

Note

How New Zealand's Adoption of the Nagoya Protocol Would Enhance Protection of Māori Traditional Knowledge

Emily Ortlieb Ricciardi*

“Te manu e kei i te miro, nōna te ngahere, Te manu e kai i te mātauranga, nōna te ao.”¹

I. INTRODUCTION

Mānuka, or tea tree, is known to have antibacterial, antifungal, and antihistamine properties, and is used to treat a variety of ailments.² It is also one of New Zealand's most common native trees, and its medicinal properties were first discovered and applied by Māori, the indigenous people of New Zealand.³ Over the last several decades, mānuka has been the subject of extensive research, providing the basis for a multi-million dollar commercial industry.⁴ New Zealand and the United States have both granted multiple patents for mānuka-related products and processes, all of which have one thing in

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1. Māori proverb meaning “[t]he bird that partakes of the miro berry, owns the forest; the bird that partakes of education, owns the world.” MINISTRY EDUC., EARLY CHILDHOOD CURRICULUM 13 (2017), <https://tewhariki.tki.org.nz/assets/Uploads/Te-Whariki-Whakatauki.pdf>.

2. WAITANGI TRIBUNAL, 1 KO AOTEAROA TENEI: A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLITY AFFECTING MĀORI CULTURE AND IDENTITY 129 (2011) [hereinafter WAI 262 REPORT], https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356416/KoAoteaoroaTeneiTT2Vol1W.pdf.

3. *Id.* at 130.

4. *Id.*

common: utter exclusion of even a mention of the foundational Māori traditional knowledge.⁵

Māori, like many indigenous and tribal peoples throughout the world, have developed a vast wealth of traditional knowledge, which they rightfully wish to protect and promote.⁶ Few indigenous peoples use the intellectual property legal system to do so, as it does not provide adequate solutions to challenges typically faced by indigenous peoples regarding traditional knowledge.⁷ However, certain legal mechanisms exist—both within New Zealand and internationally—capable of bridging the divide between the western intellectual property system and Māori understanding of ownership.

The Waitangi Tribunal, a permanent commission of review established by the Crown of New Zealand, oversees claims brought by Māori relating to Crown actions of breach of the centuries-old Treaty of Waitangi.⁸ The Nagoya Protocol, supplemental to the Convention on Biological Diversity, and not yet ratified by New Zealand, provides a transparent legal framework for fair and equitable sharing of benefits arising out of genetic resources.⁹ By ratifying and implementing the Nagoya Protocol, New Zealand could provide an optimal system of traditional knowledge protection sensitive to indigenous ways of thinking by utilizing Waitangi Tribunal Recommendations and the Nagoya Protocol in tandem.

Part I of this note introduces Māori and existing legal mechanisms governing indigenous traditional knowledge. Part II proposes the ratification of the Nagoya Protocol as a complementary mechanism to the recommendations made by the Waitangi Tribunal in the *Ko Aotearoa Tenei* (Wai 262 Report). It will analyze the issues arising in the application of a Western intellectual property regime to indigenous traditional knowledge, the methods by which New Zealand and Māori are working together to incorporate traditional knowledge into state

5. *See id.* at 130–31.

6. WORLD INTELLECTUAL PROP. ORG., PROTECT AND PROMOTE YOUR CULTURE: A PRACTICAL GUIDE TO INTELLECTUAL PROPERTY FOR INDIGENOUS PEOPLES AND LOCAL COMMUNITIES 3 (2017).

7. *Id.*

8. WAITANGI TRIBUNAL, <https://www.waitangitribunal.govt.nz/> (last visited Jan. 12, 2019).

9. *See* Conference of the Parties to the Convention on Biological Diversity, 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, U.N. Doc. UNEP/CBD/COP/DEC/X/1 (Oct. 29, 2010).

intellectual property protection mechanisms, and benefit sharing under the Nagoya Protocol as an alternative way to respect indigenous traditional knowledge rights.

II. BACKGROUND

A. MĀORI PEOPLE OF NEW ZEALAND

Māori, indigenous to New Zealand, are said to have arrived in Aotearoa, or the “land of the long white cloud,” in the fourteenth century.¹⁰ Each tribe, or *iwi*, acknowledges a common ancestry as well as a particular social order.¹¹ Much of Māori culture originated in East Polynesian traditions, which developed further during several centuries of isolation to include vibrant horticultural innovations and later a warrior culture.¹² Māori are unique in that they recognize “cognatic or bilateral descent groups” known as guardians that control or own certain resources, including land.¹³

Māori currently make up approximately 15% of the New Zealand Population.¹⁴ The socioeconomic gap between Māori and non-Māori is significant; the difference in life expectancy is about eight years, household income of Māori is 78% of the national average, and Māori make up over 50% of the prison population.¹⁵ Since the arrival of British colonists in New

10. Māori nations have and continue to refer to New Zealand as Aotearoa, or “land of the long white cloud.” *Aotearoa*, MAORI.COM, <https://www.maori.com/aotearoa> (last visited Dec. 6, 2018); *see also* *Māori*, Encyclopedia Britannica, <https://www.britannica.com/topic/maori> (last visited Dec. 6, 2018).

11. *Māori*, *supra* note 10.

12. *Id.*; *Maori*, INTERCONTINENTAL CRY <https://intercontinentalcry.org/indigenous-peoples/maori/> (last visited Oct. 19, 2018); *see also* AIG, *Haka—History*, YOUTUBE (Oct. 6, 2014), <https://www.youtube.com/watch?v=AnlFocaA64M>.

13. Victor T. King, *Cognatic Society*, in *ENCYCLOPEDIA OF SOCIAL AND CULTURAL ANTHROPOLOGY* 106, 107 (Alan Barnard & Jonathan Spencer eds., 1996).

14. *See 2013 Census Ethnic Group Profiles: Māori*, STATS NZ, http://archive.stats.govt.nz/census/2013-census/profile-and-summary-reports/ethnic-profiles.aspx?request_value=24705&parent_id=24704&tabname=#24705 (last visited Dec. 6, 2018) (“Māori comprised 598,602 people or 14.9 percent of people that stated an ethnic group living in New Zealand on 5 March 2013.”).

15. INT’L WORK GRP. FOR INDIGENOUS AFFAIRS, *THE INDIGENOUS WORLD* 2017, 283 (Katrine Broch Hansen et al. eds., Apr. 2017), <https://www.iwgia.org/images/documents/indigenous-world/indigenous-world-2017.pdf>.

Zealand in the mid-1700s, Māori have been plagued by a long history of inequality and discrimination.

1. Overview of Māori Key Cultural Language

iwi: individual tribe within Māori

kaitiaki: a guardian entrusted to nurture and care for a person or aspect(s) of the environment, such as the sky, sea, or land.¹⁶

mātauranga Māori: Māori traditional knowledge, the way in which Māori view themselves and the world.¹⁷

taonga: anything that is treasured, tangible or intangible, including land, waters, wildlife, identity, and culture.¹⁸

2. The Treaty of Waitangi and Waitangi Tribunal

The Treaty of Waitangi, often referred to as the nation's founding agreement, is an agreement made between Māori and the British Crown in 1840.¹⁹ Though available in both English and Māori at the time of signing, the Treaty contained overwhelmingly technical English terms, which lacked Māori translation.²⁰ It is not uncommon for an indigenous community to have less developed conceptual capabilities within its language, as was the case with the Treaty of Waitangi.²¹ This meant that the two parties stood on unequal ground, as Māori were additionally unaware of the full meaning of treaty agreement practices within British law and culture.²²

The Treaty provided that the British were granted a right of governance, with Māori retaining sovereignty of their lands and

16. Barbara Sullivan & Lynell Tuffery-Huria, *New Zealand: Wai 262 Report and After*, 9 J. INTELL. PROP. L. & PRAC. 403, 404 (2014).

