

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 9 | Issue 3

2026

© 2026 International Journal of Law Management & Humanities

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This article is brought to you for free and open access by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in the International Journal of Law Management & Humanities after due review.

In case of any **suggestions or complaints**, kindly contact support@vidhiaagaz.com.

To submit your Manuscript for Publication in the **International Journal of Law Management & Humanities**, kindly email your Manuscript to submission@ijlmh.com.

Beyond TRIPS: Reconciling Intellectual Property Frameworks with Indigenous Peoples' Rights over Traditional Knowledge in Global Trade

A. VENKATESWARA RAO* AND DR. D. GANESH KUMAR**

ABSTRACT

This paper examines the structural incompatibility between the international intellectual property regime, consolidated through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), and the rights of Indigenous Peoples over traditional knowledge in global trade. It argues that the foundational exclusion of Indigenous Peoples from the TRIPS framework reflects an epistemological architecture that privileges individualistic, market-driven innovation while rendering collective and intergenerational knowledge vulnerable to extraction and commodification. The paper evaluates international human rights instruments, including Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples, the 2024 WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, and the Nagoya Protocol, and undertakes a comparative analysis of national implementation across Canada, Australia, Aotearoa New Zealand, and Rwanda. It concludes that reconciliation requires not merely procedural adjustment but a paradigmatic reform centred on Indigenous epistemic sovereignty, comprising the use of TRIPS flexibilities to establish sui generis protection, the constitutional recognition of Indigenous data sovereignty, mandatory free, prior and informed consent within trade agreements, and the empowerment of Indigenous-led governance mechanisms.

Keywords: *Traditional knowledge, Intellectual property, Indigenous Peoples, TRIPS, WIPO Treaty, UNDRIP, Sui generis protection, Biopiracy, Epistemic colonialism, Data sovereignty.*

* Author is a Senior Assistant Professor at GITAM School of Law, GITAM University, Visakhapatnam, Andhra Pradesh, India.

** Author is an Associate Professor at GITAM School of Law, GITAM University, Visakhapatnam, Andhra Pradesh, India.

I. INTRODUCTION: THE JURIDICAL ARCHITECTURE OF EPISTEMIC COLONIALISM

The global intellectual property regime, consolidated through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) during the Uruguay Round negotiations from 1986 to 1994, was constructed without substantive consultation with Indigenous Peoples or cognisance of traditional knowledge systems.¹ This foundational exclusion was not merely an oversight of diplomatic process; it was constitutive of an epistemological framework that systematically privileges Western-modelled, individualistic innovation while rendering Indigenous collective knowledge vulnerable to extraction and commodification.² The juridical consequences of this exclusion persist as a structural feature of international trade governance, perpetuating what scholars have characterised as epistemic colonialism, a modality of knowledge governance that treats Indigenous knowledge as *gnaritas nullius*, that is, nobody's knowledge, thereby facilitating its enclosure within proprietary regimes that exclude original custodians from participation or compensation.³

The 2024 adoption of the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge represents a procedural watershed, yet it remains insufficient to address the fundamental structural inequities embedded within global trade regimes.⁴ Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007) establishes that Indigenous Peoples possess the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, including their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.⁵

Despite the near-universal endorsement of UNDRIP, initially opposed only by Australia, Canada, New Zealand and the United States, all of which subsequently endorsed the Declaration,⁶ the translation of Article 31 into enforceable domestic and international legal frameworks remains fragmentary and contested. This paper observes the structural mechanisms

¹ See generally PETER DRAHOS, *A PHILOSOPHY OF INTELLECTUAL PROPERTY* 201-225 (1996); CHRISTOPHER MAY & SUSAN K. SELL, *INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY* 89-112 (2006).

² Erica-Irene Daes, *Protection of the Heritage of Indigenous People*, U.N. Doc. E/CN.4/Sub.2/1994/31, paras. 17-23 (1994); see also Arlene Lo, *Anti-Colonial Science? The Politics of Indigenous Knowledge Inclusion in Science-Based Policy* 45-67 (unpublished Ph.D. thesis, London School of Economics, 2025).

³ Sophie Coffin, *Protecting Aboriginal and Torres Strait Islander Cultural and Intellectual Property, Part 2: Comparative ICIIP Frameworks*, BRIEF (Law Society of Western Australia) 1, 3 (2025); see also Tamara Lugonzo, *From Colonial Bias to Relational Intelligence: Decolonizing AI with Indigenous and African Epistemologies*, 12 *LIBERATED ARTS* 1, 4-7 (2025).

⁴ WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, pmbl., adopted May 24, 2024 (not yet in force).

⁵ G.A. Res. 61/295, art. 31(1), U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

⁶ *Id.*; see also U.N. Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, paras. 28-35, U.N. Doc. A/HRC/30/41 (July 15, 2015).

through which the TRIPS framework perpetuates the dispossession of Indigenous knowledge and evaluates emerging legal instruments designed to redress these inequities. It argues that the reconciliation of intellectual property frameworks with Indigenous rights requires not merely procedural adjustments but a fundamental reconceptualisation of knowledge governance, one that transcends the binary of protection versus access and instead centres Indigenous sovereignty over epistemic systems. The analysis proceeds through four substantive parts: first, an examination of the structural incompatibility between TRIPS and Indigenous knowledge systems; second, an evaluation of international human rights frameworks and the 2024 WIPO Treaty; third, a comparative analysis of national implementation across four jurisdictions; and fourth, a theoretically grounded proposal for paradigmatic reform.

