WAI 262 and Māori Intellectual Property Internationally: What Inspiration Can the Crown Take From International Instruments In Crafting Its Te Pae Tawhiti Framework?

The WAI 262 Waitangi Tribunal claim dealt with Māori intellectual property (IP) rights, as well as rights to Māori flora and fauna. However, the recognition and effective enforcement of these rights on the domestic level continues to be lacking, as well as creating ongoing contemporary issues that continue to arise as part of the lack of meaningful legislative measures in this space.

In this paper I will focus on the international recognition and enforcement of these Māori IP rights, as well as recommendations by the World Intellectual Property Organisation (WIPO)[1] and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),[2] of which New Zealand is a signatory. I will also discuss the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (Nagoya Protocol).[3]

The Crown, through Te Puni Kokiri, has committed to a form of implementation through a work programme called Te Pae Tawhiti, in order to develop initiatives alongside Māori, per the Crown commitment to WAI 262.[4]

This paper will additionally examine what the Te Pae Tawhiti work programme should look like, in order to best satisfy the requirements of the WIPO recommendations and UNDRIP. However, I will also discuss how Māori IP rights can be protected at an international level, in particular examining the efficacy of the WIPO recommendations and UNDRIP itself, as well as examining the Nagoya Protocol, even though New Zealand is not a signatory, and whether adoption of the Nagoya Protocol would create greater protection for Māori taonga species and mātauranga Māori.

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1 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Chair's Text of a Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources* WIPO/GRTKF/IC/41 (February 2021).

2 Declaration on the Rights of Indigenous Peoples GA Res 61/295, A/RES/61/295 (2007).

3 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, UNEP/CBD/COP/DEC/X/1 (2010).

4 Te Puni Kokiri *Wai 262 – Te Pae Tawhiti: Preliminary Proposals for Crown organisation* (August 2019).

I Background and definitions

A Explanation of the WAI 262 claim

1 The claim

The initial WAI 262 claim was first brought before the Waitangi Tribunal in 1991 and presented a culmination of claims by six different iwi.[5] As the Tribunal states, essentially the claim is about who (if anyone) controls Māori culture or identity.[6]

The Waitangi Tribunal focused on three main areas of concern, being mātauranga Māori (traditional knowledge and culture relating to the Māori worldview), the manifestations of that traditional knowledge and culture in taonga works, as well as the species of flora and fauna that are important contributors to mātauranga Māori.[7] Importantly, attached to the physical manifestations of mātauranga Māori, in both taonga species and taonga works, is a kaitiaki (guardianship) element. This kaitiaki element involves the preservation of the work or species and pass the cultural and spiritual benefits of this taonga to future generations.[8]

2 Recommendations by the Tribunal

The Tribunal recognised that recommended the creation of an independent commission to decide whether uses of mātauranga Māori are justified on a case-by-case basis.[9] As well as this, the commission is to maintain a kaitiaki register, in order to notify commercial parties and kaitiaki when a taonga work is used, and whether permission for that use has been granted.[10]

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5 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wai 262, 2011) vol 1 at 6.

6 At 17.

7 At 17.

8 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Maori Culture and Identity* (Wai 262, 2011) vol 2 at 82.

9 At 713.

10 Waitangi Tribunal, above n 5, at 95.

As well as this, the Tribunal recommended a greater consultation duty generally, where a legal framework would be implemented to create "a legal environment conducive to the long-term survival of mātauranga Māori and the kaitiaki relationship."[11]

Importantly, the Tribunal recognised that the New Zealand domestic law framework was insufficient, and international instruments were rapidly outpacing domestic efforts. The Tribunal labelled this as "not a good look."[12] In the following sections of this paper, I will further discuss the efficacy of these international instruments, particularly in section II.

B Crown response to WAI 262

1 Patents Act 2013

The Crown response to WAI 262 to date has been notably poor, particularly concerning mātauranga Māori.[13] In 2013 an amendment was passed to the Patents Act that established a Māori Advisory Committee, to advise where new patents that derive from Māori cultural knowledge have a commercial interest that is contrary to Māori values.[14] These decisions are not binding, however, and this amendment has been criticised as cursory and somewhat tokenistic.[15]

2 Proposed amendments to PVR Act

In 2021 a proposed amendment to the Plant Variety Rights Act 1987 has been drafted and was introduced to Parliament in mid-May.[16] This amendment bill

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11 Waitangi Tribunal, above n 5, at 91.

12 At 91.

13 Tai Ahu, Amy Whetu and James Whetu "Mātauranga Māori and New Zealand's intellectual property regime — challenges and opportunities since Wai 262" (2017) 8 NZIPJ 79 at 82.

14 Patents Act 2013, s 226.

15 Joseph Williams "Lex Aotearoa: An Heroic Attempt to Map the Māori Dimension in Modern New Zealand Law" (2013) 21 Waikato Law Review 2 at 31.

16 MBIE "Plant Variety Rights Act 1987 review" (25 April 2021) Ministry of Business, Innovation & Employment <https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/plant-variety-rights/plant-variety-rights-act-review/>

modernises the PVR rights system and implements "measures to give effect to the Treaty of Waitangi/te Tiriti o Waitangi (the Treaty) in the PVR regime".[17] The new bill includes mandatory disclosure requirements. Where a breeder is a breeder is working with plant species from either an indigenous plant species" or a "nonindigenous plant species of significance" they will need to engage with kaitiaki so that any impact on kaitiaki relationships can be considered and include the outcome of this engagement in their PVR application.[18] If no engagement is made, the application will likely be looked upon less favourably. Importantly, this amendment bill may go further than that of the WAI 262 recommendations, by establishing a Māori Advisory Committee that has binding decision making power.[19] The Committee will:[20]

> determine whether kaitiaki relationships will be affected by a PVR grant and, if so, whether the impacts can be mitigated to a reasonable extent so as to allow the grant (the kaitiaki condition). If the kaitiaki condition is met, the application will proceed to testing by the PVR Office. If not, the application ends there and a PVR will not be granted.

This is a positive step for Māori in this area concerning taonga species. However, whether the binding nature of the Māori Advisory Committee will make it through the decision making of Parliament is not certain, given the current political tension in adopting a binding Māori decision making body generally.[21]

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17 MBIE *Discussion Paper - Review of the Plant Variety Rights Act 1987: Outstanding Policy Issues* (Ministry of Business, Innovation & Employment, August 2020) at 8.

18 Plant Variety Rights Bill, s 61.

19 Section 52.

20 MBIE, above n 17, at 11.

21 Katie Scotcher "He Puapua report Collins called 'divisive' meant to create unity, author says" *Radio New Zealand* (online edition, 3 May 2021).