17. *Id.*

18. *Id.*

19. *The Treaty in Brief*, N.Z. HIST., <https://nzhistory.govt.nz/politics/treaty/the-treaty-in-brief> (last updated May 17, 2017). The treaty was signed by representatives of the British Crown and over 500 Māori chiefs. See Sue Scheeles, *Safeguarding Indigenous Knowledge and Access to Plant Resources Through Partnership: A New Zealand Perspective*, 4 INT'L J. RURAL L. & POL'Y 1, 1 (2015).

20. Tim Stirrup, *Bioprospecting, the Nagoya Protocol and Indigenous Rights: A New Zealand Perspective*, 107 J. INTELL. & INDUS. PROP. SOC'Y AUSTL. & N.Z. 53, 58 (2016).

21. *Id.*

22. *Id.*

resources.²³ Māori were also granted the same rights as British citizens; although subsequent New Zealand governments ignored the Treaty for many years following the signing.²⁴ Today the treaty has limited legal status and therefore “Māori rights are largely dependent on political will and ad hoc recognition of the treaty.”²⁵

Constant dispute over the operation and text of the Treaty of Waitangi led to the creation of the Waitangi Tribunal, which was established by the Treaty of Waitangi Act in 1975.²⁶ The Tribunal’s main purpose is to determine the meaning of the Treaty, which involves investigation of Māori claims of breach of the Treaty.²⁷ However, the Tribunal has no authoritative power other than to issue recommendations for remedy.²⁸ Regardless, it has been hailed a “mammoth and ongoing public history-making project.”²⁹ Since 1975, the Tribunal has issued upwards of ninety reports in response to hundreds of both historical and contemporary claims filed before it.³⁰

The Waitangi Tribunal retains up to twenty members, each appointed by the Governor-General following recommendation by the Minister for Māori Development.³¹ Typically, half are Māori and half are Pākehā, New Zealanders of European descent.³² Membership is diverse, and members are appointed based on expertise in a given area that is likely to come before the Tribunal.³³ Panels of up to seven members are appointed to carry out inquiries of the claims made before it; each panel must include at least one Māori member.³⁴

In 2014, the Tribunal announced a “Strategic Direction”

23. *Id.*

24. Susan Corbett, *Governance Systems for Access to and Use of Indigenous Knowledge and Culture: A New Zealand Perspective* (Mar. 7, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015026.

25. Stirrup, *supra* note 20, at 58.

26. *Id.* at 61.

27. Treaty of Waitangi Act 1975, pmbl. (N.Z.).

28. *Id.* art. 3; Stirrup, *supra* note 20, at 61.

29. Rachel Buchanan, *Decolonizing the Archives: The Work of New Zealand’s Waitangi Tribunal*, 14 PUB. HIST. REV. 44, 45 (2007).

30. *Id.*

31. *About the Waitangi Tribunal*, WAITANGI TRIB., <https://www.waitangi-tribunal.govt.nz/about-waitangi-tribunal/members-of-the-waitangi-tribunal/> (last updated Nov. 1, 2018).

32. *Id.*

33. *Id.*

34. *Id.*

plan to be implemented between 2014 and 2025.³⁵ The plan acknowledges that unresolved past Treaty grievances present a major obstacle to restoring and sustaining the relationship between Māori and the Crown as defined by the Treaty.³⁶ These historical claims relate to issues faced by indigenous peoples globally: colonization, loss of land, and economic and social marginalization.³⁷ Historical claims are separate from contemporary claims which cover the last twenty years, and thematic claims, which are general grievances that affect Māori statewide.³⁸ The Tribunal aspires to address all historical claims by 2020, followed by completion of thematic ones.³⁹ The overall goal is to reduce the backlog completely by 2025, giving the Tribunal the ability to hear claims as they are filed.

3. Wai 262 and Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity

Wai 262 is a collection of claims filed in 1991 by individuals from six separate Māori nations who were alarmed by the exploitation of their traditional knowledge and the misappropriation of “[i]ndigenous flora and fauna.”⁴⁰ The claim was amended in 1997 in light of proposed intellectual property and free trade legislation.⁴¹ The claimants also sought a specific definition of the term *taonga*, traditionally and broadly understood to mean “treasure,” to include all parts of a tribe’s collective estate, “material and non-material, tangible and intangible.” Probably the most sweeping claim brought before the Tribunal, Wai 262, is, at its core, a claim about *mātauranga Māori*: “the unique Māori way of viewing the world, incorporating both Māori culture and Māori traditional

35. WAITANGI TRIBUNAL, WAITANGI TRIBUNAL STRATEGIC DIRECTION 2014–2025 (2014), <https://www.waitangitribunal.govt.nz/assets/Documents/Publications/WT-Strategic-direction-2014-to-2025.pdf>.

36. *Id.* at 2.

37. *Id.* at 8.

38. *Id.* at 4.

39. *Id.*

40. Fleur Adcock, *Diluted Control: A Critical Analysis of the Wai 262 Report on Māori Traditional Knowledge and Culture*, in INDIGENOUS INTELLECTUAL PROPERTY: A HANDBOOK OF CONTEMPORARY RESEARCH 497–516 (Matthew Rimmer ed., 2015).

41. *Id.*

knowledge.”⁴² Like many legal issues, the actual claim is confounded by disputed meaning of certain words.⁴³ In this case, it is further complicated by translations in Māori and English.⁴⁴

Most of the Wai 262 centers on the meaning of *taonga* in Article 2 of the Treaty. Both the Tribunal and New Zealand courts have determined *taonga* to include treasures of both tangible and intangible nature.⁴⁵ However, the Wai 262 claimants insist that it includes other elements central to their culture and identity, including traditional cultural expressions as well as indigenous flora and fauna.⁴⁶ The Tribunal ultimately found that New Zealand intellectual property law did not provide adequate protection to Māori *taonga*, as understood by Māori people.⁴⁷ It then made a series of recommendations for intellectual property reform capable of functioning within existing intellectual property law.⁴⁸

The findings were released in a report in 2011, which considers a wide variety of Māori interests including intellectual and cultural property, protection of language, traditional Māori healing, and the impact on Māori people of international commitments made by the Crown.⁴⁹ At more than one thousand pages and twenty years of hard work, the Report is significant both for New Zealand’s and the international intellectual property systems.⁵⁰ The claim centers on a New Zealand treaty and its attempt to determine “what indigenous peoples’ control over their traditional knowledge should look like in contemporary times”⁵¹ The Report has received mixed reviews; some see it as giving too much control to Māori, and some as failing to offer Māori any meaningful control. Still some see it as striking an adequate balance between the two.⁵²

The Tribunal noted in the Report the tension between tradition in Western practice to attribute value by property rights and Māori practice to attribute value in terms of kinship

42. WAI 262 REPORT, *supra* note 2, at 1.

43. Adcock, *supra* note 40, at 500.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 506.

48. *Id.*

49. *Id.* at 497.

50. *Id.* at 498.

