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Secret Traditions as Trade Secrets

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In 2024, World Intellectual Property Organization ("WIPO") member states adopted two new treaties, both of which were groundbreaking in their mention of subject matter discussed in WIPO meetings for 25 years but never acted on until now: Traditional Knowledge ("TK"). Most simply, TK can be said to comprise knowledge (e.g., agricultural, medical, ecological, and scientific) created in a communal, intergenerational context that includes practices, skills, innovations, expressive signs, and symbols.

But neither treaty provides the positive protection for TK—or its expressive forms known as Traditional Cultural Expressions ("TCEs")—that Indigenous peoples and local communities ("IPLCs") are seeking from the global community. That issue is still part of the contentious agenda under discussion in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC"). These negotiations show no signs of a breakthrough, as developed countries are generally opposed to protection for information they see as being in the public domain.

But part *of this seemingly intractable debate* can *be solved in a way that should be acceptable for Indigenous peoples and workable for Western intellectual property interests. Many IPLCs are most concerned about TK and TCEs that they identify as* sacred *or as* secret. *Practices among communities vary tremendously, but these two categories often overlap.*

This Article proposes that Western legal systems could evolve relatively easily and painlessly to protect secret TK/TCE with trade secrecy misappropriation laws. Surprisingly little has been written about this approach, and even governments with robust trade secret regimes, like the United States, seem unaware of this as a possibility. As such, this Article, written by experienced WIPO treaty negotiators, proposes viable approaches to ending the impasse in the IGC on meaningful protection for at least some types of traditional cultural resources.

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Introduction

For more than twenty-five years, World Intellectual Property Organization ("WIPO") member states have been discussing whether and, if so, how to protect traditional knowledge, traditional cultural expressions, and genetic resources from misappropriation by those outside the traditional communities that are the holders or owners of these cultural resources and often the primary stewards of local genetic resources. This interest grew, in part, from concerns about biopiracy and cultural misappropriation—topics that have animated other international agreements, including the U.N. Convention on Biological Diversity (1992) and its Nagoya Protocol (2010), as well as the U.N. Declaration on the Rights of Indigenous Peoples (2007).[1]

Even by multilateral standards, twenty-five years is a long time to spend in negotiations. But this is not surprising. Creating new intellectual property ("IP") rights for subject matter created and stewarded by Indigenous peoples and local communities ("IPLC")—groups that are often marginalized globally—is challenging. Such rights could include allowing IPLCs to control access to and uses of their cultural resources that others have often used freely and without compensation. This could create financial and legal uncertainty for third-party content creators, technology companies, and libraries in developed countries.[2] The idea of exclusive rights over traditional knowledge and cultural expression also challenges deeply held views on the public domain.[3] Beyond these issues, there is the thorny problem of determining what traditional culture is attributable to which communities, especially where IPLCs have influenced one another (as in overlapping musical traditions, fabric designs, or herbal medicines).[4]

1. *See infra* notes 22, 30, 47.

2. *See* Madhavi Sunder, *The Invention of Traditional Knowledge*, 70 L. & Contemp. Probs. 97, 104–08 (2007).

3. Professor Carol Rose explores many of these difficult issues in Carol M. Rose, *Traditional Knowledge and the Limits of Property*, 66 Harv. Int'l L.J. 81 (2025) (Special Edition); *see also* Kal Raustiala & Christopher Jon Sprigman, *Cultural Appropriation and the Global Fashion Industry*, *in* Fashion and Intellectual Property (Jeanne Fromer & David Tan eds., Cambridge Univ. Press, forthcoming 2026), https://ssrn.com/abstract=4576505 (criticizing proposals to provide legal protection to traditional cultural resources).

4. *See, e.g.*, Boatema Boateng, The Copyright Thing Doesn't Work Here: Adinkra and Kente Cloth and Intellectual Property in Ghana 117–44 (2011) (describing overlapping claims and traditions between Ewe and Asanta people over Kente cloth production); A.L. Kroeber, Handbook of the Indians of California 819–22 (1976) (describing overlapping basketry practices among Native American groups in California).

However, in our view, protection for traditional cultural resources is not an all-or-nothing proposition. Instead, countries could achieve consensus on protection for a swath of traditional cultural resources: ones that are secret. The proposal here concerns 'information' broadly understood when it is held by a traditional community and *kept private, confidential, or secret*.[5] WIPO and World Trade Organization ("WTO") member states already provide varying degrees of protection for trade secrets, and the idea that some secret knowledge should be protected against misappropriation is almost universally acknowledged.[6] By "protection for trade secrets," we mean the variety of domestic laws that a country uses to protect secret information, including "breach of confidence," "undisclosed information," "confidential information," and other similar laws.[7] Adding secret traditional cultural resources to the kinds of confidential information that are legally protected against misappropriation is just, reasonable, and, as we hope to show, eminently doable.[8]

Surprisingly, however, trade secret protection for such information does not appear to even register as a possibility, even in a jurisdiction like the United States, which has both substantial Indigenous people groups and a robust regime of protection for trade secrets.[9]

This failure to see trade secrecy law as a possible source of protection for secret TK and TCEs likely results, at least in part, from the notion that trade secret law only protects commercially valuable information, and that most TK would not meet that requirement. However, as this Article will show, much secret TK and TCEs are protectable under broad readings of provisions in a range of jurisdictions, and such protection could be galvanized with modest tweaks to one of several international agreements.

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5. This definition overlaps partially with 'information' that the community considers sacred, but excludes such 'sacred information' that is widely known outside of the community. *See* discussion *infra* notes 80–81.

6. As one of us has observed, "There is a strong tension between the definition of protected traditional knowledge (or eligibility criteria for protection) and the scope of protection granted. For example, countries may be willing to provide stronger protection (*e.g.*, economic rights) for a narrow swath of traditional knowledge (*e.g.*, secret traditional knowledge), but offer less protection (*e.g.*, moral rights only or no protection at all) for widely diffused traditional knowledge." Margo A. Bagley, *The Fallacy of Defensive Protection for Traditional Knowledge*, 58 Washburn L.J. 323, 334 (2019).

7. Such laws would be reported by a country to the World Trade Organization ("WTO") Trade-Related Aspects of Intellectual Property Rights ("TRIPS") Council as fulfilling the country's TRIPS Article 39(2) obligations.

8. We are not the first to propose trade secret protection for some traditional cultural resources. *See generally* Deepa Varadarajan, *A Trade Secret Approach to Traditional Knowledge*, 36 Yale J. Int'l L. 371 (2011) (providing a helpful exploration of some justifications for such an approach to secret traditional knowledge).

9. *See infra* Part II.B.

The proposal here for positive protection of secret traditional culture does not require one to enter into the difficult discussions about exclusive rights (and the right to exclude) over broader, publicly known traditional cultural expressions or traditional knowledge.[10] And such protection for secret cultural resources does comport with widely shared notions of privacy, confidentiality, freedom of association, and honest commercial and social practices.[11] It is a low-hanging fruit that WIPO or WTO member states can and should harvest sooner rather than later.

Part I of this Article explores the concepts of TK and TCEs and the history of their recognition in international fora, including in treaty negotiations and documents. Part II describes the contours and concepts of trade secrecy protection in international agreements and select jurisdictions. With this background, Part III identifies how, perhaps non-intuitively, secret traditional cultural resources can meet each key requirement for trade secret protection. While we believe that individual countries can and should extend trade secret protection to secret traditional cultural resources, Part IV explores potential approaches to achieving express, multilateral recognition of trade secret protection for secret traditions. The Article concludes that the virtues of protecting secret traditions as trade secrets is both just and eminently achievable with sufficient political will and goodwill among nations.

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10. For discussions concerning Native American culture, see generally Rebecca Tsosie, *Reclaiming Native Stories: An Essay on Cultural Appropriation and Cultural Rights*, 34 Ariz. St. L.J. 299 (2002); Elizabeth Cook-Lynn, *American Indian Intellectualism and the New Indian Story*, 20 Am. Indian Q. 57, 57 (1996) (proposing tribal "jurisdiction" over the "storytelling of Indian America"). But as Tsosie acknowledges, "[j]urisdiction over culture, it seems, is antithetical to the 'American' tradition." Tsosie, *supra* note 10, at 310.

