

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/GRTKF/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).

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 exploit 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.