51. *Id.*

52. *Id.*

and obligations to the collective.⁵³ The Tribunal observes that the principles of *kaitiakitanga* (guardianship) and property rights are simply two different ways to conceptualize the same issue: “the ways in which two cultures decide the rights and obligations of communities in their created works and valued resources.”⁵⁴

At the heart of the Wai 262 claim is *mātauranga Māori*, or Māori knowledge, which is connected to the term *taonga*.⁵⁵ The Waitangi Tribunal provides a working definition of a *taonga* work as “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.”⁵⁶ *Taonga* works can be ancient or modern, and function as representations of ancestors.⁵⁷ As such, Māori *kaitiaki*, or guardians, are entrusted with the responsibility to protect the physical wellbeing of *taonga*, including *taonga* species, or flora and fauna both native and nonnative to New Zealand that carry stories related to Māori ancestors.⁵⁸

In terms of intellectual property, Wai 262 is rooted in a twofold objection: first, in the inappropriate exploitation of Māori traditional knowledge by non-Māori, and second, in the inability of Māori to control their traditional knowledge themselves.⁵⁹ Another major claim voiced within Wai 262 is the failure of New Zealand’s intellectual property laws to protect the *mātauranga Māori* (Māori traditional knowledge) as a *taonga*, or cultural treasure, which is guaranteed under Article 2 of the Treaty of Waitangi.⁶⁰ The six *iwi* who brought the claim declared that New Zealand’s intellectual property laws neither actively prevent third parties from exploiting *mātauranga Māori*, nor permit Māori to reap the benefits of their traditional knowledge should they choose to do so.⁶¹ Against the backdrop of the

53. Sullivan & Tuffery-Huria, *supra* note 16, at 404.

54. WAI 262 REPORT, *supra* note 2, at 33.

55. *Id.* at 96.

56. *Id.*

57. Adcock, *supra* note 40, at 502.

58. *Id.*

59. Seamus Woods, *Patents, PVRs and Pragmatism: Giving Effect to the WAI 262*, 19 CANTERBURY L. REV. 97, 97 (2013).

60. See *Essence of the Wai 262 Claim*, WAI 262, <https://wai262.weebly.com/essence-of-the-claim.html> (last visited Dec. 7, 2018); cf. Oliver Sutherland et al., *The Background to WAI 262*, 8, WAI 262, https://wai262.weebly.com/uploads/7/4/6/3/7463762/history_wai_262.pdf (last visited Dec. 7, 2018).

61. Woods, *supra* note 59, at 99.

irreconcilable guardianship spirit and Western intellectual property regime, the Waitangi Tribunal released its recommendations in the Report titled *Ko Aotearoa Tēnei* (“[t]his is New Zealand”) in July 2011.⁶²

B. BIOCOLONIALISM AND TRADITIONAL KNOWLEDGE

The Indigenous Peoples Council on Biocolonialism defines biocolonialism as an extension of the “reach of the colonial process into the biomes and knowledge systems of indigenous peoples in the search for marketable genetic resources and traditional knowledge.”⁶³ Some have considered cultural and intellectual property rights to be a second wave of colonization, as the principles of Western intellectual property are seen as an extension of foreign conquest and dominance.⁶⁴ Indigenous scholars have associated the biocolonial process with “control, manipulation and ownership of life itself, and the ancient knowledge systems held by indigenous peoples.”⁶⁵ Indigenous peoples then, as the original innovators, owners, and stewards of much of the world’s biodiversity, find themselves at the center of this problem.⁶⁶ Rather than consolidating the concept of ownership, some indigenous peoples view their heritage and culture as a whole in terms of community and individual responsibility.⁶⁷ Specific to Māori traditions, knowledge is shared and passed down to successive generations according to Māori customary law.⁶⁸ Generally speaking, even individual roles to care for a particular person or natural resource are undertaken on behalf of the community as a whole, emphasizing the idea of collective ownership.⁶⁹

Another scholar has said that “[i]f colonialism encompasses the interlocking array of policies and practices (economic, social,

62. WAI 262 REPORT, *supra* note 2, at xxiii (defining “*Ko Aotearoa Tēnei*”); Woods, *supra* note 59, at 101 (“The Government, which is not bound by the Tribunal’s proposals, reacted by giving assurances that it will consider the recommendations over time, but that it was in ‘no rush’ to respond . . .”).

63. Debra Harry, *Biocolonialism and Indigenous Knowledge in United Nations Discourse*, 20 GRIFFITH L. REV. 702, 702 (2011).

64. JESSICA CHRISTINE LAI, *INDIGENOUS CULTURAL HERITAGE AND INTELLECTUAL PROPERTY RIGHTS* 60 (2014).

65. Harry, *supra* note 63, at 703.

66. *Id.* at 704.

67. LAI, *supra* note 64, at 60.

68. *Id.*

69. *Id.* at 61.

political, and legal) that a dominant culture draws on to maintain and extend its control over other peoples and lands, biocolonialism emphasizes the role of science policy and of scientific practice within that array.”⁷⁰ Extractive biocolonialism is the process by which biological “resources and information about them are sought, ‘discovered,’ and ‘removed to the microworlds of biotechnoscience.”⁷¹ These resources and information are “legally christened” as the intellectual property of an individual, corporation, or institution, and then further exploited by placement in a state or global market as a commodity.⁷²

The highly controversial issue of whether traditional knowledge should or can be governed by a Western intellectual property regime is the same issue presented before the Tribunal in the Wai 262 claim.⁷³ Perhaps the largest Māori concern is that reducing this aspect of their culture to Māori “traditional knowledge” or Māori “intellectual property” overgeneralizes and misrepresents the multifaceted spiritual connection between the traditional knowledge and their culture and way of life as a whole.⁷⁴ This is not a struggle that is unique to Māori people; many peoples, particularly across the global south, are equally fraught.⁷⁵ The Western world generally highlights both commodification and individual ownership. Intellectual property rights are seen as a means of incentivizing innovation by allowing an inventor or breeder to temporarily benefit from her invention.⁷⁶ Conversely, indigenous peoples including Māori see themselves in a guardianship role over tangible and intangible resources alike.⁷⁷ Thus, emphasis is placed on an unending spiritual oneness with nature.⁷⁸ Relatedly, the Waitangi Tribunal in its 2011 report on the Wai 262 claim found that “while Māori have no proprietary rights in *taonga* species, the cultural relationships between kaitiaki and *taonga* species are

70. Laurie Anne Whitt, *Indigenous Peoples, Intellectual Property & the New Imperial Science*, 23 OKLA. CITY U.L. REV. 211, 212 (1998).

71. *Id.* at 213.

72. *Id.*

73. Woods, *supra* note 59, at 97.

74. *Id.*

75. See, e.g., WIPO ACADEMY, CASE STUDY: HOODIA PLANT (Jan. 2008), http://www.wipo.int/export/sites/www/academy/en/about/global_network/educational_materials/cs1_hoodia.pdf.