3 Te Pae Tawhiti

In 2019 the Minister for Māori Development Nanaia Mahuta announced that the WAI 262 claim would be addressed via a whole-of-government approach.[22] This programme is known as Te Pae Tawhiti, and aims to address the Tribunal's report through three broad areas, or kete:[23]

(1) Taonga Works me te Mātauranga Māori

(2) Taonga Species me te Mātauranga Māori

(3) Kawenata Aorere / Kaupapa Aorere (with an international focus).

I will examine the proposed kete in detail in Section III. However, in general terms it appears Te Pae Tawhiti will not be implemented in the near future. Even at the time of writing, Te Puni Kokiri is still advertising for a Project Coordinator for the WAI 262 Project Team, and planning for publication of a Plan of Action in mid-2021.[24] This further demonstrates that action on WAI 262 will not occur in the near future. This is particularly concerning given the timelines associated with the claim. It took 20 years for the claim to be finalised (1991-2011)[25] and as of the time of writing, it has been 10 years since the Tribunal's report, and as of yet minimal tangible action for tangata whenua. This will be further discussed later in this paper.

C UNDRIP rights pertaining to indigenous intellectual property

As discussed earlier, UNDRIP is an important international instrument aimed at protecting the rights of indigenous peoples across the world. It is important to recognise that New Zealand did not initially accede to the Declaration in 2007 when it was published, instead belatedly acceding to UNDRIP in 2010.[26]

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22 MBIE "Whole-of-government work programme announced for Wai 262" (3 September 2019) Ministry of Business, Innovation and Employment <https://www.iponz.govt.nz/news/whole-of-government-work-programme-announced-for-wai-262/>

23 Te Puni Kokiri "Te Pae Tawhiti: Wai 262" (31 March 2021) Te Puni Kokiri <https://www.tpk.govt.nz/en/a-matou-kaupapa/te-ao-maori/wai-262-te-pae-tawhiti>

24 Te Puni Kokiri "Project Coordinator" (3 May 2021) Te Puni Kokiri – Careers <https://careers.tpk.govt.nz/jobdetails?ajid=S9Sf7>

25 Waitangi Tribunal, above n 5, at xxvii.

26 Fleur Adcock "The UN special rapporteur on the rights of indigenous peoples and New Zealand: A study in compliance ritualism" (2012) 10 New Zealand Yearbook of International Law 97 at 99.

UNDRIP itself covers a wide range of issues and topics. Articles 11 and 31 deal more specifically to indigenous intellectual property and the concerns of WAI 262, and will be outlined below. I will discuss the similarities between UNDRIP and WAI 262 more specifically in Section II of this paper.

1 Article 11

The text of the article is as follows:[27]

> 1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
>
> 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

This article asserts a right of control for indigenous peoples over their cultural practices, including the manifestations of these works.[28] In particular, it focuses on traditional and customary knowledge and the right to manifest that culture in the future as well.

However, in clause 2, the Declaration states that where indigenous IP is taken or used, states will provide redress to indigenous peoples, through effective measures. As Haugen points out, this provision is of a defensive nature as it is compensatory after the fact, although it is not specific in what these defensive procedures may be.[29] The suitability of this clause in particular will be discussed in Section II.

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27 Declaration on the Rights of Indigenous Peoples, above n 2, article 11.

28 Ruth Okediji "Traditional Knowledge and the Public Domain in Intellectual Property" in Carlos Correa and Xavier Seuba (ed) *Intellectual Property and Development: Understanding the Interfaces* (Springer, Singapore, 2019) 249 at 260.

29 Hans Morten Haugen "How Are Indigenous and Local Communities' Rights Over Their Traditional Knowledge and Genetic Resources Protected in Current Free Trade Negotiations? Highlighting the Draft Trans-Pacific Partnership Agreement (TTPA)" (2014) 17(3) The Journal of World Intellectual Property 81 at 84.

2 Article 31

The text of the article is as follows:[30]

> 1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
>
> 2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

This article is much more explicit than that of article 11. It states that indigenous peoples have the right to maintain, control and protect their traditional knowledge and expressions of that knowledge, as well as their flora and fauna they have a cultural link to. Importantly the article explicitly refers to indigenous intellectual property as well.

This article goes further than that of article 11, by obligating States to take effective measures to recognise and protect these rights. This grants indigenous peoples a control and access collective right to their cultural property.[31]

What is interesting for the purposes of this paper specifically is the explicit recognition of IP rights for indigenous peoples, and the obligation on member states to recognise and protect the expression of these rights. As well as this, article 31 in particular appears to cover the ambit of WAI 262, including taonga works and taonga species. The background to the Tribunal report in considering UNDRIP in making its recommendations will be discussed in detail in the next section.

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30 Declaration on the Rights of Indigenous Peoples, above n 2, article 31.

31 Karolina Kuprecht *Indigenous Peoples' Cultural Property Claims: Repatriation and Beyond* (Springer, Switzerland, 2014) at 260.

D WIPO recommendations on indigenous intellectual property

The WIPO recommendations are somewhat less concrete to analyse, as they have constantly changed and been adapted as member states continue to disagree on the specific terms of the recommendations.[32]

In essence however, the WIPO recommendations are the product of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), which was established in 2000 to facilitate legal protections of traditional knowledge.[33]

At this stage, a draft international instrument has been released that intends to "enhance the efficacy, transparency and quality of the patent system with regard to GRs and Associated TK"[34] Prima facie, it appears this instrument may encompass taonga species and their protection, as the draft articles deal with genetic resources and associated traditional knowledge.[35] However, it also deals with an area of use of genetic material that may be covered in other international instruments, including as discussed below, in the Nagoya Protocol.[36]

The discussions of the IGC also concern the expressions of traditional cultural knowledge (TCE), however at this stage, only a limited document created in 2019 has been produced. This is due to a focus of WIPO to employ a sui generis, or individual state basis, on dealing with TCEs. This will be discussed in the next section concerning the effective protection of Māori IP at an international level.[37]

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32 Jessica Lai *Indigenous Cultural Heritage and Intellectual Property Rights Learning from the New Zealand Experience?* (Springer, Switzerland, 2014) at 78.

33 Paul Kuruk *Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property - A Global Primer* (Edward Elgar Publishing, 2020) at 73.

34 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 1, at 4.

35 At 9.

36 At 5.

37 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Report on the Compilation of Information on National and Regional Sui Generis Regimes for the Intellectual Property Protection of Traditional Knowledge and Traditional Cultural Expressions* WIPO/GRTKF/IC/41 (February 2021) at 1.

