

# **Examining the Requirements for the Litigation and Mediation of Traditional Knowledge and Associated Genetic Resources Disputes**

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## **Abstract**

Disputes on traditional knowledge and genetic resources between providers and users of these resources often arise from the diversity in cultural perspectives and interests. Every form of dispute resolution has prerequisites. There are requirements to be met to commence each cause of action in the law court. There are also essentials to consider before choosing a peaceful dispute resolution model like mediation. This article examines the requirements mandated by substantive laws that indigenous peoples would contend with if they choose to litigate. On the other hand, mediation seems flexible, attributes like self-determination, voluntariness, confidentiality and neutrality characterise mediation. Parties and mediators should understand and fulfill the legal requirements arising from mediation and the subject matter of the mediation - in this case, traditional knowledge and genetic resources.

**Keywords:** Traditional Knowledge, Genetic Resources, Litigation, Mediation, ADR

## **Introduction**

Statutes and case law are the primary reference points in determining the requirements for litigating and mediating traditional knowledge and genetic resources cases. For example, to commence a trade secret action, plaintiffs should prove that there was an obligation of secrecy, the secret is commercially valuable and reasonable effort has been made by the plaintiff to preserve secrecy. A plaintiff in a breach of contract case needs to prove the existence of a valid contract, breach of fundamental terms of the contract and actual damages or loss. In the same vein, there are salient issues worthy of reflection before commencing mediation. For instance, the requirements of mediation and the need for compliance with international treaties and existing mutually agreed terms. It is also important that decision-makers participate in mediation. The requirements of litigation and the essentials of mediation will be considered, respectively.

## **Litigating Traditional Knowledge and Genetic Resources Cases**

The requirements for the institution of unfair competition, trade secret, breach of contract, breach of confidence, unjust enrichment and public policy actions will be examined below.

### ***Unfair Competition***

Article 10<sup>bis</sup>(2) of the Paris Convention<sup>i</sup> regards “Any act of competition contrary to honest practices in industrial or commercial matters” as unfair. Several terms deserve keen consideration; competition, honesty, practices and commercial matters. What is considered honest practice is subject to interpretation by judicial authorities in the relevant country where redress is sought.<sup>ii</sup> In this context, competition is the effort of two or more parties acting independently to secure the business of a third party by offering the most favourable terms.<sup>iii</sup> The standard of honest trade practices in the relevant country should be considered. It is remarkable that the standard of "fairness" or "honesty" reflects the sociological, economic, moral and ethical concepts of a society from time to time.<sup>iv</sup>

The definition of "unfairness" should be guided by the purpose of unfair competition law. The Appellate Body in the *US – Hot-Rolled Steel* established that honest acts must conform to the dictates of the basic principles of good faith and fundamental fairness.<sup>v</sup> By contrast,

dishonest acts are characterised by inequity and bad faith.<sup>vi</sup> Practice is defined as the customary, habitual, or expected procedure or way of doing something.<sup>vii</sup> Since a majority can behave in a way detrimental to competition as a whole, 'honest' was added to prohibit customary (but dishonest) acts.<sup>viii</sup> It is also pertinent to consider who the competitors would be in a misappropriation of TKaGR case. Indigenous communities are usually the providers of input for inventions, their competitors include multi-national corporations, universities and bioprospectors. Where indigenous communities' traditional knowledge and associated genetic resources (TKaGR) are misappropriated and patented, the patent owner unfairly competes with the indigenous exporters of those resources.

Finally, commercial use distinguished from non-commercial use is defined as making or intending to make a profit.<sup>ix</sup> Profit in this context covers expectations of financial, developmental and other economic benefits. In sum, unfair competition limits the scope of protectable competition to honest practices. The primary elements of unfair competition consist of some form of dishonesty which negatively impacts competition in a commercial setting. As the name implies, it seems that there should be no unfair competition in the absence of competition.<sup>x</sup> It protects expectations on competitive relationships.<sup>xi</sup> However, there must be a causal link between the dishonest act and the impaired competitive opportunity.<sup>xii</sup>

According to Article 1(2) of the Paris Convention, the objects of industrial property protection include patents, utility models, trademarks, trade names, indications of source or appellations of origin and the repression of unfair competition. Article 1(3) of the Paris Convention states that industrial property is used in the broadest sense and shall apply to industry, commerce, agriculture, extractive industries and all manufactured or natural products such as wines, grain, fruit, cattle, minerals, mineral waters, flowers and flour. Interpreted in its broadest sense, tangible genetic resources (GR) are protected within the range of subjects covered by Article 1(3) of the Paris Convention. While intangible traditional knowledge (TK) is protected within Article 10<sup>bis</sup> of the Paris Convention. The most significant advantage of the doctrine of unfair competition is its flexibility, enabling it to be stretched across novel and inconclusively legislated unfair commercial practices. This flexibility however comes with the price that claims brought under unfair competition are subjected to intense scrutiny by the court to curtail judicial law-making.<sup>xiii</sup> In practice, courts may not be favourably disposed to suits based on the

exclusive property right over TKaGR as this may be interpreted as creating a proprietary right alien to the TRIPs Agreement.<sup>xiv</sup> Claims based on bad faith, impropriety of access and misappropriation stand a better chance of success.

Recital 4 of the Preamble to the TRIPs Agreement provides that intellectual property rights are private rights and Article 39(2) of the TRIPs Agreement states that "Natural and legal persons" shall have the possibility of preventing disclosure of confidential information. The right to repress unfair competition within Article 10<sup>bis</sup> of the Paris Convention is a defensive, not a positive right designed to prevent dishonest commercial acts. As a defensive protection, unfair competition can keep TK free from abuse via patents.<sup>xv</sup> However, unfair competition law is constrained as it does not prevent competition from independently created innovations.<sup>xvi</sup> Additionally, it cannot grant protection where IP law expressly denies it.<sup>xvii</sup> It is noteworthy that '[w]here exploitation of another's achievements becomes inequitable, unfair competition law provides a remedy.'<sup>xviii</sup> While the TRIPs Agreement defines the ambit of intellectual property protection, unfair competition fills gaps omitted by TRIPs Agreement and curtails novel vices pending the creation of specialised legislation for their redress.