76. Woods, *supra* note 59, at 100.

77. *Id.*

78. *Id.* at 101.

entitled to reasonable protection.”⁷⁹

It is not difficult to see why Māori’s guardianship relationship with the *mātauranga Māori* is inadequately served by a restrictive Western intellectual property system.⁸⁰ The idea of owning or exploiting the *mātauranga*, regardless of who is doing the owning or exploiting, is a foreign and exceptional concept.⁸¹ Further, neither intellectual property law nor equivalent terms exist within Māori culture or language.⁸² UN experts have held the position that the Western intellectual property system is “inherently unsuitable” for the protection of indigenous intellectual property, in that “[s]ubjecting indigenous peoples to such a legal scheme would have the same effect on their identities, as the individualization of land ownership, in many countries, has had on their territories—that is, fragmentation into pieces, and the sale of the pieces, until nothing remains.”⁸³

One scholar points out that it is impossible to compare intellectual property and real property in this way under a western property regime.⁸⁴ In indigenous knowledge systems, outsider use of indigenous cultural heritage can alter the integrity of that particular aspect of the indigenous cultural heritage, rendering it useless to that community.⁸⁵

C. CONVENTION ON BIOLOGICAL DIVERSITY AND THE NAGOYA PROTOCOL

In the Wai 262 Report, the Waitangi Tribunal refers to the Convention on Biological Diversity (“CBD”) as the “centre of gravity” in the debate on international bioprospecting.⁸⁶ The

79. WAI 262 REPORT, *supra* note 2, at 212.

80. *See id.* at 51, 209.

81. *See id.* at 208–11.

82. LAI, *supra* note 64, at 59.

83. *Id.* (quoting Daes, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, ¶ 32 (1993)).

84. *Id.*

85. *Id.*

86. WAI 262 REPORT, *supra* note 2, at 146; *see Bioprospecting*, UNDP, <http://www.undp.org/content/sdfinance/en/home/solutions/bioprospecting.html> (last visited Dec. 28, 2018) (describing bioprospecting as a process by which biological material in nature is sought after for the purpose of developing commercially-valuable products in areas such as pharmaceuticals and agriculture).

CBD provides an international framework for preserving biodiversity. In 2010 an optional protocol to the CBD was adopted: *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity* (“Nagoya Protocol”).⁸⁷ The Nagoya Protocol is the product of eleven years of steadfast effort on the part of multiple groups of people: experts on access and benefit-sharing agreements, a range of state representatives, UN diplomats, as well as multiple indigenous rights groups.⁸⁸ It functions as a supplementary agreement to the Convention on Biodiversity (“CBD”), aiming to facilitate “access to genetic resources from each sovereign state” and to safeguard the sharing of benefits that result from research, development and commercialization of said resources.⁸⁹ It came into force in October 2014, and has since been ratified by seventy-four countries.⁹⁰ New Zealand decided to defer ratification until the Wai 262 claim has been officially settled, as well as the clarification of certain ambiguities within the Nagoya Protocol.⁹¹ Some are of the opinion that New Zealand is also reluctant due to the paramount importance of the Treaty of Waitangi.⁹² The Wai 262 Report actually contains a thorough history of the Nagoya Protocol, but is purely informational and does not involve a recommendation.⁹³

The Nagoya Protocol provides a legal structure to regulate the use of both genetic resources and traditional knowledge by “users,” meaning third-party states, companies, or other institutions.⁹⁴ It additionally outlines accepted practices concerning bioprospecting, in order to better reduce the potential negative consequences to the states and indigenous communities from which the resource originates, or the “provider.”⁹⁵ The Nagoya Protocol also addresses traditional knowledge, as it

87. See WAI 262 REPORT, *supra* note 2, at 150; *About the Nagoya Protocol*, CONVENTION ON BIOLOGICAL DIVERSITY, <https://www.cbd.int/abs/about/> (last visited Dec. 28, 2018).

88. Stirrup, *supra* note 20, at 56.

89. *Id.*

90. *Id.*

91. *Id.* at 60. New Zealand would like to see further clarity on the application of the Protocol to various sectors, namely agriculture.

92. Scheeles, *supra* note 19, at 1.

93. See WAI 262 REPORT, *supra* note 2, at 150–52.

94. *Id.* at 148–51.

95. *Id.*

relates to genetic resources.⁹⁶ Concrete obligations of states who are party to the Nagoya Protocol include establishing clear rules and procedures for prior informed consent, and providing for the issuance of a permit or equivalent if and when access is granted.⁹⁷ States must also establish certain mechanisms and provide financial support in order to achieve the overall objective to ensure “fair and equitable sharing of benefits arising from the utilization of genetic resources . . . thereby contributing to the conservation of biological diversity and the sustainable use of its component.”⁹⁸

The CBD as a whole gives sovereign rights to states over genetic resources found within their borders.⁹⁹ On its face, this was (and is) problematic for indigenous peoples, given that said peoples are often not recognized by states as sovereign (and in many cases, hardly recognized at all).¹⁰⁰ Further, many indigenous communities worldwide reject the sovereignty of the government over their genetic resources and traditional knowledge.¹⁰¹ The Nagoya Protocol remedies the sovereignty issue, at least in theory, by recognizing that indigenous communities may have claims to a certain genetic resource associated with traditional knowledge.¹⁰² It also encourages the Provider states to recognize customary laws and work with provider communities to obtain prior informed consent “on

96. *Id.* Though this is a step in the right direction, the majority of the body of traditional knowledge involving cultural heritage and other traditional cultural expressions is left out.

97. CONVENTION ON BIOLOGICAL DIVERSITY, *supra* note 87.

98. Nagoya Protocol, *supra* note 9, art. 1.

99. *Id.* pmb.

100. See RISHABH KUMAR DHIR, INDIGENOUS PEOPLES IN THE WORLD OF WORK IN ASIA AND THE PACIFIC: A STATUS REPORT 3 (2015), https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_438853.pdf (explaining harsh conditions indigenous people face today); *Environment*, UNDESA, <https://www.un.org/development/desa/indigenoupeoples/mandated-areas1/environment.html> (last visited Dec. 28, 2018).

101. Jeremy Hance, *Indigenous Peoples Fight for Their Rights. Governments and Businesses Call Them Terrorists*, HUFFPOST (Sept. 7, 2018, 5:45 am), https://www.huffingtonpost.com/entry/indigenous-people-terrorists-criminals-land-human-rights_us_5b8fab75e4b0511db3ddcdac; *Indigenous People Fight Back with #NativeLivesMatter Movement*, N.Y. PUB. RADIO: TAKEAWAY (Oct. 26, 2016) <https://www.wnyc.org/story/do-native-lives-matter-most-americans/>; Peter Veit, *5 Ways Indigenous Groups Are Fighting Back Against Land Seizures*, WORLD RES. INST.: BLOG (June 20, 2018), <https://www.wri.org/blog/2018/06/5-ways-indigenous-groups-are-fighting-back-against-land-seizures>.

102. *Id.*

mutually agreed terms for the use of the genetic resources and traditional knowledge.¹⁰³

III. ANALYSIS

A. TRADITIONAL KNOWLEDGE WITHIN THE WESTERN INTELLECTUAL PROPERTY REGIME

At the forefront of issues relating to indigenous traditional knowledge is the divide between Western scientific methodologies and intellectual property regime, and indigenous methodologies and perceptions of traditional knowledge sharing.¹⁰⁴ The divide is further exacerbated by lack of recognition and lack of available protection for the intellectual knowledge and achievements of indigenous communities.¹⁰⁵ Multiple indigenous scholars continue to be hindered by western scientists and government officials who devalue or disregard traditional knowledge as lacking in contribution to western science.¹⁰⁶ Indigenous writers have regarded Western bioprospecting practices as biocolonialism.¹⁰⁷ They argue that the Western world is both “rooted in capitalism and practices of maldevelopment” and “looking for new colonies to invade and exploit for further accumulation of wealth.”¹⁰⁸

Although interest in acknowledging traditional knowledge in certain areas of the world has grown, it has resulted in recognition attempts that do not align with the needs. One example is the recent endeavors to document and preserve indigenous knowledge in databases. On its face, this seems both beneficial and worthwhile to indigenous and non-indigenous

103. *Id.*; see also Nagoya Protocol, *supra* note 9, art. 6, 7.

