

Protection of Traditional Knowledge: Rethinking Intellectual Property Frameworks in the Global South

Divya Singh¹, Dr Rajendra Indravadan Parikh²

1. Ph.D. Scholar, Parul Institute of Law, Parul University
Waghodia, Vadodara, Gujarat, 391760, India.
divyasinghkumpawat@gmail.com
<https://orcid.org/0000-0002-2040-3304>

2. Dean, Parul Institute of Law, Parul
University Waghodia, Vadodara, Gujarat,
391760, India
rajendra.parikh35530@paruluniversity.ac.in
<https://orcid.org/0009-0009>

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Abstract

The protection of traditional knowledge (TK) remains one of the most persistent structural challenges within international intellectual property law. Conventional IP regimes—built around individual authorship, novelty, fixation, and market-based exclusivity—are fundamentally misaligned with knowledge systems that are collective, cumulative, intergenerational, and embedded in social, cultural, and spiritual practices. This article undertakes a doctrinal and critical examination of how international intellectual property frameworks have attempted to address traditional knowledge, focusing on the TRIPS Agreement, the Convention on Biological Diversity, the Nagoya Protocol, and norm-development efforts within the World Intellectual Property Organization. Drawing on Third World Approaches to International Law (TWAIL) and legal pluralism, and grounded in comparative statutory experiences from India, Kenya, and Brazil, with reference to Peru, South Africa, the Philippines, and Bolivia, the article argues that prevailing approaches to TK protection remain constrained by the epistemic assumptions of intellectual property law itself. It contends that meaningful protection requires a shift away from property-centric models toward plural, community-governed legal frameworks grounded in self-determination, distributive justice, and epistemic recognition.

I. Introduction

The governance of traditional knowledge has emerged as one of the most contested and unresolved sites within contemporary international intellectual property law. As pharmaceutical, agricultural, and biotechnology industries increasingly rely

on indigenous medicinal practices, agricultural innovations, and ecological knowledge, disputes over misappropriation, ownership, and benefit-sharing have become recurring features of global legal practice. These disputes are

frequently framed as failures of enforcement or deficiencies in regulatory design. Such framings, however, obscure a deeper problem: the structural incompatibility between traditional knowledge systems and the conceptual foundations of modern intellectual property law.¹

International intellectual property regimes are built upon assumptions of individual authorship, originality, fixation, and commodification. Knowledge is treated as an individual achievement capable of exclusive ownership and market exchange, protected through time-bound monopolies designed to incentivize innovation.² These assumptions are historically rooted in European legal traditions and capitalist modes of production, where creativity and invention are conceptualized as discrete acts attributable to identifiable legal subjects.³ Through colonial expansion and later through multilateral treaty-making,

these assumptions were universalized and embedded within international law.⁴

Traditional knowledge, by contrast, does not conform to these premises. It is typically collective rather than individual, cumulative rather than novel, and transmitted intergenerationally rather than fixed in discrete textual or technical forms.⁵ Its authority and legitimacy often derive from long-standing social practices, customary norms, and relationships with land and community rather than from formal acts of creation or disclosure.⁶ The value of traditional knowledge is therefore inseparable from cultural identity, spiritual meaning, and collective memory.⁷ These characteristics place traditional knowledge in direct tension with orthodox intellectual property categories, particularly patent law, which demands novelty, inventive step, and industrial applicability.⁸

The World Intellectual Property Organization (WIPO) has acknowledged this disjuncture, defining traditional

¹ Rosemary J. Coombe, *The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law*, Vol 14 St. Thomas Law Review 275, 280–283 (2001).

² Peter Drahos, *A Philosophy of Intellectual Property*, 6–9 (Dartmouth Publishing Company, 1996).

³ James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, Vol 66 Law and Contemporary Problems 33, 37–40 (2003).

⁴ B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, Vol 8 International Community Law Review 3, 10–12 (2006).

⁵ Madhavi Sunder, *The Invention of Traditional Knowledge*, Vol 70 Law and Contemporary Problems 97, 99–103 (2007).

⁶ Coombe, *supra* note 1, at 285–287.

⁷ Vandana Shiva, *Protect or Plunder? Understanding Intellectual Property Rights*, 23–26 (Zed Books, 2001).