E The Nagoya Protocol

The Nagoya Protocol is another international instrument that provides some protection for traditional knowledge, with particular concern to the utilisation of genetic resources of protected traditional species. In essence, the Protocol provides that:[38]

> Each Party shall take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned, based on mutually agreed terms.

In essence, this means that a kaitiaki interest to taonga species must be recognised regardless of whether a party claims a PVR interest over the taonga species in question. The detailed process of how these rights are recognised by the Protocol, and whether the PVR regime is sufficient to protect the kaitiaki interest in taonga species, will be discussed in further detail in Section V.

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38 Nagoya Protocol, above n 3, at article 5.2.

II Efficacy of international protection of Māori IP

A Current protections of Māori intellectual property under UNDRIP

1 UNDRIP as recognised by Waitangi Tribunal report

As discussed above, Ko Aotearoa Tēnei explicitly refers to UNDRIP as being important to the recognition of collective indigenous rights, in particular with regards to articles 11 and 31 as having most relevance to taonga works and mātauranga Māori.[39]

However, the Tribunal also recognise from the outset the limitations of international law where not incorporated into the domestic legislative framework. They quote Prime Minister John Key, at the time of New Zealand's endorsement of the declaration, as stating "[the Declaration] is an expression of aspiration; it will have no impact on New Zealand law and no impact on the constitutional framework."[40]

This is indicative of a theme that I anticipate will be prevalent through my analysis of these international instruments in Sections II and V. Where an international instrument such as UNDRIP is endorsed by the Crown, it has no tangible effect unless its principles are incorporated into domestic legislation.

2 Article 11

As discussed above, Haugen argues that Article 11, as opposed to Article 31, is more of a defensive provision, as opposed to a positive provision.[41] This means that the focus of this article in terms of the obligations for member states is through the form of "redress", rather than through active protection. Haugen suggests that redress could take the form of administrative procedures, or in a judicial mechanism such as opposing the granting of a patent, for example.[42]

In terms of the application to Māori IP, Article 11 in essence provides mechanisms for compensation for a use of a taonga work or taonga species without the consent of the kaitiaki. It could be argued therefore, that the article merely obliges states to develop the "effective mechanisms" required to grant

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39 Waitangi Tribunal, above n 8, at 90.

40 At 674.

41 Haugen, above n 29, at 84.

42 At 84.

the compensation or restitution. However, as Kuprecht outlines, the article itself requires the restitution as an obligation on the state.[43] The effective mechanisms are therefore a means to provide the compensation, rather than the full extent of the obligation on member states.

As well as the restitution element, it is also important to recognise the concept of consent, in the Māori context, by kaitiaki. Free, prior, and informed consent is a key element of this article and is utilised throughout UNDRIP.[44] Participation of indigenous peoples in granting use of the cultural property is paramount.[45] This is particularly encouraging in a New Zealand context, given a key Treaty principle being partnership.[46]

3 Article 31

As Okediji points out, it is unclear to some whether traditional knowledge, such as taonga works and mātauranga Māori, should be considered in the public domain or not.[47] However, as Okediji continues, the public domain cannot effectively displace the inherent rights of indigenous peoples to their traditional knowledge, due to the recognition that international instruments like UNDRIP affords.[48] This is particularly true for Article 31, where its ambit is wide in terms of traditional knowledge and the obligations of states to recognise and protect it. As opposed to his earlier observation of Article 11 as a defensive provision of UNDRIP, Haugen declares that Article 31 is more of a positive protection, as it implores member States to create effective provisions to facilitate the protection of traditional knowledge.[49]

Similar to the above observations on the aim of the WIPO negotiations, Article 31 in essence encourages the creation of a sui generis system to deal with the traditional knowledge, as it is not prescriptive in how the "effective measures to

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43 Kuprecht, above n 31, at 78.

44 At 161.

45 At 163.

46 Waitangi Tribunal, above n 5, at xix.

47 Okediji, above n 28, at 261.

48 At 266.

49 Haugen, above n 29, at 85.

recognise and protect"[50] should be implemented state to state. Article 31 is also a representation of the overall policy of the Declaration, being the right to self-determination.[51] It is therefore arguable that this policy is manifested through the encouragement of the development of sui generis systems.

4 Soft law limitations

In order to determine the effective protection of Māori under UNDRIP, in particular under Article 31, the effectiveness of a sui generis system needs to be determined. *Prima facie,* from the above discussions of the implementation of the Waitangi Tribunal's recommendations, the effective protection of Māori under UNDRIP is lacking, given the lack of tangible implementation of Tribunal recommendations and policymaking.

This is a reflection of the limitation of international law to make a tangible difference unless implemented in domestic law and policy. The stance of the Crown at the time of the Tribunal's report, as expressed above, is indicative of the Crown's approach to the implementation of a sui generis system, where the Declaration is not seen as having an impact on domestic law in New Zealand.[52] As Toki expresses, the orthodox view is that the Declaration will not be binding upon the Crown unless incorporated into domestic legislation, and the real struggle for indigenous peoples (Māori) is the practical manifestation of these rights.[53]

This seems to be a common thread between member states, particularly in New Zealand and Australia, where it should be further noted that both were late signatories to the Declaration, as discussed above. As Douglas remarks "[e]xisting [Australian] Commonwealth legislation is limited in that it is confined to matters of a tangible nature."[54]

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50 Declaration on the Rights of Indigenous Peoples, above n 2, art 31.

51 Ana Vrdoljak "Indigenous Peoples, World Heritage, and Human Rights" (2018) 25(3) IJCP 245 at 253.

52 Waitangi Tribunal, above n 40.

53 Valmaine Toki "Indigenous Rights – Hollow Rights?" (2011) 19(2) Waikato Law Review 29 at 43.

54 Tina Douglas "But that's our traditional knowledge! - Australia's cultural heritage laws and ICIP" (2013) 1 Art + Law 5 at 9.

However, the Declaration does contain provisions that suggest that more of a hard law approach could be taken in ensuring member States are compliant with its obligations. As Barelli expresses, Article 42 provides mechanisms for representatives of the United Nations to ensure compliance, through monitoring and promotion of the values of the Declaration.[55] However, given the broad nature of the Declaration, it is unlikely that the provision of indigenous IP is a high priority for officials given the issues that other breaches of the Declaration could have, including continuing colonial practices.[56]

Despite this, Haugen argues that UNDRIP does have persuasive value, despite its non-binding nature, and should be used by states to influence their own work in the indigenous intellectual property space.[57] Although the application of UNDRIP and its protections in the New Zealand legal framework at this stage is inadequate, the application of UNDRIP in future aspirations should be stronger. I will analyse the further application of UNDRIP in the Crown's further measures in Section III.

