

# Protection of Secret Traditional Knowledge and Associated Genetic Resources During Litigation and Mediation

By *Unyime Morgan*

*Enlisted as Mediator with Maryland Program for Mediator Excellence (MPME), Maryland,  
USA*

Orcid: 0009-0009-7824-8413

---

---

## Abstract

Trade secret is a favoured medium for the protection of traditional knowledge and associated genetic resources. The ease of using trade secrets is seamless as no registration is required, rather, the commercially relevant tradition and/or the use of associated genetic resource(s) should be kept secret and practically protected to benefit from trade secrets protection designed by Article 39(2) of the 1994 TRIPs Agreement and the relevant national provision. In addition to the ease of initiating a trade secret, trade secrets can be protected at no significant cost. This article will examine the kinds of traditional knowledge and associated genetic resources that can be protected by trade secrets and the precautionary measures that can be taken for the protection of such trade secrets before, during, and after litigation or mediation.

**Keywords:** Trade Secret, Traditional Knowledge, Genetic Resources, Litigation, Mediation

## **Introduction**

Traditional knowledge is created, preserved, and disseminated according to the customs of indigenous communities.<sup>i</sup> It is usually collectively groomed, regulated documented, or communicated to generations orally.<sup>ii</sup> Genetic resources include plants used as foods, medicines, forestry, ornamentals, and their wild relatives.<sup>iii</sup> The confidential preservation of traditional knowledge and associated genetic resources is important to keep them appealing to ensure interested stakeholders consult custodians and fulfill the indigenous communities' access and benefit sharing requirement in line with Article 15(1)(2) and (7) of the Convention on Biological Diversity 1992.<sup>iv</sup> Trade secrets are intellectual property rights that protect commercially valuable, confidential information.<sup>v</sup> The use of trade secrets for the protection of traditional knowledge and genetic resources is advantageous because trade secrets do not have a filing process or filing cost. Unlike tenured intellectual property rights like patent which lasts for twenty years in most jurisdictions, trade secrets have the potential to protect traditional knowledge and genetic resources indefinitely. Trade secrets are easily transferred via mutually agreed terms recommended by Article 18 of the 2010 Nagoya Protocol and licensing contract.<sup>vi</sup> There are limitations to the protection of traditional knowledge via trade secrets. First, an independent discovery of a secret traditional knowledge can rob the indigenous community of a monopoly on the trade secret. Secondly, it is difficult, though not impossible to keep such knowledge a secret as it becomes generally known through public use or passage from one generation to another.<sup>vii</sup>

## **What Types of Traditional Knowledge and/or Genetic Resources Can Be Protected by Trade Secrets?**

This Section addresses the application of trade secret law to traditional knowledge and genetic resources. What types of traditional knowledge and genetic resources can be protected by trade secrets? Traditional knowledge has been defined as knowledge resulting from intellectual activities and practices that are developed, sustained, and passed on from generation to generation within a community.<sup>viii</sup> Traditional knowledge includes know-how, practices, skills, and innovations that can be found in a wide variety of contexts, including agricultural, ecological, cultural, artistic, and medicinal knowledge.<sup>ix</sup> Genetic resources are related to traditional knowledge, these genetic resources stand the risk of misappropriation especially if

the traditional knowledge associated with them is misappropriated. Article 2 of the 1992 Convention on Biological Diversity defines genetic resources as genetic material of actual or potential value. It goes on to define genetic material as any material of plant, animal, microbial, or other origin containing functional units of heredity. A good example of a genetic resource is a plant variety. The focus of this Section is to determine the kinds of traditional knowledge.

18 USC §1839(3) and Article 2 of the EU Trade Secret Directive<sup>x</sup> provide first-hand guidance on the protectable subject matter. The 18 US Constitution §1839(3) defines trade secrets to include tangible and intangible items; whether stored, compiled, or memorialized physically, electronically, graphically, photogenetically, or in writing. Article 2 of the EU Trade Secret Directive on the other hand states that “trade secret” means “information which meets all of the following requirements: (a) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.” These provisions share the common requirement that the information is a commercially beneficial secret carefully kept from public knowledge. Where traditional knowledge and genetic resources meet these requirements, it is qualified for protection in the EU and US.

Every traditional knowledge and genetic resource is not the subject matter of trade secret protection. Cuisines, animal feeds, and cultural practices can be protected if they meet trade secret requirements in the territory where protection is sought. Protecting cuisines via trade secrets is not a novel practice. The formulas for many recipes like Coca-Cola, Kentucky Fried Chicken, and traditional pizza are protected trade secrets.<sup>xi</sup> Traditional knowledge and genetic resources associated with the recipes of indigenous cuisines can benefit from trade secret protection if they fulfill the secrecy requirements. In addition to cuisines, medicinal knowledge, cultural practices associated with genetic resources, biological resources, ethnobotanical knowledge, and traditional ecological knowledge may also meet trade secret requirements. Many indigenous communities are likely to have traditional medicinal knowledge which can be protected if they have commercial value and are kept within a restricted circle of traditional medicine practitioners. Traditional medicinal knowledge is the summation of the skills, practices, beliefs, and experiences indigenous to diverse communities, utilized in health care,

prevention, diagnosis, and treatment of physical and mental illness.<sup>xii</sup> Common traditional medicine systems include traditional Indian (Ayurveda) medicine and Traditional Chinese Medicine (TCM).<sup>xiii</sup>