Unfair competition defined in Article 10(2)<sup>bis</sup> of the Paris Convention applies to dishonest commercial practices carried out over tangibles and intangibles like GR and TK. Even though Article 10(3)<sup>bis</sup> of the Paris Convention identifies particular unfair competitive acts prohibited, it is however not to be considered a closed list as Article 10(2)<sup>bis</sup> of the Paris Convention suggests a wider application where the commercial act is dishonest. Unfair competition can be employed to check misappropriation and abuse of TK and/or GRs.<sup>xix</sup> However, there are several instances where the desire to prevent unauthorized use of TK is not rooted in a commercial motive.<sup>xx</sup> Such instances include the public policy argument made in the *Neem* case on the unsustainability of the GR harvested for patent invention.<sup>xxi</sup> Secondly, indigenous communities may be more concerned with the violation of their human rights than commerce. An example is the allegedly unauthorised collection and distribution of 3,500 blood samples, 36 full deoxyribonucleic acid (DNA) samples and 7 cell lines drawn from 600 Ecuadorians from the Huaorani tribe for research.<sup>xxii</sup> In the absence of commercial interest, seeking redress for such TKaGR under the umbrella of unfair competition may not be practical.

The TRIPs Agreement, Paris Convention, Convention on Biological Diversity (CBD)<sup>xxiii</sup> and the Nagoya Protocol<sup>xxiv</sup> deserve consideration in TKaGR unfair competition cases? Article 2(2) of the TRIPs Agreement provides that nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention. This provision implies that the provisions of the Paris Convention supersede those of the TRIPs Agreement. This resonates with Article 30(2) of the Vienna Convention<sup>xxv</sup> which states that when a treaty specifies that it is subject to an earlier treaty, the provisions of the earlier treaty prevail. The Paris Convention and the TRIPs Agreement supersede the CBD by Article 22(1) of the CBD, which subjects CBD obligations to the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause serious damage or threat to biological diversity. However, the status of the Nagoya Protocol is not very certain as Article 4(1) of the Nagoya Protocol repeats Article 22(1) of the CBD which points to the intention to be subject to earlier treaties except where the rights and obligations would cause a serious damage or threat to biological diversity. The later part of Article 4(1) of the Nagoya Protocol seems contradictory as it states that the Nagoya Protocol is not intended to create a hierarchy between the Protocol and other international instruments.

Recital 4 of the Preamble of the Vienna Convention cautioned that disputes concerning treaties should be settled peacefully in conformity with the principles of justice and international law. Article 31(3)(c) of the Vienna Convention reads that "There shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties." By inference, obligations of the CBD must not be treated as inconsistent with the TRIPs Agreement, particularly with Articles 7, 8 and Recital 1. This interpretation accommodates the defensive protection of indigenous communities' TKaGR and curbs abuse arising from patent grants.<sup>xxvi</sup> Article 28 of the Vienna Convention states that unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact that took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party. In line with Article 28 of the Vienna Convention, the CBD and the Nagoya Protocol will not be considered as having a retroactive effect as no such intention is expressed in both treaties. Furthermore, the principles of unfair competition do not bind parties in relation to any act or fact which took place or any

situation which ceased to exist before the date of the entry into force of the TRIPs Agreement which gives effect to its application.

### ***Trade Secret***

At national courts, trade secret (TS) is first tested when a defendant in a TS misappropriation claim makes secrecy of a TK and/or GR an issue.<sup>xxvii</sup> TS requires no registration but must be subjected to the EU Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (EU TSD),<sup>xxviii</sup> German Trade Secrets Act (GTSA)<sup>xxix</sup> and the US<sup>xxx</sup> equivalents of Article 39(2) of the TRIPs Agreements' requirements - secrecy, commercial value and reasonable preservation of secrecy.<sup>xxxi</sup> The three TS requirements will be discussed below:

- **Obligation of Secrecy:** The obligation of secrecy is shared by the EU,<sup>xxxii</sup> German<sup>xxxiii</sup> and US,<sup>xxxiv</sup> which agrees that TS should not be common knowledge. The primary consideration for this requirement is a restriction of the TK and/or GR TS to a limited circle.<sup>xxxv</sup> It is noteworthy that disclosure towards negotiating a material transfer agreement under the CBD and Nagoya Protocol does not rob TS of its secrecy. This opinion can be deduced from *Lamont v Vaquillas Energy Lopeno Ltd LLP*,<sup>xxxvi</sup> where a US Appeal court held that a plaintiffs' disclosure of a map to potential working-interest investors, prospective buyers, customers, or licensees did not destroy TS status.<sup>xxxvii</sup> Based on Article 4(3)(b) of EU TSD and Section 4(2)(3) of GTSA, the same position holds in the EU and Germany, use or disclosure of a TS shall be considered unlawful whenever carried out, without consent of the TS holder, by a person in breach of a confidentiality agreement or any other duty not to disclose TS.

Additionally, there should be a clear designation of what composes the TS. In Germany and the US, the inability of a TS owner or holder to identify 'special' knowledge, as opposed to general knowledge can be fatal to the TS claim.<sup>xxxviii</sup> For instance, in *Weins v Sporleder*,<sup>xxxix</sup> the US Supreme Court decided that obtaining TS protection was not possible because there was no clarity on what protection was sought.<sup>xl</sup> A TKaGR custodian bears the burden of defining the TS for which protection is sought with sufficient definiteness to enable a court to determine whether or not there has been a misappropriation.<sup>xli</sup> For instance, where TS protection is sought for traditional medicine – the TKaGR custodian has to clarify whether

protection is sought for the novelty in the composition of the medicinal formular, the method of preparation or the identified curative value or usage.

