the 2007 closing submissions of the three Wai 262 Te Tai Tokerau claimants<sup>25</sup>:

*With the advent of global markets and increasing international trade and their consequential and often adverse impacts on indigenous peoples including Māori, it is increasingly important that the Māori presence and voice be heard in international fora. Māori have been expressing to the Crown since the 1970s, their desire to be more actively engaged on international issues. The consequence of decisions being made on behalf of Māori by the Crown without consultation or consent of their Treaty partners, have had, and continue to have, prejudicial effects.<sup>26</sup>*

Former trade minister Mike Moore<sup>27</sup> was particularly critical of Māori efforts to thwart the passage of the GATT Bill and referred, using inflammatory language, to contemporary Māori attempts to stop the Multilateral Agreement on Investment (MAI) from being adopted by New Zealand in the following terms:

*We have seen the nonsense about the Multilateral Agreement on Investment. That is just a beginning, with deranged people marching across harbour bridges and stopping the traffic on the busiest road because they think the treaty would defile the Treaty of Waitangi. What nonsense! The Multilateral Agreement on Investment would no more defile the Treaty of Waitangi than it would change the American Constitution. It is just nonsense.<sup>28</sup>*

The MAI aimed to create a comprehensive framework for international investment including in New Zealand. However, MAI faced significant opposition from Māori, Indigenous Peoples, labour unions, environmental groups and some developing countries around the world on the basis that they would all have been adversely impacted by this agreement. They argued that those who would benefit the most from the MAI were large multinational corporations, large investors and developed countries at the expense of workers, the environment and marginalised groups, including Māori and Indigenous Peoples. By the late 1990s the negotiations on the agreement were abandoned.

<sup>24</sup> The Draft Declaration was formally adopted at the United Nations in 2007 after more than 30 years negotiations with New Zealand initially voted against (along with Australia, Canada and the USA) but finally adopting the Declaration on 19 April 2011.

<sup>25</sup> Ngati Kuri, Te Rarawa and Ngati Wai

<sup>26</sup> Wai 262 Closing Submissions (Final Amended Version) for Te Tai Tokerau Claimants, 7 September 2007, page 22, paragraph 48.

<sup>27</sup> Mike Moore was Trade Minister from 1984 to 1990 and appointed in 1999 as the Director General of the World Trade Organisation and held that post until 2002.

<sup>28</sup> House of Representatives, Parliamentary Debates (Hansard), (IPR Bill) First Session, Forty-Fifth Parliament, 1996-98, page 920.

## Intellectual Property Right Acts Amendment Bill 1996 (“IPR Bill”)

The Wai 262 Claimants and other Māori were given assurances by Ministers of the Crown in 1995 in response to their opposition to the GATT Bill, and especially around the lack of protection of taonga and matauranga Māori, that their interests would not be affected or prejudiced and would be addressed in the forthcoming IPR Bill.<sup>29</sup> However, these assurances proved to be both misleading and false.

The Intellectual Property Rights Acts Amendment Bill (“IPR Bill”) was introduced to the House in 1996 to reform New Zealand’s intellectual property laws in accordance with the TRIPS agreement. The main purpose of the IRR Bill was to amend the Trademarks Act to allow for the registration of collective trademarks and to establish a Māori trademark advisory group. The IPR Bill also proposed minor amendments to the Copyright Act, Designs Act, Patents Act and Designs Layout Act.<sup>30</sup>

However, the Māori trademark advisory group had (and continues to have) very limited powers and can only *recommend* a trademark application be rejected if it is “offensive” to Māori but not if it is “inappropriate”. The Commissioner of Patents makes the final decision on these matters and has the power to overrule the advisory committee. Even the inaugural Chair of the Māori Advisory Trademarks Committee, Ms Karen Waaka, would later criticise the lack of protections that the IP laws in New Zealand and the Trade Marks Act in particular, could provide in relation to taonga and matauranga Māori.<sup>31</sup>

Another serious limitation of the IPR system including trademarks is that much of the misappropriation of matauranga Māori and taonga occurs without the perpetrators seeking to register any IP over the taonga in question. In the vast majority of cases where misappropriation of taonga occurs, the words or images are accessed via the ‘public domain’ and the only recourse that Māori have is to initiate a ‘name and shame’ campaign which has had only varying degrees of success. An example given earlier was when LEGO had used the name ‘Tohunga’ on one of its Bionicle toys.

In another well-known case, Moana Maniapoto, an internationally acclaimed Māori musician and performer, was threatened while touring in Europe in 2002, by a German based company, Media – XS with an injunction and a legal suit for monetary damages, if she did not stop using her own name “Moana” for the title of her album. She was forced by Media-XS to change the name of her album to “Moana and the Tribe Wha”. The German company had trademarked the name “Moana” and licensed it to a German trip-hop band calling itself ‘Moana’. In addition, Media-XS had trademarked forty commercial items under the brand name ‘Moana’ including CDs, soaps, fantasy toys and anything made out of cardboard or paper. As Moana Maniapoto herself explains – “*Silly me had breached the trademark registration by releasing an album under my own name. Who’d have thought?*”<sup>32</sup>

As noted by the Wai 262 Claimants in their closing submissions:

*Although matauranga Māori has found its way into the public domain, there are still obligations upon both Māori (in terms of kaitiaki responsibilities) and obligations on the Crown [via active protection of taonga under Te Tiriti] to actively protect that knowledge.*<sup>33</sup>

Speaking to the IPR Bill, Hon. Mike Moore again disagreed that Māori rights or culture could be prejudiced in any way by the passing of the IPR Bill:

*But it is misleading to say that this Bill, ... will be an attack upon indigenous rights, as has been suggested in subsequent submissions. It is really not fair to this Government.*

*It is the responsibility of the Government now, and particularly of some of its Māori members, to stand up and say that this will be a good thing for the world economy. It could be good for New Zealand, and we have to do further work with the World Intellectual Property Organization about how we can lock in certain cultural assets.*<sup>34</sup>

But the Deputy Leader of the Alliance Party, Sandra Lee, explained when also speaking to the Bill:

<sup>29</sup> Wai 262 Closing Submissions (Final Amended Version) for Te Tai Tokerau Claimants, 7 September 2007, page 107, paragraph 330.

<sup>30</sup> House of Representatives, Parliamentary Debates (Hansard), (IPR Bill) First Session, Forty-Fifth Parliament, 1996-98, page 929.

<sup>31</sup> Karen Waaka’s presentation to the Inter-Governmental Committee (“IGC”) of WIPO: WIPO Report – Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eighth session, Geneva 6-10 Jun 05, 22 Dec 2006, #R16(III) on Wai 262 ROI.

<sup>32</sup> Article by Moana Maniapoto, ‘A brand-new princess of colour – is it white or black?’, E-Tangata, November 20, 2014

<sup>33</sup> Ibid., Wai 262 Closings, page 113, paragraph 346.

<sup>34</sup> Ibid., page 935.

*The Alliance's concerns with this Bill are the same as those that I outlined in this House in the debate on GATT in 1994, and I will say them again for the record. My concern is that yet again this Bill fails to make provision for the protection of Māori intellectual property rights.*

*Perhaps that is to be expected, given that the comprehensive Wai 262 claim is yet to be heard by the Waitangi Tribunal. That claim has been before the tribunal, waiting to be heard since before GATT was introduced into this House. In my view, the Crown has an obligation to hear the claim in full and to consider the tribunal's recommendations before facilitating legislative amendments on intellectual property generated by GATT.*

*I draw to the attention of the House the legislative impediment on the Waitangi Tribunal to conduct an inquiry into any matter that is the content of a Bill before this House. It is therefore problematical that the policy and content of this Bill will affect Māori intellectual property rights, for the simple reason that the Waitangi Tribunal has not finalised---in fact, it has yet to commence---its inquiry into this matter and to find the true extent of Māori intellectual property rights in the context of the Treaty of Waitangi.*

Lee (quoting from a University of Waikato publication) then helpfully set out the reasons why Māori rights and interests would be prejudicially affected by the IPR Bill:

*IPRs rights are a Western construction, which is not necessarily appropriate to indigenous conceptions. The relationship between indigenous peoples and resources and knowledge is culturally specific and generally does not include the concept of `rights'. The categories between cultural, intellectual and physical property are not mutually exclusive in ways that fit concepts of IPRs. Spirituality and sacredness are interconnected with resources in ways which do not fit Western concepts.*

*IPRs are designed to protect identifiable individual innovations, not communal knowledge. Traditional knowledge is usually the result of the contributions of many people over a long*

*period. Generally, the identity of the originators is unknown, and if known is ancient. Although some individuals within a community, such as traditional healers, may have specialised knowledge, they do not have the right to sell that knowledge commercially.*

*The protection afforded by IPRs is temporary, and lapses after a given period, whereas permanent protection is required for the intergenerational protection of traditional knowledge and resources. Since most traditional knowledge is ancient, it would not qualify for protection.*

*The Bill will join other current intellectual property rights that are seen by many Māori as being a device simply to satisfy the commercial imperative requirements of GATT and the Agreement on Trade-related Aspects of Intellectual Property Rights while doing little or nothing to increase genuine protection for Māori cultural property. While Māori do not seek to stifle or over-protect through the intellectual property right argument, the communal responsibility and ownership of Māori intellectual property rights are not seen as being able to be owned and controlled to the exclusion of the many in the interests of the few.*

*Copyright legislation effectively restricts customary rights to Māori literary works, because the Act is silent about traditional tribal ownership of copyright and protection. The current copyright law does not provide adequate recognition of indigenous community claims to control and protect the reproduction and use of works that are communal in origin. This Bill does nothing to address such legislative shortcomings. There are emerging trends in the debate on indigenous knowledge in this area that reveal that intellectual property laws are not affording adequate protection of indigenous taonga, not just in this country but right throughout the world. These include the demise of indigenous populations and the loss of indigenous languages, the loss of biological diversity, intellectual property rights regarding biological matters, plant varieties, and life forms to name but some.<sup>35</sup>*

<sup>35</sup> Ibid., pages 935 to 937



*Kokohinau Marae, Te Teko (Photo credit: Aroha Mead)*

## The Wai 262 Claim and the Intellectual Property Rights Regime

One of the most significant challenges to the IPR system by Indigenous Peoples anywhere in the world was initiated by six Iwi of Aotearoa when they filed their historic claim with the Waitangi Tribunal in 1991. As it was the 262nd claim to be filed with that august quasi-judicial body, it has become known colloquially and the ‘Wai 262 Claim’.

As articulated by Dr Darrell Posey<sup>36</sup> in 1996 in his visionary and groundbreaking publication ‘Beyond Intellectual Property Rights’ it was not possible for the intellectual property rights system to provide any meaningful recognition or protection of Indigenous heritage and cultural rights:

*“Intellectual property rights cannot adequately protect the knowledge and resources of indigenous peoples, nor are they a panacea for the lack of self-determination of indigenous peoples and the inequalities of wealth and power between local communities on one hand and governments and corporations on the other.”*<sup>37</sup>

Concerned over the increasing loss of native plants and animals, the destruction of ecosystems and the continuing loss and misappropriation of matauranga Māori, a group of Māori elders got together in 1991 and with the assistance of the late Dr Moana Jackson, formulated a claim to the Waitangi Tribunal. The claim was in relation to the indigenous flora and fauna of Aotearoa and all associated tikanga and matauranga, as guaranteed to Māori under Article Tuarua o Te Tiriti o Waitangi. The original claimants represented were Ngāti Kuri (Mrs Saana Murray), Te Rarawa (Mrs Hema Nui a Tawhaki Witana also known as Del Wihongi), Ngāti Wai (Mr Witi McMath), Ngāti Porou (Mr Tama Poata) and Ngāti Kahungunu (Ms Kataraina Rimene).<sup>38</sup>

The claim was founded upon the rights guaranteed in Te Tiriti o Waitangi, *Ko Te Tuarua “...te tino rangatiratanga o o ratou wenua o ratou kainga me o ratou taonga katoa.”* And in the English version of Article 2 of the Treaty of Waitangi *“...the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess.*

“The Statement of Claim which was filed in 1991 with the Waitangi Tribunal and amended in 1997<sup>39</sup> states as follows:

### “2 THE CLAIM

- 2.1 The claim relates to te tino rangatiratanga o te Iwi Māori in respect of indigenous flora and fauna *me o ratou taonga katoa* (and all their treasures) including but not limited to matauranga, whakairo, waahi tapu, biodiversity, genetics, Māori symbols and designs and their use and development and associated indigenous, cultural and customary heritage rights in relation to such taonga. ‘Taonga’ in this claim refers to all elements of a tribal groups’ estate, both material and non-material, tangible and intangible.
- 2.2 Reference to ‘indigenous, cultural and customary heritage rights’ in this claim is deemed to include all rights (including intellectual and property rights) past, present and future in relation to taonga o te Iwi Māori.
- 2.3 Te tino rangatiratanga o te Iwi Māori is the authority residing within and exercised by te Iwi Māori o Aotearoa me te Waipounamu/Rēkohu prior to the arrival of the colonial government which includes but is not limited to the full and exclusive rights and responsibilities of manaakitanga, kaitiakitanga and tapu and the development of these rights.
- 2.4 Te tino rangatiratanga o te Iwi Māori incorporates a right of development which permits the Iwi to conserve, control, utilise and exercise rights over indigenous flora and fauna *me o ratou taonga katoa*.
- 2.5 Te tino rangatiratanga o te Iwi Māori incorporated and incorporates:
  - (a) Decision-making authority over the conservation, control of, and proprietary interests in natural resources including indigenous flora and fauna *me o ratou taonga katoa*;

<sup>36</sup> Dr Posey gave evidence in support of the Wai 262 claim at a specially convened hearing in Rotorua in June 1998.