Another example of protectable traditional knowledge is cultural practices and principles applied to genetic resources for better produce such as **landscape management, preparation of land, sowing, application of manures, irrigation, weeding, protection of crops, harvesting, threshing, winnowing, and storage.**<sup>xiv</sup> Biological resources including genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity are also protectable if kept secret.<sup>xv</sup> Ethnobotanical knowledge can also be protected if the requirements in Article 39(2) of the TRIPs Agreement<sup>xvi</sup> has been met. Ethnobotany is the study of interrelations between humans and the indigenous knowledge of plant classification, cultivation, and use as food, medicine, and shelter.<sup>xvii</sup> *Traditional Ecological Knowledge* (TEK) is the knowledge of practice and belief about indigenous relationship with the environment and the sustenance over decades.<sup>xviii</sup> The trade secret protection of traditional knowledge and genetic resources is necessary for the socio-development of indigenous communities' territories, resources, and heritage.<sup>xix</sup>

### **Protecting Secret Traditional Knowledge and/or Genetic Resources**

A mix of preventive and adjudicatory measures is required to protect secret traditional knowledge and genetic resources from misappropriation. Pre-dispute/litigation preservation of traditional knowledge and genetic resources trade secrets, preservation of trade secrets during and after dispute/litigation will be examined.

#### ***Pre-Dispute/Litigation Preservation:***

A common requirement by the TRIPs Agreement,<sup>xx</sup> United States Trademark and Patent Office (USTPO)<sup>xxi</sup> and EU trade secret<sup>xxii</sup> is that the concealment of trade secrets is necessary for trade secret protection. Depending on the secrecy or notoriety of traditional knowledge and/or genetic resources - indigenous communities can determine whether trade secret protection is the best medium of protection. Preservation of traditional knowledge and/or genetic resources as a trade secret generally begins with an audit of the traditional knowledge and/or genetic resources to be protected.<sup>xxiii</sup> There should be an assessment of their traditional knowledge, and

usage within and outside the community circle. A comprehensive stock-taking will guide on what has to be protected and the appropriate manner of protection. Indigenous communities should employ the service of professionals with appropriate competencies, experience, technical and legal skills to ensure a comprehensive assessment and protection of trade secrets associated with traditional knowledge and genetic resources.<sup>xxiv</sup> The report of the audit would instruct strategies and modalities for the protection of secret traditional knowledge and/or genetic resources. Audits should be carried out regularly to ensure threats to communal traditional knowledge and genetic resources are identified and checked promptly.

Furthermore, time-tested measures like **non-use, non-disclosure, and non-circumvention Agreements (NNNs) which** restrict disclosed information to contractual parties are prerequisites for sharing secret traditional knowledge and/or genetic resources.<sup>xxv</sup> A typical NNN incorporates essential clauses such as the definition of confidential information, ownership of confidential information; use of information and disclosure, ownership rights to a new product, non-compete clause, acknowledgments and disclaimers, no publicity clauses, and severability clauses.<sup>xxvi</sup> Secondly, public access to such information should be restricted. Indiscriminate sharing of traditional knowledge and/or genetic resources to tourists, researchers, bioprospectors, and curious strangers should be avoided. If traditional knowledge and associated genetic resources are held as a trade secret, the community can insist on a non-disclosure agreement and a contract to disclose the trade secret.<sup>xxvii</sup> Trade secrets are protected primarily through contract law or the equitable doctrine of breach of confidentiality.<sup>xxviii</sup> If trade secrets are unlawfully disseminated, immediate steps should be taken to mitigate potential damage to protected information.

Misappropriation of trade secrets should be promptly checked by an application for injunctive relief and improper acquisition and/or novelty-destroying publication should be contested. In light of trending documentation of traditional knowledge and associated trade secrets, it is pertinent to consider the effect of such documentation on trade secret preservation. The fact that a trade secret has been reduced to writing does not erode its secrecy if steps are still maintained to protect the written information. The Coca-Cola trade secret is a good example of a written but protected trade secret.<sup>xxix</sup> Another renowned example is the Indian Traditional Knowledge Digital Library (TKDL). Indian TKDL is only shared with patent offices subject to a non-disclosure Agreement<sup>xxx</sup> and use of disclosed traditional knowledge is limited to the search and verification of patent information.<sup>xxxi</sup> Such a database is available as evidence of

prior art which could be used to defeat a patent claim based on existing traditional knowledge and genetic resources.<sup>xxxii</sup>

Indigenous peoples should be deliberate about prior-informed consent and access control to participate in the benefit sharing arising from traditional knowledge and utilized genetic resources. Articles 6 and 7 of the Nagoya Protocol require that access to genetic resources and traditional knowledge, respectively, should be subject to prior informed consent, domestic access, and benefit-sharing legislation or regulatory requirements. Article 5 of the Nagoya Protocol provides that benefits arising from the utilization of genetic resources and subsequent applications and commercialization shall be shared fairly and equitably with the Party (indigenous people or nation) providing such resources upon mutually agreed terms. The involvement of indigenous communities is necessary especially, where the subject matter is traditional knowledge. Article 7 of the Nagoya Protocol requires the prior and informed consent or approval and involvement of indigenous and local communities.