- **Commercial Value:** Arising from its uniqueness, the secret TK and/or GR must have an independent economic value that can either be assessed in terms of an existing commercial value or viewed as a broader term that accommodates the potential for a profitable enterprise.<sup>xlii</sup> The USTPO<sup>xliii</sup> and Recital 14 of EU TSD agree that information or know-how for which protection is sought should have commercial value, whether actual or potential. This is very important especially where the unauthorized acquisition, use or disclosure is likely to harm the interest of the person lawfully controlling it by undermining his or her scientific and technical potential, business or financial interests, strategic position or ability to compete. What is the required value of the TS? In *Copart Inc v Sparta Consulting Inc*,<sup>xliv</sup> the US Federal court held that the economic value of an alleged TS need not be great, should be demonstrated through circumstantial evidence of an investment of resources in producing the information and does not require showing use by the TS owner.<sup>xlv</sup> In Germany, an economic value due to economic disadvantages can only be assumed if it is specifically stated how and to what extent the disclosed information can be detrimental to the holder of the TS and how the feared economic damage is measured.<sup>xlvi</sup> In summary, it seems the winning attribute of a commercially valuable TS in the EU, Germany and the US is that the TS' commercial value is measurable.
- **Reasonable Effort of Secrecy:** The third requirement mandated by USTPO,<sup>xlvii</sup> EU TSD<sup>xlviii</sup> and GTSA<sup>xlix</sup> - reasonable efforts to maintain secrecy, entails affirmative protective steps taken to protect the TS from disclosure. Whether or not disclosure is confidential is another important consideration in determining reasonableness. The court retains the prerogative to determine the adequacy of the protective steps.<sup>l</sup> Amongst the factors considered by courts include the location and manner of storage, risks of misappropriation, availability and costs of protective measures.<sup>li</sup> The US Court of Appeal in *E I DuPont de Nemours & Co v Christopher*,<sup>lii</sup> serves as authority that minimum, not extraordinary measures are needed to meet the reasonable efforts requirement in the US. What standard of secrecy is reasonable? Two examples shed more light on reasonable secrecy. In *Peggy Lawton Kitchens Inc v Hogan*,<sup>liii</sup> TS

protection was sought for an innovative chocolate chip recipe with nuts.<sup>lv</sup> Protective steps included locking the recipe in a safe, keeping a duplicate of the recipe in another location, and customers' requests for the recipe met with the response that the recipe was a TS.<sup>lv</sup> On the contrary, in *Weins v Sporleder*,<sup>lvi</sup> the composition and the method of preparing cattle feed were commonplace.<sup>lvii</sup> Also, the "secret" had been shared with a company without committing to a non-disclosure agreement and the feed was left unattended and easily accessible at several ranches.<sup>lviii</sup>

Applied to a practical scenario, Shuar Traditional Medicinal Knowledge concealed among Amazonian practitioners was allegedly misappropriated by the United States Agency for International Development (USAID).<sup>lix</sup> USAID allegedly connived with a Shuar schoolmaster to gather 578 medicinal secrets from the pupil's parent and traditional practitioners without any confidentiality or contractual obligation.<sup>lx</sup> This compilation was allegedly published on a platform accessible to pharmaceutical companies<sup>lxi</sup> with a potential to maliciously destroy the Shuar's TS. How does the Shuar case measure against the elements of misappropriation of TS? First, the Shuar medicinal TK was a properly concealed secret among healers and the elderly. Secondly, this medicinal knowledge are obvious commercial treasure and the resort to connivance with the schoolmaster is evidence that the information was unique, well-concealed and could not have been obtained by any proper means. In sum, TKaGR must meet the triune requirements of secrecy, commercial value and reasonable preservation before contesting for legal protection. Beyond proving the existence of a TS, TKaGR custodians have to prove that there has been a misappropriation (improper acquisition of the TK and/or GR).<sup>lxii</sup> In *Weins v Sporleder*,<sup>lxiii</sup> the court reasoned that even if the existence of a TS was proved, there could be no improper acquisition because the components of the TS were commonplace.<sup>lxiv</sup>

### ***Breach of Contract***

To trigger an action for breach of contract, several elements must be present. There must be a valid contract for instance a gene bank contract, a material breach of the contract and actual damage and loss. The burden of proof lies with the party making an allegation.<sup>lxv</sup> The court in *Guidance Endodontics LLC v Dentsply Intern Inc*,<sup>lxvi</sup> cautions that the causes of action in the Restatement Third of Unfair Competition appeared to have grown out of the Restatement of



Torts, implying a tortious categorisation.<sup>lxxvii</sup> However, the existence of an express or implied-in-fact contract protecting trade secrets does not preclude a separate cause of action in tort.<sup>lxxviii</sup>

- **Existence of a Valid Contract**

To establish there is a valid contract in place, there must have been an offer to enter into a contract, acceptance of essential terms, and consideration for the exchange of goods or services; preferably in writing.<sup>lxxix</sup> Lord Denning MR in *Storer v Manchester City Council*,<sup>lxxx</sup> provided guideline where the existence of a contract is disputed – “In contracts you do not look into the actual intent in a man’s mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: I did not intend to contract” if by his words he has done so.”<sup>lxxxi</sup> This is in line with the Lando principle which provides that the intention of a party to be legally bound by contract is to be determined from the party’s statement or conduct as they were reasonably understood by the other party.<sup>lxxxii</sup> In other words, the law will recognise an implied contract if that was the party’s intent. Common law prescribes the apparent intention of the parties.<sup>lxxxiii</sup> The governing criterion was expressed in *Trentham (G Percy) Ltd v Archital Luxfer Ltd*<sup>lxxxiv</sup> as the “reasonable expectations of honest men.” In reality, gene bank contracts, trade secret licenses and mutually agreed terms (MAT) are usually documented. In the absence of an actual contract, the court can imply the existence of a contract where the facts of the case are supportive.