11. Prompting one of us to suggest that legal protection of secret traditional knowledge ("TK") and traditional cultural expressions ("TCE") had "analogous causes of action in traditional common law jurisdictions includ[ing] trade secrecy, . . . protection of confidential information, breach of confidence, and straightforward invasion of privacy claims." Justin Hughes, *Traditional Knowledge, Cultural Expression, and the Siren's Call of Property*, 49 San Diego L. Rev. 1215, 1253 (2012). Others have also made this observation. *See* Suzy Frankel, *Traditional Knowledge, Indigenous Peoples, and Local Communities*, *in* The Oxford Handbook of Intellectual Property Law 758, 778 (Dreyfuss & Pila eds., 2017) ("The protection of secret or even sacred traditional knowledge nevertheless has analogues in the intellectual property systems. The existence of trade secrets and breach of confidence doctrines, while they do not alone provide a solution for the protection of traditional knowledge, illustrate that protecting confidentiality is not foreign to intellectual property law"); Ruth L. Okediji, *Grafting Traditional Knowledge onto a Common Law System*, 110 Geo. L.J. 75, 91 (2021); Daniel J. Gervais, *The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New*, 12 Fordham Intell. Prop. Media & Ent. L.J. 929, 987 (2002).

I. Traditional Knowledge and Traditional Cultural Expressions

There are no universally accepted definitions for either traditional knowledge ("TK") or traditional cultural expressions ("TCE").[12] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC")[13] has draft texts for international legal instruments protecting TK and TCE, but even these do not yet have final definitions; there are alternative definitions and bracketed terms, none of which have achieved consensus.[14] Definitions in national and regional regimes are pliable and vary based on, inter alia, the particular territorial context, scope of protection sought, and types of knowledge under consideration. Moreover, neither of the two WIPO treaties adopted in 2024—the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge and the Riyadh Design Law Treaty—both of which mention traditional knowledge, attempt to define the phrase, leaving the determination to national law.[15]

WIPO does provide general descriptions for the terms, classifying TCEs as:

> the forms in which traditional culture is expressed [which] form part of the identity and heritage of a traditional or indigenous community [and] are passed down from generation to generation. TCEs are integral to the cultural and social identities of indigenous and local communities, embody know-how and skills, and transmit core values and beliefs.[16]

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12. For brevity we sometimes refer to traditional knowledge and traditional cultural expressions together as "traditional cultural resources."

13. While "Folklore" remains in the full IGC name, many consider the term pejorative, and the term "traditional cultural expressions" is commonly used in the WIPO negotiations and here. *See* World Intellectual Property Organization [WIPO], *Intergovernmental Committee (IGC)*, https://www.wipo.int/en/web/igc/ [https://perma.cc/8UY2-4JU9] (last visited June 15, 2025).

14. For the current proposals before the IGC, see Secretariat, WIPO Intergovernmental Comm. on Intell. Prop. and Genetic Res., Traditional Knowledge and Folklore [hereinafter WIPO IGC], Forty-Ninth Session, *The Protection of Traditional Cultural Expressions: Draft Articles*, annex, 16–18, WIPO Doc. WIPO/GRTKF/IC/49/5 (Oct. 4, 2024) (Oct. 4, 2024) [hereinafter 2024 WIPO TCE Draft Articles]; Secretariat, WIPO IGC, Forty-Ninth Session, *The Protection of Traditional Knowledge: Draft Articles*, at annex, 20–22, WIPO Doc. WIPO/GRTKF/IC/49/4 (Oct. 4, 2024) [hereinafter 2024 WIPO TK Draft Articles]. Even definitional components that seemed to have been agreed upon in earlier drafts have now been bracketed.

15. WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge, May 24, 2024, WIPO GRATK/DC/7 [hereinafter WIPO GRATK Treaty], https://www.wipo.int/edocs/mdocs/tk/en/gratk_dc/gratk_dc_7.pdf [https://perma.cc/V2NB-SFLX]. The second treaty adopted by WIPO in 2024 which expressly recognized TK is the Riyadh Design Law Treaty, Nov. 22, 2024, WIPO DLT/DC/22, https://www.wipo.int/wipolex/en/text/593353 [https://perma.cc/ZN4N-WZDG].

16. *Traditional Cultural Expressions*, WIPO, https://www.wipo.int/tk/en/folklore/ [https://perma.cc/4CV2-KW7B] (last visited June 15, 2025).

According to WIPO, TK includes TCEs, as it embraces

> the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with TK. TK in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations [that] can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge.[17]

In the following sections, we trace the struggles for traditional cultural resource protections via international law generally and international IP law specifically.

A. International Recognition of Indigenous Peoples' Rights

According to the United Nations, Indigenous peoples comprise over 476 million persons (6.2% of the global population) living in 90 countries, in more than 5,000 distinct groups.[18] They speak a majority of the world's estimated 7,000 languages and, importantly, "are nearly three times as likely to be living in extreme poverty compared to their non-[I]ndigenous counterparts."[19]

Indigenous peoples have a strong historical link to their lands that precedes Western colonization, and they tend to maintain distinct social practices, belief systems, and legal structures, all of which they use to maintain their distinct identity despite marginalization by the dominant society.[20] Similarly, local communities have been described as "non-[I]ndigenous communities with historical linkages to places and livelihoods characterized by long-term relationships with the natural environment, often over generations."[21]

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17. *Traditional Knowledge*, WIPO, https://www.wipo.int/tk/en/tk/ [https://perma.cc/KF44-VZYL].

18. *Indigenous Peoples: Respect not Dehumanization*, United Nations, https://www.un.org/en/fight-racism/vulnerable-groups/indigenous-peoples [https://perma.cc/2FDG-UTKB] (last visited June 15, 2025).

19. *See* Solomon Maui, *An Indigenous Perspective on the WIPO IGC*, *in* Protecting Traditional Knowledge: The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 219, 227 (Daniel Robinson, Ahmed Abdel-Latif & Pedro Roffe eds., Routledge Press 2017) [hereinafter Protecting Traditional Knowledge] ("It is easy for [I]ndigenous peoples to feel disempowered and marginalized as this has been their lot for centuries in every country in which they have been colonized. However, they have managed to survive into the twenty-first century in spite of the efforts by their colonizers to suppress, and in some cases, exterminate them. Survivability and durability is a key strength of [I]ndigenous peoples . . . .").

20. *See* United Nations, *Indigenous Peoples*, *supra* note 18.

21. *Local Communities*, Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services, https://www.ipbes.net/glossary-tag/local-communities [https://perma.cc/3TUM-2R9G] (last visited June 15, 2025). While different, many of the concerns of Indigenous peoples and local communities as creators and holders of traditional cultural resources align. Thus, we will refer to them as IPLCs for brevity, consistent with the use of these terms in WIPO and other fora.

The struggle to achieve international recognition of the rights of Indigenous peoples is ongoing. The 2007 United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") is the most comprehensive delineation of the rights of Indigenous peoples; however, it is a non-binding instrument.[22] Along with the prior International Labour Organization's ("ILO") Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries (hereinafter "ILO Convention"), UNDRIP affirms the basic rights of Indigenous peoples to their cultural integrity and natural resources.[23] UNDRIP articulates the right of Indigenous populations to the conservation of their traditional flora and fauna, the land they are found on, and the resources that result from the use and development of their lands.[24] It also expresses the rights of these populations to maintain and control their "cultural heritage, traditional knowledge and traditional cultural expressions."[25]

The protections for Indigenous peoples in UNDRIP and the ILO Convention are nestled in—and reinforced by—a larger body of international human rights instruments. The 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR"),[26] one of the treaties that make up the International Bill of Rights, also upholds the rights of all peoples, which includes IPLCs, to adequate intellectual property rights,[27] and general rights to an adequate standard of living.[28] These rights specifically derive from the inherent right to dignity and worth of all peoples, which culminate in the inalienable right to freedom from discrimination in all endeavors.[29] This right to freedom from discrimination also can be said to extend to partnerships between IPLCs and third parties using genetic materials or other resources, such as traditional knowledge, to conduct research and develop new medications and products.

More recently, the U.N. Convention on Biological Diversity ("CBD") recognizes the "knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."[30] As such, the CBD requires state parties

22. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

23. International Labour Organization [ILO], Indigenous and Tribal Peoples Convention, No. 169, June 27, 1989, 1650 U.N.T.S. 384. The signatories of the ILO Indigenous and Tribal Peoples Convention are concentrated in Latin America and Western Europe.

24. UNDRIP, *supra* note 22, arts. 24, 26.

25. *Id.* art. 31.

26. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

27. *Id.* art. 15.

28. *Id.* art. 11.

29. *Id.* arts. 2–3.

30. The Convention on Biological Diversity art. 8(J), June 5, 1992, 1760 U.N.T.S. 143, 152 [hereinafter CBD]; *see also* Zafar M. Nomani, *The Access and Benefit-Sharing Regime: An Environmental Justice Perspective*, 49 ENV'T POL'Y & L. 259, 260 (2019).

to encourage "the equitable sharing" of benefits from the use of such TK and genetic resources in accordance with national law.[31]

Of course, international legal norms to protect IPLCs in their "cultural heritage, traditional knowledge and traditional cultural expressions"[32] and to ensure they receive the "benefits arising from the utilization of such knowledge" need implementation at the national level. And that need is real: As creators and holders of traditional knowledge and traditional cultural expressions, IPLCs continually face misappropriation risks.

