determined according to national legislation but to laws, traditions and customs as defined by the indigenous peoples. The document leaves open the issue of how to define 'indigenous.' While the CBD has had some impact on subsequent legal thinking, the provision in this declaration has had little impact. While there is a great degree of certainty in adhering to published national laws, following unwritten laws, traditions or customs might be difficult in practice.[25]

4. *Traditional Knowledge: A Certain Term?*

For legal certainty, it would be best if there were a general understanding – if not consensus – reached in regards to the meanings of key terms such as TK. In practice, however, a precise definition may not be required. As an example, in patent law, general terms such as 'invention' have no definition in international treaties and national laws. Nevertheless, there is a clear understanding of the nature of a 'patentable invention.' In a similar way, copyright treaties and laws do not define the exact nature of literary, artistic, and scientific works, but rather concentrate upon how these expressions may be protected.[26]

As a general guide, three main considerations assess the nature of TK: (1) whether it involves a process or product (2) whether it can be expressed in a common or in an 'indigenous' language and, most importantly, (3) whether it has been and will remain part of TK that can then form the basis for new TK in the future.[27] The same conditions apply to TM.

5. IP Laws and Traditional Knowledge

The essence of the current international system of IP laws focuses on preserving a balance between the economic interests of the author of the invention or idea and society's needs as a whole. The two sides are mutually exclusive. Extreme positions include the abolition of the patent system on the one hand, and an extension of protection on the other.[28] The protection of TK cannot fit easily into the current international IP framework. In both patent and copyright there are ways to determine the owner, but it is not possible to apply this model to all forms of TK. In some cases, TK could be

25 According to some academics there is a need for the codification of tribal laws without the imposition of dominant, western legal concepts. *See* Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 87 (2005).

26 *See* Wend B. Wendland, *Intellectual Property, Traditional Knowledge and Folklore*: *WIPO's Exploratory Program* IIC 496 (2002). The method of making TK fit into existing IP systems has been criticized in that it creates an unrecognizable hybrid that can no longer be considered TK.

27 Yinliang Liu, *IPR Protection for New Traditional Knowledge: With a Case Study in Traditional Chinese Medicine*. 4 E.I.P.R. 194, 195 (2003).

28 *See* Shubha Ghosh, *Traditional Knowledge, Patents, and the New Mecantalism (Part II)*, 85 J. PAT. & TRADEMARK OFF. SOC'Y 885 (2003). The author here defines three main positions: 1. appropriation: TK should be used by those best positioned to expoit it; 2. moral rights: endorses the rights of TK right holders to use TK as they see fit; and 3. public domain: which would prohibit the commodification of TK.