<sup>37</sup> Darrell A Posey and Graham Dufield *Beyond Intellectual Property: Towards Traditional Resources Rights for Indigenous Peoples and Local Communities* (International Development Research Centre, Ottawa, 1996) p 75.

<sup>38</sup> The only one of the original six named claimants to survive to receive the report of the Waitangi Tribunal (‘Ko Aotearoa Tenei: This is New Zealand’), issued in 2011, was Mrs Saana Murray. It had been 20 years since the claim had been filed in 1991 and the long process had taken a large toll on those who had carried the burden of the claim for those many long years. Almost 15 years after the report was released, the Crown has still not implemented any of the findings of the Tribunal but remain in “discussions” with the descendants of the original claimants about “possible” remedies.

<sup>39</sup> The most important amendment to the claim in 1997, was to include the words of the te reo version of Te Tiriti “me o ratou taonga katoa”, to make it clear that the claim encompassed *all* taonga of te Iwi Māori.

- (b) The right to determine indigenous cultural and customary heritage rights in the knowledge and use of indigenous flora and fauna *me o ratou taonga katoa*;
- (c) The right to participate in, benefit from, and make decisions about the application of existing and future technological advances as they relate to the breeding, genetic manipulation and other processes relevant to the use of indigenous flora and fauna;
- (d) The right to control and make decisions about the propagation, development, transport, study or sale of indigenous flora and fauna;
- (e) The right to protect, enhance and transmit the cultural, medicinal and spiritual knowledge and concepts found in the life cycles of indigenous flora and fauna;
- (f) A right to environmental well-being dependent upon the nurturing and wise use of indigenous flora and fauna;
- (g) The right to participate in, benefit from and make decisions about the application, development, uses and sale of *me o ratou taonga katoa*;
- (h) The right to protect, enhance and transmit the cultural and spiritual knowledge and concepts found in *me o ratou taonga katoa*.
- 2.6 The exercise of te tino rangatiratanga o te Iwi Māori as it relates to indigenous flora and fauna *me o ratou taonga katoa* was and is a recognition of an Iwi interest in the continued existence of flora and fauna and cultural taonga as particular species and as interconnected threads of te ao turoa.
- 2.7 That such recognition vested in Whanau, Hapu and Iwi all rights and responsibilities relating to the protection, control, conservation, management, treatment, propagation, sale, dispersal, utilisation and restrictions upon the use of indigenous flora and fauna and the genetic resources contained therein.
- 2.8 Indigenous flora and fauna includes the genetic resources contained therein and the environment in which they reside.
- 2.9 *Me o ratou taonga katoa* includes but is not limited to whakairo, rongoa Māori, waahi tapu, pa sites and Māori cultural images, designs and symbols and associated indigenous, cultural and customary heritage rights in relation to such taonga.
- 2.10 The claimants say that they are or are likely to be prejudicially affected by ordinances, Acts, regulations, Orders in Council, proclamations, notices and other statutory instruments, and the policies, practices, acts or omissions adopted by or proposed to be adopted by or on behalf of the Crown and further as set out in this statement of claim.
- 2.11 The claimants further claim that all of the ordinances, Acts, regulations, orders, proclamations, notices and other statutory instruments, and the policies, practices, acts or omissions adopted by or on behalf of the Crown referred to are and remain inconsistent with the principles of Te Tiriti o Waitangi/Treaty of Waitangi.”
- The claim also includes specific reference to native species of flora and fauna and to the Crown’s obligations to Māori in relation to international treaties and Conventions. In that context, the claimants argued that the New Zealand Government should not make commitments under international treaties and protocols without the prior consultation and agreement of Māori where these treaties impact on Māori rights under the Treaty of Waitangi.
- The claim has had a small measure of influence on government policy. For example, and as noted above, in 1994 the claimants narrowly failed to obtain a Treaty of Waitangi protection mechanism in the legislation giving effect to the GATT: TRIPS Agreement. The vote was lost 40:42 in Parliament on the GATT: TRIPS (Uruguay) Round Bill. Almost 50% of the Ministers of Parliament agreed that some form of prejudice to Māori rights would arise. And they were right.



7 May 2012

Moana Jackson, Maori lawyer, addresses the Eleventh Session of the UN Permanent Forum on Indigenous Issues, "The Doctrine of Discovery: Its Enduring Impact on Indigenous Peoples and the Right to Redress for Past Conquests".

The claimants were also successful in lobbying the Minister of Commerce in 1995 to defer the Intellectual Property Law Reform Bill that was then on the Government's legislative agenda. The purpose of the deferral was to allow more time for Māori to engage with the Crown about alternative ways in which Māori culture and heritage rights and responsibilities could be recognised and protected under NZ law; but ultimately these efforts proved futile and the IPR Bill was rushed through Parliament in 1996.

Without the rights of *tinu rangatiratanga* (including rights of ownership, control and decision making), Māori are unable to exercise their obligations of *kaitiakitanga* (guardianship and protection) and *manaakitanga* (sharing and providing for others). How can Māori care for the land and its resources if they are denied ownership or control over it?

The Tai Tokerau Wai 262 Claimants argued in their 2007 closing submissions that Te Tiriti o Waitangi promised a partnership in which both partners' cultures and customs would be preserved and maintained. The 'Western' system, and more particularly in the context of the Wai 262 claim, the IPR system, has predominated to the point where Māori customary law, *kaitiakitanga*, *matauranga* and *tikanga* had been suppressed and marginalised to such an extent so that only token recognition was being given to such customs in mainstream New Zealand law and policy.<sup>40</sup>

They submitted that for this imbalance to be redressed a new system grounded in *tikanga* Māori and incorporating aspects of 'tikanga Pakeha' would need to be designed and implemented. In other words, a bespoke *sui generis* system that would provide protection and expression to the *tinu rangatiratanga ... me o ratou taonga katoa*.

In relation to what the Crown should do (in conjunction with Māori) to develop a *sui generis* system in Aotearoa to protect taonga Māori, the claimants submitted that the Crown must establish *sui generis* systems that will enable Māori to, inter alia:<sup>41</sup>

*Control access to, disclosure and use of traditional knowledge in accordance with tikanga;*

*Exercise the right to require prior informed consent for any access to or disclosure and use of traditional knowledge;*

*Ensure that they derive fair and equitable benefits from the wider application of their traditional knowledge, innovations and practices.*

The claimants also submitted that *sui generis* systems will only be effective if there are complementary measures at the regional and international level. The Crown's obligations are, therefore, not limited to the establishment of national systems;

<sup>40</sup> Wai 262 Closing Submissions (Final Amended Version) for Te Tai Tokerau Claimants, 7 September 2007, page 106, paragraph 327.

<sup>41</sup> Ibid., Wai 262 Closings, pages 322 and 323

<sup>42</sup> Ibid., Wai 262 Closings page 323.

<sup>43</sup> This framework was based upon the concept of an "Ethical Space": that had been developed by a Canadian Cree Elder and Educator, Willie Ermine, as part of his Masters Thesis in 2002. It has since been widely adopted in Canada in the negotiation and settlement of some of their own claims against the Canadian government and in other jurisdictions, including by the Wai 262 Claimants.

<sup>44</sup> Ibid., Wai 262 Closing pages 301 to 303.

the Crown must also take steps to actively protect taonga Māori at the regional and international levels.<sup>42</sup>

The Wai 262 Claimants further sought urgent and interim remedies from the Tribunal to direct the Crown to immediately engage with the claimants through what they described as an 'Ethical Framework for Resolution'<sup>43</sup> to develop a suite of options for resolution of various aspects of the claim. In relation to Mātauranga and its protection, the claimants sought recommendations that:<sup>44</sup>

The Crown co-operate and engage with the Wai 262 claimants in the development and implementation of an agreed 'Ethical Framework for Resolution' as outlined in these submissions for the purposes of agreeing to and implementing a co-ordinated and comprehensive framework of legislation and policy, including (but not limited to):

The *preservation* of mātauranga and customary laws and practices by way of:

*in situ* initiatives within the kaitiaki communities to maintain and strengthen mātauranga, (e.g. cultural heritage, nga reo programmes, capacity building within kaitiaki communities) and to maintain and strengthen the inter-generational transmission of mātauranga (e.g. wananga, tohunga, education curricula); and *ex situ* initiatives (with the prior informed consent and effective participation of kaitiaki) to safeguard mātauranga from erosion and loss, in circumstances where mātauranga is held by agencies independent of the kaitiaki communities (e.g. archives, libraries, museums, educational institutions);

The protection of mātauranga and customary laws and practices by which kaitiaki can control access to, disclosure and use of mātauranga, prevent the misappropriation of mātauranga, and derive equitable benefits from the application of mātauranga by way of:

Application of customary laws and protocols as determined by the appropriate kaitiaki ;

*Sui-generis* models of protection based on intellectual property principles, which include, inter alia, applying the principles of prior informed consent of the kaitiaki and equitable benefit sharing;

Development of non-legal forms of protection including codes of ethics, codes of conduct and research guidelines;

The development and use of educative programmes and other awareness-raising mechanisms;

The *promotion* of mātauranga and customary laws and practices by which kaitiaki can harness mātauranga for sustainable development, including:

Encouragement and facilitation of partnerships between kaitiaki communities and research institutions/foreign investors for research programmes on mātauranga and/or biodiversity-related knowledge applying principles of prior informed consent and benefit sharing;

Incentives to stimulate tradition-based innovations and creativity under those principles;

Support for local, national and export production of mātauranga derived products; technical assistance on new product development, and facilitation to meet international product standards.

A recommendation that relevant government departments, and Crown agencies with responsibilities in relation to preservation, protection and promotion of mātauranga Māori (including tikanga, taonga works, reo and biological and genetic resources):

Accord priority to traditional knowledge and customary practice issues of kaitiaki in their relevant policy and planning documents and identify work in the output plans agreed with their Ministers;

Reaffirm their commitment to the Cabinet Minute of November 2001 to be proactive in the international fora in pursuing and protecting cultural and intellectual heritage rights and responsibilities of Māori;

<sup>45</sup> Ibid., Wai 262 Closings pages 304 to 305



*Photo taken at the time of the pre-release of the Wai 262 Report “Ko Aotearoa Tenei” in 2011. Saana Murray (sitting) was the last of the original claimants living to receive the report.*

Ensure that Māori are consulted and adequately resourced to attend international meetings independently and as part of government delegations;

Ensure that relevant officials working on international files relating to preservation, protection or promotion of matauranga related issues have sufficient understanding and comprehension of the issues to avoid the “fear factor” mentality that has influenced the work of some government departments as revealed in the evidence;

Report annually to a Select Committee of Parliament on progress towards achieving the above objectives.

In relation to the international arena, the Wai 262 Claimants sought the following remedies through engagement in the proposed *‘Ethical Framework for Resolution’*:<sup>45</sup>

Ensuring the full and effective participation of Māori in all international fora dealing with issues relating to traditional knowledge and/or biological and genetic resources including, but not limited to, the CBD, dDRIP, WIPO, UNESCO and WTO. Such measures for participation to involve:

Independent representation of Māori in these fora;

Provision of adequate funding and resources to enable independent Māori representation;

Ensuring appropriate skilled Māori are included in New Zealand Government Delegations to these fora.

That the Crown undertake full and effective consultation with Māori prior to attending international meetings in order to arrive at agreed statements relating to New Zealand’s interventions in these fora;

That the Crown take a proactive stance in these international fora to advocate for protection of the rights and interests of Māori to their matauranga and associated cultural and intellectual heritage rights;

That the Crown, in collaboration and agreement with Māori,

support the adoption of the Declaration on the Rights of Indigenous Peoples by the United Nations General Assembly.

A requirement that relevant government departments and Crown agencies with responsibilities for international issues affecting or relating to matauranga Māori and flora and fauna:

Accord priority to traditional knowledge and customary practice issues of kaitiaki in their relevant policy and planning documents and identify work in the output plans agreed with their Ministers;

Reaffirm their commitment to the Cabinet Minute of November 2001 to be proactive in the international fora in pursuing and protecting cultural and intellectual heritage rights and responsibilities of Māori;

Ensure that Māori are consulted and adequately resourced to attend international meetings independently and as part of government delegations;

Ensure that relevant officials working on international files concerning flora and fauna and traditional knowledge related issues have sufficient understanding and comprehension of the issues to avoid the “fear factor” mentality that has influenced the work of some government departments as revealed in the evidence; Report annually to a Select Committee of Parliament on progress towards achieving the above objectives.