Consider two examples. The Shuar people of Amazonian Ecuador have amassed an incalculable wealth of knowledge about flora and fauna in a biodiversity-rich region of the globe.[33] Authors of a case study report that from the late 1980s to the early 1990s, U.S. bioprospectors approached the Shuar people under false pretenses and gathered large amounts of both plant samples and knowledge about the plants and their uses from the group.[34] Some of the knowledge and samples even came from the Shuar's shaman, the group's holder of secrets, ostensibly to create an educational book for Shuar children.[35] Although confidentiality was promised, in fact, the samples and knowledge were shared with funders at the U.S. National Institutes of Health ("NIH"), and the information was published without Shuar consent.[36]

The Pueblo Indians of Santo Domingo suffered a very different kind of misappropriation. The Pueblo people are known to perform sacred, secret, ceremonial dances.[37] On one occasion in 1984, a photographer for the *Santa Fe New Mexican* newspaper captured unauthorized photos of a dance by flying over the location where it was being performed.[38] The newspaper published the photographs, and the Pueblo people sued the newspaper, claiming trespass and invasion of privacy.[39] However, because the "choreography" was not fixed in a tangible medium of expression, it was not protected by U.S. copyright law.[40]

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31. Daniel Robinson, Confronting Biopiracy: Challenges, Cases, and International Debates 24 (2010).

32. UNDRIP, *supra* note 22, art. 31.

33. Winston P. Nagan et al., *Misappropriation of Shuar Traditional Knowledge (TK) and Trade Secrets: A Case Study on Biopiracy in the Amazon*, 15 J. Tech. L. & Pol'y 9, 20–27 (2010).

34. *Id.* at 17–21, 25.

35. *Id.* at 26–27.

36. *Id.*

37. *See* Robert Schultheis, *The Corn Dance: Complex, Hypnotic*, N.Y. Times, July 11, 1976, Section 10, at 1 ("Much of the Pueblos' religious life remains a well-kept secret.").

38. *Id.*; *Photos of Tribal Ritual Prompt Suit*, N.Y. Times Archives (Mar. 13, 1984), https://www.nytimes.com/1984/03/13/us/photos-of-tribal-ritual-prompt-suit.html [https://perma.cc/9WEW-WDF7].

39. *Photos of Tribal Ritual Prompt Suit*, *supra* note 38.

40. The parties eventually settled out of court. *See* Stephen R. Munzer & Kal Raustiala, *The Uneasy Case for Intellectual Property Rights in Traditional Knowledge*, 27 Cardozo Arts & Ent. L.J. 37, 60 n.62 (2009).

These two scenarios provide examples of how misappropriation of traditional knowledge and traditional cultural expressions can occur. In both cases, IPLCs are harmed, not least because of a lack of recognition of their creation of and ownership of valuable "property."[41] In both cases, the misappropriators derived commercial value from what they had taken. For both examples, depending on how closely held the information was in each case, trade secret law, in its current form or perhaps modestly expanded, could have provided meaningfully more robust protection to the respective Indigenous knowledge holders.[42] However, all traditional cultural resources are not secrets, and as described below, efforts have focused on obtaining protection for a broad range of such resources for several decades.

B. WIPO's Inter-Governmental Committee

The issue of protection for traditional cultural resources through an international instrument first arose in 1963 with a request at WIPO by a group of African countries for the protection of folklore (now called traditional cultural expressions) in the context of a revision of the Berne Convention for the Protection of Literary and Artistic Works.[43] Then, in 1978, WIPO and the United Nations Educational, Scientific, and Cultural Organization ("UNESCO") convened a series of meetings that led to the adoption of the 1982 *Model Provisions for National Laws on the Protection of Expressions of Folklore*.[44] Over the years, efforts to address the topic comprehensively at WIPO failed to gain traction.

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41. Okediji, *supra* note 11, at 85 ("The misuse of TK can harm [Indigenous] communities in at least three ways: relationally, by weakening the social bonds between Indigenous persons that are founded on such knowledge; collectively, by introducing instability into a group; and developmentally, by attacking the conditions for future knowledge production.").

42. In the Pueblo case, the particular dance that was the subject of unauthorized aerial photography was not one of the group's most secret ceremonies. *Photos of Tribal Ritual Prompt Suit, supra* note 38. Had it been, the Pueblo of Santo Domingo scenario would be a close parallel to the well-known *DuPont v. Christopher* case, where taking unauthorized photos of a trade secret methanol production construction project while flying in public airspace was deemed improper acquisition of a trade secret. *See* E. I. duPont deNemours & Co. v. Christopher, 431 F.2d 1012 (5th Cir. 1970).

43. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971, and amended in 1979, S. Treaty Doc. No. 99-27 (1986), 1161 U.N.T.S. 30 [hereinafter Berne Convention]. The then folklore issues were also raised unsuccessfully in the 1960s at the United Nations Educational, Scientific and Cultural Organization ("UNESCO"). *See* Ahmed Abdel-Latif, *Revisiting the Creation of the IGC: The Limits of Constructive Ambiguity?*, *in* Protecting Traditional Knowledge, *supra* note 19, at 10, 11–12.

44. UNESCO & WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1985), https://www.wipo.int/wipolex/en/legislation/details/6714 [https://perma.cc/V8CJ-FLCP]. This project had been preceded by UNESCO & WIPO, Tunis Model Law on Copyright for Developing Countries, WIPO Pub. No. 812 (E) (1976). *See* Hughes, *supra* note 11, at 1229–31.

However, the 1996 WIPO Performances and Phonograms Treaty did include a small concession to the demands. It defines "performers" as including "actors, singers, musicians, dancers, and other persons who act, sing, . . . interpret, or otherwise perform literary or artistic works or expressions of folklore."[45]

Efforts to address misappropriation of genetic resources and traditional knowledge met with more success, at least in relation to benefit-sharing, in the CBD, adopted in 1992 at the Rio Earth Summit. The CBD has 196 members and three objectives: (1) the conservation of biological diversity, (2) the sustainable use of its components, and (3) the fair and equitable sharing of the benefits generated by the use of genetic resources.[46]

Adoption of the CBD was propelled by both a goal of facilitating access to genetic resources and a desire to stem the uncontrolled depletion of biodiversity, largely in the global South.[47] But the agreement also appears to be designed to address a particular form of perceived injustice: "biopiracy." Biopiracy has been defined as "the patenting of . . . inventions based on biological resources and/or traditional knowledge that are extracted without adequate authorization and benefit sharing from other (usually developing) countries, [I]ndigenous or local communities."[48] In Article 8(j), the CBD recognizes the "knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity."[49] As such, the CBD requires state parties to encourage "the equitable sharing of the benefits arising from the utilization of such knowledge," and genetic resources, in accordance with national law.[50]

These cultural and genetic resource protection issues converged at WIPO in 1999, when a group of Latin American member states proposed inserting a patent application disclosure of origin requirement for genetic resources and associated TK into the draft Patent Law Treaty, then being considered in the

45. WIPO Performances and Phonograms Treaty art. 2, Dec. 20, 1996, 2186 U.N.T.S. 203; *see also* Beijing Treaty on Audiovisual Performances art. 2(a), June 24, 2012, 3367 U.N.T.S. (defining "performers" to include those who "act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore").

46. CBD, *supra* note 30, art. 1.

47. *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 art. 1, Oct. 29, 2010, 3008 U.N.T.S. 3; Konstantia Koutouki & Katharina Rogalla von Bieberstein, *The Nagoya Protocol: Sustainable Access and Benefit-Sharing for Indigenous and Local Communities*, 13 Vt. J. Env't L. 513, 518 (2011).

48. Daniel Robinson, Confronting Biopiracy: Challenges, Cases, and International Debates 21 (2010); *see also* Lorna Dwyer, *Biopiracy, Trade, and Sustainable Development*, 19 Colo. J. Int'l Env't L. & Pol'y 219, 227 (2008); Kaitlin Mara, *Indigenous Groups Express Concerns on IP Protection of Their Knowledge*, Intel. Prop. Watch (Mar. 3, 2008) [https://perma.cc/D7QV-H6SM].