As important as the validity of the contract is, so is it necessary to input essential terms. To avoid the breach of the gene bank contract, MAT and trade secret license, confidential TKaGR should be protected. Such terms should not be left to the court’s inference. Indigenous communities must be diligent in including protective clauses that clearly define the TKaGR’s protected rights, timelines and obligations of parties. Due to unequal bargaining power, there is a significant chance that indigenous communities may make unfair bargains. Indigenous communities should be mindful to negotiate judiciously given *Lyle v Webster*,<sup>lxxxv</sup> where Sheriff Collins’ noted that it is not the job of contract law to relieve people from their bad bargains.<sup>lxxxvi</sup>

- **Breach of Fundamental Terms of the Contract**

A material breach is essential to commence an action for breach of contract.<sup>lxxxvii</sup> *The fundamental term has been defined in Tramways Advertising Pty Ltd v Luna Park (NSW)*

*Ltd*<sup>lxxviii</sup> as a term of the contract that went directly to the substance of the contract or was so essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all.<sup>lxxix</sup> Salient issues to consider include whether a contractual term breached is fundamental, the effect of such breach and available remedies. In the case of MAT, gene bank contracts and trade secret licences' exposure or exploitation of disclosed TKaGR beyond pre-defined limits can be considered to be fundamental breaches. For instance, where genetic resources from the gene bank have been limited to research use, commercial exploitation of such a resource would constitute a fundamental breach. Every failure to perform a primary obligation is a breach of contract which grants the innocent party the right to termination and damages.<sup>lxxx</sup>

- **Actual Damages or Loss**

Finally, the plaintiff must prove actual loss or damages such as financial loss, loss of time and loss of opportunity resulting from the breach.<sup>lxxxi</sup> The European Lando principle envisages that entitlement to damages would only arise where the aggrieved party has suffered a loss.<sup>lxxxii</sup> Thus there is no room for nominal damages.<sup>lxxxiii</sup> It seems that this is also applicable to the United States.<sup>lxxxiv</sup>

### ***Breach of Confidence***

Similar to the elements of trade secret misappropriation, a claimant must identify the breached information in specificity, such information must be confidential, must have been received in circumstances importing an obligation of confidence and there must be an actual or threatened misuse of the information.<sup>lxxxv</sup> A duty of confidentiality can be assumed in favour of an indigenous community in English law where:

- (i) The information has a quality of confidence.<sup>lxxxvi</sup>
- (ii) The receiver is informed that the information received is confidential or that a reasonable person would expect a duty of confidentiality to exist, such as in commercial and competitive settings or if parties to a contract have agreed on the confidentiality of the information.<sup>lxxxvii</sup>
- (iii) Protected information is obtained by dishonesty.<sup>lxxxviii</sup>

(iv) The recipient of the information passes the information to unauthorised person(s)<sup>lxxxix</sup> or has put the information to an unauthorised use.

It is important not only to prove that confidential information was disclosed in a confidential setting but also that such information has been abused. In other words, each of the elements must be distinctly proved. In *(I-Admin (Singapore) Pte Ltd v Hong Ying Ting*,<sup>xc</sup> inability to establish that the respondents had *used* confidential information was fatal to the claim.<sup>xci</sup> It seems a distinction should be drawn between cases where the possession of the confidential information was wrongful, disclaiming any use of the information may not be sufficient to avoid liability, because the possession itself impacts the defendant's conscience.<sup>xcii</sup> A disclosure by indigenous communities to an unwilling confidant or anyone without an opportunity to object to the imposition of confidence will not create an obligation of confidentiality to the recipient.<sup>xciii</sup> This calls for caution among indigenous communities as unsolicited display of distinctive plants, cuisines and traditional practices is often considered to be good hospitality practice amongst many indigenous communities.

- **To Whom is the Duty of Confidence Owed?**

The duty of confidence is owed to the person with the right to deny access to the confidential information,<sup>xciv</sup> in this case, indigenous communities and their designated access-granting authorities. There seems to be no distinction between the duty of an immediate and a remoter party.<sup>xcv</sup> A duty of confidentiality can arise from an express written or oral promise, can be 'implied in fact' from circumstances and can be 'implied at law' based upon the equities of the situation<sup>xcvi</sup> where a reasonable person standing in the place of the recipient understands that the information given is confidential.<sup>xcvii</sup> Trade secret owners need to prove bad faith or negligence on the part of the counterpart, in other words, that the trade secret was acquired, used or disclosed in breach of confidence.<sup>xcviii</sup> Even though a breach of confidence is a separate cause of action, a broader definition of "trade secret" may make a breach of confidence claim unnecessary.<sup>xcix</sup> Where there is an express confidentiality agreement, a tort action can be maintained for disclosure or use of the trade secret in violation of the confidence.<sup>c</sup> A "breach of confidence," claim can also be described as one for "unfair competition."<sup>ci</sup> As a general rule, if the means of the competition is tortious, it would ordinarily constitute an unfair method of competition.<sup>cii</sup>

In *Airport Systems Intern Inc v Airsys ATM Inc*<sup>ciii</sup> for instance, a US court allowed an unfair competition claim based on misuse of trade secrets and other confidential business information.<sup>civ</sup> In *Wilson v Electro Marine Systems Inc*,<sup>cv</sup> the court declined to apply the misappropriation doctrine in the absence of fraud or breach of confidence.<sup>cvi</sup> Indigenous and local communities should establish a commitment to confidentiality.<sup>cvi</sup> This implies that indigenous communities can set up a secrecy regime amongst the community members recognized under the doctrine of breach of confidence.<sup>cvi</sup> In *Foster v Mountford*,<sup>cix</sup> where traditional secret confidentially disclosed to the defendant was published in a book, the Court held that the publication had divulged information of deep aboriginal cultural significance to the aborigines and that amounted to a breach of confidence.<sup>cx</sup> The facts of this case resonate with the Shuar case where the information of TKaGR was allegedly obtained in bad faith through school children and published. The learning point is that where there is an express or implied duty of confidence, such confidential information will be protected against unfair commercial exploitation unless there is an overriding reason such as public interest compelling the court to decide otherwise.