104. Corbett, *supra* note 25, at 3.

105. Jessica Hutchings, *Is Biotechnology an Appropriate Development Path for Māori?*, in *PACIFIC GENES & LIFE PATENTS: PACIFIC INDIGENOUS EXPERIENCES & ANALYSIS OF THE COMMODIFICATION & OWNERSHIP OF LIFE* 23, 28 (Aroha Te Pareake Mead & Steven Ratuva eds., 2007).

106. See generally MARGARET KOVACH, *INDIGENOUS METHODOLOGIES: CHARACTERISTICS, CONVERSATIONS, AND CONTEXTS* (2009); LINDA TUHIWAI SMITH, *DECOLONIZING METHODOLOGIES: RESEARCH AND INDIGENOUS PEOPLES* (2d ed. 2012); Corbett, *supra* note 25.

107. Giovanna Di Chiro, *Indigenous Peoples and Biocolonialism: Defining the “Science of Environmental Justice” in the Century of the Gene*, in *ENVIRONMENTAL JUSTICE AND ENVIRONMENTALISM: THE SOCIAL JUSTICE CHALLENGE TO THE ENVIRONMENTAL MOVEMENT* 251, 252 (Ronald Sandler & Phaedra C. Pezzullo eds., 2007).

108. Hutchings, *supra* note 105, at 28.

parties; however, it can also be seen as an effort to separate indigenous knowledge from the peoples themselves.¹⁰⁹

The characteristic power and economic imbalances between states and indigenous peoples, even in states like New Zealand that formally recognize the indigenous peoples within their borders, further aggravates this issue.¹¹⁰ Economic imbalances in particular can come into play when negotiating a benefit-sharing mechanism as outlined in the Nagoya Protocol.¹¹¹ For example, indigenous communities are at a disadvantage in comparison to an international corporation seeking to patent a pharmaceutical drug rooted in traditional knowledge. The corporation is capable of employing a high-level legal team concerned exclusively with the interests of the corporation.¹¹² Imbalances aside, indigenous peoples like Māori typically come to the table lacking understanding of western intellectual property frameworks. In one account of Māori perspective, the idea of benefits derived exclusively from commercial exploitation by way of commodification and ownership is profoundly “at odds with a guardianship ethos; indeed, in many instances affording such treatment to Māori [traditional knowledge] will be deeply

109. Corbett, *supra* note 25, at 3. *See generally* Marie Battiste, *Research Ethics for Protecting Indigenous Knowledge and Heritage: Institutional and Researcher Responsibilities*, in *ETHICAL FUTURES IN QUALITATIVE RESEARCH: DECOLONIZING THE POLITICS OF KNOWLEDGE* 111, 114 (Norman K. Denzin & Michael D. Giardina eds., 2007); Arun Agrawal, *Indigenous Knowledge and the Politics of Classification*, 54 *INT'L SOC. SCI. J.* 287, 288–93 (2002).

110. *See, e.g.*, Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, ¶¶ 63–64, U.N. Doc. A/HRC/24/41 (July 1, 2013).

111. *See generally* Dhir, *supra* note 100, at 3–4 (explaining that indigenous peoples are worse than the population in general and face new threats from globalization with the intensification of pressures on resources).

112. Historically, this is generally the pattern of any agreement governing relations between states or corporate entities and indigenous peoples. *See also* WAI 262 REPORT, *supra* note 2, at 128 (explaining how the indigenous peoples are unable to exercise *kaitiaki* relationships that is essential to the preservation of *mātauranga Māori*, even with their guaranteed right under article 2 of the Treaty); Olufunmilayo B. Arewa, *TRIPs and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks* 10 *MARQ. INTELL. PROP. L. REV.* 155, 170–76 (2006) (showing how many companies have patented products that are extracted from indigenous plants without giving proper compensation to indigenous peoples); Marcia Ellen DeGeer, *Biopiracy: The Appropriation of Indigenous Peoples' Cultural Knowledge*, 9 *NEW ENG. J. INT'L & COMP. L.* 179, 179–82 (2003) (explaining how biotechnological corporations have been taking from indigenous peoples and exercising biopiracy). *See generally* Rep. of the Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 110.

offensive to Māori culture.”¹¹³ Additionally, intellectual property laws at both the international and domestic level do not recognize the traditional collective ownership and typically require some sort of novelty or originality in order for knowledge to merit protection.¹¹⁴

However, the Nagoya Protocol is extraordinary in that it focuses on the fundamentals of prior and informed consent and fair and equitable benefit sharing.¹¹⁵ Though perhaps paradoxical, some indigenous communities who balk at the idea of commercial exploitation via ownership have hailed the Nagoya Protocol as an important step in the right direction, as it addresses gaps in non-indigenous legal systems that categorically deny indigenous peoples adequate legal recourse and compensation for unapproved use of traditional knowledge by third parties.¹¹⁶ This may be better viewed as a survival mechanism; in order to remain afloat in a Western-dominated world and avoid exploitation, it is beneficial to learn the system and use it for the community's benefit. The Nagoya Protocol thus provides an important shift in international mechanisms, whether intended or not, to begin to recognize minority systems and ideologies.

B. BENEFIT SHARING AND THE NAGOYA PROTOCOL:
ALTERNATIVE WAYS TO RESPECT INDIGENOUS
TRADITIONAL RIGHTS

1. Actions Required by New Zealand Should it Choose to
Ratify the Nagoya Protocol

The Nagoya Protocol establishes an Access and Benefit-Sharing Clearing House (ABSCH), which has manifested in the form of a database available entirely online.¹¹⁷ The ABSCH profiles each state, even those not a party to the Protocol or even the Convention on Biodiversity itself, and tracks each of the obligations of the parties under the Protocol.¹¹⁸ Articles 13, 14, 17, and 29 of the Protocol provide the basis for individual state

113. Woods, *supra* note 59, at 101.

114. Corbett, *supra* note 25, at 5.

115. See Nagoya Protocol, *supra* note 9, art. 1–4.

116. Corbett, *supra* note 25, at 5.

117. See *Country Profiles*, ABSCH: ACCESS & BENEFIT-SHARING CLEARING-HOUSE, <https://absch.cbd.int/countries> (last visited Dec. 1, 2018).

118. *Id.*

responsibilities.¹¹⁹

Article 13 of the Protocol requires a state to designate a national focal point, or contact person, typically a government agency official.¹²⁰ Curiously, many states including New Zealand who are not parties to the Nagoya Protocol have a contact listed on the ABSCH website.¹²¹ Under Article 13, states are also required to name competent national authorities, responsible for regulating the concrete legal measures required by Article 14.¹²² Multiple state parties to the Protocol provide a variety of pre-existing environmental government agencies or ministries as their competent national authorities; others have developed new agencies specifically named as centers on access and benefit-sharing.¹²³ In order to comply with this requirement, New Zealand would need to construct relatively little.¹²⁴ The Intellectual Property Office of New Zealand, though primarily Western-oriented as a trademark and patent regime, accounts for *mātauranga Māori*.¹²⁵ The Department of Conservation, mentioned throughout the Wai 262 Report and included in the recommendations, also falls within competent national authorities parameters.¹²⁶ The Waitangi Tribunal itself could

119. Nagoya Protocol, *supra* note 9, art. 13–14, 17, 29.

120. *Id.* art. 13.