Indigenous peoples need to communicate the intention to keep traditional knowledge and genetic resources a secret to all stakeholders. This will guide the stakeholders' engagement with such traditional knowledge and genetic resources within the ambit of existing local and international law. The Convention on Biological Diversity addresses international access, prior-informed consent, and benefit-sharing, but does not offer intellectual property protection to traditional knowledge and associated genetic resources, that do not fit within the pre-existing intellectual property framework. The World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('IGC')<sup>xxxiii</sup> mandated by WIPO's Member States is designed to bring together representatives of government, and indigenous and local communities to address policy development on intellectual property, traditional knowledge, and genetic resources.<sup>xxxiv</sup> The ultimate objective of the IGC is the legislative protection and separation of traditional knowledge and genetic resources from the public domain for a substantial time frame or in perpetuity.<sup>xxxv</sup>

#### ***Preservation of Confidential Trade Secret/Genetic Resources During Litigation:***

Should trade secrets remain secret during judicial processes? Where a trade secret is the subject matter or seems likely to lose its confidentiality during a claim, the court may exercise its discretion to protect the trade secret at the request of the interested party. Article 9 of the EU

Trade Secret Directive addresses the protection of trade secrets during litigation. According to Section 16(1) of the German Trade Secret Act, the court may determine that part or the whole of the information is a business secret. Hence, Section 16(2) of the German Trade Secret Act requires that parties permitted to access secret information should keep such information confidential.<sup>xxxvi</sup> In the US, 18 U S C §1835(a) provides that the court shall enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the trade secret requirement of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other applicable laws. Furthermore, 18 U S C §1835(b) directs that the court may not authorize the disclosure of information the owner asserts to be trade secret unless the owner is allowed to file a submission under seal describing the owner's interest in keeping the information confidential.

Section 26(b)(5)(B) of the US Federal Rule of Civil Procedure necessitates a camera procedure for review of inadvertently disclosed documents. Section 26(c) authorizes courts to make orders "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way." Furthermore, Section 45 authorizes courts to modify a subpoena if it seeks trade secrets or other confidential information. The court exercises its discretion on the best approach to adopt if the information is considered a secret. In *Am Express Travel Related Services Inc v Cruz*,<sup>xxxvii</sup> a US court held that when trade secret privilege is asserted as the basis for resisting production, the trial court must determine whether the requested production constitutes a trade secret; if so, the court must require the party seeking production to show reasonable necessity for the requested materials.<sup>xxxviii</sup> This will in turn determine if the trade secret will be examined in camera or not. Traditional knowledge and associated genetic resources' custodians should sufficiently identify its trade secret and set out reasons why it should be considered in camera. For instance, the fact that the secret meets the requirements for trade secret protection and public disclosure will be economically detrimental to indigenous peoples.

Protective orders for the preservation of trade secrets are usually issued at the discretion of the court where the party applying shows good cause for such an order.<sup>xxxix</sup>

Parties may also mutually agree to enter into a protective or confidentiality order to keep confidential information like trade secrets protected from disclosure outside the case.<sup>xl</sup> In other to protect confidential information, there is also the option of redaction. Redaction is the legal

practice of editing a document to conceal or remove confidential information before disclosure or publication.<sup>xli</sup> Confidentiality can also be applied to documentary and expert evidence. This can be achieved through limited disclosure to legal counsels involved in the case and the restriction of expert testimony from public view. Where parties voluntarily and mutually agree not to disclose specific confidential information, the secrecy can be achieved through the parties' execution of non-disclosure agreements (NDAs). Access to secret traditional knowledge and genetic resources should be restricted.

***Preservation of Confidential Traditional Knowledge and Genetic Resources After Dispute/Litigation:***

To preserve the commercial relevance of trade secrets, post-litigation confidentiality is important for traditional knowledge and genetic resources custodians. According to Article 9(1) of the EU Trade Secret Directive and Section 18 of the German Trade Secret Act, the requirements for continuity of confidentiality after litigation is that (a) information is determined by a final decision to be a trade secret indeed or (b) the information is not generally known among or readily accessible to persons within the circles that normally deal with that kind of information. While the US Defend Trade Secrets Act of 2016 (DTSA) does not have a similar provision, it seems Section 2(b)(3)(A)(i) of the DTSA on injunction can serve the same purpose by preserving the secrecy of trade secret confirmed in a final decision.