49. CBD, *supra* note 30, art. 8(j); *see also* Nomani, *supra* note 30, at 260.

50. Robinson, *supra* note 48, at 47.

Standing Committee on Patents ("SCP").[51] This turn of events precipitated a political compromise in which matters relating to genetic resources, TK, and TCEs would be addressed in WIPO—but in a newly-created forum, the IGC, and not in the SCP.[52] This allowed a diplomatic conference on the Patent Law Treaty to proceed to a successful conclusion, producing an instrument devoid of any mention of genetic resources or traditional knowledge.[53]

The WIPO IGC's first meeting was in 2001, and while there was abundant discussion in successive meetings, real progress largely began with the start of text-based negotiations in 2010.[54] This achievement was made possible by identifying common interests between developing countries and several developed countries with significant IPLC populations, rich biodiversity, and patent applicant disclosure of origin requirements already in their national legislation.[55] The WIPO IGC's current mandate is to continue engaging in text-based negotiations leading to one or more international legal instruments.[56]

Negotiations from 2010–2019 yielded three draft texts: a genetic resources text aimed at establishing a requirement that patentees disclose the origin of certain tangible genetic resources and associated traditional knowledge used in developing a claimed invention, as well as two texts that would include, among other things, a suite of moral and economic rights for certain categories of TK and TCEs.[57] These two TK and TCE texts are the most controversial, with

51. *See* Florian Rabitz, The Global Governance of Genetic Resources: Institutional Change and Structural Constraints 96 (2017).

52. Nor the other "standing" committees at WIPO which include the Standing Committee on Copyright and Related Rights ("SCCR") and the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications ("SCT"). *See* Ruth L. Okediji, *Legal Innovation in International Intellectual Property Relations: Revisiting Twenty-One Years of the TRIPS Agreement*, 36 U. Pa. J. Int'l L. 191, 217–18, 218 n.114 (2014).

53. WIPO, Patent Law Treaty, June 1, 2000, TIAS No. 13-1218.1, 2340 U.N.T.S. 3. *See also* WIPO General Assembly, Twenty-Sixth (12th Extraordinary) Session, *Report—Adopted by the Assembly*, WIPO Doc. WO/GA/26/10 (Oct. 3, 2000).

54. *WIPO Traditional Knowledge Committee Pushes Toward Text-Based Talks*, Int'l Ctr. for Trade & Sustainable Dev. (Dec. 16, 2009) [https://perma.cc/BD6X-HR3J]; *see also* Wend Wendland, *The Evolution of the IGC from 2001 to 2016: An Insider's Perspective*, *in* Protecting Traditional Knowledge, *supra* note 19, at 31, 42. In the interest of full disclosure, we note that both authors have participated in several of these meetings as delegates or advisors to delegations, sometimes with additional formal roles (for example, facilitator, Friend of the Chair).

55. *See* Ian Goss, *25 Years in the Making: The WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge*, 66 Harv. Int'l L.J. 35, 39 (2025) (Special Edition).

56. Secretariat, Assemblies of the Member States of WIPO, Fifth-Fifth Series of Meetings, *List of Decisions*, at 10–12, WIPO Doc. A/55/INF/11 (Oct. 22, 2015).

57. *See* Secretariat, WIPO IGC, Twenty-Eighth Session, *The Protection of Traditional Cultural Expressions: Draft Articles*, Annex, WIPO Doc. WIPO/GRTKF/IC/28/6 (June 2, 2014); Secretariat, WIPO IGC, Twenty-Eight Session, *The Protection of Traditional Knowledge: Draft Articles*, Annex, WIPO Doc. WIPO/GRTKF/IC/28/5 (June 2, 2014); Delegations of Canada, Japan, Norway, the Republic of Korea & the United States of America, WIPO IGC, Twenty-Eighth

virtually no provisions having achieved consensus, hundreds of brackets around text, and multiple alternatives to several articles.[58]

Although the genetic resources text also contained many brackets and alternatives, it was long seen as having the most potential for agreement, both because it did not involve the creation of new rights and because many countries were already incorporating disclosure of origin requirements within their national patent laws.[59] The 2019 decision by then-IGC Chair Ian Goss (Australia) to create and publish a "Chair's Text"—reflecting common ground positions and compromises that all parties could accept—was a significant turning point in the negotiations as it gave member states a workable draft that actually looked like a treaty.[60] In July 2022, the WIPO General Assemblies agreed, by consensus,[61] to advance the Chair's Text to a Diplomatic Conference no later than 2024.[62]

C. The 2024 Treaty on Genetic Resource Disclosure

Because patents can facilitate biopiracy, there have been efforts in both WIPO and the WTO for more than two decades to require patent applicants to disclose the origin of genetic resources and associated TK used in creating their inventions.[63] While no real progress has been made on this issue in the Trade-Related Aspects of Intellectual Property Rights ("TRIPS") meetings at the WTO,[64] these efforts did reach fruition at WIPO in May 2024 with the adoption of the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge that grew out of the IGC negotiating process.[65]

Session, *Joint Recommendation on Genetic Resources and Associated Traditional Knowledge*, Annex, WIPO Doc. WIPO/GRTKF/IC/28/7 (May 9, 2014).

58. *See* 2024 WIPO TK Draft Articles, *supra* note 14; 2024 WIPO TCE Draft Articles, *supra* note 14.

59. *See generally* WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, WIPO Pub. No. 1047E/19 (2d ed. 2020).

60. *See* Ian Goss (Chair of the WIPO IGC), *Draft International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources*, WIPO Doc. WIPO/GRTKF/IC/40/CHAIR TEXT (Apr. 30, 2019).

61. Of course, consensus is not unanimity; some countries chose to register their disagreement for the record but indicated they would not block consensus.

62. *See* Secretariat, Assemblies of the Member States of WIPO, Sixty-Third Series of Meetings, *Summary Report*, ¶ 27, WIPO Doc. A/63/9 (July 22, 2022).

63. Charles Lawson, *Relationships between the Work of the IGC and Other Forums*, *in* Protecting Traditional Knowledge, *supra* note 19, at 56, 56, 56 n.3, 66 n.130.

64. In 2010, over 100 countries expressly endorsed a proposed disclosure of origin amendment to the TRIPS Agreement, but no meaningful movement has occurred on the issue in the WTO since that time. *See* WTO, Council for Trade-Related Aspects of Intellectual Property Rights, *Minutes of Meeting Held in the Centre William Rappard on 26–27 October 2010*, para. 22, WTO Doc. IP/C/M/64 (Feb. 17, 2011).

65. WIPO GRATK Treaty, *supra* note 15.

This agreement is the first new multilateral intellectual property treaty in more than a decade.[66] It mandates that contracting parties require patent applicants to disclose the country of origin (or source, if the country of origin is unknown) of genetic resources and associated traditional knowledge where the claimed invention depends on specific properties of those genetic resources and associated TK which were necessary for the claimed invention.[67] Patent applicants unaware of both the country of origin and the source can make a declaration to that effect.[68] The treaty is the first IP treaty to explicitly mention IPLCs and includes a reference to the U.N. Declaration on the Rights of Indigenous Peoples in the treaty preamble.[69] However, the treaty is a transparency mechanism only; it creates no new rights.

Disclosing the origin of genetic resources and associated TK necessary for a claimed invention may help to improve the quality of issued patents by making it easier for examiners and others to find relevant prior art. It may also support compliance with the CBD and the Nagoya Protocol by providing information that could allow countries and IPLCs to determine if their resources have been used without permission or appropriate benefit-sharing.

Prior to the new treaty's adoption, more than thirty countries already had mandatory disclosure of origin requirements in their patent laws. These laws contain varying sanctions, some of which include patent revocation.[70] Thus, such a disclosure requirement is already a fact of life for many researchers in high-income countries seeking patent protection in other countries, even if their home country does not have a genetic resource disclosure of origin requirement. As such, and similarly to trade secret protection, it is not a completely new type of device in the IP world. Moreover, because the new treaty puts a ceiling on sanctions,[71] the treaty could improve legal certainty for patentees.[72]

66. Prior to 2024, the last WIPO treaty was the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, June 27, 2013, S. Treaty Doc. No. 114-6, 3162 U.N.T.S. 3.

67. WIPO GRATK Treaty, *supra* note 15, art. 3.

68. *Id.* art. 3(3).

69. *Id.* at pmbl. ("Acknowledging the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and commitment to achieving the ends set forth therein.").

70. WIPO, Key Questions, *supra* note 59, at Annex: Disclosure Requirements Table (listing Belgium, Brazil, China, Denmark, the EU, France, Germany, India, Indonesia, Italy, Norway, Peru, South Africa, and Switzerland as among the jurisdictions with a genetic resource disclosure requirement as of 2020).

71. Article 5 states that "no Contracting Party shall revoke, invalidate, or render unenforceable the conferred patent rights solely on the basis of an applicant's failure to disclose the information" required. WIPO GRATK Treaty, *supra* note 15, at art. 5.

72. However, there are a plethora of ambiguities in the treaty text that leave much policy space for national implementation choices that could result in a range of weak to strong sanctions for patent applicant non-compliance.