The Crown’s response to this request by the claimants was to suggest that, whilst the TRIPS agreement enabled development of *sui generis* mechanisms under Article 27(3) of that agreement, any such bespoke mechanisms would have to be consistent with the philosophy of the TRIPS agreement and that to do otherwise, would require amendment of the TRIPS agreement, which “*would not be in New Zealand’s international trade interests.*”<sup>46</sup>

On the basis that multiple witnesses for the Crown had conceded in cross examination that matauranga was a taonga and needed protecting, the Wai 262 Claimants sought urgent and interim findings and recommendations from the Tribunal

<sup>46</sup> Ibid., page 107, paragraph 329 per Gerard Van Bohemen, Brief of Evidence for MFAT, #R34 on Wai 262 Record of Inquiry

<sup>47</sup> Ibid., page 307

<sup>48</sup> Ibid., Wai 262 Closings, pages 308 to 325.

that a process be immediately established as between Māori and the Crown to investigate the best way in which to develop a process that would lead to mechanisms and bespoke systems of protection. Specifically, the interim findings sought were:<sup>47</sup>

*Matauranga Māori was a taonga of whanau, hapu and iwi prior to, and as at 1840, and continues to be a taonga of kaitiaki today;*

*Current legislation and policy designed to protect and promote intellectual property is inadequate to deal with the protection of Matauranga;*

*Matauranga continues to be at risk of misappropriation because of this lack of protection.*

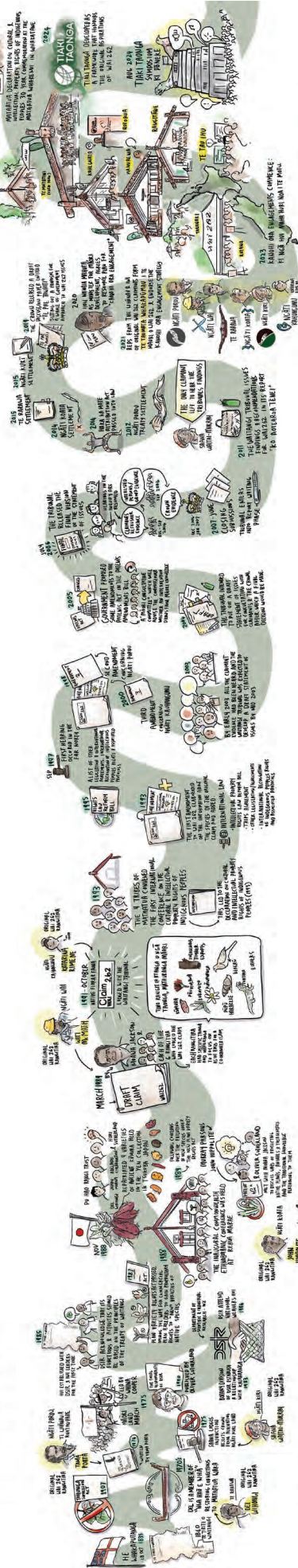
The urgent and interim recommendations requested by claimants (being cognisant that the Tribunal would probably take several years to complete and issue its report) was to establish what the Wai 262 Claimants referred to as a two-step process. The first step was to be a 'Kanohi Ora' strategy whereby claimants would engage with Māori all over Aotearoa me te Waipounamu about the Wai 262 claim and its potential remedies. The second step was then to negotiate with the Crown through a 'Process of Engagement' to discuss and develop the appropriate mechanisms for recognition and protection of matauranga and other taonga. The claimants' closing submissions outlined in extensive detail how this would all work in practical terms including policies, principles, options and objectives.<sup>48</sup>



*L-R Dell Wihongi, Maui Solomon (Senior counsel for Te Rarawa, Ngati Kuri and Ngati Wai) and Saana Murray taken at the 1998 hearing held in Rotorua to hear evidence from International witnesses on Wai 262 related issues such as IPR and biological diversity.*

# The Taura Whakapapa

--THE CONNECTIVE THREAD--



Wai 262  
KIA WHAKAPŌHIAU

TIAKI  
TAONGA

## **Sui Generis<sup>49</sup> systems, International Instruments and Intellectual Property Rights**

Among the urgent recommendations being sought was the development of a bespoke/*sui generis* system that was be grounded in tikanga Māori and would act to protect and promote taonga and be controlled by Māori. Examples were given of existing *sui generis* systems for protecting traditional knowledge around the world, including the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002, the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identify and their Traditional Knowledge of Panama 2000 and the related Executive Decree of 2001 and the Tunis Model Law on Copyright for Developing Countries 1976.

A sui generis system of protection grounded in tikanga would, according to the Wai 262 Te Tai Tokerau claimants, have some or all of the following characteristics:<sup>50</sup>

- *The Tikanga Framework to be developed by Māori after full consultation among Māori following a series of regional and local hapu, Iwi and national hui. There would also be a need for consultation with Crown agencies and other relevant private sector stakeholders and interest groups (eg nursery groups, design groups, and intellectual property groups etc);*
- *Any system designed should be based primarily in tikanga Māori, reflecting Māori cultural values and practices but also taking into account existing legislative and regulatory frameworks;*
- *Implicit would be the expectation that the NZ legislative structures would need to be altered and amended to accommodate a Tikanga Framework. A series of options could evolve under this model including utilizing, developing and strengthening existing tikanga models and customary laws, development of sui generic mechanisms and adapting existing laws and processes;*
- *Inherent in this system will be the acknowledgement; protection and promotion of rights and obligations to control, manage, protect, utilize, and develop resources in accordance with Māori cultural values, protocols and tikanga;*
- *Whatever structure or structures are settled upon will need to be flexible enough to take account of issues that affect Māori at a Iwi, hapu, whanau, individual and national level (i.e. issues that have generic application for many or all Iwi/hapu). The structure must also accommodate the rights of individuals such as Māori artists, carvers, musicians and designers;*
- *A national structure or body would be appointed by Māori with representatives of the original Wai 262 claimants forming the nucleus of a body to widely consult with Māoridom on the establishment, form, structure, functions and administration of any such national body;*
- *In terms of the resourcing of the framework, the claimants would seek an allocation of funds from the Crown (as part of their remedies package), to undertake nationwide consultation with tribes and urban Māori to discuss the formation of an appropriate structure or structures;*
- *Resources and Funding would also be needed to develop, implement and administer the Tikanga Framework on an ongoing basis;*
- *The Tikanga Framework would be responsible for developing mechanisms for protecting and promoting the use of Mātauranga Māori me o ratou taonga katoa taking into account:*
  1. *Te Tiriti o Waitangi/Treaty of Waitangi*
  2. *Tikanga, customary laws and values;*
  3. *NZ legal system, government policy and regulations;*
  4. *International customary laws, and conventions (eg Declaration on Rights of Indigenous Peoples, Mataatua Declaration, WIPO draft objectives and guidelines, Convention on Biodiversity etc) ;*
  5. *Relevant codes of ethics and research guidelines both national and international.*

<sup>49</sup> *Sui Generis* is a Latin phrase meaning “of its own kind” or “unique in its characteristics”

<sup>50</sup> Tikanga Māori Framework - A Framework for Protection, Use, Control and Ownership of Mātauranga Māori me o Ratou Taonga Katoa 1996, by Maui Solomon

• *In order to enforce compliance with this Tikanga Framework, some form of legal recognition and protection will be necessary within the current New Zealand legal system. But there may also be non-legal codes of ethics, guidelines and protocols containing rights and obligations, designed to educate and persuade voluntary compliance with the Tikanga Framework.*<sup>51</sup>

Claimants also cited references to the support given at various meetings of the Convention of the Parties to the Convention on Biological Diversity (to which New Zealand is a Party) for the recognition and protection of TK through the adoption of sui generis systems. For example, at COP 7 held in Kuala Lumpur in 2004<sup>52</sup> it was:

*Recognised that indigenous and local communities have their own systems, as part of their customary laws, for preserving and maintaining traditional knowledge, innovations and practices as well as for the protection and transmissions of traditional knowledge;*

*Recognised the need to halt the misuse and misappropriation of knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and related genetic resources through effective mechanisms that will protect the rights of indigenous and local communities;*

*Recognised that a sui generis system for the protection of traditional knowledge at the international level may enable indigenous and local communities to effectively protect their knowledge against misuse and misappropriation and that such a system should be flexible and respect the interests and rights of indigenous and local communities;*

*Emphasised that any sui generis system for the protection of traditional knowledge, innovations and practices needs to be developed taking into consideration customary law and practices with the full and effective involvement and participation of concerned indigenous and local communities*

The WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge, Traditional Cultural Expressions and Folklore (IGC)<sup>53</sup> also acknowledged that due to the evolving and dynamic nature of IP that sui generis systems were always developing to accommodate changing circumstances, such as the rapid advancement of science and technology, and that the same could apply in respect of accommodating and ‘protecting’ TK and TCE’s.<sup>54</sup>

*Sui generis is a Latin phrase meaning “of its own kind”. A sui generis system, for example, is a system specifically designed to address the needs and concerns of a particular issue. Calls for a “sui generis system” for TK protection are sometimes heard. **This could mean a system entirely separate from and different from the current IP system.***

*Some persons, however, also use the term to refer to new IP, or IP-like, rights. There are already several examples of sui generis IP rights, such as plant breeders’ rights (as reflected in the International Convention on the Protection of New Varieties of Plants, 1991 (“The UPOV Convention”)) and the IP protection of integrated circuits (as reflected in the Treaty on Intellectual Property in Respect of Integrated Circuits, 1989 (“The Washington Treaty”)). In the field of TK, the 1982 Model Provisions (see above) provide sui generis protection for expressions of folklore. (Emphasis added.)*

The Fact-Finding Mission (FFM) carried out by WIPO around the globe in 1998 to 1999 to ascertain Indigenous and Traditional Peoples ‘needs and expectation of IP and TK’ specifically contemplated that a sui generis system for protecting TK “could mean a system entirely separate from and different from the current IP system.” This accorded with the Wai 262 Claimants own calls for a sui generis system grounded in tikanga Māori to recognise, protect and promote TK and other taonga as the current IP system was neither designed to, and nor could it adequately, do so.

<sup>51</sup> Bearing in mind that this was written almost 30 years ago, there has been some evolution in the thinking and while the Wai 262 claimants have retained the essence of the Tikanga Maori Framework, the name has changed to a ‘Tiaki Taonga Framework’ and work is progressing (2025) on development of a draft Bill that would give effect to such a framework. It is also recognised that there is more than one ‘tikanga’ within Aotearoa and this is reflected in the Tiaki Taonga Framework.

<sup>52</sup> CBD Decision VII/16H, 2004, Kuala Lumpur

<sup>53</sup> The WIPO IGC process was established in 2000 to investigate mechanisms for accommodating, incorporating and “protecting” traditional knowledge within the existing system of intellectual property rights.

<sup>54</sup> *Intellectual Property Needs and Expectations of Traditional Knowledge Holders* WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), page 25

## Waitangi Tribunal’s Response to Wai 262 – ‘Ko Aotearoa Tenei’ 2011

The Waitangi Tribunal ignored the Tai Tokerau Claimants requests for interim and urgent findings and recommendations and they had to wait another four years for the Tribunal to issue its report.<sup>55</sup> It then took another ten years for the Crown to formally acknowledge and respond to the report and this was largely due to the efforts by the Minister Nanaia Mahuta<sup>56</sup> to convince her Labour Party Cabinet colleagues that something needed to be done to acknowledge the years of effort by all of the claimants and the importance of many of the Tribunal’s findings and put processes in place to respond to the report.

In his covering letter to Ministers of the Crown when forwarding the report, the President of the Waitangi Tribunal, Chief Judge Joe Williams (as he then was) noted that:<sup>57</sup>

*In some areas, particularly intellectual property, we saw that these claims presented New Zealand with an opportunity to be first mover in international law reform, with all of its attendant advantages to national interest. International frameworks for the protection of traditional knowledge and traditional cultural expressions— what we in New Zealand would call matauranga Māori and taonga works – are currently being negotiated. It would be far better for New Zealand to lead that debate than simply receive its result for compulsory implementation.*

However, despite 14 years passing since the report was published and this letter written, there is no sign that the Crown has taken on board the suggestion for New Zealand to become a “first mover in international law reform” in the area of IP and TK. Indeed, New Zealand’s advocacy in this arena within the WIPO IGC process that is leading these initiatives internationally has significantly decreased over the last 20 years. As discussed below, the IGC process is on a one-way track to nowhere in terms of providing any effective recognition, let alone protection, of Indigenous cultural and intellectual rights and responsibilities.



Ngati Wai Trust Board Hearing 17.09.1997, L-R- Crown counsel Brendan Brown QC, Dave Para, Eru Manuera, tribunal Judge Richard Kearney and kaumatua Bishop Manu Bennett (Photo credit: Hema Wihongi)

<sup>55</sup> *Ko Aotearoa Tenei*/This is New Zealand, the Waitangi Tribunal report on the Wai 262 Claim issued in 2011

<sup>56</sup> Honourable Nanaia Mahuta was the Minister of Foreign Affairs and Minister for Māori Development from 2020 to 2023 under the Labour led Government.

<sup>57</sup> *Ibid.*, Letter dated 11 June 2011 from Presiding Officer Judge J.Williams to Ministers of the Crown, pages xix and xx.

## Wai 262 Taumata Whakapumau

In 2020 (some 9 years after the Tribunal issued its report) the Crown, based on the recommendations sought by the Wai 262 Claimants in their closing submissions in 2007, agreed to enter into an engagement process for resolving the issues and addressing the findings in the Tribunal report. This involves a ‘Kanohi Ora’ process whereby the Wai 262 Claimants have established a taumata known as Te Taumata Whakapumau Wai 262, which is a roopu of representatives of the original six claimant Iwi. The Taumata is engaging with local Iwi at a national and international level to both inform Māori about the Wai 262 claim, and to seek feedback on ways in which the claim can be resolved in a manner that acknowledges and respects the original kaupapa of the claim and of the original claimants.

One of the aims of the Taumata Whakapumau is to design a framework they have called the ‘Tiaki Taonga’ framework or *sui generis* system that will give effect to the main aspects of the claim.