B Current protections of Māori intellectual property under WIPO

As outlined above, the protections of traditional knowledge under WIPO are vague and difficult to define in their entirety, as well as not being contained in an instrument which member states have acceded to. However, I will examine the two primary draft documents that deal the closest with the content of WAI 262.

1 Protections of TK and TCE

The protection of TK and TCE are the vaguest of the WIPO recommendations, given the limited nature of the draft provisions provided.[58] However, as

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55 Mauro Barelli "The role of soft law in the international legal system: The case of the United Nations Declaration on the Rights of Indigenous Peoples" (2009) 58(4) International and Comparative Law Quarterly 957 at 983.

56 Dorothée Cambou "The UNDRIP and the legal significance of the right of indigenous peoples to self-determination: a human rights approach with a multidimensional perspective" (2019) 23(1-2) The International Journal of Human Rights 34 at 36.

57 Haugen, above n 29, at 85.

58 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *The Protection of Traditional Knowledge: Draft Articles – Rev* WIPO/GRTKF/IC/40 (June 2019).

expressed above, a primary focus of the IGC is the creation of sui generis regimes for member states.[59] Importantly, the IGC focuses on the sui generis creation strategy, as it recognises the fact that indigenous traditional knowledge does not sufficiently fit within the traditional Western concept of intellectual property. Thus, the creation of a sui generis regime that recognises the special nature of indigenous IP without attempting to confine it to the classic definitions of IP is important.[60] This is an encouraging sign that the IGC recommendations will be beneficial for Māori IP, given a key recognition by the Tribunal Report similarly is that Māori IP cannot be confined to the Western notions of IP.[61]

In line with article 11 of UNDRIP, the IGC also recommends the inclusion of redress measures for indigenous peoples. However, the IGC's recommendations are somewhat limited. They state that in order for effective redress to be made, if patents or trademarks associated with traditional knowledge are used, then the indigenous holders of the knowledge should be allowed to use the IP without penalty, as well as some form of restitution.[62] This is similar to the provisions made in UNDRIP, but with less emphasis on restitution.

As opposed to the Tribunal however, WIPO suggests that knowledge registers and databases of traditional knowledge should not be implemented, given the risk factors of increased use of the traditional knowledge by non-indigenous parties, and the fact that they should not be controlled by national governments.[63] Where WIPO and the Tribunal's recommendations do align is in the voluntary participation aspect of the registers, and that their participation need not be a prerequisite for IP protection by the state.[64] Despite this however, a register may

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59 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore *Update of the Technical Review of Key Intellectual Property-Related Issues of the WIPO Draft Instruments on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions within the Framework of Indigenous Human Rights* WIPO/GRTKF/IC/41 (February 2021) at 3.

60 At 3.

61 Waitangi Tribunal, above n 5, at 55.

62 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 59, at 4.

63 At 7.

64 At 7.

inherently cause conflict on who is the correct kaitiaki of a TCE over certain disputed works.

What is beneficial for Māori from these draft provisions or ideas is the underpinning tenet that both WIPO and the Tribunal act from, being the principle of free and prior consent, stated in Article 11(2) of UNDRIP as well.[65] However, the weakness for Māori of the WIPO articles is its draft nature, and lack of foreseeable progress.

2 Protection of GR and associated TK

The draft article for the protection of traditional knowledge and genetic resources is once again an uncertain document. Although the document does provide key aspects for the protection of this IP, such as disclosure requirements and due diligence requirements, there are alternative clauses for each section which are yet to be agreed to.[66] These alternative clauses provide significantly less protection, such as non-mandatory disclosure requirements and state discretion as to the dispute resolution process needed for breaches.[67] It is clear therefore that these articles suffer from the same lack of certainty as the other WIPO instruments, and are therefore less helpful for the protection of Māori.

This weakness may be due to the wide ambit or jurisdiction that WIPO serves. The diversity of different international indigenous peoples cannot be ignored, and their relationship with the state may differ significantly.[68]

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65 At 5.

66 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 1, at 13.

67 At 12.

68 Silke von Lewinski "Genetic resources, traditional knowledge and traditional cultural expressions" in S Ricketson (ed) Research handbook on the World Intellectual Property Organization (Edward Elgar Publishing, 2020) 243 at 250.

III Analysis of Te Pae Tawhiti and recommendations

A Te Pae Tawhiti

As discussed above, Te Pae Tawhiti forms the Crown's plan of action for progress on WAI 262. The proposed workstreams will be discussed in more detail below. Each kete is divided into two parts, being existing work that falls under the ambit of Te Pae Tawhiti and the future collaborative work that could be achieved.[69]

1 Kete 1: Taonga works me te mātauranga Māori

This workstream specifically addresses the idea of taonga works as discussed by the Waitangi Tribunal. In terms of existing work that is covered by work on WAI 262, Te Puni Kokiri lists a number of reviews of existing legislation, including reviews of the Statistics Act, the Haka Ka Mate Attribution Act, and perhaps most importantly the Copyright Act.[70] As Te Puni Kokiri recognise, as part of the Copyright Act review MBIE are currently reviewing what a workstream that would address the Tribunal recommendations of a separate legislative regime for taonga works would look like.[71] However, since the publication of the Te Pae Tawhiti document MBIE has since withdrawn its initial Issues Paper and proposes to consult on a new Issues Paper sometime in 2021.[72] This means progress in this area has once again been further delayed.

In terms of future issues that Te Pae Tawhiti will deal with, the document states that the exercise of kaitiakitanga, the creation of a new legal framework, the process of decision making, and the Crown management of taonga works will be considered.[73] While these are quite broad issues, they are a good first step in the direction the Crown should take in addressing taonga works.

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69 Te Puni Kokiri, above n 4, at 17.

70 At 31.

71 At 31.

72 MBIE "Review of the Copyright Act 1994" (26 February 2021) Ministry of Business, Innovation and Employment < https://www.mbie.govt.nz/business-and-employment/business/intellectual-property/copyright/review-of-the-copyright-act-1994//>

73 Te Puni Kokiri, above n 4, at 20.

2 *Kete 2: Taonga species me te mātauranga Māori*

Similar to the approach taken with taonga works, Te Puni Kokiri proposes that in the future the Crown will address the kaitiakitanga and decision-making aspects of dealing with taonga species.[74]

As well as this, Te Puni Kokiri anticipated that a number of workstreams across the whole of government will be affected by the considerations of taonga species as set out by the Tribunal, including a new biodiversity strategy, the changes to the RMA that have since been implemented, and impacts on freshwater.[75] However, most relevant to the scope of this paper is the consideration of taonga species in the PVR rights review, which will be discussed in Section V, and the disclosure of origin in the patent system internationally through WIPO, discussed in the previous section.[76] This is a favourable sign that the Crown is sufficiently addressing the problems of WAI 262 relating to taonga species.