The treaty will only come into force after fifteen countries ratify it.[73] While it was adopted with a consensus of over 170 WIPO member states, only thirty-one of those signed it, and none of those are high-income countries.[74] So, it remains to be seen whether it will ever come into effect and, if so, where. Nevertheless, it is an achievement and may improve the prospects for genuine progress on the remaining two IGC texts addressing positive protection for TK and TCEs.[75]

D. The Different Elements of Traditional Cultural Resources

Both TK and TCEs contain the term "traditional." A common misconception is that the presence of the word "tradition" means the subject matter must be old. However, what makes some knowledge or expressions "traditional" is the community-based context of its creation, not its age per se. Taubman and Leister note that "conceptual difficulties arise in policy and legal debate when limiting preconceptions [like age] are imposed on the notion of TK."[76] They explain:

> Knowledge is not 'traditional' because of its object, nor its subject matter or content, nor its age or antiquity, nor its aesthetic qualities. What makes it traditional is the way it has been preserved and transmitted between generations within a community: 'its nature relates to the manner [in which] it develops rather than to its antiquity.' . . . The essential characteristics of traditional knowledge are its linkage with a traditional community as such and its dynamic, intergenerational quality.[77]

73. WIPO GRATK Treaty, *supra* note 15, at art. 17.

74. Secretariat, Diplomatic Conference to Conclude an International Legal Instrument Relating to Intellectual Property, Genetic Resources and Traditional Knowledge Associated with Genetic Resources, *Signatures of the WIPO Treaty on Intellectual Property, Genetic Resources, and Associated Traditional Knowledge*, at 1 WIPO Doc. GRATK/DC/10 (May 28, 2024). The signatories to date are: Algeria, Bosnia and Herzegovina, Brazil, Burkina Faso, Central African Republic, Chile, Colombia, Congo, Côte d'Ivoire, Democratic People's Republic of Korea, Eswatini, the Gambia, Ghana, Lesotho, Madagascar, Malawi, Marshall Islands, Morocco, Namibia, Nicaragua, Niger, Nigeria, Niue, Paraguay, Saint Vincent and the Grenadines, Sao Tome and Principe, Senegal, South Africa, United Republic of Tanzania, Uruguay, and Vanuatu. *Id.*

75. *See infra* Part IV.D.

76. Antony Taubman & Matthias Leister, *Analysis of Different Areas of Indigenous Resources: Traditional Knowledge*, *in* Indigenous Heritage and Intellectual Property 59, 60 (Silke von Lewinski ed., 2008).

77. *Id*. at 59–60, 77; *see also* Graham Dutfield, *Should We Protect Turmeric Lattes?*, *in* Protecting Traditional Knowledge, *supra* note 19, at 332, 334 ("As for experiments and trying things out in a systematic way, it is not just white-coated laboratory scientists who do this; many traditional healers and farmers . . . do as well.").

Traditional cultural resource debates in the WIPO IGC are perennially contentious—and not only on questions of definition. Often, the debates appear to represent a clash of opposing worldviews. Some countries see TK and TCEs as valuable, owned information for which permissions to use must be obtained, largely irrespective of the age or public availability of the resource.[78] Other countries take the position that such publicly available information is in the public domain and therefore available as prior art, but otherwise free for use without compensation.[79]

While these conflicts are important, they are not germane to our proposal, which only concerns 'information' held by a traditional community and kept private, confidential, or secret.[80] This will overlap partially, but not completely, with knowledge, processes, and practices that the community considers *sacred*,[81] but to the extent that a traditional community has sacred knowledge, processes, and practices that are widely known outside the community, our idea does not encompass that non-secret 'information.'

We now turn to the contours of trade secret law to assess whether and how its protections can be mapped onto secret traditional cultural resources.

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78. *See, e.g.*, 2024 WIPO TK Draft Articles, *supra* note 14; WIPO TCE Draft Articles, *supra* note 14. Most non-demandeur countries support alternative 1 of art. 5 on the scope of protection, which largely leaves the determination of protection to national law, in conjunction with alternative 2 of art. 9.7 on exceptions and limitations, which states, "National Authorities shall exclude from protection traditional knowledge that is already available without restriction to the general public." *Id.* art. 9.7. Many demandeur countries seeking protection for all categories of traditional knowledge tend to favor alternative 2 of art. 5, which lays out a tiered approach, in conjunction with alternative 1 of art. 9, which uses a modified three-step test to constrain exceptions and limitations to traditional knowledge protection. *See* Chidi Oguamanam, *Tiered or Differentiated Approach to Traditional Knowledge and Traditional Cultural Expressions: The Evolution of a Concept*, *in* Center for International Governance Innovation August 2018, at 4–15, (Paper No. 185, 2018) (describing the tiered approach), https://www.cigionline.org/publications/tiered-or-differentiated-approach-traditional-knowledge-and-traditional-cultural [https://perma.cc/K3J5-ND9C].

79. *See, e.g.*, Oguamanam, *supra* note 78, at 4–15.

80. Of course, our proposal does concern cultural resources that meet the requirements for trade secret protection but are then made public through misappropriation, without the resource holder's consent. However, our proposal would see remedies for such actions provided under the relevant trade secret law of the jurisdiction.

81. This too is a contested concept. The WIPO Draft TK Articles provide a proposed definition for "sacred" TK: "Sacred traditional knowledge is traditional knowledge that in spite of being secret, narrowly diffused, or widely diffused, constitutes part of the spiritual identity of the beneficiaries." Secretariat WIPO IGC, Forty-Ninth Session, *The Protection of Traditional Knowledge: Draft Articles*, at Annex, 5, WIPO Doc. WIPO/GRTKF/IC/49/4 (Oct. 4, 2024).

II. Trade Secrecy Law Internationally and Nationally

Rooted in principles of unfair competition, trade secret law is both relatively newer and less developed than patent, copyright, and trademark law.[82] Of the big five areas of IP, trade secret law is the least harmonized. For example, TRIPS devotes six articles to copyrights (which explicitly incorporate provisions from the Berne Convention), seven to trademarks (ten, if one includes provisions on geographical indications, which some countries address under trademark law), eight to patents, and two to industrial designs. Just one article, Article 39, addresses trade secrets.[83] Moreover, all these other areas of IP have WIPO-administered treaties that further harmonize international legal norms,[84] but there is no such multilateral agreement for trade secrets.

Article 39 itself does not explicitly refer to trade secrets, describing its subject matter as "undisclosed information" and unfair competition.[85] As such, many countries appear to comply with their TRIPS Article 39 obligations without having distinct trade secret regimes, providing protection instead under a patchwork of varying laws dealing with "breach of confidence," "undisclosed information," "confidential information," and other similar subject matter.[86]

The following provides an overview of international provisions addressing trade secret protection, followed by descriptions of approaches in selected jurisdictions. While a comprehensive survey of national trade secret laws is beyond the scope of this Article, the descriptions of national regimes below should convey some common approaches to trade secret protection that we see across the globe.

A. International Standards

The Paris Convention for the Protection of Industrial Property of 1883 is the oldest multilateral IP treaty.[87] As the multilateral intellectual property system

82. Various commentators have observed that trade secret law is younger, has less acuity, and is less harmonized than patent or copyright law. Lateef Mtima, *The Idea Exclusions in Intellectual Property Law*, 28 Tex. Intell. Prop. L.J. 343, 344 (2020); Deepa Varadarajan, *Trade Secret Precautions, Possession, and Notice*, 68 Hastings L.J. 357, 363 (2017); James Kwangho Jang, *Extraterritoriality of State Trade Secret Law,* 96 J. Pat. & Trademark Off. Soc'y 409, 419, 424 (2014).

83. *See generally* Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 25, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]. As amended on January 23, 2017, TRIPS added one article to the patent section, Article 31bis.

84. *See WIPO-Administered Treaties*, WIPO, https://www.wipo.int/treaties/en/ [https://perma.cc/Q67W-FG58].

85. TRIPS Agreement, *supra* note 83, art. 39.

86. *See* discussion *infra* Part II.A.

87. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, *revised at* the Stockholm Revision Conference, July 14, 1967, 24 U.S.T. 2140, 828 U.N.T.S. 305, *amended* Sept. 28, 1979 [hereinafter Paris Convention].

began, the first iteration of the Paris Convention did not have any provisions that could reasonably be interpreted as bearing upon trade secrets, but the question of "unfair competition" between commercial actors became a topic of discussion in subsequent revisions of the Convention.