II. THE STRUCTURAL INCOMPATIBILITY OF TRIPS AND INDIGENOUS KNOWLEDGE SYSTEMS

A. The ontological divide: individual versus collective rights

The TRIPS Agreement operates upon a paradigm of intellectual property that presupposes individual authorship, finite temporal protection and market-driven exploitation. Articles 27 to 34 establish patent rights predicated upon the identification of specific inventors, the satisfaction of novelty and inventive step criteria, and the assignment of exclusive rights to discrete legal persons.⁷ This framework is fundamentally incompatible with the nature of traditional knowledge, which the World Intellectual Property Organization itself acknowledges as collective, cumulative and intergenerational.⁸

Traditional knowledge is not merely old knowledge awaiting patentability assessment; it constitutes living, evolving systems of understanding embedded within relational ontologies that connect knowledge to land, ancestry and spiritual obligation.⁹ The identification of specific inventors within Indigenous communities is often impossible, as knowledge is maintained through collective custodianship across generations. The TRIPS requirement of industrial applicability further excludes holistic healing practices, ecological management systems and spiritual knowledge that do not conform to reductionist Western scientific methodology.¹⁰

⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 27-34, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS].

⁸ WIPO, INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE 12, WIPO Publication No. 920(E) (2012).

⁹ See, e.g., Māori Marsden, *God, Man and Universe: A Māori View*, in THE TREATY OF WAITANGI IN MĀORI HISTORY 117 (Huia Tomlins-Jahnke ed., 2003); VINE DELORIA JR., RED EARTH, WHITE LIES: NATIVE AMERICANS AND THE MYTH OF SCIENTIFIC FACT 51-78 (1995).

¹⁰ WIPO, *supra* note 8, at 15-18; see also Graham Dutfield, *TRIPS-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 245-250 (2001).

The ontological divide extends beyond procedural incompatibility to encompass fundamentally divergent conceptions of the relationship between knowledge, community and temporality. Within Indigenous epistemologies, knowledge is not a commodity to be alienated but a sacred trust to be stewarded across generations.¹¹ The TRIPS framework, by contrast, conceptualises knowledge as a fungible asset subject to temporal limitation and market transaction. This divergence is not merely a matter of cultural preference; it reflects distinct civilisational approaches to the relationship between humanity and the natural world, approaches that the international intellectual property regime has historically privileged one over the other through the juridical architecture of patentability criteria.

B. The public domain presumption and the mechanisms of biopiracy

The absence of explicit provisions for traditional knowledge within TRIPS creates a legal vacuum wherein Indigenous knowledge is presumptively treated as residing within the public domain. This presumption enables what has been termed biopiracy, namely the patenting of inventions derived from genetic resources and associated traditional knowledge without the free, prior and informed consent of Indigenous custodians or equitable benefit-sharing.¹² The silence of the TRIPS Agreement on traditional knowledge, combined with the permissive language of Article 27(3)(b) regarding plant variety protection, effectively legitimises the extraction of Indigenous knowledge as raw material for commercial pharmaceutical and agricultural innovation.¹³

The implications are not merely theoretical. The patenting of turmeric wound-healing properties, neem insecticidal applications and quinoa genetic resources, all derived from longstanding Indigenous knowledge, demonstrates how the TRIPS framework facilitates the enclosure of collectively held knowledge within proprietary regimes that exclude the original custodians from participation or compensation.¹⁴ These cases reveal a systematic pattern wherein Western scientific institutions appropriate Indigenous knowledge, subject it to reductionist analysis, and claim proprietary rights over the resulting inventions, thereby

¹¹ See, e.g., ROBIN WALL KIMMERER, *BRAIDING SWEETGRASS: INDIGENOUS WISDOM, SCIENTIFIC KNOWLEDGE AND THE TEACHINGS OF PLANTS* 207-230 (2013); Eru Kapa-Kingi, *Kia Tawharautia Te Matauranga Maori: Decolonising the Intellectual Property Regime in Aotearoa New Zealand*, 51(4) VICTORIA U. WELLINGTON L. REV. 657, 662-665 (2020).

¹² Graham Dutfield, *Biopiracy: The Need for a Coherent Coordinated and Global Response*, 7 J. INT'L BIOTECH. L. 221, 223-225 (2004); see also VANDANA SHIVA, *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* 1-25 (1997).

¹³ TRIPS, *supra* note 7, art. 27(3)(b).

¹⁴ See, e.g., Turmeric patent (U.S. Patent No. 5,401,504, re-examined and revoked 1997); Neem patent (European Patent No. 0436257 B1, revoked 2000); Quinoa patent (U.S. Patent Application No. 09/923,268, abandoned 2003).

completing a circuit of epistemic extraction that mirrors the territorial dispossession of colonial eras.