The culture of post-litigation protection of confidential traditional knowledge and genetic resources at national courts should also be reciprocated at patent offices where confidential traditional knowledge and genetic resources are also disclosed. Even though Indian TKDL is only disclosed confidentially at patent offices, it seems that there are still leakages to the public via patent decisions that disclose details of contested Indian traditional knowledge. Such Indian traditional knowledge and genetic resources trade secrets can serve a novelty-destroying purpose in patent applications, obviously, at the cost of lost trade secret confidentiality. Concerns on trade secret preservation should be raised by traditional knowledge and genetic resources custodians and taken into consideration by patent offices just like a regular court would take precautions to ensure trade secrets in dispute are not thrown out to hungry competitors.

Confidentiality is advantageous where traditional knowledge and genetic resources custodians preserve secrecy during litigation but disadvantageous during pre-litigation patent opposition



at patent offices where the veil of secrecy on misappropriated traditional knowledge and genetic resources cannot be lifted to determine “ownership” of traditional knowledge and genetic resources. For instance, Kansas State University (KSU), DuPont, and two professors allegedly claimed to be inventors of genes derived from a Bolivian sorghum and refused to disclose the source of the gene.<sup>xliii</sup> Unfortunately, the TRIPs Agreement, patent and the trade secret law do not compel such disclosure of origin. Pre-dispute/litigation preservation is necessary to prevent disclosures that may result in disputes or litigation at national courts and the attendant cost and time wastage. After litigation, there is a need for post-litigation assessment. Post-litigation assessment is required to check loopholes in the protection of secret traditional knowledge and genetic resources. Legal obligations arising from the litigation should be identified and complied with.

### **Protection of Secret Traditional Knowledge and Genetic Resources During Mediation**

Mediation has been defined as a voluntary process "whereby a third party assists two or more parties, with their consent, to prevent, manage, or resolve a conflict by helping them to develop mutually acceptable agreements."<sup>xliii</sup> The 2008 EU Mediation Directive<sup>xliv</sup> and the Model Standards of Conduct for Mediators in 2005<sup>xlvi</sup> guide the mediation of disputes in Europe and America respectively. Nonetheless, each State is entitled to create laws for the regulation of mediation within their local jurisdictions. For instance, mediation in Maryland, USA is regulated by the Maryland Standards of Conduct for Mediators,<sup>xlvi</sup> Title 9<sup>xlvii</sup> and 17<sup>xlviii</sup> of the Maryland Court Rules. The resolution of traditional knowledge and genetic resources is usually an international dispute, thus the United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Mediation, and International Settlement Agreements Resulting from Mediation 2018 (Singapore Convention on Mediation)<sup>xlix</sup> seems relevant where the disputing states are signatories.

The deliberations made in 3.1 regarding the preservation of secret traditional knowledge and associated genetic resources before dispute also apply to the preservation of trade secrets before mediation. A primary advantage of mediation for the resolution of secret traditional knowledge and associated genetic resources disputes is that confidentiality is already embedded in the mediation process. Mediation is conducted privately between the designated parties. In other words, mediation is not a public process like a standard litigation. Secondly, evidence and

disclosures made by parties during mediation are regarded as confidential unless legitimate exceptions (such as the requirement of disclosure by law) are applicable. Additionally, where a party discloses confidential information during caucusing, a mediator can only disclose to the other party, information that is expressly permitted to be disclosed. The mediation rules, agreement to mediate, settlement agreement, and privileges extend the confidentiality of mediation disclosures beyond the settlement. Even where there is no settlement, the agreement to mediate secures the confidentiality of disclosures made before the mediation is discontinued.

As discussed above, the principle of confidentiality is already embedded in the process and documentation of mediation. Nonetheless, parties may execute a non-disclosure agreement to address deeper levels of confidentiality required by indigenous states or the relevant industry, for instance, the pharmaceutical industry. It is noteworthy that there are exceptions to the duty of confidentiality. Rule 17-105(d) of the Maryland Court Rules permits disclosure where required by law, such as threat of bodily harm or death. The same provision also permits disclosure of confidential information made during mediation when such disclosures are relevant to the assertion of or defense against allegations of mediator misconduct or negligence and when disclosures are relevant to a claim or defense that a settlement agreement from a mediation should be rescinded because of fraud, duress, or misrepresentation. The mediator should watch out for vitiating factors that can affect the confidentiality and validity of the settlement agreement.

There are underlying peculiarities of traditional knowledge and genetic resources that mediators and parties should be abreast of. First, the requirements of prior informed consent before access and benefit-sharing should be complied with in line with relevant international regulations like the Nagoya Protocol and the Convention on Biological Diversity. The requirements of prior informed consent, access, and benefit-sharing in Articles 5, 6, and 7 of the Nagoya Protocol have already been discussed. It is noteworthy that Article 7 of the Nagoya Protocol requires the prior and informed consent or approval and involvement of indigenous and local communities. It is recommended that indigenous communities participate in the mediation process because they are conversant with the facts of the dispute. Additionally, indigenous communities have a lot to lose if their interests are misrepresented. Parties should reflect on contractual terms to ensure settlement terms tally with subsisting contractual terms.