The first Paris Convention provision on "unfair competition" was added in the 1900 Brussels revision as Article 10*bis*, but it only required national treatment in respect of unfair competition provisions in national law without requiring such provisions to be enacted.[88] The 1911 Washington revision of the Paris Convention converted Article 10*bis* into an obligation to provide effective protection against unfair competition,[89] and subsequent revision conferences (1925 The Hague, 1934 London, 1958 Lisbon) elaborated on that obligation, adding specific examples to the article.[90] In all those deliberations, the focus was on commercial communications that could deceive the consumer, and the present form of Article 10*bis* reflects this:

> (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
> (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
> (3) The following in particular shall be prohibited:
> (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
> (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
> (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.[91]

Decades after Article 10*bis* took its final form, the General Agreement on Tariffs and Trade ("GATT") Uruguay Round negotiators drafting the TRIPS provisions, "reimagined" the breadth of "unfair competition" in Article 10*bis* to include the protection of confidential information. Captioned "protection of undisclosed information," Article 39 of the 1994 TRIPS Agreement provides as follows:

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88. Acte de Bruxelles [Brussels Act], Dec. 14, 1900, WIPO Lex No. TRT/PARIS/007, https://www.wipo.int/wipolex/en/text/287735 [https://perma.cc/PC6S-3KBH]; Martin Senftleben, *Article 10bis of the Paris Convention as the common denominator for protection against unfair competition in national and regional contexts*, 19 J. Intell. Prop. L. & Practice 81, 82 n.4 (2024).

89. Acte de Washington [Washington Act], June 2, 1911, WIPO Lex No. TRT/PARIS/006, https://www.wipo.int/wipolex/en/text/287796 [https://perma.cc/SY84-AEKT].

90. Senftleben, *supra* note 88, at 82.

91. Paris Convention, *supra* note 87, at art. 10*bis*.

> 1. In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.
> 2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:
>   (a) 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) has commercial value because it is secret; and
>   (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.[92]

Paragraph 3 of Article 10*bis* relates to the submission of undisclosed test data for marketing pharmaceuticals and agricultural chemicals, so it is not directly relevant here. Article 39 also includes an "agreed statement" providing that violation of "honest commercial practices" includes, at a minimum, breach of contract, breach of confidence, and inducement for such breaches.[93]

By tying explicit protection of secret information back to Article 10*bis* of the Paris Convention, TRIPS Article 39 identifies trade secrets protection as a legal norm under the broader umbrella of legal norms against unfair competition.[94] Neither TRIPS Article 39 nor any other part of TRIPS imposes a durational limit on the protection of undisclosed information;[95] this means that trade secret protection, like trademark protection, can continue indefinitely.[96]

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92. TRIPS Agreement, *supra* note 83, at art. 39.

93. *Id*. art. 39 n.10.

94. Senftleben, *supra* note 88, at 88; *see also* Elizabeth A. Rowe & Sharon K. Sandeen, Trade secrecy and international transactions law and practice 29 (2015) (describing how the premise that "the protection of 'undisclosed information' arises under pre-existing principles of unfair competition" was a "crucial compromise" for the inclusion of trade secret protection in TRIPS).

95. TRIPS Agreement, *supra* note 83, at art. 39 (protection "so long" as the requirements are met). Contrast this with the express durational limits in TRIPS for copyright (art. 12, life of the author plus 50 years) and patents (art. 33 "twenty years counted from the filing date"). TRIPS also has a minimum term of protection for industrial designs (art. 16(3)) and integrated circuits (art. 38), indicating that those forms of intellectual property are also expected to be of limited duration.

96. *Id.* art. 18 ("The registration of a trademark shall be renewable indefinitely.").

The TRIPS Agreement was followed in 1996 by WIPO's release of "Model Provisions on Protection Against Unfair Competition"[97] (hereinafter "Model Provisions") to assist countries in implementing their Paris Convention Article 10*bis* and TRIPS Article 39 obligations. While this model law was not a binding international instrument and may or may not be "soft law,"[98] it provides another data point on the development of the international legal norm for the protection of trade secrets. Article 6 of the model law proposes that countries adopt the following in their domestic law:

> Any act or practice, in the course of industrial or commercial activities, that results in the disclosure, acquisition or use by others of secret information without the consent of the person lawfully in control of that information (hereinafter referred to as "the rightful holder") and in a manner contrary to honest commercial practices shall constitute an act of unfair competition.[99]

The Model Provisions give examples of nonconsensual disclosure as including industrial or commercial espionage, breach of contract, breach of confidence, or use of the information knowing it was obtained by one of those methods.[100] The Model Provisions define "secret information" as follows:

> (i) 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;
> (ii) it has commercial value because it is secret; and
> (iii) it has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret.[101]

While some elements of the WIPO Model Provisions are clearly oriented toward commercial and business enterprises, many of the concepts and principles are more general. In fact, while Article *10bis* speaks of "any act of competition" that is unfair, the Model Provisions "apply also in situations where there is no direct competition between the party who commits the act and the party whose interests are affected by the act."[102]

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97. WIPO, Model Provisions on Protection Against Unfair Competition, WIPO Pub. No. 832(E) (1996, *reprinted* 1997) [hereinafter 1996 WIPO Model Provisions].

98. *See, e.g.*, Dinah L. Shelton, *Soft Law*, *in* Handbook of International Law 68, 69 (2008) ("While there is no accepted definition of 'soft law,' it usually refers to any written international instrument, other than a treaty, containing principles, norms, standards, or other statements of expected behavior. Soft law 'expresses a preference and not an obligation that [a] state should act, or should refrain from acting, in a specified manner.' This 'expressed preference' for certain behavior aims to achieve functional cooperation among states to reach international goals.") (citations omitted).

99. 1996 WIPO Model Provisions, *supra* note 97, at 47.

100. *Id.* at 51–55.

101. *Id.* at 57.

102. *Id.* at 10, n.1.06.

Of course, these legal norms have been implemented in varied ways at the national level, as the examples that follow illustrate.

B. *Trade Secrecy Law in the United States*

Until the last quarter of the 20th century, trade secret misappropriation was a common law tort in the United States, but since the 1970s, trade secrecy law has been codified, both at the state and federal levels.[103] As with trademark law, having both state and federal laws may make the topography of modern trade secrecy law in the United States initially look complex. But state trade secrecy laws are largely harmonized by states' adoption of the 1979 Uniform Trade Secrets Act ("UTSA"), a model law created by state law commissioners[104] that displaces any equivalent state common law claims. The only states that have not enacted some version of the UTSA[105] are North Carolina[106] and New York. In New York, trade secrecy claims continue to be governed by common law.[107]

At the federal level, some trade secrecy claims have been subject to criminal prosecution since 1996 under the Economic Espionage Act ("EEA"),[108] but the 2016 Defend Trade Secrets Act ("DTSA") created a standalone civil federal cause of action for trade secret misappropriation.[109] So, here, we will focus on the basics of UTSA and DTSA claims. It is generally agreed that

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103. Sections 757 and 758 of the Restatement of Torts (1939) set forth the basic framework for this tort that was widely adopted by U.S. courts. Restatement (First) Torts §§ 757–58 (Am. L. Inst. 1939).

104. National Conference of Commissioners on Uniform State Laws, Uniform Trade Secrets Act with 1985 Amendments (1986) [hereinafter UTSA]. *See generally* Sharon Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 Hamline L. Rev. 493 (2010) (describing the development and adoption of the UTSA).

105. Although there is some variation in state implementation of UTSA, it is generally accepted that case law from different states may be used to interpret provisions in any one state's UTSA implementation, especially when the issue has not been addressed before by that state's courts. *See, e.g.*, Ajaxo Inc. v. E*Trade Fin. Corp., 115 Cal. Rptr. 3d 168, 176–77, n.6 (Cal. Ct. App. 2010).

106. Nonetheless, North Carolina law is similar to the UTSA. *Compare* UTSA, *supra* note 104, *with* N.C. Gen. Stat. § 66-152 (2025).

107. *See* Lawrence Goodwin & Stacy Grossman, *Trade Secrets*, N.Y.C. Bar Ass'n (Dec. 2018), https://www.nycbar.org/get-legal-help/article/intellectual-property/trade-secrets/ [https://perma.cc/76TS-EC79] ("New York State does not have any statutes covering trade secrets and is one of only two states that have not adopted the Uniform Trade Secrets Act. Instead, all trade secret protection in New York comes from the common law.").

108. Economic Espionage Act of 1996, Pub. L. No. 104-294, § 101, 110 Stat. 3488, 3488–91 (codified as amended at 18 U.S.C. §§ 1831–1839).

109. Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, §§ 2(a), (b)(3), 130 Stat. 376, 376, 379–81 (2016) (codified as amended at 18 U.S.C. § 1836(b)(3)).

there is a substantial overlap between state and federal standards for trade secrecy protection.[110]

1. A Trade Secret

The DTSA defines a trade secret as any type of "financial, business, scientific, technical, economic, or engineering information,"[111] including formulas, designs, methods, techniques, and processes, "whether tangible or intangible,"[112] if two conditions are met:

> (A) the owner there of has taken reasonable measures to keep such information secret; and
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.[113]

The UTSA has these same two conditions.[114] However, the UTSA applies to any information; it is not limited to the specific types delineated in the DTSA.[115]

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110. InteliClear v. ETC Glob. Holdings, 978 F.3d 653, 657 (9th Cir. 2020) (finding that the elements of federal and state law trade secret claims are "substantially similar"); Free Country Ltd. v. Drennen, 235 F.Supp.3d 559, 565 (S.D.N.Y. 2016) ("The requirements for showing a misappropriation of a trade secret are similar under state and federal law."); ASC Engineered Sols. v. Island Indus., 2021 WL 2583555 at *3 (W.D. Tenn. 2021) (single analysis of misappropriation claims possible under UTSA and DTSA because they are "largely the same"); Oklahoma Land Holdings v. BMR II, 2020 WL 4284806 at *12 (W.D. Okla. 2020) (same determination).