C. Temporal limitations and the intergenerational character of knowledge

TRIPS mandates finite protection periods, typically twenty years for patents, after which protected knowledge enters the public domain.¹⁵ This temporal limitation is ontologically incompatible with Indigenous knowledge systems, which operate across intergenerational timeframes and are governed by obligations to ancestors and future descendants. The concept of knowledge expiration is antithetical to Indigenous epistemologies that understand knowledge stewardship as a perpetual sacred duty rather than a temporary economic monopoly.¹⁶

The temporal dimension of this incompatibility reveals a deeper philosophical divergence. Western intellectual property law treats knowledge as a product of individual labour subject to Lockean appropriation, whereas Indigenous epistemologies understand knowledge as emergent from relational networks that transcend individual lifespans. The TRIPS framework thus not only fails to protect Indigenous knowledge but actively undermines its ontological foundations by imposing temporal structures that contradict the intergenerational continuity essential to its preservation and transmission.¹⁷

III. INTERNATIONAL HUMAN RIGHTS FRAMEWORKS AND THE 2024 WIPO TREATY

A. UNDRIP Article 31 as a normative foundation

Article 31(1) of UNDRIP establishes the comprehensive right of Indigenous Peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, explicitly including their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.¹⁸ Article 31(2) imposes an affirmative obligation upon States to take effective measures to recognise and protect the exercise of these rights in conjunction with Indigenous Peoples.¹⁹

While UNDRIP is formally a non-binding declaration, its provisions have achieved significant normative weight through consistent invocation by the UN Permanent Forum on Indigenous

¹⁵ TRIPS, *supra* note 7, art. 33.

¹⁶ See, e.g., James (Sákéj) Youngblood Henderson, *Indigenous Knowledge and Legal Discourse*, 5(1) INDIGENOUS L.J. 25, 31-38 (2005); Val Napoleon & Hadley Friedland, *Indigenous Legal Traditions: Roots to Renaissance*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 225, 228-232 (Markus D. Dubber & Tatjana Hörnle eds., 2014).

¹⁷ See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT 285-302 (Peter Laslett ed., 1988); contrast with Henderson, *supra* note 16, at 33-35.

¹⁸ G.A. Res. 61/295, *supra* note 5, art. 31(1).

¹⁹ *Id.* art. 31(2).

Issues and the UN Expert Mechanism on the Rights of Indigenous Peoples.²⁰ Moreover, several states, notably Canada through the United Nations Declaration on the Rights of Indigenous Peoples Act 2021, have incorporated UNDRIP into domestic law, creating legally enforceable obligations to align intellectual property frameworks with Indigenous rights. The juridical status of UNDRIP has thus evolved from an aspirational declaration to an interpretive framework capable of informing the construction of domestic legislation and international treaty obligations.²¹

B. The 2024 WIPO Treaty: procedural advancement and substantive limitations

In May 2024, WIPO Member States adopted the Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, representing the first international intellectual property treaty to address traditional knowledge explicitly within the patent system.²² As of July 2025, forty-four Member States had signed the treaty, with Malawi and Uganda having ratified it; the treaty requires fifteen ratifications to enter into force.²³

The treaty mandates that patent applicants disclose the origin of genetic resources and traditional knowledge associated with genetic resources used in the development of claimed inventions.²⁴ This disclosure requirement aims to enhance the transparency of the patent system and to prevent the erroneous granting of patents for inventions lacking novelty relative to existing traditional knowledge. The treaty objectives explicitly include enhancing the efficacy, transparency and quality of the patent system with regard to genetic resources and traditional knowledge associated with genetic resources.²⁵

However, the treaty contains significant limitations that constrain its capacity to effect substantive justice. It does not create substantive rights in traditional knowledge itself, nor does it establish mandatory benefit-sharing obligations.²⁶ The disclosure requirement is procedural

²⁰ U.N. Permanent Forum on Indigenous Issues, *Report on the Twenty-First Session*, paras. 45-52, U.N. Doc. E/C.19/2022/9 (2022); Expert Mechanism on the Rights of Indigenous Peoples, *Study on the Role of the UN Declaration on the Rights of Indigenous Peoples in the Context of the 2030 Agenda*, paras. 22-31, U.N. Doc. A/HRC/51/28 (2022).

²¹ United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c. 14 (Can.); see also GOVERNMENT OF CANADA, UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT ACTION PLAN 2023-2028, at 12-15 (2023).

²² WIPO Treaty, *supra* note 4, art. 1.

²³ WIPO, STATUS OF THE WIPO TREATY ON INTELLECTUAL PROPERTY, GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE 3, WIPO Doc. WO/GA/55/7 (2025); see also IWGIA, THE INDIGENOUS WORLD 2026: WORLD INTELLECTUAL PROPERTY ORGANIZATION 278-280 (2026).

²⁴ WIPO Treaty, *supra* note 4, art. 3.

²⁵ *Id.* art. 2.

²⁶ See, e.g., Daniel Robinson, *The WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge: A Critical Assessment*, 45(3) EUR. INTEL. PROP. REV. 145, 148-152 (2024); see also Christoph Antons, *The 2024 WIPO Treaty: A New Chapter in the Protection of Traditional Knowledge?*, 55(4) INT'L REV. INDUS. PROP. & COPYRIGHT L. 389, 395-398 (2024).

rather than substantive; it does not compel patent applicants to obtain free, prior and informed consent or to negotiate equitable terms prior to utilisation. Furthermore, the treaty is limited to traditional knowledge associated with genetic resources, excluding vast domains of Indigenous knowledge, including ecological management practices, oral traditions and spiritual knowledge, that do not involve genetic materials.²⁷ The treaty thus represents incremental procedural reform rather than the paradigm shift necessary to reconcile intellectual property systems with Indigenous epistemic sovereignty.