## Conclusion<sup>1</sup>

Commercial value, secrecy and preservation of trade secrets are required for trade secret protection. Like other communal assets, traditional knowledge and associated genetic resources secrets can be exchanged for profit and they can be entangled in conflicts. This article examined the preservation of trade secrets before, during, and after disputes. It is important to identify that there is a trade secret that needs to be protected. Indigenous people should understand the threats to their secret traditional knowledge and associated genetic resources and seek out an appropriate means of protection to preserve such treasured secrets.

## References

### *Books*

- Jonathan Curci, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property* (1st Ed, 2010) 15-16
- Sophia Twarog & Promila Kapoor, *Protection and Promoting Traditional Knowledge: Systems National Experience and International*, UN Conference on Trade and Development, United Nations: New York and Geneva., 223

### *Articles and Online Resources*

- Adejoke Oyewunmi, “Sharpening the Legal Tools to Overcome Biopiracy in Africa through Pro-Development Implementation of Normative International Standards: Lessons from Brazil, South Africa and India” (2013) *A J I C L* 21(3) 447, 464
- American Bar Association, Association for Conflict Resolution and the American Arbitration Association, “Model Standards of Contract for Mediators” September 2005 [https://www.adr.org/sites/default/files/document\\_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf](https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf) accessed 28 February 2024
- Anu Bala, “Traditional Knowledge and Intellectual Property Rights: An Indian
- Perspective” TIFAC, Department of Science and Technology, New Delhi, India <https://ssrn.com/abstract=1954924> accessed 13 April 2024

- Asvidhi, “Trade Secret: Limited Approach to Protect Traditional Knowledge” <https://legalserviceindia.com/legal/article-604-trade-secret-limited-approach-to-protect-traditional-knowledge.html> accessed 15 April 2024
- Aurelien Portuese, “From Non-Disclosure Agreements to Trade Secrets: Antitrust Implications” (2018) 39(6) E C L R 274, 279
- Babak Zarin, “Knead to Know: Cracking Recipes and Trade Secret Law” *Elon Law Review* Vol 8, 183 – 203 [192]
- Catherine Saez, “What Protection of Traditional Knowledge Means to Indigenous Peoples” 20 August 2013 <https://intercontinentalcry.org/what-protection-of-traditional-knowledge-means-to-indigenous-peoples/> accessed 17 April 2024
- Convention on Biological Diversity, “Introduction What are Genetic Resources?”
- <https://www.cbd.int/doc/articles/2002-/A-00414.pdf> accessed 15 April 2024
- Cultural Intellectual Property Rights Initiative, ‘How Can the Fashion Industry Treat Indigenous People and Craft Communities with Fairness and Equity?’ 16 September 2020 <https://www.culturalintellectualproperty.com/post/how-can-the-fashion-industry-treat-indigenous-people-and-craft-communities-with-fairness-and-equity> accessed 15 April 2024
- Damilola Ayiola, “Towards A Legalised International Instrument for Traditional Knowledge and Genetic Resource” <https://www.theipress.com/2024/04/03/towards-a-legalised-international-instrument-for-traditional-knowledge-and-genetic-resource/> accessed 16 April 2024
- Deepa Varadarajan, 'A Trade Secret Approach to Protecting Traditional Knowledge' (2011) 36 *Yale J Int'l L* 371, 406
- Deloitte, "The New Trade Secret Protection Act and its Implications for Practice" <https://www2.deloitte.com/dl/en/pages/legal/articles/geschaeftsgeheimnisschutzgesetz.html> accessed 15 April 2024
- Donal O'Connell, “Trade Secret Licensing” (2018) Vol 38 Issue 7 *Licensing Journal* 21, 22
- Edward Hammond, “Biopiracy Watch A Compilation of Some Recent Cases” (2013) *Volume 1 Third World Network* 40 <<https://www.twn.my/title2/books/pdf/Biopiracywebsite.pdf>> accessed 15 April 2024

- Emerson Bennett, “The Advantages and Disadvantages of Trade Secrets” 22 June 2023 <https://www.etblaw.com/advantages-and-disadvantages-of-trade-secrets/> accessed 15 April 2024
- Jamaica Intellectual Property Office, “Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources” <https://www.jipo.gov.jm/node/90> 17 April 2024
- Krishna Srinivas, “Traditional Knowledge and Intellectual Property Rights: A Note on Issues, Some Solutions and Some Suggestions” *AJWH* [2008] Vol. 3, 81-120, 99
- Maurice Iwu, *Ethnomedicine and Drug Discovery in Advances in Phytomedicine*, 2002 <https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/ethnobotany> accessed 15 April 2024
- National Park Service, “Indigenous Knowledge and Traditional Ecological Knowledge” [https://www.nps.gov/subjecttrade secret/tek/description.htm](https://www.nps.gov/subjecttrade%20secret/tek/description.htm) accessed 15 April 2024
- OpenAI. “ChatGPT” CHATGPT Android app, version 2.0. OpenAI, 2024 <https://chat.openai.com> accessed 27 April 2024
- Peace Mediation Germany - Federal Foreign Office, “Basics of Mediation: Concepts and Definitions: Fact Sheet Series: Peace Mediation and Mediation Support” January 2017 <https://peacemaker.un.org/sites/peacemaker.un.org/files/Basics%20of%20Mediation.pdf> accessed 17 April 2024
- Rebecca Bratspies, “The New Discovery Doctrine: Some Thoughts on Property Rights and Traditional Knowledge” 3 <https://ssrn.com/abstract=987042> accessed 13 April 2024
- Ryan Abbott, “Documenting Traditional Medical Knowledge” *World Intellectual Property Organization (WIPO)* 3 <https://ssrn.com/abstract=2406649> accessed 18 April 2024
- Sagarika Swamy, “Agricultural Practices: Definition, Significance, and Procedure” 21 June 2023. <https://www.embibe.com/exams/agricultural-practices/#What%20Are%20Basic%20Agricultural%20Practices?> accessed 15 April 2024