Such a framework was part of the original intentions of the Tai Tokerau claimants which was outlined in their closing submissions and was also acknowledged by the Tribunal as necessary (but with a much more limited scope and function) in its report *Ko Aotearoa Tēnei*:<sup>58</sup>

*We think New Zealand should take a leading role in developing a domestic framework for the protection of taonga works and mātauranga Māori.*

The Tribunal saw such a framework as necessary to “improve prospects for investment in New Zealand and also for Māori overseas”<sup>59</sup>, in addition to its function of protecting TK and other taonga. While the Tribunal acknowledged that there is a “dissonance” between the IP system and kaitiakitanga whatever framework was developed must nevertheless “speak to the existing IP framework” because it:<sup>60</sup>

*... must be able to affect how copyright arises, and to affect whether trademarks or registered design rights can be granted or enforced. It must therefore be seen as both additional to, and separate from, the IP system, yet able to*

*impact upon the rights within that system in appropriate circumstances. Rather than adopting a system for the protection of mātauranga Māori and taonga works which is either entirely within the orthodox IP framework or entirely sui generis (standalone), it might be best to think of what we recommend as a series of protections that are beyond the current parameters of IP law, but which work together with that system so as to resolve any conflict.*

So, while the Tribunal was supportive of a legal framework for accommodating taonga katoa, they stopped short of endorsing a standalone sui generis system and supported instead a ‘half-way house’ approach that worked with the existing system “so as to resolve any conflicts”. Whilst this may be seen, on the one hand, as a pragmatic approach by the Tribunal, it also means that in reality the Māori system for protecting taonga will always be subject to the Pakeha system of IP that has sought to dominate and subjugate it within the western capitalist paradigm. As much is acknowledged by the Tribunal in its several references to the importance and reality of commercialisation and expectation for economic benefits and investment from ‘taonga works’ in its report.<sup>61</sup>

As will be seen in the next section dealing with the WIPO IGC process on IP and TK, the efforts by Indigenous Peoples to have their concerns and interests not only heard but accommodated within that western-dominated process has, after 25 years of strenuous effort, yielded minimal returns.<sup>62</sup> The reason for this can be put down to the fact that Members States from the developed countries have deeply vested economic interests in maintaining the status quo of the current IP system and will resist any attempts to erode those interests.

For example, at the recent Fiftieth meeting of the IGC held in March 2025 when addressing the proposed texts on TK and TCE’s first proposed in 2002, the United Kingdom in its Opening Statement notes that:<sup>63</sup>

The United Kingdom has concerns about continued text-based discussions whilst key underlying principles remain undiscussed and unresolved. These include fundamental questions such as,

<sup>58</sup> Ibid., Wai 262 Report, page 54.

<sup>59</sup> Ibid., page 54

<sup>60</sup> Ibid., page 51

<sup>61</sup> Ibid., Wai 262 Report. See in particular pages 51 to 54

<sup>62</sup> This comment is reinforced by the authors direct experience of attending meetings of the IGC from 2002 to 2013

<sup>63</sup> Opening Statement by the UK presented to the Fiftieth Meeting of the IGC WIPO/GRTKF/IC/50/Statement/UK

- a. Who and what constitutes indigenous people and local communities for the purposes of this instrument(s);
- b. What constitutes traditional knowledge and traditional cultural expressions for the purposes of this instrument(s);
- c. How any potential instrument(s) or process would work for secret or unidentifiable traditional knowledge and traditional cultural expressions;
- d. Who and to what extent indigenous peoples' and local communities', traditional knowledge and traditional cultural expression can or should be recognised or protected as intellectual property or similar rights;
- e. Whether any proposed instrument(s) will be legally binding or not;
- f. Critically, how any instrument(s), particularly any proposed right based approach, would work alongside member states' existing international copyright and related rights obligations;
- g. How this will impact on existing copyright and related right works, performances and broadcasts, as well as right holders, where it is claimed that those are based on or use of traditional knowledge or traditional cultural expressions?

It is a little ironic that a representative of a country (Britain) that has historically been the greatest coloniser of Indigenous Peoples around the globe should, in the twenty-first century, be asking "who are Indigenous Peoples?"

Even if one was to suspend belief for a moment and allow for a degree of naivety on the part of the questioner, one would still need to ask – where has this Member State been for the last Forty-Nine meetings of the IGC? Have its officials not read any of the hundreds of documents covering the very subject matters they have questions about? It is difficult to know whether this statement is intentionally disingenuous or simply another stalling tactic which has characterised the IGC process since it began all those years ago. It does, however, serve to graphically illustrate for Indigenous Peoples the frustratingly

slow and obstructive process that has been adopted by Member States in the IGC when it comes to dealing with the rights, interests and responsibilities of Indigenous Peoples. This same frustration and unreasonable delays are reflected in our own domestic situation in terms of dealing with the issues raised by the Wai 262 Claimants that have spanned a period of over 30 years without any effective resolution.

The resistance and stonewalling by the Crown in terms of addressing the issues raised by the Wai 262 Claimants are significantly multiplied at the international level for Indigenous Peoples generally in terms of doing anything meaningful to protect their rights and interests in TK and IP.

The Waitangi Tribunal in its *Ko Aotearoa Tenei* report also recommended that a commission be established that would administer and implement the 'halfway house' framework outlined in its report and discussed above. The commission should be:<sup>64</sup>

*... empowered to receive complaints from anyone **alleging offensive or derogatory public use of taonga works, taonga-derived works, or mātauranga Māori**. The commission will need to decide what steps must be taken to remedy the situation. This will cover a wide range of possibilities. It should also be empowered to receive complaints from kaitiaki about the commercial use of taonga works and mātauranga Māori without their involvement. If the commission considers that the thing in question is a taonga work or mātauranga Māori for which the kaitiaki has an obligation of kaitiakitanga, it will need to decide whether consultation between the kaitiaki and user is sufficient, or whether consent must precede any further use. And if the object in question is a work, the commission will be required to determine whether it is a taonga work, a taonga-derived work, or neither.*

In acknowledging the importance of protecting what they have termed 'taonga works' and mātauranga Māori, the tribunal referred to the importance of Article 31 (1) of the Declaration on the Rights of Indigenous Peoples:<sup>65</sup>

<sup>64</sup> Ibid., page 53

<sup>65</sup> Ibid., page 43

*Indigenous Peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions*

However, the tribunal controversially found that Māori do not have exclusive rights over their own mātauranga which, in some circumstances, must be afforded a “reasonable degree of protection”:<sup>66</sup>

*We also concluded that the Treaty **does not provide for exclusive ownership of mātauranga Māori** or the intangible aspects of taonga works. However, where some forms of mātauranga Māori – for example, a tribal story or other forms of tikanga Māori – have identifiable kaitiaki, they are entitled to a reasonable degree of protection.*

The reasons given by the Tribunal for arriving at this conclusion are that:

*Mātauranga Māori cannot be exclusively ‘possessed’ except perhaps where, for some special reason, kaitiaki deem it necessary to keep the mātauranga secret. It is a core characteristic of almost all knowledge that it is shared. It is the sharing of mātauranga Māori – indeed of knowledge generally – that makes it valuable.*

The Tribunal created a new genre of taonga they referred to as ‘taonga works’ which they defined as follows:

*A taonga work is a work, whether or not it has been fixed, that is in its entirety an expression of mātauranga Māori; it will relate to or invoke ancestral connections, and contain or reflect traditional narratives or stories. A taonga work will possess mauri and have living kaitiaki in accordance with tikanga Māori.*

In contrast, ‘taonga derived works’ “are works that have a Māori element to them, but those elements are generalised or adapted, and other non-Māori influences may also be present in the work.” The Tribunal gave the following as a ‘working definition’ of a taonga derived work:<sup>67</sup>

*A taonga-derived work is a work that derives its inspiration from mātauranga Māori or a taonga work, but does not relate to or invoke ancestral connections, nor contain or reflect traditional narratives or stories, in any direct way. A taonga-derived work is identifiably Māori in nature, but has neither mauri nor living kaitiaki in accordance with tikanga Māori.*

<sup>66</sup> Ibid., Wai 262 Report page 43

<sup>67</sup> Ibid., Wai 262 Report, page 54



*Wai 262 claimant representatives attending the release of the Wai 262 Report, 2011, holding photos of named claimants who have passed away.  
Photo credit: Wai 262 website*



Government of Canada & WIPO Workshop in Iqaluit, Nunavut, May 2019 (Photo credit: <https://ised-isde.canada.ca/site/intellectual-property-strategy/en/indigenous-peoples-and-intellectual-property>)

## WIPO and IGC Process for GR,TK and TCE's – Sui Generis?

Support for the development of sui generis modalities can also be found in the early meetings and documentation produced by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). This recognition is based upon the notion that IPR are “inherently dynamic”<sup>68</sup> in nature and therefore adaptable to meet changing circumstances:<sup>69</sup>

*In some areas, existing legal mechanisms have been adapted to the characteristics of new subject matter: the patent system has been confronted with the challenges of biotechnological inventions and new processes of using information technology devices (so-called “business methods”); copyright and related rights have been broadened so as to meet the challenges of computer software, electronic commerce and protection of databases.*

The international ‘Fact Finding Mission’<sup>70</sup> (FFM) that WIPO embarked upon between 1998 and 1999 included meetings in Aotearoa with the Wai 262 Claimants and representatives who drafted the Mataatua Declaration) and heard very clear messages from Indigenous Peoples around the world: namely

that the intellectual property rights system was at odds with their own values, concepts of knowledge and its transmission and ways to protect cultural knowledge and related taonga and that new systems were required for its recognition and protection. Despite undertaking that consultation process, WIPO had already determined the path it would take from the outset:<sup>71</sup>

*If they develop in appropriate ways, intellectual property systems may therefore have an essential role in the preservation of the cultural identity of traditional communities and, consequently, in the empowerment of traditional knowledge holders, ...*

And in the final report of the FFM, the ultimate objective was more boldly stated as to:<sup>72</sup>

identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development.

<sup>68</sup> WIPO IGC, Third Session, Geneva, June 13-21, 2002, ‘Elements of a Sui Generis System for Protection of Traditional Knowledge’. (WIPO/GRTKF/IC/3/8) page 10.

<sup>69</sup> Ibid., IGC 2002, page 10.

<sup>70</sup> The stated purpose of the FFM was to “enable WIPO to identify, as far as possible, the IP needs and expectations of TK holders.” ([https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo\\_pub\\_768.pdf](https://www.wipo.int/edocs/pubdocs/en/tk/768/wipo_pub_768.pdf) pages 17)

<sup>71</sup> Ibid., IGC 2002, page 9

<sup>72</sup> Ibid., FFM Report, page 21

<sup>73</sup> Ibid., FFM Report, page 25

Even though the FFM Report acknowledges that a *sui generis* in terms of TK could be something quite different from IP:<sup>73</sup>

*This could mean a system **entirely separate from** and different from the current IP system.*

Some of the key messages that came from the FFM trip to the Pacific (Aotearoa, Australia, Fiji and Papa New Guinea) regarding the need for new systems of protection based on custom and tikanga were expressed as follows:

*What is now advocated by Indigenous communities is protection of traditional cultural expression by the application of customary intellectual property law on its own terms, as of right.<sup>74</sup>*

*As first nations, we have our own IPRs and that's mainly coming from who we are and what we believe.<sup>75</sup>*

*One should not attempt to amend Western laws to cater for indigenous peoples. Attempts to do so will be doomed, because the IP system and the needs of indigenous peoples are too distinct.<sup>76</sup>*

*In relation to the use of trademarks to protect Māori artistic works, symbols and designs, WIPO was told that Māori have concerns with the formal trademark system as it is "not their system."<sup>77</sup>*

Māori were very firm in their advocacy to the FFM people, and subsequently in the IGC process itself, that what was required was not just a tweaking the edges of the existing IPR regime but the development of a new and innovative system(s) for protecting TK and other taonga.

In 2002 the IGC produced a policy paper on what elements of a *sui generis* system for protection of traditional knowledge might look like:<sup>78</sup>

*Given its holistic nature and the need to respond to the cultural context, the sui generis system should not require the separation and isolation of the different elements of traditional knowledge but rather take a systematic and comprehensive approach.*

However, as the WIPO is concerned with property rights the elements that were outlined by the IGC for identifying and developing a system for protecting TK were essentially rights focussed and failed to comprehend that Indigenous Peoples are equally, if not more so, concerned with how they are able to exercise and fulfil their obligations to one another and to the natural world. The IGC asked:<sup>79</sup>

*(i) what is the policy objective of the protection?*

*(ii) what is the subject matter?*

*(iii) what criteria should this subject matter meet to be protected?*

*(iv) who owns the rights?*

*(v) what are the rights?*

*(vi) how are the rights acquired?*

*(vi) how to administer and enforce the rights?; and*

*(vii) how are the rights lost or how do they expire?*

However, although the Secretariat of the IGC may not have got all of the elements right for recognising TK, it was certainly on the right track in terms of initiating discussion about what a *sui generis* system might look like. Sadly, as will be discussed later in this paper, the developed countries, led by the US, Japan, Australia, Canada, (New Zealand to a lesser extent but also complicit) and Europe poured cold water (not to mention some degree of scorn) on the notion that TK should have any special form of protection. From my personal experience in the IGC forum over many years, these countries were primarily concerned about propping up the existing IPR system and only ever intended to make token gestures at most in recognising and protecting TK so long as any such recognition did not detract or undermine their own heavily invested interests in maintaining the status quo. After almost 25 years of the IGC process, these countries eventually achieved their objectives with the only "meaningful" result so far from this long and expensive exercise being for the IGC to agree on a disclosure of origin requirement in any patent application involving genetic resources that might be based on the use of TK.<sup>80</sup>

<sup>74</sup> Ibid., FFM Report, page 59 (per Terri Janke, 'Our culture, Our Future', page 25)

<sup>75</sup> Ibid., FFM Report page 59 (per Wai 262 Claimants, counsel and others)

<sup>76</sup> Ibid., FFM Report, page 74

<sup>77</sup> Ibid, FFM Report, page 59 (per Crown Officials including Ministry of Commerce and Office of Treaty Settlements, June 19, 1998)

<sup>78</sup> Ibid., IGC 2002 page 14

<sup>79</sup> Ibid., IGC 2002, page 16.