The procedural limitations of the WIPO Treaty are compounded by institutional constraints. The proposal to fund Indigenous participation in WIPO governance from the organisation's regular budget, blocked in 2025 by objections from a minority of Member States, demonstrates the political resistance to genuine Indigenous empowerment within international institutions.²⁸ The WIPO Voluntary Fund for Indigenous Peoples, though chronically underfunded and recently depleted, represents a nascent recognition of the need for Indigenous participation, yet its precarious funding structure renders it inadequate to the task of ensuring a meaningful Indigenous voice in intellectual property governance.²⁹

C. The Nagoya Protocol and the architecture of access and benefit-sharing

The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (2010) complements the WIPO Treaty by establishing binding obligations for prior informed consent and benefit-sharing regarding genetic resources.³⁰ However, the implementation of the Protocol remains uneven, and its scope is limited to genetic resources rather than encompassing the full spectrum of traditional knowledge. The intersection of the Nagoya Protocol, the WIPO Treaty and TRIPS creates a complex and often contradictory legal landscape that Indigenous Peoples must navigate without dedicated legal infrastructure or resources.³¹

The relationship between these instruments reveals a fundamental tension in international environmental and trade law. The Nagoya Protocol operates within the framework of the

²⁷ WIPO Treaty, *supra* note 4, art. 1(2); see also Robinson, *supra* note 26, at 150-152.

²⁸ IWGIA, *supra* note 23, at 279; see also WIPO, REPORT OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE, paras. 78-82, WIPO Doc. WIPO/GRTKF/IC/46/8 (2025).

²⁹ IWGIA, *supra* note 23, at 279; see also WIPO, REPORT ON THE WIPO VOLUNTARY FUND FOR INDIGENOUS PEOPLES 4-7, WIPO Doc. WO/GA/54/10 (2024).

³⁰ 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, Oct. 29, 2010 (entered into force Oct. 12, 2014), U.N. Doc. UNEP/CBD/COP/DEC/X/1.

³¹ See, e.g., Elisa Morgera, *The Nagoya Protocol and the WIPO Treaty: Complementary or Competing Regimes?*, 34(2) REV. EUR. COMP. & INT'L ENVTL. L. 198, 201-208 (2025).

Convention on Biological Diversity, emphasising conservation and sustainable use, whereas the WIPO Treaty operates within the trade-oriented framework of the international intellectual property regime.³² TRIPS, meanwhile, prioritises the harmonisation of intellectual property standards for trade facilitation. The resulting legal pluralism creates opportunities for forum shopping and regulatory arbitrage that undermine the effectiveness of traditional knowledge protection across all three regimes.

IV. COMPARATIVE NATIONAL APPROACHES: MODELS, GAPS AND STRUCTURAL LIMITATIONS

A. Canada: legislative implementation and the implementation gap

The Canadian approach illustrates both the potential and the limitations of domestic implementation. Following the 2021 enactment of the United Nations Declaration on the Rights of Indigenous Peoples Act, Canada committed to aligning its intellectual property frameworks with UNDRIP principles.³³ The federal Intellectual Property Strategy includes Indigenous intellectual property initiatives, notably the Indigenous Intellectual Property Program, designed to support Indigenous capacity-building and participation in intellectual property policy development.³⁴

However, substantive legislative reform remains pending. The 2023 to 2028 UNDRIP Act Action Plan includes provisions for consultation on legislative alignment in intellectual property, but no amendments to the Copyright Act or the Patent Act have been enacted to recognise Indigenous knowledge rights specifically.³⁵ The Canadian framework thus exemplifies the implementation gap, where political commitments and policy programmes precede enforceable legal protections, leaving Indigenous knowledge vulnerable to continued misappropriation during extended transition periods.³⁶

Canada's constitutional framework, including section 35 of the Constitution Act 1982, recognises Aboriginal and treaty rights, yet protection specific to Indigenous cultural and intellectual property remains limited.³⁷ Existing trade mark and copyright laws are used to protect Indigenous cultural and intellectual property, but these laws retain the same structural

³² *Id.* at 203-205.

³³ United Nations Declaration on the Rights of Indigenous Peoples Act, *supra* note 21.

³⁴ GOVERNMENT OF CANADA, INTELLECTUAL PROPERTY STRATEGY (ISED, May 2025), <https://ised-isde.canada.ca/site/intellectual-property-strategy/en> (last visited June 7, 2026).

³⁵ Government of Canada, *supra* note 21, at 18-22.

³⁶ See, e.g., Dwight Newman, *The Implementation Gap in Indigenous Rights Protection: Canada and Beyond*, 41(2) WINDSOR Y.B. ACCESS JUST. 45, 52-58 (2023).

³⁷ Constitution Act, 1982, s. 35 (Can.).

limitations as the broader intellectual property framework.³⁸ The absence of *sui generis* legislation for Indigenous cultural and intellectual property in Canada, despite strong constitutional recognition of Indigenous rights, demonstrates that constitutional protection alone is insufficient without dedicated legislative frameworks that address the particularity of Indigenous knowledge systems.