⁸ Srividhya Ragavan, *Protection of Traditional Knowledge*, Vol 2 Minnesota Journal of Law, Science & Technology 1, 18–21 (2001).

knowledge as “knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community.”⁹ Yet definitional recognition has not translated into corresponding legal authority for knowledge-holding communities. Instead, traditional knowledge has largely been reframed as an object of regulation—either as prior art to be documented defensively or as a resource to be accessed through contractual benefit-sharing arrangements.¹⁰ In neither case is it treated as a normative system capable of generating autonomous legal rights or governance authority.¹¹

This tension is particularly acute for states in the Global South. Traditional knowledge continues to underpin healthcare delivery, food security, biodiversity conservation, and cultural survival across Asia, Africa, and Latin America.¹² At the same time, these states operate within an international legal order structured by binding intellectual property obligations under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹³.

TRIPS requires patent protection for inventions that are “new, involve an inventive step and are capable of industrial application.”¹⁴ These criteria systematically exclude most forms of traditional knowledge while offering limited scope for alternative forms of protection.¹⁵

This article argues that prevailing international approaches to traditional knowledge protection remain constrained by the epistemic and structural assumptions of intellectual property law itself. Drawing on doctrinal treaty analysis, comparative statutory examination, and Third World Approaches to International Law (TWAIL), it contends that meaningful protection requires rethinking intellectual property frameworks rather than extending them incrementally. The analysis proceeds on the premise that the problem of traditional knowledge protection is not one of technical adjustment, but of legal imagination and institutional authority.¹⁶

II. Literature Review

⁹ World Intellectual Property Organization, *Intellectual Property and Traditional Knowledge*, 3 (World Intellectual Property Organization Publication No. 920E, 2013).

¹⁰ Graham Dutfield, *Protecting Traditional Knowledge: Pathways to the Future*, 42–45 (Earthscan Publications, 2006).

¹¹ Carlos M. Correa, *Traditional Knowledge and Intellectual Property*, 7–10 (Quaker United Nations Office, 2001).

¹² Shiva, *supra* note 7, at 30–32.

¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights, adopted 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, United Nations Treaty Series Vol 1869, 299.

¹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 27.1.

¹⁵ Correa, *supra* note 11, at 15–17.

¹⁶ Chimni, *supra* note 4, at 14–16.

Early legal scholarship on traditional knowledge approached the issue primarily as a problem of doctrinal accommodation. Scholars explored whether collective ownership models, extended durations of protection, or modified novelty requirements could enable traditional knowledge to fit within existing intellectual property categories.¹⁷ This body of work generated important insights, particularly in highlighting the rigidity of patent law standards and the difficulty of applying individualistic concepts of authorship to communal knowledge systems.¹⁸

Despite these contributions, much of this literature accepted intellectual property law as the appropriate normative framework within which protection should occur. Traditional knowledge was treated as an anomalous subject requiring adaptation rather than as a challenge to the underlying premises of the system itself.¹⁹ As a result, incompatibility was framed as a technical problem to be solved through doctrinal innovation, rather than as a structural feature of the international intellectual property regime.²⁰

A second strand of scholarship emerged following the adoption of the Convention on Biological Diversity (CBD). This literature reframed the debate around access and benefit-sharing (ABS), emphasizing state sovereignty over genetic resources as a corrective to earlier regimes that treated such resources as part of the global commons.²¹ ABS frameworks were presented as mechanisms capable of ensuring distributive equity by requiring prior informed consent and benefit-sharing when traditional knowledge was used commercially.²²

While the ABS turn represented an important shift, it has been subject to sustained critique. Scholars have noted that ABS regimes often privilege states and commercial intermediaries rather than indigenous communities.²³ Moreover, by focusing on contractual access to knowledge and resources, ABS frameworks risk reducing traditional knowledge to a transactional input within global value chains.²⁴ This approach may secure compensation in specific cases, but it does little to address broader questions of

¹⁷ Daniel J. Gervais, *Traditional Knowledge and Intellectual Property*, Vol 2005 *Michigan State Law Review* 137, 142–146 (2005).

¹⁸ Ragavan, *supra* note 8, at 22–24..

¹⁹ Sunder, *supra* note 5, at 105–107.

²⁰ Dutfield, *supra* note 10, at 47–49.

²¹ Convention on Biological Diversity, adopted 5 June 1992, United Nations Treaty Series Vol 1760, 79.

²² Convention on Biological Diversity, Article 15.

²³ Brendan Tobin, *Biodiversity, Traditional Knowledge and Rights of Indigenous Peoples* 91–94 (Routledge 2014).