It is important that indigenous communities deliberately create a confidential atmosphere and state the intention to make shared TKaGR information confidential. The import of this principle can be seen in *Fail-Safe LLC v A O Smith Corp*,<sup>cx</sup> where a US Federal court held that the defendant had no reason to know that the plaintiff's disclosure of information to the defendant was intended to be held in confidence because there was no agreement on confidentiality.<sup>cxii</sup> It is also noteworthy that indigenous peoples individually and collectively owe a duty of confidence to their communities. In *Bulun Bulun & Milpurrurru v R & T Textiles Pty Ltd*,<sup>cxiii</sup> for instance, the Court found that an indigenous person owes a fiduciary duty to his community.<sup>cxiv</sup> First, he should not exploit his community's TKaGR in a manner contrary to his community's customary law.<sup>cxv</sup> Secondly, in the event of infringement by a third party, he should take reasonable and appropriate action to restrain and remedy the infringement of his communal resources.<sup>cxvi</sup> Applied to TKaGR secrets, it seems the duty not to act in a manner contrary to communal customary law includes the obligation to keep communal TKaGR secrets within communal boundaries.

- **The Quality of Confidentiality**

Regarding the quality of confidentiality, Lord Greene stated in *Saltman Engineering Co Ltd v Campbell Engineering Co*,<sup>cxvii</sup> 'something which is public property and public knowledge' cannot provide any foundation for proceedings of breach of confidence. It seems a distinction can be made in the case of communal TKaGR where ownership is collective and redress for breach of confidential duty is sought collectively. Even though it is not expressly stated by the TRIPs Agreement, some element of originality, novelty or ingenuity is required to confer a confidential nature on the information sought to be protected.<sup>cxviii</sup> Information solely derived from the public domain may possess the necessary quality of confidentiality by the application of the skill and ingenuity of the human brain.<sup>cxix</sup> It seems to be accepted that confidential information can be passed on from one person to another, and the person to whom it has been imparted can take action to protect the information."<sup>cxx</sup> The notion of a transferable or at the very least, a shareable right seems compatible with the CBD benefit-sharing scheme but such alliance should be meticulously documented as mutually agreed terms. Whether or not a tacit secrecy agreement between parties exists, depends on the peculiar circumstances of the specific case.<sup>cxxi</sup> For instance in *T 1081/01*<sup>cxxii</sup> the EPO board held that information provided subject to a confidentiality agreement did not become available to the public merely because of the expiry of the obligation to keep it confidential.<sup>cxxiii</sup> The express permission of the TS owner is required to make confidential information public.

Sovereign states must notify recipients of the confidentiality of TKaGR.<sup>cxxiv</sup> Disclosure must be preceded by notification. However, confidentiality given to one person may not bind others who acquire such information from that person.<sup>cxxv</sup> To the benefit of indigenous communities, disclosures induced by the defendant under false pretences are considered to have been disclosed confidentially.<sup>cxxvi</sup> Additionally, information disclosed to assess the merits of a bargain is confidential.<sup>cxxvii</sup> This means the information shared in the course of negotiating a mutually agreed term may also be considered confidential. Fundamentally, the protection of confidential information promotes the exploitation of information by encouraging the dissemination of ideas through confidential disclosures.<sup>cxxviii</sup> An indigenous community should guard against wide disclosure of TKaGR within and outside the indigenous community. In *Flotec Inc v Southern Research Inc*,<sup>cxxix</sup> where information for which protection was sought was already in the market, could readily be reverse engineered and the defendant to whom the

plaintiff once voluntarily disclosed the information at issue, never consented to keep it confidential.<sup>cxxx</sup> The court did not grant protection to the trade secret because the information was not a protectable secret and the plaintiff had not taken adequate precautions to protect the secret.<sup>cxxxii</sup> In the absence of any special circumstances – the sale of a device suffices to make it publicly available.<sup>cxxxiii</sup> However, in *Wright Medical Technology Inc v Grisoni*,<sup>cxxxiii</sup> the court recognized that if portions of information are available in the public domain, the integration of such information into a process not commonly known could still be protectable.<sup>cxxxiv</sup>

- **Intentional and Unintentional Breach of Confidence**

It seems that the law does not distinguish between intentional and unintentional breaches of confidence. In *Imerman v Tchenguiz*,<sup>cxxxv</sup> Lord Neuberger of Abbotsbury MR, stated that breach of confidence applies to a defendant who adventitiously, but without authorisation, obtains information in respect of which he must have appreciated that the claimant expected privacy.<sup>cxxxvi</sup> The duty of confidence extends to defendants who intentionally, and without authorisation, take steps to obtain such information.<sup>cxxxvii</sup> In the same vein, Lord Phillips in *Campbell v MGN*<sup>cxxxviii</sup> objectively rejected the proposition that dishonesty is required for liability for breach of confidence.<sup>cxxxix</sup> Failure to prove the elements of a breach of confidence claim may be fatal to the plaintiff's case. In *Contact Materials Processing Inc v Kataleuna GmbH Catalysts*,<sup>cxli</sup> for example, it was held that the action for breach of confidence had been brought in bad faith because the plaintiff had failed to keep its information confidential.<sup>cxli</sup> Indigenous communities should be mindful of loopholes that give rise to any form of breach of confidence.

### ***Inducement to Breach***

According to *Kuhn Construction Co v Ocean & Coastal Consultants Inc*,<sup>cxlii</sup> the elements of inducement to breach in the US are "1) a contract, 2) about which the defendant knew, 3) an intentional act that is a significant factor in causing the breach of contract, 4) without justification, and 5) which causes injury."<sup>cxliii</sup> How does the court determine whether the defendant has a justification for the inducement? In *Kickflip Inc v Facebook Inc*,<sup>cxliv</sup> Facebook had argued that Kickflip failed to plead a lack of justification.<sup>cxlv</sup> The court remarked that whether Facebook's conduct was without justification or wrongful will require a fact-intensive

determination.<sup>cxlvi</sup> For example, the fact that Facebook itself ran non-compliant advertisements adequately shows that Facebook's conduct was unjustified.<sup>cxlvii</sup> Thus, the Court denied Facebook's motion to dismiss the tortious interference claims.<sup>cxlviii</sup> Why is the *Facebook* case on justification important to indigenous communities? Failure of a providing state to prove that a researcher, for instance, had been induced by a university to commercially exploit its resources accessed for educational purposes only, without justification, may be fatal to the state's inducement to breach case.