<sup>80</sup> [https://www.wipo.int/edocs/mdocs/tk/en/gratk\\_dc/gratk\\_dc\\_7.pdf](https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf)

## IGC Patent Treaty, Genetic Resources and TK

At a Diplomatic Conference held by the IGC in Geneva from 13 to 24 May, 2024, the Member States agreed to a Treaty on TK associated with genetic resources.<sup>81</sup>

The Treaty sets out the key purposes and aims of the Treaty in the Preamble as follows:<sup>82</sup>

*Desiring the promotion of the efficacy, transparency and quality of the patent system in relation to genetic resources and traditional knowledge associated with genetic resources,*

*Emphasizing the importance of patent offices having access to appropriate information on genetic resources and traditional knowledge associated with genetic resources to prevent patents from being granted erroneously for inventions that are not novel or inventive with regard to genetic resources and traditional knowledge associated with genetic resources,*

*Recognizing the potential role of the patent system in contributing to the protection of genetic resources and traditional knowledge associated with genetic resources, Recognizing that an international disclosure requirement related to genetic resources and traditional knowledge associated with genetic resources in patent applications contributes to legal certainty and consistency and, therefore, has benefits for the patent system and for providers and users of such resources and knowledge,*

*Recognizing that this Treaty and other international instruments related to genetic resources and traditional knowledge associated with genetic resources should be mutually supportive,*

*Recognizing and reaffirming the role that the intellectual property system plays in promoting innovation, transfer and dissemination of knowledge and economic development, to the mutual advantage of providers and users of genetic resources and traditional knowledge associated with genetic resources,*

***Acknowledging the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and commitment to achieving the ends set forth therein, and***

***Affirming that best efforts should be made to include Indigenous Peoples and local communities, as applicable, in implementing this Treaty, (bolding added)***

This Preamble makes it clear the main purpose is to advance the objectives of the current patent system and that protecting TK and the rights of Indigenous Peoples are a secondary consideration. The Treaty merely “acknowledges” the importance of UNDRIP, and that “best efforts” are to be made by States to “include Indigenous Peoples and local communities, as **applicable**, in implementing this Treaty.” And we know from long experience what ‘best efforts’ of States are in relation to protecting and promoting the rights and interests of Indigenous Peoples. Nothing meaningful is hardly ever accomplished, simply because there is not the will to do so and States will always prefer their own corporate and economic interests over those of its colonised and marginalised peoples.

Article 3.2 of the Treaty requires disclosure of the communities or sources that the patent applicant has relied on for any TK:

*Where the claimed invention in a patent application is based on traditional knowledge associated with genetic resources, each Contracting Party shall require applicants to disclose:*

*(a) the Indigenous Peoples or local community, as applicable, who provided the traditional knowledge associated with genetic resources, or,*

*(b) in cases where the information in Article 3.2(a) is not known to the applicant, or where Article 3.2(a) does not apply, the source of the traditional knowledge associated with genetic resources.*

There are many seriously limiting factors with this Treaty. For example, there is no obligation on the Patents Offices to “verify

<sup>81</sup> WIPO, IGC, ‘Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources’, 13-24 May 2024 (GRATK/DC/7)

<sup>82</sup> Ibid., IGC Treaty, page 2

the authenticity of the disclosure” (Article 3.5); it does not apply to any patent application filed before the Treaty takes effect in the relevant country (Article 4); existing international treaties on patents are to take precedence over the IGC Treaty (Article 7 and footnotes 4 and 5); an Assembly is to be established to oversee the implementation of the Treaty with “effective participation” of Indigenous Peoples to be “encouraged” as “accredited observers” with States “invited...to consider financial arrangements for participation of Indigenous Peoples and local communities.” (Article 10)<sup>83</sup>; even if States do sign up to the Treaty they have a wide discretion to implement the Treaty in whatever they deem an “appropriate method” that suits their own “legal systems and practices” (Article 9.2); the Treaty will only take effect once fifteen (15) Member States of WIPO have ratified it (Article 17) – to date only two have done so; and any signatory to the Treaty can “denounce” the Treaty at any time (Article 19).

There are so many ways for States to avoid being bound by the terms of the Treaty (even if they decide they want to be in the first place) that there is room for a fleet of proverbial ten tonne trucks to be driven through the middle of it – all loaded with pharmaceuticals bio-pirated from Indigenous territories!

Of particular concern is the ability of States under Article 6 to establish databases of TK related to genetic resources with “consultation...where applicable” to be undertaken with Indigenous Peoples and local communities. But there is no requirement for them to do so and “national circumstances” will be taken into account even in relation to this minimal requirement. So, many States who do not recognise Indigenous Peoples or the importance of TK will either not ratify the Treaty or if they do, can simply say their *national circumstances* are such that they are not bound by the requirements to consult in setting up a database of TK. The treaty says:<sup>84</sup>

*Contracting Parties may establish information systems (such as databases) of genetic resources and traditional knowledge associated with genetic resources, in consultation, where applicable, with Indigenous Peoples*

*and local communities, and other stakeholders, taking into account their national circumstances.*

*Contracting Parties should, with appropriate safeguards developed in consultation, where applicable, with Indigenous Peoples and local communities, and other stakeholders, make such information systems accessible to Offices for the purposes of search and examination of patent applications. Such access to the information systems may be subject to authorization, where applicable, by the Contracting Parties establishing the information systems.*

It is likely that in many, if not most, countries who adopt the Treaty (and it is by no means certain that many will do so)<sup>85</sup> Indigenous Peoples will have minimal if any meaningful role or say in the establishment of TK databases. A further concern is that these databases could themselves be used by some companies to ‘mine’ for TK that could lead them to ‘discover’ ‘new’ medicinal remedies and cures for ailment, especially in the ‘new age’ emphasis on so-called natural remedies.

Articles 6.1 and 6.2 of the Treaty also fall foul of the following advice received from the Updated Technical Review panel of the IGC processes that Indigenous Peoples should have control over databases of TK and provide their Free Prior Informed Consent (FPIC) to any TK being recorded on any database:<sup>86</sup>

... registers and databases ... cannot be solely controlled by national governments. Accordingly, indigenous peoples have expressed reservations regarding the use of databases; citing likelihoods of free dissemination of the information to third parties. Indigenous peoples are hence emphatic that any documentation and recording of TK and TCEs should primarily benefit indigenous peoples; and their participation in such schemes should be voluntary, not a prerequisite for protection of TK and TCEs.

The Treaty also falls foul of the advice and recommendations of Professor James Anaya<sup>87</sup> who undertook in 2014 the first

<sup>84</sup> IGC Treaty, Articles 6.1 and 6.2

<sup>85</sup> As at the date of writing only Malawi and Australia had ratified the IGC Treaty (per comms 20 April 2025, Wend Wendland, Director of IGC)

<sup>86</sup> Update of the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions within the Framework of Indigenous Human Rights, By Mr. Elifuraha Laltaika and Ms. Neva Collings, WIPO/GRTKF/IC/50/INF/8, page 6, paragraph 36.

<sup>87</sup> James Anaya is the former UN Special Rapporteur on the Rights of Indigenous Peoples from 2008 to 2014

technical review of the IGC processes on genetic resources, TK and TCEs, he advised that the processes should, in particular, comply with the terms of UNDRIP and other international human rights instruments:<sup>88</sup>

*The focus on supporting indigenous peoples' aspirations to maintain and develop these community bonds and institutions has necessarily led to the first core principle of the contemporary indigenous rights regime: that indigenous peoples should be able to exercise meaningful control over the future development of all those aspects of collective human interaction that define and constitute their distinct societies. This principle embraces the right of indigenous peoples to self-determination, related rights of self-government or autonomy, and the right to culture, as expressed in the United Nations Declaration on the Rights of Indigenous Peoples and several other international sources of authority.*

*Second, but intrinsically connected to the first principle, indigenous peoples' cultures and societies are deeply rooted in the lands, waters and natural resources that they have traditionally used. Indeed, this is the key feature in the understanding of which groups constitute indigenous peoples. As a consequence, from the outset, the international concern for indigenous peoples has had a particular focus on rights over lands and natural resources, as it became increasingly understood that continued access to and control over lands and resources constitute a prerequisite for indigenous peoples' ability to preserve and develop their distinct societies and cultures.*

*A third general principle that underpins the contemporary indigenous peoples' rights regime is the principle of equality. The contemporary human rights system rests heavily on this principle. All human rights, and not least indigenous peoples' human rights, must be understood in light of the right to non-discrimination. Article 2 of the United Nations Declaration on the Rights of Indigenous Peoples provides that "[i]ndigenous peoples and individuals are free and equal to all other peoples and individuals". As I will elaborate upon shortly, the fact that indigenous peoples must be treated equally in relation to other peoples is clearly relevant to the Intergovernmental Committee's deliberations.*

*The principles I have just outlined constitute pillars upon which the contemporary indigenous peoples' rights regime rests. Today, these principles serve as a foundation for a well-developed set of rights of indigenous peoples that are of direct relevance to the deliberations of the Intergovernmental Committee, including on the definition of norms that govern access to genetic resources and traditional knowledge and the fair and equitable sharing of their utilization.*

There are no provisions in the Treaty for Indigenous Peoples to provide their FPIC to any TK being recorded on databases, and certainly no provisions requiring that applicants for patents who have relied on TK should share any commercial benefits with the traditional knowledge holders. These requirements have been standard terms of the Convention of Biological Diversity since 1992, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity 2014 and the Kunming – Montreal Global Biodiversity Framework 2022. The Kunming-Montreal GBF provides under 'Goal C' that:

*The monetary and non-monetary benefits from the utilization of genetic resources and digital sequence information on genetic resources, and of traditional knowledge associated with genetic resources, as applicable, are shared fairly and equitably, including, as appropriate with indigenous peoples and local communities, and substantially increased by 2050, while ensuring traditional knowledge associated with genetic resources is appropriately protected, thereby contributing to the conservation and sustainable use of biodiversity, in accordance with internationally agreed access and benefit-sharing instruments.*

It was also recommended by the IGC Technical Review report that redress should be provided to Indigenous Peoples for TK obtained and utilised without their FPIC in patents over GR:<sup>89</sup>

*Indigenous peoples' right to redress for the unauthorised utilisation and exploitation of their TK, TCEs, GRs and associated TK is affirmed by the UNDRIP, requiring States to provide redress through effective mechanisms including*

<sup>88</sup> Keynote address by the UN Special Rapporteur on the Rights of Indigenous Peoples, Professor S. James 26th session of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Indigenous Panel: Intellectual property and genetic resources: What is at stake for indigenous peoples? 3 February 2014, page 2

<sup>89</sup> Ibid., Technical Review Report of IGC, 2025, page 3, paragraph 14.

*restitution for cultural and intellectual property taken without FPIC, and that may involve adopting special concrete measures. State parties are thus obliged to adopt concrete measures to ensure the full enjoyment of human rights by indigenous peoples through effective mechanisms that provide restitution for cultural heritage and intellectual property taken without FPIC.*

However, Article 14 (Non-Retroactivity) of the Treaty provides that any patent obtained and applied for or registered prior to the coming into effect of the Treaty shall not be bound by the terms of the Treaty. The Technical Review panel argued that existing patent holders should not be exempt on the basis that:

*... if a company holds a patent, this fact should not prevent indigenous peoples -the original holders of the relevant TK- from using the patented invention. Another element of redress is repatriation. As the indigenous caucus has stated before, the legal instrument should include repatriation on the basis that 'negotiations could not just address future practices related to patent issues' but should also address 'historical misappropriations and wrongdoings.*

The Treaty on GR and related TK can be described as comprehensively failing to meet any of the existing international standards and principles developed over the past 40 years to recognise and protect the rights and interests of Indigenous Peoples, ignoring all of the advice from Indigenous Peoples and local communities since the IGC process formerly commenced in 1998, and ignoring many of its own internal reviews undertaken, such as that by Professor James Anaya in 2014 and the Updated Technical Review Panel in 2025.



*Kopinga Marae (Photo credit: Maui Solomon)*

## TK and TCEs – Where to next for the IGC?

The IGC is now turning its attention to (re) examine what instrument or set of instruments the Members States will agree on in relation to TK and TCEs.<sup>90</sup> However, if past experience is anything to go by, and the Genetic Resources Treaty is a measure of the IGC's capacity to 'recognise and protect' TK and TCEs, it is unlikely that anything of real significance to Indigenous Peoples will emerge from this process. If any instrument does emerge, it will be seriously watered down and provide, at best only token protection of TK and TCEs and ultimate control to rest in the hands of the Member States and the corporates who control them, and not the knowledge holders themselves. The draft articles on TK and TCEs presented at the 49th meeting of the IGC held in December 2024 would, unfortunately, appear to support this view.