3 *Kete 3: Kawenata Aorere / Kaupapa Aorere*

This kete pertains specifically to the Crown's implementation of international instruments relating to mātauranga Māori. In particular, these include the implementation of the three international instruments discussed in this paper, including the Nagoya Protocol, which will be discussed in Section V.

In terms of UNDRIP, this document recognises that Te Puni Kokiri has been working on a plan for the implementation of the Declaration in New Zealand generally, which has now been realised in He Puapua, discussed below.[77] Therefore, the effectiveness of the Crown in implementing this particular workstream should be criticised on a government wide level, rather than just through the implementation of WAI 262.

In terms of the WIPO recommendations, this document states that "New Zealand is seen as a leader in these negotiations for its approach to recognising Māori rights and interests" but does not elaborate further.[78] However, it is important to recognise that the WIPO negotiations are made by the Crown as the Contracting

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74 At 21.

75 At 36.

76 At 39.

77 At 43.

78 At 43.

State, with minimal Māori input. As Lai recognises, this is potentially in breach of the Crown's Treaty obligations.[79]

B Recommendations based on UNDRIP

1 He Puapua report

In order to determine what changes need to be made to the Te Pae Tawhiti workstream in terms of UNDRIP, the He Puapua report, which creates a plan of action to implement UNDRIP, must be examined.[80]

The report recommends, as an indicative approach, that by 2022 the process of strengthen intellectual property laws and new standards for dealing with mātauranga Māori must happen, and recommends that by 2035 Parliament creates a practice of endorsing Māori decisions over their cultural rights, essentially making Māori primary decision makers in a bicultural system.[81]

Although this report does not address the specific articles of UNDRIP or the specific legislative changes that need to be made, the report deals with the same positive principles seen in UNDRIP and Ko Aotearoa Tēnei, that of self-determination and a recognition that Western IP laws simply do not work for mātauranga Māori.[82]

2 Political reception of He Puapua

However, the likelihood of these goals set out by He Puapua being implemented is unfortunately very low, due to the use of the report as a political tool against "separatist and 'racist' policies."[83] As Johnsen points out, the rhetoric of separatism such as this may "spook the Labour government into backing away

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79 Jessica Lai "New Zealand, mātauranga Māori and the IGC" in Daniel Robinson, Ahmed Abdel-Latif and Pedro Roffe (ed) *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge, New York, 2017) 289 at 296.

80 Claire Charters and others *He Puapua: Report of the Working Group on a plan to realise the UN Declaration on the Rights of Indigenous Peoples in New Zealand* (Te Puni Kokiri, October 2020).

81 At 75.

82 Emile Donovan "What is He Puapua?" (Podcast, 17 May 2021) RNZ – The Detail <https://www.rnz.co.nz/programmes/the-detail/story/2018795469/what-is-he-puapua>

83 Meriana Johnsen "He Puapua report bogged down in 'swamp of politics'" *Radio New Zealand* (online edition, 9 May 2021).

from He Puapua".[84] This may be true given the redacted nature of the officially released report. As this is quite a contemporary issue at the time of writing, it will be interesting to see how the political arena around this subject shapes the legal framework being created.

Once again however, it seems although the Crown has formed a good framework from which to make effective legislative change, the timeframes in which these changes are implemented have extended longer and longer, which has an inherent impact on Māori.

C Recommendations based on WIPO

As above, it is not clear from the Te Pae Tawhiti preliminary proposals themselves how the WIPO recommendations might be implemented in the future. This is perhaps due to their inherent weakness as highly contested draft articles.

Indeed, as Lai points out:[85]

> Given [the Crown's] willingness to introduce novel laws and the central nature of the Treaty when it does, the outcome of the IGC deliberations are of limited importance to New Zealand in terms of potential changes to substantive national laws.

The articles therefore, in their current state, are not particularly helpful in assisting on a domestic level to protect mātauranga Māori. Despite this, it is important to recognise the principles these articles are based on, and their influence on further decision making, most importantly, the principle of free and prior consent, which is reflected in much of the discourse in Ko Aotearoa Tēnei.[86] Any legislation that the Crown considers in the future as part of Te Pae Tawhiti should start with this key principle.

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84 Above n 83.

85 Lai, above n 79, at 293.

86 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 59, at 5.

IV Sufficiency of international instruments

A International issues for Māori IP

1 Importance of international instruments, exclusive of domestic law

While much of this paper has been focused on how the international instruments of UNDRIP and the WIPO draft articles affect the domestic implementation of policy to protect mātauranga Māori, it is important to recognise the value international instruments have in providing a level of protection of abuse of indigenous intellectual property in other jurisdictions.

Recht, quoting Solomon, points out that:[87]

> [A]n internationally sanctioned regime for protecting TK is a vital and necessary adjunct to any domestic sui generis framework of protection in order to ensure the effective compliance and enforcement of acts of misappropriation of TK by foreign based entities.

Therefore, the international instruments do play a key role in preventing abuse outside of the jurisdiction of the indigenous country.

2 Case examples of use of Māori IP in other jurisdictions without consent

A notable example of abuse of Māori IP in an international jurisdiction is that of the Whitmill v Warner Bros case. In that case, an artist responsible for Mike Tyson's infamous facial tattoo attempted to block the release of the Warner Bros produced film The Hangover Part II for copyright infringement, as the tattoo was copied as part of the plot and replicated on another actor's face.[88] The cultural appropriation in this case is the purported claiming of a non-Māori artist to Māori cultural property, ta moko.[89] As Tan observes, instruments such as the purported WIPO articles can have a massive effect on artistic expression and use of indigenous cultural material across member states.[90] As discussed above, a taking such as this without free and prior consent would likely be prohibited.

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87 Jo Recht "Hearing Indigenous Voices, Protecting Indigenous Knowledge" (2009) 16 IJCP 233 at 237.

88 *Whitmill v. Warner Bros. Entertainment Inc.* No. 4:11CV752 CDP (Missouri E Dist Ct 2011).

89 Leon Tan "Intellectual Property Law and the Globalization of Indigenous Cultural Expressions: Māori Tattoo and the Whitmill versus Warner Bros. Case" (2013) 30(3) Theory, Culture and Society 61 at 66.

90 At 76.

Indeed, without a legislative framework, these takings from other jurisdictions are normally justified through a claim to the public domain. An example of this is seen in the use of Māori culture and language by Lego in their Bionicle toys, by using words such as tohunga, whenua and kanohi in their marketing and product lines.[91] As Frankel outlines, because there is no definitive statement on what the public domain constitutes, where there is a grey area unauthorised taking are much more common.[92] Thus, an instrument such as the one attempted by WIPO can provide this needed certainty.

