

‘functional’ here one may understand that this covers folklore as broadly understood. The main method of protecting folklore is copyright (Articles 5-10) and neighboring rights (Articles 11-14). Section 2 of the Model Provisions defines protected expressions of folklore as: “... characteristic elements of traditional artistic heritage ...” The term folklore clearly encompasses artistic expressions, but it is not precisely defined. The framers of the Model Provisions apparently did not assume patent protection was an option. Recent international agreements do not use the term folklore.

2. *The Convention on Biological Diversity*

The 1992 Earth Summit in Rio de Janeiro led to the agreement entitled the Convention on Biological Diversity (CBD). The primary goal of the convention is to conserve biological diversity, promote sustainable use of its components, and promote a fair and equitable sharing of benefits from the use of genetic resources. Previously assumptions were that biological diversity was the common heritage of humankind. The CBD established that sovereign nations have ownership of their TK and biological resources. The preamble of the CBD states:

Recognizing the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.²⁰

This statement can be divided into two parts. The first part deals with the dependence on certain lifestyles on biological resources. The second part of the statement deals explicitly with rights. Instead of using the broad term ‘traditional knowledge’ alone, the document qualifies it with the terms ‘innovations and practices.’ TM is not specifically mentioned in the 1982 model provisions, but there is little doubt that it is included in the CBD as a ‘practice.’ The CBD also draws a distinction between indigenous and local communities. However, TK from either source is considered equivalent. The use of the term ‘traditional’ however, carries with it a major assumption. It suggests that there has been a period of cultural transmission that remains faithful to the past.²¹ The CBD, in including local communities in the same formulation, effectively sidesteps the issue of faithfulness to the past.

Article 8 of the CBD, is titled ‘In-situ Conservation.’ Provision (j) states that each contracting party shall, as far as possible and as appropriate, subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge,

20 The Convention on Biological Diversity came into force on 29 December 1993. Text available at <http://www.biodiv.org/doc/legal/cbd-un-en.pdf> (last visited Sept. 5, 2006).

21 See Tony Simpson, *The Protection of Cultural and Intellectual Property Rights of Indigenous Peoples* INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS 18-22 (1997).

innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Provision 8(j) leaves questions of protection to national legislation. It frames the issue in terms of promoting the wider use of sustainable methods of utilizing biological diversity.²² This provision tries not to restrict exploitation of resources by either the sovereign national government or the international community.

As a whole the CBD has had a limited impact as a template for further legislation. Few countries have met the minimum standards of protection. A WIPO survey asked 47 countries, not including the EU, if they had any specific legislation that addressed TK. Brazil, Costa Rica, Guatemala and the Philippines replied that they had specific laws, the rest said they did not. The United States, which is not a signatory to the CBD, stated that they do not have laws that specifically protect TK. The US reply continued that: "... it is important to keep in mind that intellectual property, whether of an existing or *sui generis* nature, serves as an incentive for future creative endeavors; by definition, traditional knowledge needs no incentive for development."²³ The statement leaves open the question of what TK definition the US follows. However, the contention that TK needs no incentive for development is controversial.

Elements of the CBD, including provision 8(j) has had a significant impact on the laws of some countries. The Indian Biological Diversity Act 2002 clearly follows the CBD. The CBD has also served as a basis for academic debate. While the US is not a signatory, there is increasing international pressure to recognize benefit sharing as an objective.

3. *Declaration of the Rights of Indigenous Peoples*

The Draft United Nations declaration on the rights of indigenous peoples of 1994²⁴ also covers TK. Article 12 states:

Indigenous peoples have the right to practice 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 . . . ceremonies and technologies . . . as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violations of their laws, traditions, or customs.

This document does not note TK specifically, but clearly includes TM in 'traditions and customs.' It goes much further than 8(j) of the CBD in that rights to TK are not

22 Much discussion stemming from the CBD is political and defines these rights as distinct from IP rights. See Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge and New Social Movements in the Americas: Intellectual Property, Human Right, or Claims to an Alternative form of Sustainable Development?*, 17 FLA. J. INT'L L. 115 (2005).

23 WIPO Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge. Document WIPO/GTRKF/IC/2/5, <http://www.wipo.int/tk/en/questionnaires/ic-2-5/replies.pdf> (last visited Sept. 5, 2006).

24 Draft United Nations declaration on the rights of indigenous peoples. See [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument) (last visited Sept. 5, 2006).