111. 18 U.S.C. § 1839(3).

112. *Id.* The definition also provides that information is included "whether or how stored, compiled, or memorialized," that is, it could just be information known to employees and not actually fixed in any recordkeeping or information storage device (other than the human brain). *Id.*

113. *Id.*

114. The UTSA's economic value condition uses the same wording as the DTSA but further requires that the information "is subject to efforts that are reasonable under the circumstances to maintain its secrecy." UTSA, *supra* note 104, at 5 § 1(4). A trade secret can consist of a particular combination of components each of which, by itself, is widely known or considered to be in the public domain. Hertz v. Luzenac Grp., 576 F.3d 1103, 1108 (10th Cir. 2009).

115. UTSA, *supra* note 104, at 5 § 1(4) ("'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process."). In 51 U.S. jurisdictions that have adopted the UTSA (48 states, DC, Puerto Rico, and the Virgin Islands), this definition replaces "the widely relied-upon definition of a trade secret found at Restatement of Torts s 757, comment b (1939)," Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 474 (1974). A "trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers." *Id.* at 474–75; *see also* Sharon K. Sandeen & Christopher B. Seaman, *Toward a Federal Jurisprudence of Trade Secret Law*, 32 Berkeley Tech. L.J. 829, 905 (2017).

Importantly, under both the UTSA and DTSA, the information need only have "potential" economic value; it does not have to be commercially exploited by the holder of the secret.[116] For example, information about a new product design that is being kept "on the shelf" until the company is ready to put it on the market would have potential, not actual, economic value for the company maintaining that information as a trade secret.[117] Likewise, secret TK held by an IPLC group regarding a medicinal plant that could have value to a pharmaceutical company could also be considered to have potential economic value.

Also, under both the UTSA and DTSA, efforts to maintain the secrecy of the information need only be "reasonable under the circumstances"; "extreme and unduly expensive procedures . . . to protect trade secrets" are not required, and "controlled disclosure to employees and licensees is consistent with the requirement of relative secrecy."[118] The types of measures that count as reasonable are well-known and familiar: physical security of company facilities, security of computer networks, requiring employees to agree to nondisclosure or confidentiality agreements, and restricting the information to specific individuals on "need-to-know" criteria.[119] Courts have found that even partial application of such measures may be enough to establish a trade secret.[120]

2. Misappropriation of that Secret

Generally speaking, misappropriation of a trade secret occurs through either knowing improper acquisition of the trade secret, knowing disclosure of the trade secret, or knowing use of the trade secret.[121] Consistent with the Paris

116. UTSA, *supra* note 104, at 5 §1(4)(i); 18 U.S.C. § 1839(3)(B).

117. *See* James Pooley, Trade Secrets: How to Protect Your Ideas and Assets 63–64 (1982).

118. UTSA, *supra* note 104, at 7 § 1 cmt.

119. Christopher T. Zirpoli, Cong. Rsch. Serv., IF12315, An Introduction to Trade Secrets Law in the United States (2023); *see also* U.S. Trinity Defense v. DTV Arms, 2023 WL 3681686 (E.D. Tex. 2023) at *2 (employees required to sign non-disclosure agreements and company "intentionally keeps the number of people with knowledge small"); Morlife Inc. v. Perry, 56 Cal. App. 4th 1514 (Cal. Ct. App. 1997) (indicating that for customer information stored on computers with restricted access, employees may be subject to confidentiality provisions).

120. Siegel v. Arter & Hadden, 85 Ohio St.3d 171, 707 N.E.2d 853 (Ohio 1999) (customer list was a trade secret because the employer maintained the list on a password-protected computer, kept copies of the customer list in a filing cabinet that was sometimes locked, and "probably" told employees that its customer list was confidential).

121. Camick v. Holladay, 758 F. App'x 640, 645 (10th Cir. 2018); Motorola Sols. v. Hytera Commun., 436 F. Supp. 3d 1150, 1163 (N.D. Ill. 2020), aff'd, No. 22-2370, 2024 WL 3268954 (7th Cir. July 2, 2024).

Convention and TRIPS, this protection against misappropriation has no durational limits.[122]

Under both the UTSA and DTSA, "improper means" of acquiring a trade secret include, but are not limited to, "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means."[123] Misappropriation also includes second-order "acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means."[124] It also includes disclosure or use of a trade secret knowingly received by someone who acquired the trade secret by improper means.[125]

The person spying on a company meeting or hacking a company's confidential systems is assumed to "know" they are engaged in improper means in relation to trade secret information; the same goes for a person who is willfully violating their nondisclosure or confidentiality agreement.[126] But a person *using* a trade secret may not know the information is a trade secret or that the information was gained by improper means. Thus, liability for disclosure or use of a trade secret commonly includes an express knowledge requirement (which also applies to the illicit acquisition), that is, "the individual acquiring, using, or disclosing the trade secret knew or should have known the trade secret was acquired by improper means."[127] Misappropriation further includes misuse of information acquired through a confidential relationship, such as breach of a confidentiality agreement, as well as misuse by someone who accessed the information through the person with the confidentiality obligation.[128]

3. Harm

In addition to these elements, state courts enforcing their respective versions of the UTSA have sometimes expressed a distinct harm element, that is, the "use of the secret to Plaintiff's detriment."[129] The Restatement (Third) of Unfair Competition summarizes this idea nicely:

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122. *See* Restatement (First) Torts § 757 (Am. L. Inst. 1939) (trade secret protection "is not limited to a fixed number of years"); Nova Chemicals, Inc. v. Sekisui Plastics Co., Ltd., 579 F.3d 319, 327 (3d Cir. 2009) ("[T]rade secret protections are theoretically unlimited in duration, lasting as long as the information remains a trade secret.").

123. 18 U.S.C. § 1839(6); UTSA, *supra* note 104, § 1(1).

124. 18 U.S.C. § 1839(5)(A); UTSA, *supra* note 104, § 1(2).

125. 18 U.S.C. § 1839(5)(B); UTSA, *supra* note 104, § 1(2).

126. 18 U.S.C. § 1839(6)(A); UTSA, *supra* note 104, § 1(1); *see also* UTSA, *supra* note 104, § 1 cmt.

127. Balfour Beatty Infrastructure v. Am Track Generations, 533 F. Supp. 3d 1030, 1035 (D. Wyo. 2020).

128. 18 U.S.C. § 1839(5)(B)(iii); UTSA, *supra* note 104, § 1(2).

129. Oklahoma Land Holdings v. BMR II, 2020 WL 4284806 (W.D. Okla. 2020) (applying Oklahoma UTSA); MTG Guarnieri Mfg. v. Clouatre, 239 P.3d 202, 209 (Okla. 2010).

> There are no technical limitations on the nature of the conduct that constitutes 'use' of a trade secret for purposes of the rules stated in Subsection (b). As a general matter, any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a 'use' under this Section.[130]

Harm is not an actual element of trade secret liability.[131] Nonetheless, the idea that "use" constituting "misappropriation" includes any use that "results in injury to the trade secret owner" has resonance with the protection of Indigenous peoples' secret traditional cultural expressions and secret traditional knowledge.[132]

4. Relief

Both the UTSA and DTSA provide for damages which can be measured by the plaintiff's "actual loss,"[133] the defendant's "unjust enrichment,"[134] or, alternatively, a reasonable royalty.[135] When a trade secret was "willfully and maliciously misappropriated," the DTSA also allows for "exemplary damages" cued to the damages awarded for the plaintiff's actual loss, the defendant's unjust enrichment, or both.[136]

Both the UTSA and DTSA provide for injunctive relief "to prevent any actual or threatened misappropriation."[137] Both also provide that such injunctions can order affirmative acts to protect a trade secret.[138]

The Comments to the UTSA provide that such ordered affirmative acts can include "the return of stolen blueprints or the surrender of surreptitious photographs or recordings."[139] In a similar vein, the DTSA provides for extraordinary relief in the seizure orders against "property necessary to prevent the

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130. Restatement (Third) Unfair Competition § 40, cmt. (c) (1995) (Appropriation of Trade Secrets).

131. Because even threatened misappropriation can be enjoined. 18 U.S.C. § 1836(b)(3)(A)(i).

132. Motorola Solutions v. Hytera Communications, Case No. 22-2370 & 22-2413 (7th Cir., 2 July 2024) at *33; Motorola Solutions v. Hytera Communications, 436 F. Supp. 3d 1150, 1164 (N.D. Ill. 2020).