According to Simester and Chan, it seems the mental element required to induce breach of contract differs if the inducement is by persuasion or prevention, "Where D prevents C from performing, it is likely that P acquires a cause of action against D only if D acts with the intent to harm P, by depriving P of C's performance." In this regard, Lord Denning MR stated in the UK case of *Torquay Hotel Co Ltd v Cousins*,<sup>cxlix</sup> that such acts should have been intended to harm P in such circumstances.<sup>cl</sup> "By contrast, it seems that an intent to harm P is not required when D persuades C to breach her contract"<sup>cli</sup> but recklessness on D's part will suffice.<sup>clii</sup> In this case, D becomes answerable to P because he attacks the contract though he does not directly harm P.<sup>cliii</sup> According to Street J in *Short v City Bank of Sydney*,<sup>cliv</sup> "The persuasion may take the form of advice or friendly solicitation, or it may take the form of intimidation or molestation, but in every case, I think that it must be shown that the defendant deliberately intervened between the contracting parties, either with the express design of depriving the plaintiff of the benefit of his contract or under such circumstances that he must have known that the effect of his intervention would be to deprive the plaintiff of that benefit."<sup>clv</sup> It seems sufficient that the defendant deliberately disregarded the terms of the contract even if the actual terms of the contract are unknown.<sup>clvi</sup> This is because it is unlawful for a third person to procure a breach of contract knowingly, or recklessly, indifferent to whether it is a breach or not.<sup>clvii</sup> Factors to be considered in the UK were outlined by Lord Justice Romer in *Glamorgan Coal Co v South Wales Miners Fed'n*.<sup>clviii</sup> In his words, "[R]egard might be had to the nature of the contract broken; the position of the parties to the contract; the grounds for the breach; the means employed to procure the breach; the relation of the person procuring the breach to the person who breaks the contract; and.., to the object of the person in procuring the breach."<sup>clix</sup> The object of the plaintiff's and defendant's pursuit is worthy of consideration. Where both sought the same object, allocation of liability depends on a careful and critical balancing of interests.<sup>clx</sup>

Therefore, if the defendant's aim was an object foreign to that of the plaintiff, the defendant "caused" but did not "procure" the breach, and is not liable.<sup>clxi</sup> It seems that where the providing state and the foreign stakeholder's (e.g., a university's) object is profit-making, the commercial interest of the university will sustain a claim for inducement to breach.

### ***Unjust Enrichment***

The concept of unjust enrichment combines injustice which relates to the absence or presence of a legal basis for the enrichment and enrichment of the defendant which is detrimental to the plaintiff.<sup>clxii</sup> Enrichment occurs by non-voluntary transfer of benefit or uncompensated subtraction of value from the plaintiff by the defendant.<sup>clxiii</sup> Unjust enrichment doctrine is sometimes referred to as a quasi-contractual remedy, unjust enrichment is not based on an express contract. Instead, litigants normally resort to the remedy of unjust enrichment when they have no written or verbal contract to support their claim for relief.<sup>clxiv</sup> In the US, elements of unjust enrichment include (i) enrichment, (ii) impoverishment, (iii) a connection between enrichment and impoverishment, (iv) the absence of a justification for the enrichment and impoverishment and (v) an absence of a remedy provided by the law.<sup>clxv</sup> Similarly, Lord Steyn and Lord Hoffmann in the English case of *Banque Financière de la Cité v Parc (Battersea) Ltd*<sup>clxvi</sup> identified the elements of unjust enrichment claims as follows: a. The enrichment of the defendant b. The enrichment must have occurred at the claimant's expense c. The retention of such enrichment by the defendant is unjust<sup>clxvii</sup> and d. there is no defence. These elements will be analysed below.

- **Enrichment**

Enrichment includes money and material resources.<sup>clxviii</sup> It occurs when the patrimonial assets of the obligor increase or his liability diminishes.<sup>clxix</sup> Enrichment must be unjust to satisfy the requirements of this element. An enrichment can be justified if the disadvantaged person has freely consented to the disadvantage; provided the consent is not granted by error.<sup>clxx</sup> According to Article 2:103 of the PECL, consent can be vitiated by incapacity, fraud, threats or unfair exploitation. Enrichment in the context of this research occurs by an unauthorised use of indigenous traditional knowledge and associated genetic resources<sup>clxxi</sup> Such use must be intentional and aimed at displacing the claimant.<sup>clxxii</sup>



- **Impoverishment**

Displacement of another's use of a tangible or intangible asset may be complete or partial.<sup>clxxiii</sup> The impoverishment of the obligee occurs when "his patrimonial assets diminish or his liabilities increase."<sup>clxxiv</sup> The plaintiff must establish that the transfer of value was made at the expense of the defendant.<sup>clxxv</sup>

- **Causal Link Between Enrichment and Impoverishment**

The impoverishment must directly result from the defendant's enrichment.<sup>clxxvi</sup> In *Kleinwort Benson Ltd v Birmingham City Council*,<sup>clxxvii</sup> Morritt LJ said: "... the words 'at the expense of the plaintiff' on which the authority placed such reliance do not appear in a statute and should not be construed or applied as if they did. In my view, they do no more than point to the requirement that the immediate source of the unjust enrichment must be the plaintiff".<sup>clxxviii</sup>

- **No Defence:**

Finally, there must be no defence or public policy concern exonerating the defendant. Defences include the doctrine of unclean hands, fraud<sup>clxxix</sup> and independent acquisition of contested rights. Lord Reed in *Investment Trust Companies v Revenue and Customs Commissioners*,<sup>clxxx</sup> has cautioned that the structured approach provided by the four questions does not, dispense with the necessity for a careful legal analysis of individual cases.<sup>clxxxi</sup> It is noteworthy that each of these elements must be proved by an indigenous community to sustain an unjust enrichment action.