The Secretariat of the IGC came up with the following "working concept" of TK in 2002 for the purposes of developing a *sui generis* system for its recognition and protection:<sup>91</sup>

*[T]he Secretariat of WIPO has used the term "traditional knowledge" in an open-ended way to refer to 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. "Tradition based" refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment. This is not a formal definition, but a working concept of traditional knowledge, ...*

Twenty years later in 2023, the IGC definition of TK had been 'refined' as follows:<sup>92</sup>

Traditional Knowledge refers to knowledge originating from indigenous [peoples], local communities and/or [other beneficiaries] that is dynamic and evolving and is the result of

intellectual activity, experiences, spiritual means, or insights in or from a traditional context, which may be connected to land and environment, including know-how, skills, innovations, practices, teaching, or learning.

The Draft Articles presented to the Forty-Ninth Session of the IGC includes four alternatives as the main objective for 'protecting' TK under an international instrument:<sup>93</sup>

### *[First Proposed Objectives]*

The **objectives** of this instrument are to:

- (a) Provide effective and adequate protection of traditional knowledge;
- (b) Prevent the erroneous grant of intellectual property rights over traditional knowledge; and
- (c) [Recognize Indigenous [Peoples] and local communities as holders of traditional knowledge].

### **[Alternative 1]**

The objective of this instrument is to provide effective, balanced and adequate protection relating to intellectual property against:

- (a) unauthorized and/or uncompensated uses of traditional knowledge; and
- (b) the erroneous grant of intellectual property rights over traditional knowledge, [while supporting the appropriate use of traditional knowledge].]

### **[Alt 2]**

The objective of this instrument is to support the **appropriate use and effective, balanced and adequate protection of traditional knowledge within the intellectual property system**, in accordance with national law, recognizing the rights of [indigenous [peoples] and local communities] [beneficiaries].]

<sup>90</sup> In personal comms (21 April 2025), the current Director of the Traditional Division of the IGC, Wend Wendland, advises that the IGC is working from the original articles and objectives documents (8/4 and 8/5) it produced in 2005 as the "parent" documents for these ongoing discussions.

<sup>91</sup> Ibid., WIPO IGC page 5, paragraph 10.

<sup>92</sup> IGC Forty-Ninth Session, Geneva, 2-6 December 2024, 'The Protection of TK: Draft Articles' WIPO/GRTKF/IC/49/4, page 5.

<sup>93</sup> Ibid., Forty-Ninth Meeting of the IGC, Draft Articles on TK, page 7

**[Alt 3**

The objective of this instrument is to **support the appropriate use of traditional knowledge within the patent system**, in accordance with national law, respecting the values of traditional knowledge holders, by:

(a) **contributing toward the protection of innovation and to the transfer and dissemination of knowledge**, to the mutual advantage of holders and users of protected traditional knowledge and in a manner conducive to social and economic welfare and to a balance of rights and obligations;

(b) **recognizing the value of a vibrant public domain**, the body of knowledge that is available for all to use and which is essential for creativity and innovation, and the need to protect, preserve and enhance the public domain; and

(c) preventing the erroneous grant of patent rights over non-secret traditional knowledge.]] (emphasis added)

The first proposed objectives above appear to provide some *limited* form of protection for TK, but alternatives 1, 2 and 3 are very much weighted towards ensuring that the IP system holds sway over TK and ‘protects’ IP holders right to utilise TK, protect the public domain and innovation, and the free dissemination of TK. This IP emphasis accords with the aims as stated in the preamble to these draft articles which are:<sup>94</sup>

11. Recognizing and **reaffirming the role the IP system plays in promoting innovation and creativity, transfer and dissemination of knowledge and economic development**, to the mutual advantage of stakeholders, providers and users of traditional knowledge;

12. Recognizing **the value of a vibrant public domain and the body of knowledge that is available for all to use**, [and] which is essential for creativity and innovation [and the need to protect and preserve the public domain]; (emphasis added)

The same IP weighted emphasis is also contained in the draft articles for TCEs presented at the forty-ninth session of the IGC, along with the plethora of qualifiers that will ensure all control rests with the national governments.<sup>95</sup> For example, the wording in clauses 11 and 12 above for TK is repeated word for word in the TCE draft articles, with TCEs substituted for TK:<sup>96</sup>

11. Recognizing and **reaffirming the role that the IP system plays in promoting innovation and creativity, transfer and dissemination of traditional cultural expressions and economic development**, to the mutual advantage of stakeholders, providers and users of traditional cultural expressions.

12. Recognizing the **value of a vibrant public domain and the body of traditional cultural expressions that are available for all to use**, [and] which are essential for creativity and innovation [and the need to protect and preserve the public domain].

The references to recognising customary laws of Indigenous Peoples as a means of protecting TK and TCEs have also been dispensed with in these latest drafts. As noted by Tobin in his contribution to the 2017 review of the IGC process:<sup>97</sup>

*After years of leaning towards recognition of the fundamental role of customary law in the development of a sui generis regime for protection of traditional knowledge, the IGC has veered sharply away towards a hybridised intellectual property style system devoid of any significant role for customary law. In doing so the draft IGC instruments signify a backward step in the progressive recognition of customary law and its role in the protection of TK under international human rights law, the Nagoya Protocol, as well as regional and national law.*

These most recent iterations of draft articles for protecting TK and TCEs are a far cry from the original draft objectives, principles and articles presented at the eighth meeting of the IGC twenty years prior.<sup>98</sup> For example, in the introductory section of the 2005 edition of the draft provisions for protection of TCEs it was noted that:

<sup>95</sup> Ibid., Forty Ninth Session of the IGC, Draft Articles on TCE's (WIPO/GRTKF/IC/49/5), see for example Annex, page 2, clauses 8, 11 and 12 and Articles 4.2, 5.1 and 6.1:

<sup>96</sup> Ibid., clauses 11 and 12.

<sup>97</sup> Tobin, Brendan, 'Rise and fall of customary law in the IGC', Article in 'Protecting Traditional Knowledge, The WIPO IGC', 2017, Routledge Research in International Environmental Law, page 195

<sup>98</sup> Eighth Session of the IGC, 6-10 June 2005. 'The Protection of TCEs: Revised Objectives and Principles', WIPO/GRTKF/IC/8/4 and 'The Protection of TK: Revised Objectives and Principles', WIPO/GRTKF/IC/8/5

*The draft provisions set out substantive standards [ie articles] which may provide the content of international standards for the protection of TCEs/EoF against misappropriation and misuse, without requiring the assertion of new exclusive property rights over TCEs/EoF, but accommodating this option should TCEs/EoF holders elect to take it up. The provisions focus on protection against misappropriation and misuse of TCEs/EoF as a complement to international instruments and processes which deal with the preservation, safeguarding and promotion of TCEs/EoF. (words in brackets added)*

These early iterations of the draft provisions for recognising and protecting TCEs, (and also TK) more accurately reflected the aims and aspirations of Indigenous Peoples, as can be seen from the contents of the provisions as they stood at that time:<sup>99</sup>

#### OBJECTIVES

- (i) Recognize value
- (ii) Promote respect
- (iii) Meet the actual needs of communities
- (iv) Prevent the misappropriation of traditional cultural expressions/expressions of folklore
- (v) Empower communities
- (vi) Support customary practices and community cooperation
- (vii) Contribute to safeguarding traditional cultures
- (viii) Encourage community innovation and creativity
- (ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms
- (x) Contribute to cultural diversity
- (xi) Promote community development and legitimate trading activities
- (xii) Preclude unauthorized IP rights
- (xiii) Enhance certainty, transparency and mutual confidence

#### II. GENERAL GUIDING PRINCIPLES

- (a) Responsiveness to aspirations and expectations of relevant communities
- (b) Balance

- (c) Respect for and consistency with international and regional agreements and instruments
- (d) Flexibility and comprehensiveness
- (e) Recognition of the specific nature and characteristics of cultural expression
- (f) Complementarity with protection of traditional knowledge
- (g) Respect for rights of and obligations towards indigenous peoples and other traditional communities
- (h) Respect for customary use and transmission of TCEs/EoF
- (i) Effectiveness and accessibility of measures for protection

Some Members States (led by the US) were critical that these provisions “favoured a particular policy direction” while some Indigenous participants (including the author who attended the 2005 meeting), submitted that the provisions did not go far enough.<sup>100</sup>

As noted by Wend Wendland (the current Director of the Traditional Knowledge Division of the IGC) in a 2017 publication on the work of the IGC, these draft 2005 provisions on protecting TK and TCEs precipitated a “crisis” within the IGC. The Secretariat (which produced the draft provisions) came under “withering criticism” from many of the developed countries for having gone too far in proposing provisions which would actually go a long way towards providing some genuine protection for TK and TCE’s. Wendland notes that developed countries accused the Secretariat:<sup>101</sup>

... of having overstepped its mandate and for having tilted the playing field in favour of those delegations seeking a legally binding international instrument(s). Most developing countries welcomed the revised documents.

As a consequence of the gaping disjunct between the aims and aspirations of developed countries focussed on maintaining the IP status quo, and developed countries (with support from many Indigenous groups) who were looking for genuine change to the system, work on these draft articles was suspended for many years by the IGC.

<sup>99</sup> Ibid., Eighth Session Draft Provisions on TCE’s, Annex, page 1.

<sup>100</sup> Ibid., Eighth Session Draft Provisions on TCE’s, WIPO/GRTKF/IC/8/4, page 5, paragraph 16 in reference to footnotes 9, 10 and 12

<sup>101</sup> ‘Protecting Traditional Knowledge. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.’ Routledge Research in International

In the same 2017 publication, this author also noted that the 2005 draft provisions for protecting TK and TCEs “came closest” to providing some form of protection for TK and TCEs that Indigenous Peoples have been calling for since the IGC commenced its work in 1998 with the FFM.<sup>102</sup> However, it needs to be noted here that, notwithstanding the progressive nature of the 2005 draft documents, there were still concerns over the way in which these provisions would remain subject to and subjugated by prevailing national laws of Member States. In a review of these 2005 documents, which this author undertook in 2006, I recorded some of these concerns as follows:<sup>103</sup>

*Although these policies purport to express worthy and strong sentiments for empowering Indigenous Peoples, they are somewhat watered down ... for example, respect for customary laws and protection of TK is made subject to ‘national law and policy’ (document 8/5, Principle (h)); enforcement of protection against misappropriation of TK is to be guided ‘as far as possible and appropriate’ by respect for customary law (document 8/5, Article 1, 5); TK related to biological and genetic resources are subject to national laws governing ownership and access to these resources (document 8/5, General Principle (f) and Substantive Principles, Article 12, 1).*

*Moreover, although the above Policy Objectives speak of tailoring solutions to meet the distinctive nature of TK systems ensuring that the balanced approach is adopted, the General and Substantive Principles appear to place significantly greater weight on the application of national regulatory laws and IP tools, rather than enhancing and promoting the use of customary laws and protocols for the protection of TK.*

Although by no means perfect or complete, these 2005 draft principles and articles were a genuine attempt by the IGC Secretariat to give expression to the demands of Indigenous Peoples and many developing countries to have provisions that protected their TK and TCEs from being misappropriated and would give them a measure of control over their own knowledge and taonga.

However, over the ensuing years developed countries from the North, led by the USA, Europe and Japan (but also supported by Canada, Australia and New Zealand), have ensured that these draft provisions have been rewritten in a way that reflects and protects their own vested economic interests and strengthen the IP system, which they largely control. So much so that the latest draft of articles presented at the forty-ninth session of the IGC in December 2024 bear little resemblance to those drafted in 2005. Any semblance of providing genuine recognition and protection of TK has been done away with and replaced with language that suits the agendas of the developed countries. The acknowledgement that TK should be protected is now couched in language that suggests that this is applicable only insofar as it ‘protects’ the status quo IP regime.<sup>104</sup>

*Acknowledging that **the protection of traditional knowledge should contribute toward the promotion of creativity and innovation, and to the transfer and dissemination of knowledge** to the mutual advantage of holders and users in a manner conducive to social and economic welfare and to a balance of rights and obligations.*

The Technical Review Report presented to the fiftieth meeting of the IGC in March 2025 is critical of the IP-centric approach to protecting TK and TCEs as not reflecting Indigenous Peoples world views:

*While the intellectual property system seeks to ensure that all knowledge benefits society as a whole, indigenous peoples possess human and other rights over TK and TCEs, which are integral to customary laws, culture, language, and religion. Accordingly, since human rights are long lasting, intellectual property laws cannot circumvent them; hence there should be no law or prohibition to limit indigenous peoples from using their TK and TCEs.*

The Technical Review team are equally critical of the ‘public domain’ concept as not reflecting or recognising how Indigenous Peoples view their traditional knowledge as a taonga tuku iho:<sup>105</sup>

<sup>102</sup> Ibid., 2017 ‘An Indigenous Perspective on the WIPO IGC’, per Maui Solomon, page 223

<sup>103</sup> Solomon, Maui, *Peer Review of WIPO Documents: The Protection of Traditional Cultural Expressions and Expressions of Folklore: Revised Objectives and Principles: (WIPO/GRTKF/IC/8/4) and the Protection of Traditional Knowledge: Revised Objectives and Principles (WIPO/GRTKF/IC/8/5)*, 2006, paragraph 6.26 to 6.28, page 43.