B. Australia: unfulfilled commitments and the limits of consumer protection

Australia endorsed UNDRIP in 2009 but has not ratified it as binding domestic law.³⁹ The federal government has committed to developing a National Cultural Policy to protect First Nations traditional knowledge and cultural expressions, based on ten principles including respect, self-determination, consent and consultation, cultural integrity and benefit-sharing. Australia signed the 2024 WIPO Treaty but has not yet ratified it.⁴⁰

The Australian case is particularly instructive regarding the limitations of existing intellectual property law. The litigation in *Australian Competition and Consumer Commission v. Birubi Art Pty Ltd* (2019) exposed the inadequacy of consumer protection law in addressing the misappropriation of Indigenous cultural expressions, demonstrating that existing legal frameworks cannot adequately protect Indigenous knowledge without dedicated *sui generis* mechanisms.⁴¹ The ongoing development of legislation for Indigenous cultural and intellectual property represents a necessary but insufficient step toward genuine protection.

The First Nations Strategy 2025 to 2030 of IP Australia reflects a commitment to safeguarding Indigenous cultures, yet the existing Trade Marks Act 1995 (Cth) provides only limited protection through the scandalous matter provision in section 42, which requires a high threshold of offensiveness and does not ensure that trade marks using Indigenous knowledge are registered and used in accordance with cultural values and traditions.⁴² The Strategy indicates that IP Australia will set clear, measurable metrics for each strategic objective, but the absence of binding legislative reform leaves these commitments vulnerable to administrative discretion and political transition.

³⁸ Coffin, *supra* note 3, at 8; see also Government of Canada, *supra* note 34.

³⁹ AUSTRALIAN GOVERNMENT, AUSTRALIA'S ENDORSEMENT OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (2009), <https://www.ag.gov.au> (last visited June 7, 2026).

⁴⁰ AUSTRALIAN GOVERNMENT, NATIONAL CULTURAL POLICY: REVIVE 28-32 (2023).

⁴¹ *Austl. Competition & Consumer Comm'n v. Birubi Art Pty Ltd (in liq) (No 3)* (2019) 374 ALR 776 (Austl.).

⁴² IP AUSTRALIA, FIRST NATIONS STRATEGY 2025-2030, at 12-14 (2025); see also Trade Marks Act 1995 (Cth) s. 42 (Austl.).

C. Aotearoa New Zealand: legislative recognition and advisory limitations

New Zealand has made a noteworthy attempt at the recognition and implementation of Indigenous cultural and intellectual property. The WAI 262 Waitangi Tribunal claim addressed the lack of protection of the ownership and use of Māori knowledge, and in 2011 the Tribunal recommended extensive policy and legislative reforms.⁴³ Some recommendations were implemented, including legislative recognition of *Mātauranga Māori*, but the enforcement of protection for Indigenous cultural and intellectual property has limitations.

Under the Trade Marks Act 2002 (NZ), section 17(1)(c) prohibits the registration of trade marks likely to offend a significant proportion of the Māori community.⁴⁴ Sections 117 and 118 establish a Māori Advisory Committee to prevent culturally inappropriate trade mark registrations, providing advice on the registration of trade marks and the granting of patents that have a Māori cultural element.⁴⁵ However, the decisions of the Māori Advisory Committee are not binding, and the lack of mandatory consultation limits the effectiveness and certainty of this mechanism.⁴⁶

The Patents Act 2013 (NZ) establishes a similar Māori Advisory Committee for patent applications, but again its decisions are advisory rather than binding.⁴⁷ The Copyright Act 1994 (NZ) provides little protection for Indigenous cultural and intellectual property, as there is no specific provision for Māori interests, and copyright registration can protect only the specific physical expression of some forms of *Mātauranga Māori*, not the underlying ideas, content or style.⁴⁸ A further limitation of the New Zealand framework is that protection for Indigenous cultural and intellectual property is enlivened only when a person attempts to register their own intellectual property rights, leaving unregistered Indigenous knowledge vulnerable to misappropriation.

⁴³ WAITANGI TRIBUNAL, KO AOTEAROA TĒNEI: A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLICY AFFECTING MĀORI CULTURE AND IDENTITY, WAI 262, vol. 1, at 45-67 (2011).

⁴⁴ Trade Marks Act 2002, s. 17(1)(c) (N.Z.).

⁴⁵ *Id.* ss. 117-118.

⁴⁶ INTELLECTUAL PROPERTY OFFICE OF NEW ZEALAND, EXAMINATION OF APPLICATIONS FOR TRADE MARKS THAT CONTAIN, OR APPEAR TO DERIVE FROM, ELEMENTS OF MĀORI CULTURE (Practice Guidelines, Apr. 2025), <https://www.iponz.govt.nz/get-ip/trade-marks/practice-guidelines/current/maori-advisory-committee-and-maori-trade-marks/> (last visited June 7, 2026); see also Kapa-Kingi, *supra* note 11, at 670-672.

⁴⁷ Patents Act 2013, ss. 225-228 (N.Z.).

⁴⁸ INTELLECTUAL PROPERTY OFFICE OF NEW ZEALAND, COPYRIGHT AND MĀTAURANGA MĀORI (Web Page, Apr. 2025), <https://www.iponz.govt.nz/get-ip/maori-ip/maori-culture-and-intellectual-property/> (last visited June 7, 2026).