### ***Public Policy***

Article 27(2) of the TRIPs Agreement reads, "*Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law*". This provision necessarily implies that what constitutes *ordre public* or morality will differ from one State to another. The doctrine of public order exalts public interest over the need for private exploitation of patents. Morality is a very broad concept and therefore cannot be raised vaguely. Rather, the specific

reason why a particular patent offends public order should be exposed to the court's discretionary assessment. Article 8(1) of the TRIPs Agreement identifies possible areas of public policy intervention to include health, nutrition, socio-economic and technological development.

In the *Kingdom of the Netherlands v European Parliament and Council of the EU*<sup>clxxxii</sup> a similarly worded public order exception in Article 6 of the Biotechnology Directive<sup>clxxxiii</sup> was interpreted. The court reasoned that the system embodies certain generally unquestioned social and moral values, thereby acting as a “social and moral filter,” allowing certain things into mainstream commercial life while blocking others.<sup>clxxxiv</sup> It was rightly stated that “Interpretation cannot remain unaffected by the subsequent development of law [...]. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”<sup>clxxxv</sup> It has been reasoned that a state may refuse to grant a patent on the basis of *order public* and morality to preserve natural resources against misappropriation if the patent applicant fails to share benefits with the provider State.<sup>clxxxvi</sup> The concept of public order is a balancing tool to restrain commercial exploitation within current moral confines.

In *Panel Report, US – Gambling*,<sup>clxxxvii</sup> the Panel deliberated on the term 'public morals' in the context of Article XIV(a) of the General Agreement on Tariffs and Trade (GATT) which seems to be expressed in the same context as Article 27(2) of the TRIPs Agreement. The court considered that despite the inherent difficulties and sensitivities associated with the interpretation of the terms 'public morals' and 'public order' in the context of Article XIV(a), we must nonetheless give meaning to these terms to apply them to the facts of this case.<sup>clxxxviii</sup> Indeed, the principle of effective treaty interpretation requires us to do so.<sup>clxxxix</sup> In other words, the court must identify the public policy doctrine applicable to the facts of each case. The Panel stated that public policy 'can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values'.<sup>cx</sup> However, the Panel in *Appellate Body Report, US – Shrimp* recognised that the definition given to public policy is evolutionary taking into consideration changing times.<sup>cxci</sup>

The US Supreme Court in *Diamond v Chakrabarty*,<sup>cxcii</sup> attempted to define the ambit of the doctrine of public policy in relation to patent.<sup>cxci</sup> The court stated, “It is argued that this Court

should weigh these potential hazards [to health, the environment and respect for life] in considering whether respondent's invention is patentable subject-matter under 35 US Code Section 101. I disagree."<sup>cxci</sup> Courts have a role in shaping public policy. In *Juicy Whi Webber v State of Virginia*,<sup>cxcv</sup> the court reasoned that, "...Congress is free to declare particular types of inventions unpatentable for a variety of reasons ..."<sup>cxcvi</sup> thereby allocating the role of defining the ambit of public policy to Congress. Additionally, the court in *Lowell v Lewis*<sup>cxcvii</sup> opined that "All that the law requires is that the invention should not be frivolous or injurious to the well-being, good policy, or sound morals of society."<sup>cxcviii</sup> Thus patent monopoly was preserved for useful inventions while mischievous or immoral inventions were declared unfit for patent protection. Indigenous communities should take cognisance of the ambit of public order and morality in the relevant jurisdiction before commencing a suit based on public policy.

### **Mediating Traditional Knowledge and Associated Genetic Resources Disputes<sup>cxci</sup>**

The requirements for the litigation of TKaGR cases via unfair competition, trade secret, unjust enrichment, breach of contract, inducement to breach and public policy have been examined. Mediation is a favoured dispute resolution option because it is less costly, saves time and indigenous communities are conversant with mediation. The essentials for the mediation of TKaGR are discussed below. Such considerations include requirements that inherently characterise the mediation process, subject-matter competence, compliance with international treaties and mutually agreed terms, protection of existing intellectual property rights, the participation of decision-makers in the mediation process, accommodation of parties and enforcement concerns.

#### ***Requirements that Characterise Mediation:***

Several requirements qualify the process as mediation. First, mediation is voluntary. Mediators should ensure that parties agree to mediate and that the principle of self-determination is not violated at any stage of the mediation. Parties' self-determination should guide decision-making and the design of the mediation process. Secondly, mediation is confidential. Confidentiality covers, pre-mediation and mediation disclosures. Confidentiality provisions like Standard V of the 2005 US Model Standards of Conduct for Mediators, and confidentiality clauses in

agreements to mediate and settlement agreements, preserve confidential information during and after mediation. It is also required that the mediators are neutral and competent to mediate the dispute they have been engaged to resolve (subject-matter expertise will be discussed further below). The mediator should ensure that the legal requirements that characterise mediation are fulfilled.

***Subject-Matter Expertise:***

TKaGR raises intricate issues that are still being deliberated on by the World Intellectual Property Organization (WIPO) Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('IGC')<sup>cc</sup> The WIPO IGC is an ongoing international legislation towards the creation of a unique intellectual property right for TKaGR. Mediators who accept the offer to mediate such disputes, should be competent to wade through the intricacies arising from the delicate relationship between indigenous communities and foreign stakeholders, the subsisting legal rights of the parties, the international framework of the dispute and parties' cultural affiliations. Mediators may also consider co-mediating to benefit from each other's expertise and experiences. Thus subject-matter expertise may be met by co-mediating with one or more mediators. Choosing an international forum for the mediation of TKaGR disputes may also expose parties to experienced experts. The World Intellectual Property Organization (WIPO) Arbitration and Mediation Center, for instance, offers time and cost-efficient alternative dispute resolution (ADR) options like mediation.<sup>cci</sup> However, WIPO's dispute resolution services are designed to cater to the domestic and cross-border commercial dispute resolution needs of private parties.<sup>ccii</sup>

***Compliance with International Treaties:***

Several international treaties deserve consideration in the resolution of traditional knowledge and genetic resources cases. Article 1(1) of the 1976 International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>cciii</sup> for instance, recognises indigenous peoples' rights of self-determination. The TRIPs Agreement protects intellectual property rights. While the CBD and Nagoya Protocol regulate prior-informed consent, access and benefit-sharing for the utilisation of TKaGR. Article 6(1) of the Nagoya Protocol, for example, requires that access to genetic resources for their utilization shall be subject to the prior informed consent of the Party providing such resources. Article 5(1) of the Nagoya Protocol mandates fair and equitable benefit-sharing and Article 7 of the Nagoya Protocol requires the involvement of indigenous

and local communities where TKaGR is held by such communities. If the provisions of the CBD and Nagoya Protocol apply to parties who have chosen to mediate their TKaGR disputes, the parties and mediator(s) should ensure that the mandates of relevant treaties are reflected in the parties' deliberations and settlement.