B Are WIPO and UNDRIP sufficient?

As discussed previously, while UNDRIP does provide a wide range scope of important declarations in relation to indigenous IP, it does not necessarily provide certain terms that can form the basis of an international instrument to be specifically bound to, and instead provides aspirational principles.[93] This is due to the broad nature of capturing so many indigenous peoples with differing commercial ability.[94]

While the WIPO articles attempt to apply these principles and create a document that does provide definitional certainty in this area, as discussed through this paper the timeliness and continued breakdown of negotiations means that no legislative instruments can be agreed upon. Indeed, this delay may further "water down" any substantive protections of traditional knowledge.[95]

C Further changes

1 Are changes to UNDRIP required?

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91 Suzy Frankel "Traditional knowledge as entertainment" in S Ricketson (ed) Research handbook on the World Intellectual Property Organization (Edward Elgar Publishing, 2020) 446 at 446.

92 At 446.

93 Toki, above n 53.

94 Ghazala Javed, Ritu Priya and Deepa V. K. "Protection of Traditional Health Knowledge: International Negotiations, National Priorities and Knowledge Commons" 6(1) Society and Culture in South Asia 98 at 104.

95 Maui Solomon "An indigenous perspective on the IGC" in Daniel Robinson, Ahmed Abdel-Latif and Pedro Roffe (ed) *Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* (Routledge, New York, 2017) 219 at 227.

It could be argued that changes are required to these instruments in order to create a more effective international foundation, and in turn create a framework from which to base domestic legislation.

In the case of UNDRIP, it can be argued that the Declaration is the foundational international instrument that deals with indigenous people's rights to self-determination and sets that as the starting point with dealing with all the areas it covers, including traditional knowledge and its manifestations.[96] Indeed, many see UNDRIP as being the key "parameter of reference when interpreting and applying indigenous rights".[97]

2 Domestic protection as the primary goal

Instead, a possibility for the best method to protect mātauranga Māori on an international level is to focus on the domestic response to the challenges WAI 262 sets out.[98] Given New Zealand's reputation as an innovator in this aspect of international law, as the Te Pae Tawhiti document recognises,[99] if the Crown were able to develop a legal framework domestically, New Zealand could perhaps lead the way internationally.[100]

The biggest change that needs to come when dealing with any aspect of WAI 262, whether domestically or internationally, is the speed at which parties address the substantive issues. It must be recognised that it took nine years from the completion of Ko Aotearoa Tēnei for the Government to respond, and even then, with no firm promise on how they might act but a proposed outline.[101] Given the impact of COVID-19 on the national policy focus, one should not expect decisions in this space to come swiftly.

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96 Jérémie Gilbert & Corinne Lennox "Towards new development paradigms: the United Nations Declaration on the Rights of Indigenous Peoples as a tool to support self-determined development" (2019) 23(1-2) The International Journal of Human Rights 104 at 106.

97 Felipe Gómez Isa (2019) 23(1-2) "The UNDRIP: an increasingly robust legal parameter" The International Journal of Human Rights 7 at 15.

98 Isabella Tekaumarua Wilson "The Misappropriation of the Haka: Are the Current Legal Protections around Mātauranga Māori in Aotearoa New Zealand Sufficient?" (2020) 51 VUWLR 523 at 551.

99 Te Puni Kokiri, above n 4, at 43.

100 Wilson, above n 98, at 557.

101 Doug Calhoun "Twenty-five years on — is New Zealand now a place where talent wants to live?" (2020) 9 NZIPJ 125 at 126.

V Should the Nagoya Protocol be adopted to protect taonga species, or are the suggested PVR amendments sufficient?

A Ambit of Nagoya Protocol

1 Nagoya Protocol in New Zealand

As discussed in Section I, the Nagoya Protocol is another international instrument that seeks to protect genetic resources relating to traditional knowledge and species under the control of indigenous peoples.[102] The Protocol also sets out access provisions to this traditional knowledge, incorporating the concept of "bioprospecting", defined as "the systematic search for biochemical and genetic information in nature in order to develop commercially-valuable products for pharmaceutical, agricultural, cosmetic and other applications."[103]

However, as Ko Aotearoa Tēnei recognises, a specific bioprospecting legal regime does not exist in New Zealand currently.[104] Recommendations made in Ko Aotearoa Tēnei closely align with the principles of the Nagoya Protocol, signalling that if the Crown were to accept the recommendations of the Tribunal in this area, they would be in line to meet the requirements of the Protocol in the New Zealand domestic framework.[105]

The Nagoya Protocol was not signed or ratified by New Zealand in 2010 when it was first established, and subsequently has still not been adopted by New Zealand, citing a need for "a government response to Wai 262 before progressing the Protocol."[106]

2 Reasons for and against signing the Protocol

A further reason why the Crown may wish to accede to the Protocol is similar to the reasoning given above for domestic implementation, rather than international implementation. New Zealand as a purported pioneer in this field could lead the

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102 Nagoya Protocol, above n 3, article 1.

103 UNDP "Bioprospecting" (2021) United Nations Development Programme <www.sdfinance.undp.org/content/sdfinance/en/home/solutions/bioprospecting.html>

104 Waitangi Tribunal, above n 5, at 142.

105 Tim Stirrup "Bioprospecting, the Nagoya Protocol and Indigenous Rights; A New Zealand Perspective" (2016) 107 Intellectual Property Forum: Journal of the Intellectual Property Society of Australia and New Zealand 53 at 62.

106 At 60.

charge on protecting taonga species by adopting the Protocol. It has been already recognised that the implementation of the Protocol is dependent on the state's will to include all parties in negotiations to implement a clear benefit sharing and access framework.[107] If the Crown were to effectively include Māori in discussions, it may indicate a positive approach to future WAI 262 negotiations. On the other hand, the Nagoya Protocol's protections are somewhat covered by the WIPO IGC negotiations. As discussed above, the draft instrument pertaining to genetic resources and intellectual property discusses the implementation of databases or knowledge registers for traditional knowledge relating to genetic resources.[108] Therefore, the access aspects of the Nagoya Protocol are somewhat addressed. Despite this however, it will be difficult to set up such a database, due to accuracy and identity concerns, and has the potential of abuse for commercial gain.[109]

It is also important to recognise these problems as being one of the potential negative consequences of a bioprospecting regime if set up in accordance with the Nagoya Protocol. A related issue is that of shared traditional knowledge and the identification of that knowledge to the correct indigenous party. As discussed above in Section II, a problem with a kaitiaki register is that it may cause disputes over who is the correct kaitiaki of a certain taonga work or species. Similarly, where traditional knowledge has been shared across different groups or iwi, the benefit sharing mechanisms for commercial restitution may not be adequate.[110] This may be particularly contentious given the commercial power of some iwi in modern New Zealand, and the disputes that may arise there. As well as this,

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[107] M Teran "The Nagoya Protocol and Indigenous Peoples" (2016) 7(2) The International Indigenous Policy Journal 1 at 16.