D. Rwanda: sui generis protection in the Global South

Rwanda offers an alternative model through its Law No. 28/2016 on the Preservation of Cultural Heritage and Traditional Knowledge, which establishes a dedicated sui generis framework for the protection of traditional knowledge.⁴⁹ Combined with Rwanda's ratification of the Nagoya Protocol and the Swakopmund Protocol on the Protection of Traditional Knowledge under the African Regional Intellectual Property Organization (ARIPO), Rwanda demonstrates how developing nations can leverage Article 27(3)(b) of TRIPS, which permits members to exclude plants and animals from patent protection, to establish alternative protection systems.⁵⁰

However, Rwanda's approach also reveals the challenges of sui generis protection in isolation. Without harmonised international standards, national regimes for traditional knowledge remain vulnerable to circumvention through forum shopping and the extraterritorial application of dominant intellectual property regimes.⁵¹ The effectiveness of sui generis systems depends upon their integration into broader international trade governance structures and the willingness of developed nations to recognise and enforce foreign sui generis determinations.

V. TOWARD A RECONCILED FRAMEWORK: A THEORETICALLY GROUNDED REFORM AGENDA

A. Integrating sui generis systems within TRIPS

Article 27(3)(b) of TRIPS explicitly permits WTO members to exclude from patentability plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes.⁵² This provision provides legal space for members to establish sui generis systems for plant variety protection that can incorporate mechanisms for the protection of traditional knowledge. The reform agenda should prioritise the elaboration of model sui generis legislation that recognises collective rights, perpetual protection for sacred knowledge and mandatory protocols for free, prior and informed consent.

The sui generis approach must transcend the mere adaptation of existing intellectual property categories to Indigenous contexts. It requires the recognition of Indigenous knowledge as an

⁴⁹ Law No. 28/2016 on the Preservation of Cultural Heritage and Traditional Knowledge (Rwanda, Official Gazette, 2016).

⁵⁰ See, e.g., ASEAN IP ASSOCIATION, COMPARATIVE STUDY ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS 26-33 (2021); see also Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Aug. 9, 2010 (entered into force May 11, 2015).

⁵¹ See, e.g., ENYINNA NWAUCHE, THE PROTECTION OF INDIGENOUS KNOWLEDGE IN AFRICA 145-167 (2025); see also Dutfield, *supra* note 12, at 228-230.

⁵² TRIPS, *supra* note 7, art. 27(3)(b).

autonomous juridical category with its own criteria of validity, ownership and enforcement.⁵³ This entails not merely the insertion of Indigenous exceptions into Western intellectual property frameworks but the parallel development of Indigenous knowledge governance systems that operate according to Indigenous legal traditions and customary law.

B. Constitutional recognition of Indigenous data sovereignty

The concept of Indigenous data sovereignty, extending beyond traditional knowledge to encompass all data derived from Indigenous communities, provides a framework for rethinking knowledge governance.⁵⁴ Constitutional or statutory recognition of Indigenous data sovereignty would establish the legal foundation for Indigenous communities to control the collection, use and dissemination of knowledge pertaining to their peoples, lands and cultures. This approach moves beyond intellectual property reform toward the recognition of Indigenous jurisdictional authority over epistemic domains.

Data sovereignty encompasses not merely the right to control existing knowledge but the authority to govern the conditions under which new knowledge is generated from Indigenous territories and communities.⁵⁵ This includes the right to refuse research, to mandate community-controlled research protocols and to establish Indigenous ethical review processes that operate independently of Western institutional review boards. The constitutionalisation of data sovereignty would thus represent a fundamental reconceptualisation of the relationship between knowledge, territory and governance.

C. Mandatory free, prior and informed consent in trade agreements

All bilateral and multilateral trade agreements containing intellectual property chapters should incorporate mandatory requirements for free, prior and informed consent for the utilisation of genetic resources and traditional knowledge. The Africa Arbitration Academy Model Bilateral Investment Treaty (2022) provides a template for integrating Indigenous rights protections within investment frameworks, including explicit recognition of Article 31 of UNDRIP and the obligation to protect traditional knowledge through effective legal mechanisms.⁵⁶

⁵³ See, e.g., Antony Taubman, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge*, in INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME 521, 528-535 (Keith E. Maskus & Jerome H. Reichman eds., 2005).

⁵⁴ See, e.g., Stephanie Russo Carroll et al., *Indigenous Data Sovereignty*, 3(1) INDIGENOUS DATA SOVEREIGNTY NETWORK 1, 4-8 (2020); see also INDIGENOUS DATA SOVEREIGNTY: TOWARD AN AGENDA 1-20 (Tahu Kukutai & John Taylor eds., 2016).

⁵⁵ Russo Carroll, *supra* note 54, at 6-9; see also Kukutai & Taylor, *supra* note 54, at 15-18.

⁵⁶ AFRICA ARBITRATION ACADEMY, MODEL BILATERAL INVESTMENT TREATY art. 15(3)-(5) (2022).