121. See ABSCH: ACCESS & BENEFIT-SHARING CLEARING-HOUSE, *supra* note 117.

122. Nagoya Protocol, *supra* note 9, art. 13.

123. See, e.g., *Belarus: Competent National Authorities*, ABSCH: ACCESS & BENEFIT-SHARING CLEARING-HOUSE, <https://absch.cbd.int/countries/BY> (last visited Dec. 1, 2018); *Mexico: Competent National Authorities*, ABSCH: ACCESS & BENEFIT-SHARING CLEARING-HOUSE, <https://absch.cbd.int/countries/MX> (last visited Dec. 1, 2018); *Peru: Competent National Authorities*, ABSCH: ACCESS & BENEFIT-SHARING CLEARING-HOUSE, <https://absch.cbd.int/countries/PE> (last visited Dec. 1, 2018); *Syrian Arab Republic: Competent National Authorities*, ABSCH: ACCESS & BENEFIT-SHARING CLEARING-HOUSE, <https://absch.cbd.int/countries/SY> (last visited Dec. 1, 2018).

124. However, whether it *should* construct is an entirely separate matter. The potential costs associated with setting up new administrative agencies is likely to contribute to New Zealand's refusal to adopt the Protocol. See Corbett, *supra* note 25, at 9.

125. An entire section of the Intellectual Property Office of New Zealand is devoted to "Māori IP." Recognition itself is the first step; however, the placement of *mātauranga Māori* within a Western intellectual property regime still fails to account for Māori traditions such as collective ownership. See Corbett, *supra* note 25, at 5 (explaining that Western intellectual property laws do not acknowledge collective ownerships); *Māori IP*, N.Z. INTELL. PROP. OFF., <https://www.iponz.govt.nz/about-ip/maori-ip/> (last visited Jan. 17, 2019).

126. See WAITANGI TRIBUNAL, 2 KO AOTEAROA TENEI: A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLITY AFFECTING MĀORI

also qualify as a competent national authority.¹²⁷ Together, the national focal point and competent national authorities ideally provide information, grant access and oversee compliance with respect to users and providers within the state.¹²⁸

Article 14 stipulates that states must make a variety of information available to the ABSCH, including concrete legislative, administrative, and policy access rights and benefit-sharing.¹²⁹ New Zealand patent law currently compels the existence of the Patents Māori Advisory Committee (“Patents MAC”), though the current Patents MAC does not conform entirely to the Wai 262 Report recommendation.¹³⁰ The Patents MAC advises whether an invention claimed on a patent application was derived from Māori traditional knowledge as well as whether the commercial exploitation of it would be “contrary to Māori values.”¹³¹

The Wai 262 Report also recommends a register of guardian interests in *taonga* species, a legal requirement that patent applications include disclosure of Māori traditional knowledge used in research.¹³² If implemented, the register would qualify

CULTURE AND IDENTITY 491 (2011), https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf (explaining that Department of Conservation, as one of the agencies that have a role in the support, oversight, ownership and custody of *mātauranga Māori*, provides administrative support for Mātauranga Kura Taiao Fund, a fund focused on the preservation and transmission of *mātauranga Māori* in biodiversity management).

127. This is especially so given that the Wai 262 Report has provided a framework for finalizing a national access and benefit-sharing system. See generally JORGE CABRERA MEDAGLIA ET AL., OVERVIEW OF NATIONAL AND REGIONAL MEASURES ON ACCESS AND BENEFIT SHARING: CHALLENGES AND OPPORTUNITIES IN IMPLEMENTING THE NAGOYA PROTOCOL 12 (3d ed. June 25, 2014), http://www.cisd.org/wp-content/uploads/2018/04/Global-Overview-of-ABS-Measures_FINAL_SBSTTA18.pdf.

128. CONVENTION ON BIOLOGICAL DIVERSITY, *supra* note 87.

129. See *Key Steps Towards the Implementation of the Nagoya Protocol*, CONVENTION ON BIODIVERSITY, <https://www.cbd.int/abs/keysteps.shtml> (last visited Dec. 28, 2018).

130. N.Z. INTELLECTUAL PROP. OFFICE, PROTECTING INTELLECTUAL PROPERTY WITH A MĀORI CULTURAL ELEMENT: USER GUIDE 5–6 (2016), <https://www.iponz.govt.nz/assets/pdf/maori-ip/protecting-ip-with-a-maori-cultural-element.pdf>.

131. *Id.* at 5. When the Intellectual Property Office receives an application for a patent, the office first decides whether the application needs to be considered by the Patents MAC. See also Patents Act of 2013, ss 225–28 (N.Z.).

132. *Cf.* Patents Act of 2013, 226 (N.Z.); see also WAI 262 REPORT, *supra* note 2, at 202–03.

as a concrete measure under Article 14.¹³³ Additionally, the Tribunal recommended that Māori be allowed input in decisions made by the Department of Conservation regarding bioprospecting; policy along these lines would fall within Article 14, should it be developed.¹³⁴ Under Article 14, the state must also produce copies of permits issued when a biological resource is accessed, that are then archived in the ABSCH and used as evidence of compliance.¹³⁵

2. Unpacking New Zealand's Reluctance to Ratify the Nagoya Protocol

In 2015, New Zealand submitted a National Report to the CBD serving as a mid-term assessment of its implementation.¹³⁶ The review process involved addressing a set of twenty targets under *Strategic Goal A*, which aim to address the underlying causes of biodiversity loss, one of which is to be a party to and compliant with the Nagoya Protocol.¹³⁷ This report acknowledges that New Zealand has not yet signed the Protocol even though it is of particular interest given that New Zealand is both a “user and provider of genetic resources.”¹³⁸ The Crown also highlights the lack of existing domestic access and benefit-sharing framework, but maintains that certain legislation provides coverage.¹³⁹ The National Report then cites the Treaty of Waitangi as justification for refusing to sign, stating that “it is essential . . . that any domestic or international regime maintains the Crown’s ability to fulfill its obligations under the Treaty of Waitangi.”¹⁴⁰

By ratifying the Nagoya Protocol, New Zealand would be required to come to terms with the requirement that indigenous

133. CONVENTION ON BIODIVERSITY, *supra* note 129.

134. WAI 262 REPORT, *supra* note 2, at 198.

135. The permits serve as evidence that the government grants access based on prior informed consent and mutually agreed terms. *See* CONVENTION ON BIODIVERSITY, *supra* note 129.

136. N.Z., NEW ZEALAND’S FIFTH NATIONAL REPORT TO THE UNITED NATIONS CONVENTION ON BIOLOGICAL DIVERSITY 3 (2015), <https://www.cbd.int/doc/world/nz/nz-nr-05-en.pdf>.

137. *Aichi Biodiversity Targets*, CONVENTION ON BIODIVERSITY, <https://www.cbd.int/sp/targets/> (last visited Dec. 28, 2018).

138. N.Z., *supra* note 136, at 51.

139. *Id.* (citing the Wildlife Act of 1953 as an example).