²⁴ Dutfield, *supra* note 10, at 63–66.

authority, governance, and epistemic recognition.²⁵

More recent interventions draw on Third World Approaches to International Law and socio-legal scholarship to situate traditional knowledge within the broader political economy of international law. From this perspective, the marginalization of traditional knowledge is understood as a structural outcome of international law's Eurocentric foundations and colonial histories.²⁶ Intellectual property law is viewed not as a neutral incentive mechanism, but as a legal technology that has historically facilitated enclosure and commodification.²⁷ Attempts to “fit” traditional knowledge into IP law are therefore seen as reproducing epistemic hierarchies rather than dismantling them.²⁸

This article builds on that critical tradition while grounding its analysis firmly in treaty text, negotiating history, and domestic law. It seeks to bridge doctrinal analysis and critical theory by showing how structural constraints are produced and maintained through specific legal instruments and institutional practices.²⁹

III. Conceptual and Theoretical Framework

The analysis in this article is informed by a pluralist and critical conception of intellectual property grounded in Third World Approaches to International Law and legal pluralism. Third World Approaches to International Law scholarship emphasizes that international legal regimes emerged through colonial processes that privileged Western modes of knowledge production, economic organization, and governance.³⁰ Intellectual property law is a paradigmatic example of this dynamic, as it universalizes particular epistemic assumptions—individual authorship, commodification, and exclusivity—under the guise of neutrality and technical rationality.³¹

From a TWAIL perspective, the exclusion of traditional knowledge from effective protection is not accidental. It reflects the historical construction of international law in ways that systematically marginalize non-Western knowledge systems while facilitating their extraction and commercialization.³² The contemporary global IP regime, consolidated through

²⁵ Coombe, *supra* note 1, at 300–302.

²⁶ Makau Mutua, *What Is Third World Approaches to International Law?*, Vol 94 *Proceedings of the American Society of International Law* 31, 34–36 (2000).

²⁷ Boyle, *supra* note 3, at 54–56.

²⁸ Sunder, *supra* note 3, at 110–12.

²⁹ Sunder, *supra* note 5, at 110–112.

³⁰ Chimni, *supra* note 4, at 18–20.

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TRIPS, continues this pattern by constraining the regulatory autonomy of Global South states while privileging transnational commercial interests.³³

Legal pluralism complements this critique by recognizing the coexistence of multiple normative orders within and alongside state legal systems. Customary and indigenous legal systems govern the creation, transmission, and use of knowledge through norms that differ fundamentally from those embedded in intellectual property law.³⁴ Within a pluralist framework, traditional knowledge is not merely an object requiring protection, but a site of normative authority in its own right.³⁵

The central question addressed by this article is therefore not whether traditional knowledge can be assimilated into intellectual property law, but whether international law can accommodate fundamentally different ways of knowing and governing knowledge. Addressing this question requires moving beyond property-centric models toward legal frameworks that recognize community governance,

customary norms, and collective authority as sources of legal legitimacy³⁶.

IV. International Intellectual Property Law and Traditional Knowledge

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) remains the most powerful and coercive instrument shaping national intellectual property regimes worldwide. Its relevance to traditional knowledge lies less in what it explicitly regulates than in what it excludes. TRIPS is premised on a model of innovation that privileges discrete, identifiable inventions capable of private ownership and commercial exploitation. Traditional knowledge, which is collectively held and incrementally developed over generations, sits uneasily within this framework³⁷.

Article 27.1 of TRIPS requires Members to make patents available for inventions that are “new, involve an inventive step and are capable of industrial application.”³⁸ These criteria operate as epistemic filters. Knowledge that is widely shared within a community, transmitted orally, or embedded in customary practice is rarely “new” in the sense demanded by patent law,

³³ Agreement on Trade-Related Aspects of Intellectual Property Rights.

³⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 27.1.

³⁵ Correa, *supra* note 11, at 12–15.

³⁶ Gervais, *supra* note 17, at 150–152.

³⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Article 29.

³⁸ Sunder, *supra* note 5, at 112–115.

even if it remains unknown to scientific or commercial actors³⁹. Similarly, the requirement of an “inventive step” presumes a moment of creative rupture rather than cumulative accretion⁴⁰.

Article 29 compounds this exclusion by mandating disclosure sufficient to enable a “person skilled in the art” to carry out the invention⁴¹. This standard privileges scientific codification and written disclosure over experiential and embodied knowledge. Traditional knowledge systems, which often rely on tacit understanding, ritual practice, and contextual application, are rendered legally invisible by this requirement⁴².