The integration of free, prior and informed consent into trade agreements must move beyond procedural box-checking to encompass substantive negotiation rights. This requires the establishment of independent verification mechanisms, the provision of legal and technical capacity to Indigenous communities, and the recognition that free, prior and informed consent is not a one-time event but an ongoing relationship of consultation and consent that extends throughout the lifecycle of knowledge utilisation.⁵⁷

D. Indigenous-led governance mechanisms

Ultimately, effective protection requires the establishment of Indigenous-led governance bodies with authority to administer traditional knowledge rights, adjudicate disputes and negotiate access agreements. The WIPO Voluntary Fund for Indigenous Peoples, though chronically underfunded and recently depleted, represents a nascent recognition of the need for Indigenous participation in intellectual property governance.⁵⁸ The proposal to fund Indigenous participation from WIPO's regular budget, blocked in 2025 by objections from a minority of Member States, demonstrates the political resistance to genuine Indigenous empowerment within international institutions.⁵⁹

Indigenous-led governance must extend beyond advisory roles to encompass decision-making authority. This includes the establishment of Indigenous intellectual property tribunals with binding jurisdiction over disputes concerning traditional knowledge, the creation of Indigenous-led certification systems for authentic Indigenous knowledge products, and the development of Indigenous-controlled databases and registries that operate according to Indigenous data sovereignty principles.⁶⁰

VI. CONCLUSION: BEYOND HARMONISATION TOWARD EPISTEMIC JUSTICE

The reconciliation of intellectual property frameworks with Indigenous Peoples' rights over traditional knowledge requires moving decisively beyond the constraints of the TRIPS Agreement. While the 2024 WIPO Treaty represents meaningful procedural advancement, it does not address the fundamental structural inequities that render Indigenous knowledge vulnerable to extraction and commodification within global trade regimes.

⁵⁷ See, e.g., Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, paras. 22-35, U.N. Doc. A/HRC/39/62 (2018); see also James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction*, 4(1) INDIGENOUS L.J. 1, 8-15 (2005).

⁵⁸ IWGIA, *supra* note 23, at 279.

⁵⁹ WIPO, *supra* note 28, paras. 78-82.

⁶⁰ See, e.g., Tomasz G. Smolinski, *A Proposal for a Model Indigenous Intellectual Property Production Tribal Code*, 22(2) TRIBAL L.J. 3, 9-15 (2023); see also Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Cultural Resource Protection Act, SWO Code, ch. 73 (2005).

The analysis presented in this paper demonstrates that effective protection necessitates a multi-layered approach: the use of TRIPS flexibilities to establish sui generis protection systems; the constitutional recognition of Indigenous data sovereignty; the mandatory integration of protocols for free, prior and informed consent within trade agreements; and the empowerment of Indigenous-led governance mechanisms within international institutions. These reforms must be understood not as charitable accommodations but as obligations arising from the human rights framework established by UNDRIP and the imperative to redress historical and ongoing epistemic colonialism.

The path forward demands that states, international organisations and scholars abandon the assumption that Indigenous knowledge must be translated into Western intellectual property categories to merit protection. Instead, the global community must recognise that Indigenous knowledge systems constitute autonomous, sovereign domains of intellectual creativity that require protection on their own terms. Only through such a paradigm shift can the promise of Article 31 be realised, not merely as an aspirational declaration but as an enforceable foundation for justice in global knowledge governance.

The juridical transformation required is not merely technical but civilisational. It demands the decolonisation of the epistemological foundations upon which the international intellectual property regime has been constructed, and the recognition that the diversity of human knowledge systems is not a problem to be managed through harmonisation but a resource to be protected through pluralism. The future of global knowledge governance depends upon the willingness of the international community to embrace this pluralism and to construct legal frameworks that accommodate the ontological diversity of human intellectual traditions.

VII. BIBLIOGRAPHY

1. ANTONS C. (ed.), *TRADITIONAL KNOWLEDGE, TRADITIONAL CULTURAL EXPRESSIONS AND INTELLECTUAL PROPERTY LAW IN THE ASIA-PACIFIC REGION* (Kluwer Law International 2009).
2. DRAHOS P., *A PHILOSOPHY OF INTELLECTUAL PROPERTY* (Dartmouth Publishing 1996).
3. DUTFIELD G., *INTELLECTUAL PROPERTY RIGHTS AND THE LIFE SCIENCE INDUSTRIES* (2nd edn, World Scientific 2009).
4. KUKUTAI T. & TAYLOR J. (eds.), *INDIGENOUS DATA SOVEREIGNTY: TOWARD AN AGENDA* (ANU Press 2016).

5. MAY C. & SELL S.K., *INTELLECTUAL PROPERTY RIGHTS: A CRITICAL HISTORY* (Lynne Rienner Publishers 2006).
6. NWAUCHE E., *THE PROTECTION OF INDIGENOUS KNOWLEDGE IN AFRICA* (Springer 2025).
7. SHIVA V., *BIOPIRACY: THE PLUNDER OF NATURE AND KNOWLEDGE* (South End Press 1997).
8. TAUBMAN A., *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge*, in Maskus K.E. & Reichman J.H. (eds.), *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME* 521 (CUP 2005).
9. NAPOLEON V. & FRIEDLAND H., *Indigenous Legal Traditions: Roots to Renaissance*, in Dubber M.D. & Hörnle T. (eds.), *THE OXFORD HANDBOOK OF CRIMINAL LAW* 225 (OUP 2014).
10. Anaya J., *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction*, 4(1) *INDIGENOUS LAW JOURNAL* 1 (2005).
11. Antons C., *The 2024 WIPO Treaty: A New Chapter in the Protection of Traditional Knowledge?*, 55(4) *INTERNATIONAL REVIEW OF INDUSTRIAL PROPERTY AND COPYRIGHT LAW* 389 (2024).
12. Coffin S., *Protecting Aboriginal and Torres Strait Islander Cultural and Intellectual Property, Part 2: Comparative ICIP Frameworks*, *BRIEF* (Law Society of Western Australia) 1 (2025).
13. Dutfield G., *Biopiracy: The Need for a Coherent Coordinated and Global Response*, 7 *JOURNAL OF INTERNATIONAL BIOTECHNOLOGY LAW* 221 (2004).
14. Dutfield G., *TRIPS-Related Aspects of Traditional Knowledge*, 33 *CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW* 233 (2001).
15. Henderson J. (S.) Y., *Indigenous Knowledge and Legal Discourse*, 5(1) *INDIGENOUS LAW JOURNAL* 25 (2005).
16. Kapa-Kingi E., *Kia Tawharautia Te Matauranga Maori: Decolonising the Intellectual Property Regime in Aotearoa New Zealand*, 51(4) *VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW* 657 (2020).