- Thomson Reuters Practical Law, “Protective Orders” <https://content.next.westlaw.com/practical-law/document/I0f9fbe36ef0811e28578f7ccc38dcbee/Protective-Order?viewType=FullText&contextData=%28sc.Default%29&transitionType=Default> accessed 16 April 2024
- United States Trademark and Patent Office (USPTO), “Trade Secrets/Regulatory Data Protection” <https://www.uspto.gov/ip-policy/trade-secret-policy> accessed 15 April 2024
- Vera Shrivastav, “Protection of Traditional Knowledge within the Existing Framework of Intellectual Property Rights: Defensive and Positive Approach” 12 <https://ssrn.com/abstract=2463017> accessed 18 April 2024
- Vincenzo Jandoli and Martina Dani, “Trade Secrets in Italy: the Reform” (2019) 41(1) *E I P R* 46, 54-55
- Will Kenton, “Redacted: Concealing Confidential Information in Documents” 21 January 2022 <https://www.investopedia.com/terms/r/redacted.asp> accessed 16 April 2024
- World Intellectual Property Organization (WIPO) “Intergovernmental Committee (IGC) Diplomatic Conference on GRs and associated TK in 2024” <https://www.wipo.int/tk/en/igc/#:~:text=The%20WIPO%20Intergovernmental%20Committee%20on%20Intellectual%20Property%20and,traditional%20cultural%20expressions%20%28TCEs%29%20and%20genetic%20resources%20%28GRs%29>. accessed 17 April 2024
- World Health Organisation (WHO), “Traditional Medicine” 9 August 2023 <https://www.who.int/news-room/questions-and-answers/item/traditional-medicine> accessed 15 April 2024
- World Intellectual Property Organization (WIPO) “Traditional Knowledge” <https://www.wipo.int/tk/en/tk/> accessed 15 April 2024
- World Intellectual Property Organisation (WIPO), “Trade Secrets” <https://www.wipo.int/tradesecrets/en/> accessed 15 April 2024

### ***Legislations***

- Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 33 ILM 1197 signed on 15 April 1994
- Convention on Biological Diversity 1760 UNTS 79; 31 ILM 818 of 5 June 1992, entered into force on 29 December 1993
- Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters (the Mediation Directive)
- Directive (EU) 2016/943 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against their Unlawful Acquisition, Use and Disclosure
- German Trade Secrets Act (Geschäftsgeheimnisschutzgesetz, GeschGehG) entered into force on April 26, 2019
- Maryland Judiciary, The Maryland Standards of Conduct for Mediators, 1 January 2020
- Maryland Court Rules, Title 9 - Family Law Actions
- Maryland Court Rules, Title 17 - Alternative Dispute Resolution
- 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 2010
- United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Mediation, and International Settlement Agreements Resulting from Mediation 2018
- United States Constitution
- United States Federal Rule of Civil Procedure

### ***Case***

- Am Express Travel Related Services Inc v Cruz 761 So 2d 1206, 1208-09 (Fla 4th DCA 2000)