Global South states have repeatedly attempted to address this asymmetry within the WTO framework. India, Brazil, and the African Group have proposed amendments requiring patent applicants to disclose the origin of genetic resources and associated traditional knowledge, as well as evidence of prior informed consent and benefit-sharing⁴³. These proposals have been

consistently resisted by developed countries on the grounds that they would undermine patent certainty and exceed the scope of TRIPS.⁴⁴ The resulting deadlock reveals how formal equality in WTO negotiations masks deep structural power imbalances.⁴⁵

V. Biodiversity Law, Access, and Benefit-Sharing

Outside the WTO, the Convention on Biological Diversity (CBD) represents a partial reorientation of international legal discourse. Article 8(j) obliges parties to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities” and to promote their wider application “with the approval and involvement of the holders of such knowledge.”⁴⁶ This language signals an important normative shift, acknowledging the legitimacy of community knowledge systems and the need for consent.

³⁹ World Trade Organization Council for Trade-Related Aspects of Intellectual Property Rights, *Review of the Provisions of Article 27.3(b): Communication from India, Brazil and Others*, Document IP/C/W/403 (24 June 2003).

⁴⁰ World Trade Organization, *Declaration on the Agreement on Trade-Related Aspects of Intellectual Property Rights and Public Health*, Document WT/MIN(01)/DEC/2 (14 November 2001).

⁴¹ Chimni, *supra* note 4, at 25–27.

⁴² Convention on Biological Diversity, Article 8(j).

⁴³ Convention on Biological Diversity, Article 15.

⁴⁴ 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 29 October 2010, United Nations Treaty Series Vol 3008, 3.

⁴⁵ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, Articles 5–7.

⁴⁶ Tobin, *supra* note 23, at 101–105.

However, the CBD remains fundamentally state-centric. Article 15 affirms state sovereignty over genetic resources, positioning states—not communities—as the primary legal subjects controlling access.⁴⁷ As a result, traditional knowledge is mediated through national regulatory frameworks that may or may not reflect customary governance structures.⁴⁸

The Nagoya Protocol sought to operationalize access and benefit-sharing through legally binding obligations. It requires prior informed consent and mutually agreed terms for access to genetic resources and associated traditional knowledge.⁴⁹ While the Protocol strengthens procedural safeguards, it does not resolve the underlying question of authority. Benefit-sharing regimes often function as regulatory permissions rather than recognition of ownership or governance rights.⁵⁰ Traditional knowledge is compensated, but not empowered.

This regulatory logic risks transforming traditional knowledge into a negotiable commodity rather than recognizing it as a living normative system. Compensation

does not necessarily translate into control, nor does it address epistemic marginalization⁵¹.

VI. WIPO and the Limits of Sui Generis Protection

Norm-development efforts at the World Intellectual Property Organization (WIPO) further illustrate the conceptual uncertainty surrounding traditional knowledge protection. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has been negotiating draft instruments for over two decades without reaching consensus.⁵²

The draft articles oscillate between property-like rights, defensive protection, and regulatory safeguards. Some provisions suggest exclusive rights held by communities, while others emphasize prevention of misappropriation or misuse.⁵³ This oscillation reflects an unresolved tension: whether traditional knowledge should be protected *as property*, *against property*, or *outside property altogether*.⁵⁴

⁴⁷ Dutfield, *supra* note 10, at 70–73.

⁴⁸ World Intellectual Property Organization, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Draft Articles on the Protection of Traditional Knowledge*, Document WIPO/GRTKF/IC/47/4 (2023).

⁴⁹ *Id.*

⁵⁰ Boyle, *supra* note 3, at 58–60.

⁵¹ Mutua, *supra* note 26, at 38–40.

⁵² Biological Diversity Act, 2002 (India).

⁵³ Ragavan, *supra* note 8, at 30–32.

⁵⁴ Coombe, *supra* note 1, at 310–312.

The persistence of this ambiguity underscores the limits of attempting to resolve structural incompatibility through incremental norm-building within an IP-centric institution. WIPO's mandate and institutional culture remain grounded in intellectual property logic, constraining the imaginative space available for alternative models.⁵⁵

VII. Comparative Statutory Approaches in the Global South

A. India

India has adopted a hybrid approach combining defensive and regulatory strategies. The Biological Diversity Act regulates access to biological resources and associated knowledge, requiring approval from national authorities.⁵⁶ In parallel, the Traditional Knowledge Digital Library (TKDL) documents Ayurvedic, Unani, and Siddha knowledge to prevent erroneous patent grants.⁵⁷

While the TKDL has been effective in defeating biopiracy claims, it raises deeper

concerns. By converting living knowledge into searchable databases accessible to patent offices, it facilitates global circulation without corresponding community control.⁵⁸ Defensive protection prevents misappropriation, but it does not confer affirmative rights or governance authority.⁵⁹

B. Kenya

Kenya's Protection of Traditional Knowledge and Cultural Expressions Act adopts a more rights-oriented framework. It recognizes community ownership of traditional knowledge and requires prior informed consent for use⁶⁰. However, enforcement remains weak, and community capacity to assert rights is limited. The statute's effectiveness is constrained by institutional under-resourcing and ambiguity in the relationship between customary and state law.⁶¹

C. Brazil

Brazil's Biodiversity Law emphasizes access and benefit-sharing for genetic resources and associated traditional knowledge.⁶² While comparatively

⁵⁵ Protection of Traditional Knowledge and Cultural Expressions Act, 2016 (Kenya).