140. *Id.*

requests be formally upheld by law.¹⁴¹ The Crown has taken the position that it prefers to first settle the Wai 262 claim.¹⁴² With the importance of the Treaty of Waitangi in New Zealand domestic affairs, the Crown has stressed the importance of keeping options—in terms of domestic policy on access to biological resources—free from limitation.¹⁴³ The potential high cost of compliance that would include bringing into force appropriate legislation, policies, and processes for monitoring compliance coupled with uncertainty of how best to address these complex requirements are likely contributing factors.¹⁴⁴

C. ASSESSING IMPLEMENTATION OF THE WAI 262 REPORT

1. Wai 262: What has Been Accomplished so Far?

In the Wai 262 Report, the Tribunal ultimately found failure on the part of the New Zealand government to fulfill its obligations under the Treaty of Waitangi to acknowledge and safeguard the guardian relationships between Māori and their *taonga*.¹⁴⁵ The Tribunal also stresses the importance of partnership and shared responsibility in protecting and conveying *mātauranga Māori*.¹⁴⁶ The government of New Zealand has yet to issue a formal response to the Report or even a timeframe for responding, but has implemented certain measures in response.¹⁴⁷ The Report made several recommendations with respect to the protection of traditional knowledge.¹⁴⁸ Several will be examined below in light of New Zealand's actions (or lack thereof) since the release of the Report in 2011.

In terms of patents, the Tribunal recommended that an advisory committee be formed to give input to the Commissioner of Patents, the official who considers and grants patent rights, on Māori interests.¹⁴⁹ The Tribunal envisioned a committee that would advise on issues concerning *mātauranga Māori*,

141. Corbett, *supra* note 25, at 9.

142. Scheeles, *supra* note 19, at 1–2.

143. *Id.*

144. Corbett, *supra* note 25, at 9.

145. See Sullivan & Tuffery-Huria, *supra* note 16, at 403.

146. *Id.* at 407.

147. *Id.*

148. See generally WAI 262 REPORT, *supra* note 2.

149. *Id.* at 169–74.

specifically when *kaitiakitanga* (guardianship interests) are involved.¹⁵⁰ Per the recommendation, the committee would be given (1) considerable authority to give formal advice that the Commissioner would be obligated to consider, as well as (2) the ability to investigate any patent or patent application as it sees fit.¹⁵¹ The *kaitiaki* (guardians) would also have the option to register their interests in a particular species in order to give a patent owner fair warning of the interest, though it would not need to be registered in order to be considered by the committee. Additionally, patent applicants within New Zealand would be required to disclose whether they relied on Māori traditional knowledge.¹⁵²

The Tribunal devotes a section of the Report to plant variety rights, ultimately finding that “while Māori have no proprietary rights in *taonga* species, the cultural relationship between *kaitiaki* and *taonga* species is entitled to reasonable protection.”¹⁵³ This reasonable protection does not include the *exclusive* right of the *kaitiaki* to breed, sell, and export *taonga* species.¹⁵⁴ The Report provides two recommendations.¹⁵⁵ First, any new plant variety rights legislation should include a Māori power of refusal if the plant variety rights would affect *kaitiaki* relationships with *taonga* species.¹⁵⁶ Second, the Patents MAC, the advisory committee to the Commissioner of Patents, should also assist in crafting adequate ethical guidelines and codes of conduct for use by those in research and development, and in the education sector as a whole.¹⁵⁷

New Zealand’s Patents Act 2013 provides for a Māori advisory committee, the Patents MAC, which has considerably more limited functions than recommended by the Wai 262 Report.¹⁵⁸ While it is possible to assume that this new Patents Act resulted from the Wai 262 Report, it was actually proposed prior to the issuance of the Report and then delayed in order to

150. *Id.* at 99–100.

151. *Id.*; *see also* Sullivan & Tuffery-Huria, *supra* note 16, at 406.

152. *See also* Sullivan & Tuffery-Huria, *supra* note 16, at 406.

153. WAI 262 REPORT, *supra* note 2, at 212.

154. *Id.* at 192–95, 209–211; *see also* Sullivan & Tuffery-Huria, *supra* note 16, at 406–07.

155. Sullivan & Tuffery-Huria, *supra* note 16, at 407.

156. WAI 262 REPORT, *supra* note 2, at 212.

157. *Id.*

158. *See generally* Māori Advisory Committees, N.Z. INTELL. PROP. OFF., <https://www.iponz.govt.nz/about-ip/maori-ip/maori-advisory-committees/> (last visited Dec. 28, 2018); *see also* Sullivan & Tuffery-Huria, *supra* note 16, at 407.

give the government an opportunity to consider the recommendations made by the Tribunal in the Report.¹⁵⁹ Developments regarding the protection of *mātauranga Māori* continue to be driven predominantly by Māori, and tend to be localized to a specific purpose or issue.¹⁶⁰ While the New Zealand government may provide funding or support in certain instances, it has yet to provide any formal directives of its own.¹⁶¹

The Wai 262 consolidated claim itself does not focus on whether existing intellectual property laws are sufficient to accommodate *mātauranga Māori*.¹⁶² The claim instead appears to be driven by a desire to show that imposing a Western intellectual property regime upon Māori is contrary to Māori interests.¹⁶³ According to some scholars, there is little engagement with the issues that typically inform the debate over whether legal protection of traditional knowledge—including ideas of group ownership—can be accommodated by intellectual property regimes such as patents and plant variety rights.¹⁶⁴ Instead, the Wai 262 claim is more of a demand to repeal and reassess New Zealand intellectual property laws that are inconsistent with Māori rights under the Treaty of Waitangi.¹⁶⁵ The Wai 262 Report then addresses the claims and issues recommendations accordingly.¹⁶⁶

2. The Ordre Public: A Potential Issue

A recommendation for an extensive *ordre public* is included in the Wai 262 Report, permitting outright denial of patents for inventions in which the prevention of commercial exploitation of the subject matter is necessary to protect public order or morality, including human, animal or plant life, or to avoid serious destruction to the environment.¹⁶⁷ The immediate

159. Sullivan & Tuffery-Huria, *supra* note 16, at 409.

160. *Id.* at 409–10.

161. *Id.* at 410.

162. Graeme W. Austin, *Re-Treating Intellectual Property? The Wai 262 Proceeding and the Heuristics of Intellectual Property Law*, 11 CARDOZO J. INT'L & COMP. L. 333, 359 (2003).

163. *Id.* at 360.

164. *Id.* at 359–60; *see also* Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 22 CASE W. RES. J. INT'L L. 223, 245–46 (2001).

165. Austin, *supra* note 162, at 360.

166. *See generally* WAI 262 REPORT, *supra* note 2.

167. The Tribunal references the Agreement on Trade-Related Aspects of

problem is the fact that New Zealand has no commanding judicial or legislative guidance related to the actual meaning or enforcement of an *ordre public*.¹⁶⁸ The Wai 262 recommendation prioritizes guardianship relationships with *mātauranga Māori*, giving the Commissioner the authority to deny otherwise eligible patents.¹⁶⁹ While it does leave the criteria for patent applications intact, some scholars think that it allows all parties to avoid confronting the more difficult issues, such as informed consent and disclosure, by acting as a catch-all.