## Endnotes

- <sup>i</sup> Jonathan Curci, *The Protection of Biodiversity and Traditional Knowledge in International Law of Intellectual Property* (1st Ed, 2010) 15-16 in Asvidhi, “Trade Secret: Limited Approach to Protect Traditional Knowledge” <https://legalserviceindia.com/legal/article-604-trade-secret-limited-approach-to-protect-traditional-knowledge.html> accessed 15 April 2024
- <sup>ii</sup> Sophia Twarog & Promila Kapoor, *Protection and Promoting Traditional Knowledge: Systems National Experience and International*, UN Conference on Trade and Development, United Nations: New York and Geneva., 223 in Asvidhi, “Trade Secret: Limited Approach to Protect Traditional Knowledge” <https://legalserviceindia.com/legal/article-604-trade-secret-limited-approach-to-protect-traditional-knowledge.html> accessed 15 April 2024
- <sup>iii</sup> Convention on Biological Diversity, “Introduction What are Genetic Resources?” <https://www.cbd.int/doc/articles/2002-/A-00414.pdf> accessed 15 April 2024
- <sup>iv</sup> Cultural Intellectual Property Rights Initiative, “How Can the Fashion Industry Treat Indigenous People and Craft Communities with Fairness and Equity?” 16 September 2020 <https://www.culturalintellectualproperty.com/post/how-can-the-fashion-industry-treat-indigenous-people-and-craft-communities-with-fairness-and-equity> accessed 15 April 2024; See Convention on Biological Diversity 1760 UNTS 79; 31 ILM 818 of 5 June 1992, entered into force on 29 December 1993
- <sup>v</sup> World Intellectual Property Organisation, “Trade Secrets” <https://www.wipo.int/tradesecrets/en/> accessed 15 April 2024
- <sup>vi</sup> Emerson Bennett, “The Advantages and Disadvantages of Trade Secrets” 22 June 2023 <https://www.etblaw.com/advantages-and-disadvantages-of-trade-secrets/> accessed 15 April 2024; See 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 2010
- <sup>vii</sup> Vera Shrivastav, “Protection of Traditional Knowledge within the Existing Framework of Intellectual Property Rights: Defensive and Positive Approach” 12 <https://ssrn.com/abstract=2463017> accessed 18 April 2024
- <sup>viii</sup> World Intellectual Property Organization (WIPO) “Traditional Knowledge” <http://www.wipo.int/traditional-knowledge/en/traditional-knowledge/> accessed 15 April 2024
- <sup>ix</sup> *ibid*
- <sup>x</sup> Directive (EU) 2016/943 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) against their Unlawful Acquisition, Use and Disclosure
- <sup>xi</sup> Babak Zarin, “Knead to Know: Cracking Recipes and Trade Secret Law” *Elon Law Review* Vol 8, 183 – 203 [192]
- <sup>xii</sup> World Health Organisation (WHO), “Traditional Medicine” 9 August 2023 <https://www.who.int/news-room/questions-and-answers/item/traditional-medicine> accessed 15 April 2024
- <sup>xiii</sup> Ryan Abbott, “Documenting Traditional Medical Knowledge” World Intellectual Property Organization (WIPO) 3 <https://ssrn.com/abstract=2406649> accessed 18 April 2024
- <sup>xiv</sup> Sagarika Swamy, “Agricultural Practices: Definition, Significance, and Procedure” 21 June 2023 <https://www.embebe.com/exams/agricultural-practices/#What%20Are%20Basic%20Agricultural%20Practices?> accessed 15 April 2024
- <sup>xv</sup> Article 2 of the Convention on Biological Diversity
- <sup>xvi</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, 33 ILM 1197 signed on 15 April 1994
- <sup>xvii</sup> Maurice Iwu, *Ethnomedicine and Drug Discovery in Advances in Phytomedicine*, 2002 <https://www.sciencedirect.com/topics/agricultural-and-biological-sciences/ethnobotany> accessed 15 April 2024
- <sup>xviii</sup> National Park Service, “Indigenous Knowledge and Traditional Ecological Knowledge” <https://www.nps.gov/subjecttrade-secret/tek/description.htm> accessed 15 April 2024
- <sup>xix</sup> Rebecca Bratspies, “The New Discovery Doctrine: Some Thoughts on Property Rights and Traditional Knowledge” 3 <https://ssrn.com/abstract=987042> accessed 13 April 2024
- <sup>xx</sup> Article 39(2)(c) of the 1994 TRIPs Agreement