[108] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 1, at 16.

[109] Stirrup, above n 105, at 63.

[110] Rodrigo Cámara-Leret and others "Geospatial patterns in traditional knowledge serve in assessing intellectual property rights and benefit-sharing in northwest South America" (2014) 158 Journal of Ethnopharmacology 58 at 59.

some iwi "may be reluctant to make their sacred relationships available to the public, given potential to facilitate biopiracy."[111]

B What does the new PVR Act protect?

1 Legislative provisions

As discussed in Section I, the new Plant Varieties Rights Act currently making its way through Parliament contains several provisions that have positive implications for the protection of taonga species in New Zealand. The Bill was established to meet the requirements under the CPTPP and meet the recommendations of WAI 262.[112]

The mandatory disclosure of kaitiaki interests is an important section that is in line with the WAI 262 recommendations of consultation and disclosure. Breeders utilising taonga species will need to engage with kaitiaki so that any impact on kaitiaki relationships can be considered and include the outcome of this engagement in their PVR application.[113]

What is most important in this Bill however is the establishment of the Māori Plant Varieties Committee that will be addressing PVR applications where kaitiaki interests are concerned and making a binding decision on their granting. This may prove incredibly important for the future of the Crown's approach to addressing WAI 262, as it will set the standard for Māori to have self-determination over the use of mātauranga Māori in the New Zealand IP system. This means that there is a general protection for taonga species in the IP system, determined by Māori decision making bodies.

2 Political aspects

Despite this, there is political controversy that may upset the implementation of the Māori Advisory Committee having binding decision making power, including the controversy around He Puapua and Māori self-determination generally.[114]

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111 Emily Ortlieb Ricciardi "How New Zealand's adoption of the Nagoya Protocol would enhance protection of Māori Traditional Knowledge" (2019) 28(1) Minnesota Journal of International Law 281 at 304.

112 Doug Calhoun "Plant Variety Rights" (2020) 9 NZIPJ 49 at 49.

113 Plant Variety Rights Bill, s 61.

114 Johnsen, above n 83.

As well as this, the legislative journey of this Bill might be disrupted due to this political issue. Some MPs take issue with the veto power of the Māori Plant Varieties Committee and believe the Committee should be relegated to an advisory role.[115] However, it can be argued that this will wholly undermine the idea of protecting the abuse of taonga species. Similar to the discussions on the Māori Advisory Committee in the Patents Act 2013,[116] a Committee dealing with Māori intellectual property that can be overruled by a Crown body such as IPONZ seems antithetical and tokenistic.

C Differences between the PVR Act and Nagoya Protocol

1 Scope

The main difference between these two pieces of legislation is the ambit or scope to which they can provide protection for taonga species. Where the PVR rights regime provides protection for those seeking to claim an exclusive economic right in certain species or derived species from taonga species, the Nagoya Protocol would apply this protection as a matter of right, exclusive of a party applying for a PVR to be granted.[117]

The Nagoya Protocol also provides international scope where the Planet Variety Rights Act by virtue of being domestic law does not. Part of the Nagoya Protocol includes compliance measures that include the recognition of international access and benefits sharing laws.[118] This means that if New Zealand was a signatory to the Protocol, international parties that operate from signatory states seeking to utilise New Zealand based genetic resources must recognise New Zealand law in a bilateral fashion.

2 Disclosure of origin requirement

A common issue that both instruments deal with in some fashion is the disclosure of origin requirement for patents. This would mean that New Zealand would

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115 (18 May 2021) 752 NZPD (Plant Variety Rights Bill — First Reading, Hon Dr Nick Smith).

116 Williams, above n 15.

117 Calhoun, above n 111, at 52.

118 Jessica Lai and others "Māori knowledge under the microscope: Appropriation and patenting of mātauranga Māori and related resources" (2019) 22 Journal of World Intellectual Property 205 at 221.

implement a compulsory requirement that patent applications disclose the sources of genetic resources and/or traditional knowledge in their claimed inventions.[119]

The new Plant Variety Rights Act has implemented a similar requirement to this, as mentioned above, with the disclosure of kaitiaki interests as part of a PVR application being encouraged for a favourable application.[120] While the consultation is not required outright, not consulting or disclosing a kaitiaki interest is grounds for the PVR to be revoked.[121]

In terms of the Nagoya Protocol, a disclosure of origin requirement has been recognised as a key effective compliance mechanism to ensure access and benefit sharing occurs in an efficient manner that recognises the originators of the traditional knowledge that is being used.[122]

The Te Pae Tawhiti document does address this requirement specifically. It states that although MBIE did consider a disclosure of origin requirement for patents as part of their consultation for the new Plant Variety Rights Act, it is preferred that this requirement be implemented as part of a wider bioprospecting regime.[123] This may be indicative of the potential for bioprospecting legislation to be introduced into New Zealand, discussed further below.

3 Does the Nagoya Protocol need to be implemented?

The Protocol provides scope for parties to implement articles in a flexible manner, given its nature as an international instrument.[124] It therefore follows that New Zealand could implement the requirements of the Nagoya Protocol in a flexible manner, in accordance with our approach to WAI 262 and the reform of the indigenous intellectual property sector broadly. Where suggested protections addressed in the majority of this paper are focused on negative rights, or protections against abuse of taonga species or works, the Nagoya Protocol

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119 Te Puni Kokiri, above n 4, at 40.

120 Plant Variety Rights Bill, s 61.

121 Section 67.

122 Lai and others, above n 118, at 221.

123 Te Puni Kokiri, above n 4, at 40.

124 Michelle F Rourke "Who Are 'Indigenous and Local Communities' and What Is 'Traditional Knowledge' for Virus Access and Benefit-sharing? A Textual Analysis of the Convention on Biological Diversity and Its Nagoya Protocol" (2018) 25 JLM 707 at 726.

provides an opportunity for positive rights for Māori to utilise their kaitiaki interests, through the forming of partnerships for benefit sharing.[125] As discussed above, it also provides a framework from which a bioprospecting regime may be formed.

D Where to next for bioprospecting regime

1 Next steps for bioprospecting in New Zealand

As the Te Pae Tawhiti document recognises, the bioprospecting regime in New Zealand will need to be established before New Zealand ratifies the Nagoya Protocol.[126] As mentioned earlier, there is a positive attitude towards this bioprospecting framework being established in the future.