<sup>104</sup> IGC Forty-Ninth Session, Geneva, 2-6 December 2024, ‘The Protection of TK: Draft Articles’ WIPO/GRTKF/IC/49/4, Annex, page 2, clause 8.

<sup>105</sup> Ibid., Technical Review Report of IGC, 2025, page 4, paragraph 22

*Examined from the indigenous peoples' perspectives, public domain is at odds with indigenous peoples' human rights enshrined in authoritative international instruments such as the UNDRIP. It is also misaligned to indigenous peoples' customary laws. While the concept is premised on time-limited rights, indigenous peoples regard TK and TCEs and human rights associated to them, such as the right to self-determination, the principle of FPIC, and associated rights to lands, territories and resources, to be timeless. Correspondingly, subjecting indigenous peoples' TK and TCEs to time limitation negates the limitless and trans-generational nature of rights associated with TK and TCEs among indigenous peoples.*

The Technical Review team see the development of a sui generis system of protection as a "potential solution" to this conundrum of how to protect TK and TCEs in relation to IP:<sup>106</sup>

A potential solution to the above conundrum lies partly *in crafting a sui-generis system* of protection of TK and TCEs, taking into account indigenous peoples' human rights and customary laws, as opposed to fitting it within the intellectual property system as expounded in paragraphs 12 and 13 of this Update. The envisaged sui-generis system should respect indigenous peoples' rights to control and protect their TK and TCEs.(bolding added)

However, it is highly unlikely that there will be any improvements (from Indigenous Peoples perspectives) on the latest iterations of the IGC draft articles for TK and TCEs and equally likely that they will be 'dumbed down' even further. Sadly, the IGC process has been a 25-year charade to give the *impression* that member states care about protecting TK or the rights of Indigenous and traditional peoples, but the *reality* is quite different. So much so that the deeply flawed Traditional Knowledge Patent treaty agreed to in 2024 was hailed by WIPO and member states as some kind of ground breaking achievement for protecting TK when in fact, as examined above, it is nothing of the sort and simply reinforces the rights of patent holders and patent right aspirants.

This low ambition is already flowing through to attempts by Brazil, India and Peru to "revitalise the discussions on the relationship between the TRIPS Agreement and CBD" in the WTO. Their paper from March 2025 began promisingly. It noted the CBD "conditioned access to biological resources and associated traditional knowledge with prior informed consent (PIC) and access and benefit sharing (ABS) with local communities, who are the rightful holders of such knowledge." However, neither the CBD (1994) nor the Nagoya Protocol (2014), which developed a legal framework to operationalise those requirements, linked them to the patent system, including under TRIPS. The paper then cited the adoption of the WIPO treaty as giving "a fresh impetus to resume these negotiations":

*In the context of protecting the legitimate rights of traditional communities and preventing misappropriation of genetic resources, the momentum gained from adopting the WIPO treaty must be channelled towards reviving negotiations on TRIPS-CBD linkage, thereby fostering greater harmony between the environmental, IP and trade regimes. This will ensure the flow of benefits to local and indigenous peoples of the developing countries as the providers and conservers of the genetic resources and the associated knowledge. This would also prevent the grant of erroneous patents and facilitate and ensure adequate and effective protection of Intellectual property rights.*

However, to make any changes to the TRIPS would require consensus of all WTO Members, which will not happen.

<sup>106</sup> Ibid., Technical Review Report of IGC, 2025, page 3, paragraph 11

## Towards A Tiaki Taonga Framework

The question remains ‘where to from here?’ and applies at multiple levels: TRIPS and the FTAs, in other international institutions and in domestic law. The danger for Māori and other Indigenous Peoples is that the outcomes from IGC process will significantly influence the development of policies and legal instruments at the national level. This has already been signalled by MFAT in discussions between officials and members of Nga Toki Whakarururanga during hui relating to negotiation of FTAs by the NZ government as these agreements relate to IP and TK,<sup>107</sup> and from several WTO members in relation to the review of TRIPS.

In Aotearoa, the Wai 262 claimants have been working on the development of what they have called the ‘Tiaki Taonga Framework’.<sup>108</sup> This framework has as its main objective “*the constitutionalising of te Tiriti o Waitangi through entrenchment of the framework, Tiaki Taonga*”.<sup>109</sup>

As noted on the Wai 262 Whakapumau website:<sup>110</sup>

*Tiaki Taonga Wai 262 is multi-faceted, complex and all-encompassing and so must be the solutions. Ultimately the remedy will require a suite of different solutions that are woven together to create a fabric for te tino rangatiratanga mō ngā taonga katoa....*

*The preferred model for this component of Tiaki Taonga is by way of legislation, which is then supported by a network of solutions including Codes of Conduct, contractual provisions, research guidelines, and educational material. The proposed solutions will embody the principle that Māori have the full and exclusive decision-making authority to taonga Māori as guaranteed by Te Whakaputanga, Te Tiriti o Waitangi and subsequent declarations, including the United Nations Declaration on the Rights of Indigenous Peoples, the Mataatua Declaration, and the Te Puea Declaration...*

The Tiaki Taonga framework also proposes a draft Bill that would give effect to the Wai 262 claimants aspirations, and which builds on the ‘Tikanga Māori Framework’ that was proposed by the Tai Tokerau claimants as part of their legal closing submissions in 2007.

This approach was supported by the previous Minister of Foreign Affairs and Minister for Māori Development, the Honourable Nanaia Mahuta, when she held this portfolio under the Labour government during the period 2020 to 2023. However, it is difficult to see that this mahi will continue to progress under the existing Coalition government led by the National Party, given its focus on minimalizing and eviscerating Te Tiriti o Waitangi and Māori rights from policy and law in this country. Indeed, government funding for the Wai 262 kaupapa will cease from the end of June 2025.<sup>111</sup> However, the Wai 262 claimants will continue to pursue alternative avenues of resourcing to enable them to carrying on with the work begun over 35 years ago by their elders and which is being pursued on by the mokopuna of the original claimants. This mahi is widely supported throughout Aotearoa through following a nationwide ‘kanohi ora’ engagement strategy with whanau, hapu and iwi.

<sup>107</sup> Personal notes from meeting with MFAT officials, Wellington, May 2025

<sup>108</sup> Refer to Wai 262 website for details on the Tiaki Taonga framework (<https://www.wai262.nz/Taumata-whakapumau>)

<sup>109</sup> See <https://www.tiakitaonga.com/from-wai-262-to-tiaki-taonga-16-04-2024>

<sup>110</sup> See [www.tiakitaonga.com/wp-content/uploads/2023/07/Wai-262-Booklet-2024-Online-Jan-25-202430\\_compressed.pdf](http://www.tiakitaonga.com/wp-content/uploads/2023/07/Wai-262-Booklet-2024-Online-Jan-25-202430_compressed.pdf)

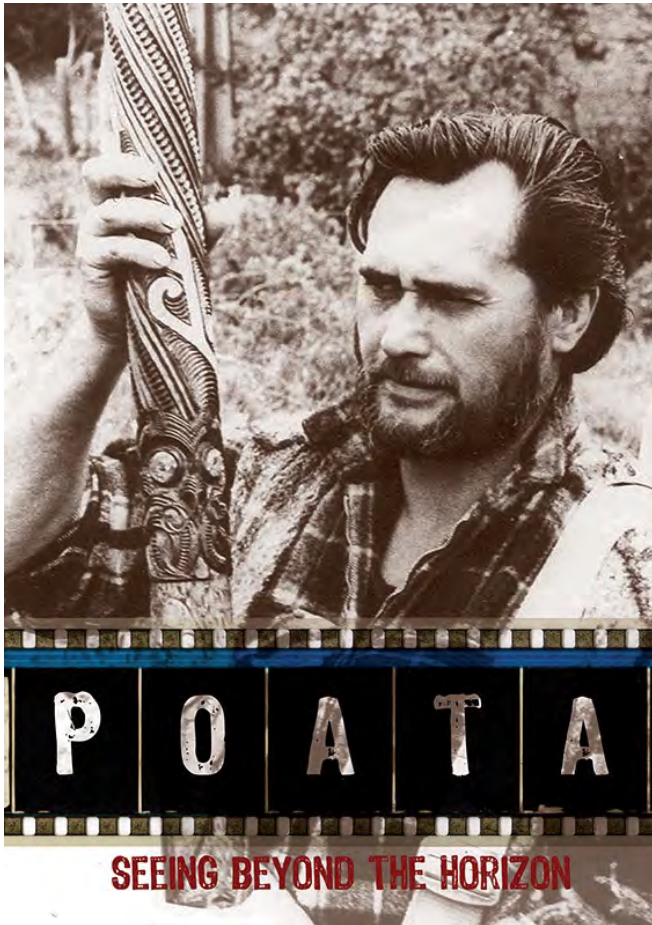
<sup>111</sup> Personal communications with claimant counsel, Leo Watson, May 2025.



Hori Parata, champion of tikanga a Ngati Wai, whale flensing expert and long time advocate for Ngati Wai in the Wai 262 claim  
(Photo credit: <https://ngatiwai.iwi.nz/2018/07/13/ngatiwai-rangatira-hori-parata-shares-ancient-knowledge-with-taranaki-hapu/>)



Named Claimant for Ngati Koata in Wai 262 (Photo credit - <https://www.facebook.com/photo/?fbid=603543188852353&set=a.187897220416954>)



*Tom Poata, named claimant for Ngati Porou in Wai 262*



*Ngahiwi Tomoana, Former long serving Chair of Ngati Kahungunu and member of Te Taumata Whakapumau as a representative for Ngati Kahungunu in the Waia 262 claim (Photo credit: <https://www.mfat.govt.nz/en/about-us/who-we-work-with/engagement-with-maori/te-hurumanu/ngahiwi-tomoana>)*



*Laly Haddon, Named claimant for Ngati Wai in Wai 262 claim' Photo credit: Stuff.co.nz*

# INTERNATIONAL INSTRUMENTS FOR RECOGNITION AND PROTECTION OF INDIGENOUS KNOWLEDGE AND ‘INTELLECTUAL PROPERTY’

## United Nations Declaration on the Rights of Indigenous Peoples

The most important international instrument affecting Indigenous Peoples is the United Nations Declaration on the Rights of Indigenous Peoples. Māori had a major role in the development and passage of the Declaration over the 30 or so years that it was being discussed and debated - and opposed by some states.<sup>112</sup> In 1972, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities (now called the UN Sub-Commission on Protection of Human Rights) commissioned a ‘Study of the Problem of Discrimination Against Indigenous Populations’. It took 10 years for the study to be completed, the longest in the history of the United Nations.<sup>113</sup> One of the major recommendations in the eventual report<sup>114</sup> was the establishment of a permanent forum inside the United Nations human rights system to report regularly on discriminatory practices and allowing for the participation of indigenous ‘populations’ themselves.

In 1982, the UN established the Working Group on Indigenous Populations (WGIP) and drafting of the declaration began in 1985. After 20 years of negotiations the draft declaration was eventually adopted by the UN General Assembly on 13 September 2007. New Zealand, along with Canada, Australia and the United States, voted against the declaration in 2007.<sup>115</sup> New Zealand became a signatory in 2010. However, the Declaration is not a legally binding instrument.

This can be compared with the International Labour Organization Convention 169 which recognises the status and rights of Indigenous and Tribal Peoples, which is a legally binding international treaty. New Zealand has not signed up to ILO Convention 169 even though it was promulgated in 1989.

Importantly, the Declaration under Article 3 recognises that Indigenous Peoples have the right to self-determination. This was one of the key reasons for New Zealand (and other major colonial nations) initially refusing to support the Declaration in 2007.

In terms of the main focus of this paper, Article 31 of the Declaration is the most significant, as it provides:<sup>116</sup>

*Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

*In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

However, in terms of the progress being made to implement the Declaration at the international level, the Permanent Forum noted in its annual report at its latest meeting held from 21 April to 2 May, 2025, that:

*its implementation remains inconsistent and insufficient, challenged by the lack of recognition of Indigenous Peoples, political resistance and economic interests, among other issues.*<sup>117</sup>

<sup>112</sup> Prominent Māori leaders who were involved with the Declaration over this period of time included Irihapeti Murchie, Pauline Tangiora, Moana Jackson, Aroha Mead, Ngāneko Minhinnick and many others

<sup>113</sup> See <https://onlinelibrary.wiley.com/doi/ful/10.1111/j.1468-0130.2006.00342.x>

<sup>114</sup> The Study was chaired by the Ecuadorian Ambassador to the UN, Jose R. Martinez Cobo

<sup>115</sup> Canada signed the Declaration in 2016 and passed legislation in 2021 giving it legal effect in Canada. The USA, with support of President Obama, signed it in 2010 and Australia signed it in 2009.

<sup>116</sup> See: [www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](http://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf), Article 31

<sup>117</sup> See <https://press.un.org/en/2025/hr5489.doc.htm> - Annual meeting of the UN Permanent Forum of Indigenous Peoples, 21 April 2025



Waitangi 1996 (PHOTO: John Miller)

In terms of its implementation in Aotearoa New Zealand, despite the passage of 18 years since the Declaration was passed and 15 years since New Zealand signed up to it, there has not been any real progress made on implementing the Declaration into NZ law and policy. The last official statement from Te Puni Kokiri, the Crown agent charged with this task, was a Cabinet paper in 2022 committing to “*outlining an iterative process of reviewing and updating the Declaration plan through to 2040*”.<sup>118</sup> The Cabinet minute also noted that consistency with the Declaration would need to happen over time and require some adjustments to the legal and policy settings.<sup>119</sup>

The National-NZ First coalition agreement in 2023 confirmed that the government will not recognise the Declaration as having any binding legal effect. Given that, and the Coalition government’s antipathy to Indigenous rights generally, it is highly unlikely that any progress is going to be made in the foreseeable future on the domestic front.