***Compliance with Mutually Agreed Terms:***

Article 18 of the Nagoya Protocol requires compliance with mutually agreed terms. What are mutually agreed terms? Mutually agreed terms are consensuses reached between the providers of genetic resources and users on the conditions of access, use of the resources, and the benefits to be shared between the parties.<sup>cciv</sup> It provides a sound basis for cooperation, transparency, communication and trust between the parties to the Agreement.<sup>ccv</sup> Mutually agreed terms embody contractual provisions that regulate the parties' working relationship. It is noteworthy that, mediation and the ensuing settlement terms may alter existing mutually agreed terms, but such alteration should comply with the procedure mandated by the mutually agreed terms so that parties are not left with ambiguous contracts that cannot be enforced.

***Protection of Existing Intellectual Property Rights:***

Currently, existing intellectual property rights protect TKaGR if the requirements of such intellectual property rights are met. For instance, if a commercial TK has been kept secret and the community has made a deliberate effort to preserve such a secret, TS protects such a TK. Proprietary protection in this context entails exclusive rights like patents and non-proprietary forms of protection like moral rights, and equitable compensation schemes.<sup>ccvi</sup> It is noteworthy, that an intellectual property or non-proprietary right may be associated with more than one community in different countries.<sup>ccvii</sup> The mediator and the parties should be mindful to protect such proprietary rights during mediation.

***Participation of Decision Makers:***

In a typical TKaGR case, decision-makers include the indigenous community, the allied sovereign state, and foreign individual and corporate stakeholders. Mediators should ensure that primary decision-makers participate in the mediation process or appoint representatives who can make decisions during the mediation. Joel Reck makes recommendations on how to identify decision-makers.<sup>ccviii</sup> One of the recommendations is discussing the risks of brokering a settlement with non-decision makers during the pre-mediation conference call.<sup>ccix</sup> Parties may also be expressly required to identify their decision-makers so that the mediators are not

mistaken. Identifying decision-makers on both sides before the commencement of the mediation is cost-effective and time-saving. This is also professional for the diligent mediator. Standard VI(A) of the 2005 US Model Standards of Conduct for Mediators provides that the mediator shall conduct the mediation in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency, and mutual respect among all participants.

***Accommodation:***

Mediators should monitor parties to make provision for accommodations identified before or during the mediation. Standard VI(A)(10) of the 2005 US Model Standards of Conduct for Mediators introduces the concept of accommodation. This provision requires that if “a party appears to have difficulty comprehending the process, issues, or settlement options, or difficulty participating in a mediation, the mediator should explore the circumstances and potential accommodations, modifications or adjustments that would make possible the party’s capacity to comprehend, participate and exercise self-determination.” The anticipated basis for accommodation includes diversity in cultural backgrounds. TKaGRs are significantly held by indigenous communities, there is the likelihood of cultural diversity between the indigenous communal cultures and the technological background of many foreign stakeholders. Legal and language diversity is also expected. The diversity in legal knowledge can determine parties' comprehension of legal rights, benefits, and obligations arising from their ownership or engagement with proprietary assets. The engagement of legal and indigenous experts can cure such inequalities. Another source of concern is the language barrier which can be cured by the employment of a neutral interpreter.

***Enforcement:***

Article 15 of the 2018 Singapore Convention<sup>ccx</sup> states that, if parties conclude a settlement of a dispute, that settlement agreement is binding and enforceable. The Singapore Convention applies to international commercial mediation and international settlement agreements.<sup>ccxi</sup> A mediation is “international” if parties to an agreement to mediate have, at the time of the conclusion of that agreement, their places of business in different States.<sup>ccxii</sup> Mediation is also international if the State in which the parties have their places of business is different from either the State in which a substantial part of the obligations of the commercial relationship is

to be performed or the State with which the subject matter of the dispute is most closely connected.<sup>ccxiii</sup> TKaGR disputes are usually international as parties are typically the host state and foreign investors or corporations. Mediators and parties should seriously consider the enforcement of settlement agreements to ensure mediation does not result in wasted time and resources.

## Conclusion

The requirements for the litigation of TKaGR cases and essential considerations to reflect on when mediating such cases have been discussed. Where a statute mandates requirements for the commencement of a cause of action in court, it is obvious that such requirements must be met for the case to be successfully adjudicated in a court of law. On the other hand, mediation seems flexible, but parties and mediators should be cautious to ensure the ingredients that characterise mediation are not waived or ignored. For, instance meeting the requirement of competency may be achieved by co-mediating where a solo mediator does not have the required competence. Solo-mediating incompetently may jeopardise the validity of the settlement. Furthermore, applicable laws relevant to the subject matter should be complied with. The ease of mediating presents mediation as a favoured option. Parties should consider the likelihood of repaired relationships, potential profits from shared benefits, and the cost-effectiveness and time savings mediation offers before litigating TKaGR cases.

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- <sup>xxviii</sup> Article 2(1) of the Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (EU TSD)
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<sup>xxxviii</sup> The mere allegation of the defendant having breached commercial or trade secrets is not enough. Federal Labour Court, 15 June 1993, BeckRS 9998, 150856

<sup>xxxix</sup> [1997] SD 111 NW2d

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<sup>xlix</sup> Section 2(1)(b) of the GTSA; In Germany, the requirement in a related case was that competitive information created from generally inaccessible sources has been kept secret.[ Regional Labour Court Düsseldorf , Judgment of June 3rd, 2020 - 12 SaGa 4/20 [115]]

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