The He Puapua report does suggest that a bioprospecting regime might be implemented in New Zealand by 2025, and is a regime that "protects mātauranga and provides for benefit sharing".[127] This is in line with the general recognition of the report that Māori should be the decision maker or joint decision maker, and have free and prior consent when it comes to Māori resources.[128]

2 Vanuatu as case example

An example of a Pacific nation that has adopted the Nagoya Protocol and effectively implemented a bioprospecting and access and benefit sharing regime is that of Vanuatu. After Vanuatu ratified the Protocol in 2014, it subsequently amended its Environmental Protection and Conservation Act to include rules on bioprospecting, establishing a Biodiversity Advisory Council to review applications for the research of biological resources.[129]

As well as this, Vanuatu has implemented significant fines and potential jail time for breaches of these provisions, and requires that "appropriate fees, concessions of royalties that will be charged for any research" are implemented to compensate indigenous peoples.[130]

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125 Ricciardi, above n 110, at 306.

126 Te Puni Kokiri, above n 4, at 44.

127 Charters and others, above n 80, at 66.

128 At 63.

129 Daniel Robinson and others "Legal geographies of kava, kastom and indigenous knowledge: Next steps under the Nagoya Protocol" (2021) 118 Geoforum 169 at 175.

130 At 175.

However, as Robinson and others demonstrate with the example of kava, the problems with a benefit sharing regime have the potential to occur, given "[a]ny determination as to exactly who the 'providers' of traditional knowledge and custom landholders might be is likely to be problematic".[131] Such issues need to be addressed at the implementation stage.[132] This will hopefully be dealt with when New Zealand addresses the bioprospecting space, hopefully in the near future.

[131] At 175.

[132] Daniel Robinson and Michelle Forsyth "People, plants, place, and rules: the Nagoya Protocol in pacific island countries" (2016) 54(3) Geographical Research 324 at 332.

VI Conclusion

This paper has covered a wide range of issues in relation to the protection and integration of mātauranga Māori and Māori intellectual property into both a domestic and international system. While it does not make detailed observations into how the domestic IP system should be amended and drafted, it attempts to examine the primary international instruments relating to international indigenous intellectual property and apply its principles or articles where relevant.

I have based my observations of these international instruments on the report of the Waitangi Tribunal on WAI 262, Ko Aotearoa Tēnei. As a first principle Ko Aotearoa Tēnei outlines that Māori intellectual property is incompatible with the Western intellectual property systems that attempt, but fail to capture it.[133]

An attempt has been made to implement this principle in New Zealand law, through the creation of the Māori Advisory Committee as part of the 2013 amendments to the Patents Act 2013, but this has been criticised as cursory and tokenistic.[134] A later and arguably stronger attempt has been made through the new Plant Variety Rights Act which is making its way through Parliament at the time of writing. This legislation is ambitious as it grants the Māori Plant Varieties Committee decision making power over whether a kaitiaki interest has been sufficiently recognised and compensated.[135] It remains to be seen whether the political appetite will allow this decision-making power, which goes further than the recommendations of the Tribunal, to continue in its current form.

The principle of recognition of the unique nature of indigenous intellectual property is also seen in the United Nations Declaration on the Rights of Indigenous Peoples which sets out two primary means of dealing with indigenous IP. Article 11 provides an arguably defensive provision, by recognising indigenous peoples' rights of control over their cultural and intellectual property, and mandating that states must provide sufficient redress

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133 Waitangi Tribunal, above n 8, at 51.

134 Williams, above n 15.

135 Plant Variety Rights Bill, s 60.

where there is an unauthorised taking or misuse of this property.[136] Article 31 provides a more positive protection, that in essence encourages the establishment of a sui generis system to protect indigenous IP and allow the maintenance and development of this property.[137]

However, the key observation of this international instrument and its implementations is the soft law limitations it has as an international declaration of principles, despite having high persuasive value.[138] This is particular true in New Zealand in terms of He Puapua, the report which sets out a plan for New Zealand to achieve its commitments under the Declaration. The report is currently being used as a tool of political actors in their party politics, which may have an adverse effect in the implementation of these recommendations to actually achieve these commitments, which in turn affects the protection of indigenous IP.[139]

The continued discussions of the WIPO IGC in creating an instrument that member states can use as a common ground when dealing with traditional knowledge is promising for international protection of these rights, given the key principle of free and prior informed consent that underpins these negotiations.[140] However continued failures of these negotiations to effectively progress may further dilute the strength of any protections of traditional knowledge.[141]

In terms of domestic implementation, the Te Pae Tawhiti whole of government response is encouraging for creating a plan of action that outlines Crown implementation of the WAI 262 recommendations and beyond. However, aside from the general plan there is no apparent definitive action to be taken, particularly concerning taonga works.[142]

Whilst the new Plant Variety Rights Act provides some protection for taonga species for future granted PVR's, the international instrument of the Nagoya

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136 Declaration on the Rights of Indigenous Peoples, above n 2, article 11.

137 Article 31.

138 Toki, above n 53.

139 Johnsen, above n 83.

140 Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, above n 59, at 5.

141 Solomon, above n 95.

142 Calhoun, above n 101.

Protocol provides some additional protections.[143] It provides a framework for an access and benefit sharing regime in the first instance, but also provides a framework for bioprospecting, yet to be established in New Zealand, as a positive rights framework that enables Māori to utilise their kaitiaki interests. While not yet in development, it is probable a bioprospecting regime will be implemented in the future.[144]

Looking ahead, the greatest factor that will affect the effective implementation of the protections of mātauranga Māori is the pace at which reform will be introduced. Te Pae Tawhiti does not have any hard timeframes incorporated in the document, instead appearing to incorporate He Puapua as part of their overall approach. However, as discussed above, the political factors relating to He Puapua may further affect the implementation of Te Pae Tawhiti, as well as the future bioprospecting regime.[145]

As well as this, the WIPO draft articles have been severely hampered by the lack of speed at which they have been negotiated and will likely continue to be delayed while countries do not agree on fundamental terms such as mandatory disclosure.[146]

Overall, while the Crown has only recently begun to address on a domestic level the concerns of WAI 262 in legislation, international discussions have provided a good framework from which domestic policy can be implemented, including the principles of free and prior consent in UNDRIP and WIPO, as well as the potential ratification of the Nagoya Protocol when a bioprospecting regime is developed.

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143 Calhoun, above n 112, at 52.

144 Te Puni Kokiri, above n 4, at 40.

145 Johnsen, above n 83.

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