It is symptomatic of the continuing *colonial* mindset in countries such as NZ, US, Australia and to a lesser extent, Canada, that they will continue to obfuscate, obstruct, and oppose the principles and human rights norms they have previously agreed to in the Declaration and other international instruments and fora wherever Māori and Indigenous Peoples rights are concerned. This is an egregious breach of good faith and honour on the part of these governments who attempt to justify and cloak their racist dogma in the worn out and duplicitous rhetoric such as, “*but we are all one people*”, “*there should be equal rights for all*” and “*we all have the same opportunities so why can’t Māori/Indigenous Peoples be successful like the rest of society?*” This rhetoric ignores the fact that Indigenous Peoples continue to suffer from inter-generational disadvantage and trauma from having their lands stolen; cultures, languages and identities suppressed; and, in the worst cases, are survivors of genocide.<sup>120</sup>

<sup>118</sup> See Cabinet Social Welfare Committee minute @ tpk-undrip-minute0053.pdf

<sup>119</sup> Ibid

<sup>120</sup> Imi Mori from Rēkohu (Chatham Islands) are an example of an Indigenous Peoples who suffered genocide and for which the Crown has never expressed any remorse or accepted any responsibility.

## Convention on Biological Diversity, Nagoya Protocol and Kunming-Montreal Biodiversity Framework

As discussed above, the first Indigenous to Indigenous international instrument to give full recognition of Indigenous cultural and intellectual property rights was the Mataatua Declaration 1993. The call for protection of TK, and recognition of customary law as a mechanism for achieving that objective, was first recognised by the international community in Agenda 21, adopted in 1992, which recommends that governments

*... adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.*<sup>121</sup>

In 2002, the Conference of the Parties (COP) to the Convention on Biological Diversity called for Parties, with the approval and involvement of ‘Indigenous and local communities’:

*to develop and implement strategies to protect TK, innovations and practices based on a combination of appropriate approaches, respecting customary laws and practices, including the use of existing intellectual property mechanisms, sui generis systems and customary laws.*<sup>122</sup>

COP 10 adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefit Arising from their Utilisation. The Protocol, which entered into force in October 2014, creates obligations for Parties (New Zealand is not a Party) – both as home to ‘Indigenous and local communities’ and as countries into which their resources and knowledge may be imported – to adopt measures with the aim of ensuring that access to genetic resources and TK has the prior informed consent of those peoples and is subject to mutually agreed terms.

It is worth noting that the Nagoya Protocol does not directly refer to ‘Indigenous Peoples’ but rather uses the term ‘indigenous and local communities’, presumably as a way to circumvent acknowledging that Indigenous Peoples (spelt with an “s” on the end of Peoples) have the right to ‘self-determination’ as recognised in the International Covenant on

Civil and Political Rights 1976 and the UN Declaration on the Rights of Indigenous Peoples 2007.

In implementing the Protocol’s provisions on TK, Parties are obliged under Article 12 to ‘take into consideration the customary laws and community practices and procedures’ of Indigenous and local communities. According to Tobin:<sup>123</sup>

*This is one of the most important and groundbreaking provisions of the Protocol, recognising as it does, the international dimension and laws of Indigenous Peoples and local communities, where their traditional knowledge is concerned.*

It is widely recognised that a significant percentage<sup>124</sup> of the world’s remaining biological diversity exists within the traditional territories of Indigenous Peoples who act as the stewards of that biological diversity. For this reason alone, Indigenous and traditional peoples’ opinions and values around how to preserve our precious planet should be heeded.

In 1992, at the Rio Earth Summit, the CBD was signed by 196 nations states. Article 8(j) recognised the importance of TK to preserving the planet’s biological diversity by exhorting Parties to “*preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.*” It further calls for the “*involvement and approval*” of the holders of the knowledge and for the “*equitable sharing of any benefits*” arising from the utilisation of such knowledge. However, the provision is caveated by inclusion of language such as “*subject to national legislation*” and “*as far as possible and as appropriate*”, providing many countries with an ‘out’ in terms of compliance with this provision.

Notwithstanding the barriers to TK of Indigenous Peoples being taken seriously by colonial and other nation states, the CBD Secretariat at the 2020 COP continued to call for the full inclusion of Indigenous Peoples because:<sup>125</sup>

<sup>121</sup> Agenda 21, chapter 26.4

<sup>122</sup> See COP Decision VI/10F.33, See also ‘Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation’, Secretariat of the Convention on Biological Diversity, Montreal, 2002, Para 31

<sup>123</sup> Tobin, Brendan, ‘*Rise and fall of customary law in the IGC*’, Article in ‘Protecting Traditional Knowledge, The WIPO IGC’, 2017, Routledge Research in International Environmental Law, page 195

<sup>124</sup> There are some researchers who have put this as high as 80% of the planets biodiversity see for example, Dr Darrell Posey in ‘Beyond Intellectual Property Rights’.

<sup>125</sup> Elizabeth Maruma Mrema, Executive Secretary of the UN Secretariat of the Convention on Biological Diversity, (<https://www.cbd.int/gbo5/local-biodiversity-outlooks-2>)

*... the destruction of Nature and the dramatic loss of biodiversity and cultural diversity can be successfully reversed, by embracing the values, and building on the collective and local actions of the World's indigenous peoples and local communities.*

Despite the passage of more than 30 years since Article 8(j) was adopted as part of the CBD, its implementation by the international community has moved with glacial-like speed. In 2024 the COP, as part of its implementation of the Kunming-Montreal Global Biodiversity Framework (GBF),<sup>126</sup> was still calling for an effective programme of work to be adopted that is “*..aimed at promoting the implementation of Article 8(j) and other provisions of the Convention related to indigenous peoples and local communities*”<sup>127</sup> and that “*traditional knowledge, innovations, practices and technologies of indigenous peoples and local communities should be valued, considered essential and given the same respect and consideration as other forms of knowledge.*”<sup>128</sup>

Yet, these same countries as agreed to the COP outcome have shown that with the development and adoption of FTAs, including TRIPS-related issues, they can move with the speed of a fast flowing river when it suits them. For example, as at the date of writing the current New Zealand government is planning to conclude a FTA with India within a matter of months because of the perceived economic benefits to the country, having previously concluded an FTA with the United Arab Emirates in 2024 in just over four months.

The Kunming-Montreal GBF is an attempt to respond to the ongoing and unprecedented loss of biodiversity: “*despite ongoing efforts, biodiversity is deteriorating worldwide at rates unprecedented in human history*”.<sup>129</sup> As regards Indigenous Peoples, the Framework:<sup>130</sup>

*... acknowledges the important roles and contributions of indigenous peoples and local communities as custodians of biodiversity and as partners in its conservation, restoration*

*and sustainable use. The Framework's implementation must ensure that the rights, knowledge, including traditional knowledge associated with biodiversity, innovations, worldviews, values and practices of indigenous peoples and local communities are respected, and documented and preserved with their free, prior and informed consent, including through their full and effective participation in decision-making, in accordance with relevant national legislation, international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples, and human rights law.*

The Framework also recognises that, while different people in different places may have different values as regards the environment, for those countries that acknowledge them the “*rights of nature and rights of Mother Earth [are] an integral part of its successful implementation.*”<sup>131</sup> This is important as one of the first international binding treaties (ie the CBD) to recognise the inherent rights of Mother Nature, something that Māori and Indigenous Peoples have been advocating for a very long time.

On 7 October 2024, New Zealand submitted 13 national targets to the CBD that it aims to achieve by 2030 in relation to implementing the Kunming-Montreal GBF targets, which include under National Target 2:<sup>132</sup>

***Treaty partners, whānau, hapū, iwi and Māori organisations are rangatira and kaitiaki. By 2030: a) Innovative Treaty partnership approaches are developed and lead the delivery of many biodiversity restoration projects. b) Māori cultural and intellectual property rights and data interests regarding indigenous biodiversity are upheld.***  
(underlining added)

The words underlined reflect a worthy sentiment, but it remains to be seen what, if anything, will be done over the next five years to give effect to that target by the New Zealand government.

<sup>128</sup> Ibid

<sup>129</sup> The Kunming-Montreal Global Biodiversity Framework (see COP/CBD/Decision 15/4, Annex, page 4)

<sup>130</sup> Ibid, Annex, page 5, 7(a)

<sup>131</sup> Ibid, page 5, Para 7(b))

<sup>132</sup> See [www.doc.govt.nz/globalassets/documents/about-doc/role/international/nz-national-targets-contributing-to-the-gbf.pdf](http://www.doc.govt.nz/globalassets/documents/about-doc/role/international/nz-national-targets-contributing-to-the-gbf.pdf) and [www.cbd.int/doc/decisions/cop-16/cop-16-dec-01-en.pdf](http://www.cbd.int/doc/decisions/cop-16/cop-16-dec-01-en.pdf) page 5

National Target 5 provides that:

***Mātauranga Māori is an integral part of biodiversity research and management. By 2030: Treaty partners make decisions based on the best knowledge from multiple scientific disciplines and ways of seeing/understanding the world, including mātauranga Māori.***

This target acknowledges that mātauranga Māori is integral to biodiversity management and research and that it will be for the 'Treaty Partners' to make these decisions. No indication is given about who these 'partners' are or that the holders of the mātauranga will be asked for their prior informed consent.

Notably, New Zealand is not among the listed countries<sup>133</sup> who provided a national biodiversity strategy and action plan to the CBD aligned with the Kunming-Montreal Global Biodiversity Framework.

While the CBD and associated protocols and frameworks have laudable objectives, the slow pace of doing anything on sufficient global scale to actually address biodiversity loss and to listen to the voices and draw on the traditional knowledge and millennial experiences of Indigenous Peoples to help address those issues, is a tragic failure of will on the part of the international community. If the incentive was financial rather than biological the results would be immediate. The fact that the United States (the largest consumer of goods in the world) has not even ratified the CBD since it was promulgated in 1992, says a lot about where that country places its priorities. But the rest of the (mostly developed) world can and should be doing much more than they currently are to prevent the exhaustion of the Mother Earth's finite and precious natural resources. If they had been listening to the collective voices of Indigenous People over the past 500 years on how to conserve and live with nature instead of raping and pillaging it (along with the dispossession and theft of their lands), we would not be now facing the potential extinction of our species.

On the domestic front, the current Coalition government recently announced in its 2025 Budget a \$750m cut to Māori based and run programmes.<sup>134</sup> This includes terminating funding for the Wai 262 Taumata Whakapumau that was only commenced in 2022 after the Wai 262 claimants had waited 11 years for a response from the Crown to the findings of the Waitangi Tribunal to the Wai 262 claim that was issued in 2011.

This comes on the back of a plethora of legislative and policy initiatives of this government to diminish te reo Māori as a recognised official language in Aotearoa, to redefine and eviscerate Te Tiriti o Waitangi so as to appease the racist and corporate agendas of this country, to fast track the despoilation of Papatuanuku in pursuit of profit at the expense of te taiao, and generally to "put the uppity natives back in their place". However, the 'genie is out of the bottle' and there is no way it is going to be put back in! Toi tu Te Tiriti!



<sup>133</sup> There are only 44 countries out of the 196 who have submitted to the CBD a national biodiversity and action plan in October 2024. This hardly gives hope that the worthy objectives of the CBD and GBF are a top priority for member states. See also, [www.cbd.int/doc/decisions/cop-16/cop-16-dec-01-en.pdf](http://www.cbd.int/doc/decisions/cop-16/cop-16-dec-01-en.pdf), page 3.

<sup>134</sup> See: [thespinoff.co.nz](http://thespinoff.co.nz) 'Budget 2025: New Funding headlines mask deeper cuts to Māori Programmes.'

## CONCLUSION

In conclusion it might be asked that given the immense barriers and opposition that Māori, Moriori and other Indigenous Peoples have historically faced and continue to face both nationally and internationally in pursuit of the recognition, protection, control of their traditional lands, and cultural rights and obligations, what further can be done? Colonial states, including New Zealand, have systematically erected obstacles through the TRIPS and FTAs, obstructed any genuine advances in other international institutions, and resisted a *sui generis domestic* law. Looking for justice and fairness from the coloniser will, at best, be tokenistic and paternalistic and at worst outright racist and oppressive. There is simply not the political or *moral* will on the part of the colonial power brokers to share genuine power with those whose lands they have stolen, whose peoples they have oppressed and whose cultures and identities they have tried, over centuries, to eliminate.

But in spite of these depravities and setbacks, Māori, Moriori and Indigenous Peoples everywhere have continued to survive and, in many cases, thrive. The answers, as always, resides within the hearts, souls, memories and commitment of the Peoples themselves. No matter the 'slings and arrows' that have been thrown our way, we are still here and growing stronger, more populous and more savvy with each passing generation. And that, ultimately, is where the answers lie, within us and our own *tino rangatiratanga* both personal and collective.

Me rongo (in peace),

**Maui Solomon**

Pukenga,

Nga Toki Whakarururanga

15 June 2025





# NGĀ TOKI WHAKARURURANGA



<https://ngatoki.nz>