It is possible that the *ordre public* could function retroactively, causing the nullification of an existing patent which may not be proportional to the fault of the patent-holder.¹⁷⁰ Such an issue would arise in cases where Māori guides researchers to particular *mātauranga*, which is further developed with substantial additional research into a product, for which Māori are given no credit.¹⁷¹ Further complicating the matter is the fact that the specific *mātauranga* may belong to one specific Māori tribe.¹⁷² The *ordre public* provides for a strictly black and white dichotomy: grant or refuse the patent outright.¹⁷³ A better option might be for the Commissioner to allow conditions for the patent applicant to correct the situation in order that the invention may then be patentable.¹⁷⁴

D. RECONCILING NEW ZEALAND'S CURRENT INTELLECTUAL PROPERTY SYSTEM, THE WAI 262 AND THE NAGOYA PROTOCOL: A MĀORI-CENTERED SOLUTION

1. Wai 262 Recommendations as a Framework for New Zealand's Access and Benefit-Sharing Regime

In the Wai 262 Report, the Tribunal recommends the establishment of the Māori advisory committee, which is not particularly necessary under the Nagoya Protocol. Although the

Intellectual Property Rights (TRIPS) agreement developed by the World Trade Organization. See Woods, *supra* note 59, at 113.

168. *Id.* at 121.

169. *Id.* at 120.

170. *Id.* at 121; see also Geertrui Van Overwalle, *Belgium Goes its Own Way on Biodiversity and Patents*, 24 EUR. INTELL. PROP. REV. 233, 234–35 (2002).

171. Woods, *supra* note 59, at 121–22.

172. *Id.* at 122.

173. *Id.*

174. *Id.*

Patents MAC exists, there is currently no information or data available to confirm that it functions in harmony with the Wai 262 Report recommendation calling for its existence. However, the Tribunal seems to endorse the MAC as advisory (as opposed to directive) in nature, meaning that like the Tribunal, its advice would not be binding.¹⁷⁵ The Tribunal also stresses the need to balance all competing interests on a case-by-case basis with respect to advising the Commissioner of Patents.¹⁷⁶ Not to mention, the MAC appears to provide more of an administrative (as opposed to substantive) augmentation to the current intellectual property regime.¹⁷⁷

The Tribunal also recommends the institution of a voluntary register of *kaitiaki* (guardianship) interests in *mātauranga Māori* and *taonga* species.¹⁷⁸ Registration would be publicly available as well as allow potential users to easily familiarize themselves with existing Māori interests.¹⁷⁹ Though the Tribunal provides that registration should not be obligatory, such a register would also function as an administrative supplement to New Zealand intellectual property law.¹⁸⁰ In theory, this system would likely cause more issues than it solves. Some Māori may be reluctant to make their sacred relationships available to the public, given potential to facilitate biopiracy.¹⁸¹ However, the Tribunal points out in the Report that a register would be able to address the needs of guardians whose *mātauranga* is already available in the public domain.¹⁸² Additionally, it would not limit or require significant change to current New Zealand intellectual property law, and its optional nature would protect Māori who prefer to keep their guardianship out of the public sphere.¹⁸³

175. However, this is not particularly representative of the views of Māori lobbyists. See WAI 262 REPORT, *supra* note 2, at 201; Woods, *supra* note 59, at 113.

176. WAI 262 REPORT, *supra* note 2, at 195–97.

177. Woods, *supra* note 59, at 113.

178. WAI 262 REPORT, *supra* note 2, at 95.

179. LAI, *supra* note 64, at 253; *see also* Woods, *supra* note 59, at 116–17.

180. LAI, *supra* note 64, at 253–54.

181. Woods, *supra* note 59, at 119.

182. WAI 262 REPORT, *supra* note 2, at 203.

183. *Id.*; *see also* Woods, *supra* note 59, at 119.

2. The Nagoya Protocol Fills the Gaps within the Waitangi Tribunal Framework

The Wai 262 Report recommends several negative protections allowing Māori to prevent exploitation of *mātauranga* by third parties, but fails to provide for any positive protections, such as rights that would allow guardians to develop and protect *mātauranga* for their own benefit.¹⁸⁴ This is in part due to the concept of ownership and exclusive rights being incompatible with Māori guardianship philosophy.¹⁸⁵

However, the Nagoya Protocol does provide for these positive rights by allowing for partnerships to be formed between Māori and those seeking to use *mātauranga Māori*. Any legislative or policy initiatives developed by the New Zealand government to conform with Article 14 of the Nagoya Protocol would likely provide some form of positive rights to Māori. The combination of positive and negative rights thus empowers Māori by both protecting and promoting *mātauranga*.

3. The Answer to Difficult Questions Involving Indigenous Issues is More Indigenous Involvement

Professor Linda Tuhiwai Smith, a leading Māori researcher and academic, illustrates:

The past, [indigenous] stories local and global, the present . . . communities, cultures, languages and social practices—all may be spaces of marginalization, but they have also become spaces of resistance and hope. It is from within these spaces that increasing numbers of indigenous academics and researchers have begun to address social issues within the wider framework of self-determination, decolonization and social justice.¹⁸⁶

The few indigenous researchers who have succeeded in academia typically have had to achieve more than their peers in order to establish themselves.¹⁸⁷ Not only must they survive and do exceedingly well, but they must do so in a system that denies

184. Woods, *supra* note 59, at 125.

185. *Id.*

186. SMITH, *supra* note 106, at 4.

187. *Id.* at 223.

the existence of traditional knowledge of their own peoples.¹⁸⁸ It is a fine line to walk in terms of earning credentials, “decod[ing] and demystify[ing] the system in order to learn and be educated without being damaged.”¹⁸⁹ Once inside, indigenous researchers are also tasked with making the case for the existence of indigenous traditional knowledge as its own distinctive body of worldly knowledge capable of contributing to modern disciplines in addition to indigenous communities themselves.¹⁹⁰ Even finding journals to publish indigenous research in general, as it relates to traditional knowledge or otherwise, also proves to be challenge.¹⁹¹

Indigenous scholars and activists have fought to protect their own systems of study and research of traditional knowledge.¹⁹² In terms of Māori, indigenous knowledge scholarship appears to thrive both within Māori institutions and within a wide range of disciplines including science, health, and Māori studies themselves.¹⁹³ Conceptual work relating to the *mātauranga Māori* continue to be institutionalized in student dissertations, research programs, and Masters-level courses of study within universities.¹⁹⁴ As is evident in the quote at the beginning of this section, the lengths that indigenous communities have successfully gone to protect and nurture traditional knowledge as a whole in the face of colonization is inspiring.¹⁹⁵

IV. CONCLUSION

If applied together, the Waitangi Tribunal and Nagoya Protocol have the capacity to provide recognition and protection to Māori that do not currently exist under any state intellectual property regime. Instead of forcing established indigenous cultural ideals to abide by incompatible Western intellectual property mechanisms, both the Waitangi Tribunal and Nagoya

188. *Id.* at 222.

189. *Id.* at 223.

190. *Id.*

191. *Id.* at 224.

192. *Id.* at 225.

193. *Id.*

194. *Id.*

195. *Id.* These lengths include direct political action, protests, court actions, land occupations, and claims to the Waitangi Tribunal. In Smith’s words, “[t]raditional indigenous knowledge is regenerating in spaces created by activism.”

Protocol provide sensitivity to this issue as well as alternative ways to protect and respect *mātauranga Māori*. This model could then provide an example to other states with indigenous peoples within their borders as a way to foster and promote rights for all.