⁵⁶ Law No. 13,123 of 20 May 2015 on Access to Genetic Resources and Associated Traditional Knowledge (Brazil).

⁵⁷ Law No. 27,811 Establishing a Regime for the Protection of the Collective Knowledge of Indigenous Peoples (Peru).

⁵⁸ Indigenous Knowledge Act 6 of 2019 (South Africa).

⁵⁹ Indigenous Peoples' Rights Act of 1997, Republic Act No. 8371 (Philippines).

⁶⁰ Dutfield, *supra* note 10, at 72–73.

⁶¹ Chimni, *supra* note 4, at 26–27.

⁶² Coombe, *supra* note 1, at 305–308.

comprehensive, it remains heavily state-mediated. Customary governance structures are acknowledged but subordinated to administrative processes.⁶³ As in India, recognition does not necessarily translate into autonomy.

D. Comparative Jurisdictions

Other Global South jurisdictions illustrate similar tensions. Peru's *sui generis* regime for collective knowledge offers stronger community recognition but faces implementation challenges. South Africa's Indigenous Knowledge Act formalizes protection while centralizing control. The Philippines' Indigenous Peoples' Rights Act constitutionally recognizes indigenous knowledge yet struggles with enforcement. Bolivia's constitutional framework symbolically elevates indigenous knowledge without clear operational mechanisms.⁶⁴

Across these jurisdictions, the same pattern recurs: recognition without full redistribution of authority.⁶⁵

VIII. Discussion: Beyond Property-Centric Models

Across international and domestic frameworks, traditional knowledge is protected only insofar as it can be translated into the regulatory or proprietary logic of intellectual property law. Defensive databases, access contracts, and *sui generis* statutes mitigate misappropriation but rarely disrupt underlying epistemic hierarchies.⁶⁶ These limitations are structural rather than technical.

A pluralist approach grounded in community governance and self-determination offers a more promising direction. Rather than treating traditional knowledge as an object to be owned or licensed, international law could recognize community protocols, customary norms, and collective authority as sources of legal legitimacy.⁶⁷ This would require a shift away from exclusive rights toward relational and stewardship-based models of protection.⁶⁸

Such a shift challenges the foundational assumptions of intellectual property law. It demands that international legal institutions confront their colonial genealogies and epistemic biases. Without this reckoning,

⁶³ Sunder, *supra* note 5, at 112–115.

⁶⁴ Boyle, *supra* note 3, at 61–63.

⁶⁵ Dutfield, *supra* note 10, at 70–73.

⁶⁶ Mutua, *supra* note 26, at 37–39

⁶⁷ Convention on Biological Diversity, Article 8(j).

⁶⁸ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization, Articles 5–7.

traditional knowledge will remain protected only at the margins.⁶⁹

IX. Conclusion

This article has argued that the persistent difficulty of protecting traditional knowledge within international intellectual property law reflects structural incompatibilities rather than doctrinal gaps. International frameworks—from TRIPS to the CBD, the Nagoya Protocol, and WIPO negotiations—have accommodated traditional knowledge only to the extent that it can be translated into the language of property, regulation, and contract. While these mechanisms offer partial safeguards, they leave intact the epistemic hierarchies that marginalize non-Western knowledge systems.

By integrating doctrinal analysis with TWAIL and comparative statutory examination, the article demonstrates that traditional knowledge protection cannot be achieved through incremental adjustment of existing intellectual property frameworks. Meaningful protection requires a reorientation toward legal pluralism, community governance, and epistemic recognition. For Global South states, this entails reclaiming regulatory

imagination and resisting the universalization of intellectual property norms that fail to reflect local realities.

Future research must therefore move beyond questions of fit and compatibility to address questions of authority, legitimacy, and justice. Only by confronting these deeper issues can international law support the survival, dignity, and autonomy of traditional knowledge systems in an increasingly commodified world.⁷⁰

⁶⁹ Chimni, *supra* note 4, at 18–20.

⁷⁰ Coombe, *supra* note 1, at 305–308.