- <sup>xxi</sup> United States Trademark and Patent Office (USTPO), “Trade Secrets/Regulatory Data Protection” <https://www.uspto.gov/ip-policy/trade-secret-policy> accessed 15 April 2024
- <sup>xxii</sup> Article 2(1)(c) of EU Trade Secret Directive
- <sup>xxiii</sup> *Donal O’Connell*, “Trade Secret Licensing” (2018) *Vol 38 Issue 7 Licensing Journal* 21, 22
- <sup>xxiv</sup> *ibid*
- <sup>xxv</sup> Vincenzo Jandoli and Martina Dani, “Trade Secrets in Italy: the Reform” (2019) 41(1) *E I P R* 46, 54-55
- <sup>xxvi</sup> **Aurelien Portuese**, “From Non-Disclosure Agreements to Trade Secrets: Antitrust Implications” (2018) 39(6) *E C L R* 274, 279
- <sup>xxvii</sup> Krishna Srinivas, “Traditional Knowledge and Intellectual Property Rights: A Note on Issues, Some Solutions and Some Suggestions” *AJWH* [2008] Vol. 3, 81-120 99
- <sup>xxviii</sup> Anu Bala, “Traditional Knowledge and Intellectual Property Rights: An Indian Perspective” TIFAC, Department of Science and Technology, New Delhi, India <https://ssrn.com/abstract=1954924> accessed 13 April 2024
- <sup>xxix</sup> World Intellectual Property Organization (WIPO) “Traditional Knowledge” <https://www.wipo.int/tk/en/tk/> accessed 15 April 2024
- <sup>xxx</sup> Adejoke Oyewunmi, “Sharpening the Legal Tools to Overcome Biopiracy in Africa through Pro-Development Implementation of Normative International Standards: Lessons from Brazil, South Africa, and India” (2013) *A J I C L* 21(3) 447, 464
- <sup>xxxi</sup> Deepa Varadarajan, ‘A Trade Secret Approach to Protecting Traditional Knowledge’ (2011) 36 *Yale J Int’l L* 371, 406
- <sup>xxxii</sup> Damilola Ayiola, “Towards A Legalised International Instrument for Traditional Knowledge and Genetic Resource” <https://www.theipress.com/2024/04/03/towards-a-legalised-international-instrument-for-traditional-knowledge-and-genetic-resource/> accessed 16 April 2024
- <sup>xxxiii</sup> See World Intellectual Property Organization (WIPO) “Intergovernmental Committee (IGC) Diplomatic Conference on GRs and associated TK in 2024” <https://www.wipo.int/tk/en/igc/#:~:text=The%20WIPO%20Intergovernmental%20Committee%20on%20Intellectual%20Property%20and,traditional%20cultural%20expressions%20%28TCEs%29%20and%20genetic%20resources%20%28GRs%29.> accessed 17 April 2024
- <sup>xxxiv</sup> Jamaica Intellectual Property Office, “Traditional Knowledge, Traditional Cultural Expressions and Genetic Resources” <https://www.jipo.gov.jm/node/90> 17 April 2024
- <sup>xxxv</sup> Catherine Saez, “What Protection of Traditional Knowledge Means to Indigenous Peoples” 20 August 2013 <https://intercontinentalcry.org/what-protection-of-traditional-knowledge-means-to-indigenous-peoples/> accessed 17 April 2024
- <sup>xxxvi</sup> According to Section 2(b)(c) GTSA, protection as a trade secret requires that appropriate confidentiality measures have been taken and that there is a legitimate interest in confidentiality. Federal Court of Justice, Judgment of 12 April 2022 - X ZR 73/20 [160]
- <sup>xxxvii</sup> 761 So 2d 1206, 1208-09 (Fla 4th DCA 2000)
- <sup>xxxviii</sup> *ibid* 1208-1209
- <sup>xxxix</sup> Thomson Reuters Practical Law, “Protective Orders” <https://content.next.westlaw.com/practical-law/document/I0f9f9be36ef0811e28578f7ccc38dcbee/Protective-Order?viewType=FullText&contextData=%28sc.Default%29&transitionType=Default> accessed 16 April 2024
- <sup>xl</sup> *ibid*
- <sup>xli</sup> Will Kenton, “Redacted: Concealing Confidential Information in Documents” 21 January 2022 <https://www.investopedia.com/terms/r/redacted.asp> accessed 16 April 2024
- <sup>xlii</sup> Edward Hammond, “Biopiracy Watch A Compilation of Some Recent Cases” (2013) Volume 1 Third World Network 40 <<https://www.twm.my/title2/books/pdf/Biopiracywebsite.pdf>> accessed 15 April 2024
- <sup>xliii</sup> Peace Mediation Germany - Federal Foreign Office, “Basics of Mediation: Concepts and Definitions: Fact Sheet Series: Peace Mediation and Mediation Support” January 2017 <https://peacemaker.un.org/sites/peacemaker.un.org/files/Basics%20of%20Mediation.pdf> accessed 17 April 2024
- <sup>xliv</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008, on certain aspects of mediation in civil and commercial matters (the Mediation Directive)
- <sup>xlvi</sup> American Bar Association, Association for Conflict Resolution and the American Arbitration Association, “Model Standards of Contract for Mediators” September 2005

---

[https://www.adr.org/sites/default/files/document\\_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf](https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf) accessed 28 February 2024

<sup>xlvi</sup> Maryland Judiciary, “The Maryland Standards of Conduct for Mediators” 1 January 2020 <https://www.courts.state.md.us/sites/default/files/import/macro/pdfs/mdstandardsofconductformediators.pdf> accessed 28 February 2024

<sup>xlvii</sup> Maryland Court Rules, “Title 9 - Family Law Actions” <https://casetext.com/rule/maryland-court-rules/title-9-family-law-actions> Accessed 28 February 2024

<sup>xlviii</sup> Maryland Court Rules, "Title 17: Alternative Dispute Resolution" <https://casetext.com/rule/maryland-court-rules/title-17-alternative-dispute-resolution> accessed 28 February 2024

<sup>xlix</sup> Singapore Convention on Mediation, “The Model Law Text” <https://www.singaporeconvention.org/model-law/text> accessed 5 February 2024

<sup>1</sup> Full Disclosure: This research has benefited from AI-generated insights. See OpenAI. “ChatGPT” CHATGPT Android app, version 2.0. OpenAI, 2024 <https://chat.openai.com> accessed 27 April 2024. Nonetheless, I have made a deliberate effort to constrain sentence and paragraph quotes and references to the writings of traceable human authors and institutions.