17. Morgera E., *The Nagoya Protocol and the WIPO Treaty: Complementary or Competing Regimes?*, 34(2) REVIEW OF EUROPEAN, COMPARATIVE AND INTERNATIONAL ENVIRONMENTAL LAW 198 (2025).
18. Newman D., *The Implementation Gap in Indigenous Rights Protection: Canada and Beyond*, 41(2) WINDSOR YEARBOOK OF ACCESS TO JUSTICE 45 (2023).
19. Robinson D., *The WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge: A Critical Assessment*, 45(3) EUROPEAN INTELLECTUAL PROPERTY REVIEW 145 (2024).
20. Russo Carroll S. & others, *Indigenous Data Sovereignty*, 3(1) INDIGENOUS DATA SOVEREIGNTY NETWORK 1 (2020).
21. Smolinski T.G., *A Proposal for a Model Indigenous Intellectual Property Production Tribal Code*, 22(2) TRIBAL LAW JOURNAL 3 (2023).
22. ASEAN IP ASSOCIATION, COMPARATIVE STUDY ON GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND TRADITIONAL CULTURAL EXPRESSIONS (2021).
23. AUSTRALIAN GOVERNMENT, NATIONAL CULTURAL POLICY: REVIVE (2023).
24. Daes E.-I., *Protection of the Heritage of Indigenous People*, U.N. Doc. E/CN.4/Sub.2/1994/31 (1994).
25. Expert Mechanism on the Rights of Indigenous Peoples, *Free, Prior and Informed Consent: A Human Rights-Based Approach*, U.N. Doc. A/HRC/39/62 (2018).
26. Expert Mechanism on the Rights of Indigenous Peoples, *Study on the Role of the UN Declaration on the Rights of Indigenous Peoples in the Context of the 2030 Agenda*, U.N. Doc. A/HRC/51/28 (2022).
27. GOVERNMENT OF CANADA, INTELLECTUAL PROPERTY STRATEGY (ISED, May 2025).
28. GOVERNMENT OF CANADA, UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT ACTION PLAN 2023-2028 (2023).
29. IWGIA, THE INDIGENOUS WORLD 2026: WORLD INTELLECTUAL PROPERTY ORGANIZATION (IWGIA 2026).
30. IP AUSTRALIA, FIRST NATIONS STRATEGY 2025-2030 (2025).
31. G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).
32. U.N. Permanent Forum on Indigenous Issues, *Report on the Twenty-First Session*, U.N. Doc. E/C.19/2022/9 (2022).

33. WAITANGI TRIBUNAL, *KO AOTEAROA TĒNEI: A REPORT INTO CLAIMS CONCERNING NEW ZEALAND LAW AND POLICY AFFECTING MĀORI CULTURE AND IDENTITY* (WAI 262, 2011).
34. WIPO, *INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE* (WIPO Publication No. 920(E), 2012).
35. WIPO, *REPORT OF THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE* (WIPO Doc. WIPO/GRTKF/IC/46/8, 2025).
36. WIPO, *REPORT ON THE WIPO VOLUNTARY FUND FOR INDIGENOUS PEOPLES* (WIPO Doc. WO/GA/54/10, 2024).
37. WIPO, *STATUS OF THE WIPO TREATY ON INTELLECTUAL PROPERTY, GENETIC RESOURCES AND ASSOCIATED TRADITIONAL KNOWLEDGE* (WIPO Doc. WO/GA/55/7, 2025).
38. *Constitution Act, 1982* (Can.).
39. *Copyright Act 1994* (N.Z.).
40. *Indian Arts and Crafts Act of 1990* (U.S.).
41. *Law No. 28/2016 on the Preservation of Cultural Heritage and Traditional Knowledge* (Rwanda).
42. *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* (adopted Oct. 29, 2010, entered into force Oct. 12, 2014).
43. *Patents Act 2013* (N.Z.).
44. *Promotion, Development and Management of Indigenous Knowledge Act of 2019* (South Africa).
45. *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation Cultural Resource Protection Act*, SWO Code, ch. 73 (2005).
46. *Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore* (adopted Aug. 9, 2010, entered into force May 11, 2015).
47. *Trade Marks Act 1995* (Cth).
48. *Trade Marks Act 2002* (N.Z.).
49. *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 (Can.).

50. Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted Apr. 15, 1994, entered into force Jan. 1, 1996) 1869 U.N.T.S. 299.
51. WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge (adopted May 24, 2024, not yet in force).
52. Lo A., *Anti-Colonial Science? The Politics of Indigenous Knowledge Inclusion in Science-Based Policy* (unpublished Ph.D. thesis, LSE 2025).