133. 18 U.S.C. § 1836(b)(3)(B)(i)(I) (for DTSA).

134. 18 U.S.C. § 1836(b)(3)(B)(i)(II) (for DTSA). In state implementations of UTSA, these might be combined, as in New Mexico's trade secret damage provision allowing for the award of "actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss." N.M. Stat. Ann. § 57-3A-4 (2025).

135. 18 U.S.C. § 1836(b)(3)(B)(ii) (for DTSA); 18 U.S.C. § 1836(b)(3)(A)(ii) (for DTSA).

136. 18 U.S.C. § 1836(b)(3)(C) (for DTSA).

137. UTSA, *supra* note 104, at 7 § 2(a) ("Actual or threatened misappropriation may be enjoined."); 18 U.S.C. § 1836(b)(3)(A)(i).

138. UTSA, *supra* note 104, at 7 § 2(c) ("In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order."); 18 U.S.C. § 1836(b)(3)(A)(iii) (permissible to have injunction "requiring affirmative actions to be taken to protect the trade secret").

139. UTSA, *supra* note 104, at 9 § 2 cmt.

propagation or dissemination of the trade secret that is the subject of the action."[140] Such orders can be granted in an ex parte hearing but require a showing that "an immediate and irreparable injury will occur if such seizure is not ordered."[141]

Finally, the DTSA has been interpreted by courts to apply extraterritorially, that is, the plaintiff can seek relief for *global* misappropriation of their trade secret as long as "an act in furtherance of the offense was committed in the United States."[142]

C. Trade Secrecy Law in the European Union

Until 2016, member states of the European Union ("EU") were only required to have national laws meeting the requirements of the TRIPS Agreement.[143] Not all EU member states had statutory definitions of a trade secret or what constituted misappropriation; remedies varied even more from country to country.[144] Substantial harmonization of trade secrecy law in EU countries began with the "Directive on the protection of undisclosed know-how and business information (trade secrets)."[145] Promulgated in 2016, the same year as the DTSA,

140. 18 U.S.C. § 1836(b)(2)(A)(i).

141. 18 U.S.C. § 1836(b)(2)(A)(ii)(II).

142. 18 U.S.C. § 1837 ("This chapter also applies to conduct occurring outside the United States if . . . an act in furtherance of the offense was committed in the United States."). Motorola Solutions v. Hytera Communications, Case No. 22-2370 & 22-2413 (7th Cir., 2 July 2024).

143. Anand B. Patel et al., *The Global Harmonization of Trade Secret Law: The Convergence of Protections for Trade Secret Information in the United States and European Union*, 83 DEF. COUNS. J. 472, 475–76 (2016).

144. *See* Edouard Fortunet & Sabine Rigaud, *Heading for a Harmonization of the European Legislation on the Protection of Trade Secrets*, JONES DAY COMMENTARY, at 2 (Jan. 2014), https://www.jonesday.com/-/media/files/publications/2014/01/heading-for-a-harmonization-of-the-european-legisl/files/heading-for-a-harmonization/fileattachment/heading-for-a-harmonization.pdf [https://perma.cc/7GXN-CF3Z] ("Only Sweden has an Act wholly directed to trade secrets misappropriation … other Member States merely rely on general provisions not specifically designed to punish trade secrets violations (unfair competition law, contractual law, tort law, etc."); *see also* Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure, at § 2.5, COM (2013) 813 final, COD 2013/0402, INT/725 (Mar. 25, 2014) ("In the absence of a uniform understanding of trade secrets in the EU, their legal protection is fragmented across the different legal systems of the Member States"), https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/trade-secrets [https://perma.cc/9YCL-RM3H].

145. 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, art. 2(2), 2016 O.J. (L 157) 9 [hereinafter Trade Secrets Directive].

the two laws are similar in their concepts and coverage.[146] The EU Trade Secrets Directive requires each EU country to amend its national law to comply with basic, harmonized requirements for trade secrecy protection.[147]

1. *A trade secret*

Article 2 of the directive defines a protectable trade secret as information with three characteristics:

> (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;[148]

The directive's recitals make clear that "such know-how or information should have a commercial value, whether actual or potential."[149]

2. *Misappropriation of that Secret*

Like U.S. law, the directive targets "unlawful acquisition, use or disclosure" of a trade secret.[150] Unlawful acquisition is described as "unauthorised access to, appropriation of, or copying" of anything "containing the trade secret or from which the trade secret can be deduced," as well as any other conduct considered contrary to "honest commercial practices."[151]

As to disclosure or use, the Trade Secrets Directive has a similar scope as the DTSA but organizes unlawful use or disclosure by the actors involved. Use or disclosure of a trade secret is unlawful when it is done by a person who acquired the trade secret unlawfully or who is acting in breach of a confidentiality agreement or "any other duty to limit the use of the trade secret."[152] Separately, use or disclosure of the trade secret is unlawful when done by a person who "knew or

146. Medimpact Healthcare Sys. v. IQVIA Holdings, No. 19CV1865-GPC(DEB), 2022 WL 718551, at *8 (S.D. Cal. Mar. 10, 2022) ("The DTSA and EU Directive have similar definitions of what constitutes a trade secret and what constitutes misappropriation."); *see also* Sharon Sandeen & Ulla-Maija Mylly, *Trade Secrets and the Right to Information: A Comparative Analysis of E.U. and U.S. Approaches to Freedom of Expression and Whistleblowing*, 21 N.C.J.L. & Tech., 1, 7 (2020).

147. Trade Secrets Directive, *supra* note 145, at art. 19(1) (providing that EU Member States would bring their laws, regulations, and administrative provisions into compliance with the Directive by June 9, 2018).

148. *Id*. art. 2(1).

149. *Id*. at Recital 14.

150. *Id.* art. 4(1).

151. *Id.* art. 4(2).

152. *Id*. art. 4(3).

ought, under the circumstances, to have known that the trade secret had been obtained . . . unlawfully."[153]

3. Relief

The Trade Secrets Directive provides that national courts shall have the power to grant preliminary injunctions to stop "the use or disclosure of the trade secret on a provisional basis"[154] as well as permanent injunctions to bar the use or disclosure of the trade secret,[155] to recall and destroy goods that infringe upon the trade secret, and to destroy "all or part of any document, object, material, substance or electronic file containing or embodying the trade secret."[156]

Under the directive, a court can order a defendant "to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret."[157] Like the DTSA, the directive provides that these damage calculations shall include the trade holder's lost profits and any "unfair profits made by the infringer,"[158] but unlike its American law counterpart, the directive intriguingly provides that damages shall include "in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret."[159]

Finally, the Trade Secrets Directive provides detailed requirements to "maintain the confidentiality of trade secrets in the course of legal proceedings;" the UTSA and DTSA contain corresponding protections.[160] In the case of the Directive, these provisions, which could be very important to holders of secret traditional culture, presumably exist in the Directive because not all EU member states' judicial systems had established rules for closed hearings or sealing and redacting records.

D. Trade Secrecy Law on the African Continent

With fifty-four U.N.-recognized countries and no binding, continent-wide harmonized legislation, African approaches to trade secrecy protection are as varied as the day is long. Nevertheless, as the home of many holders of traditional cultural resources and of two large regional IP rights-granting entities (one Anglophone, one Francophone), African approaches to trade secrecy protection merit a closer look. The African Regional Intellectual Property

153. *Id.* art. 4(4).
154. *Id.* art. 10.
155. *Id.* art. 12.
156. *Id.* art. 12(1)(d).
157. *Id.* art. 14(1).
158. *Id.* art. 14(2).
159. *Id.*
160. *Id.* art. 9. For the DTSA, see 18 U.S.C. § 1835; UTSA, *supra* note 104, § 5.

Organization ("ARIPO") provides a variety of IP examination and grant services for twenty-two anglophone African countries.[161] On May 11, 2015, the ARIPO Swakopmund Protocol (hereinafter "the Protocol") entered into force.[162] It provides holders of TK and TCEs with certain rights and protections in relation to their traditional cultural resources. For example, the Protocol requires ARIPO members to, among other things, ensure proper acknowledgment and source identification of cultural resource holders[163] and to enable such holders to prevent the acquisition of IP rights over those resources and adaptations thereof.[164]

Because the Protocol applies to all TK and TCEs that meet the requirements for protection, even if widely known, its obligations are not limited to secret traditional cultural resources. Nevertheless, Article 19 of the Protocol provides an explicit obligation for the protection of secret expressions of folklore:

> 19.4. Contracting States shall provide adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of intellectual property rights over expressions of folklore that are held secret.[165]

Surprisingly, there is no comparable language relating to TK. But it seems likely, considering that protection of TK is in the name of the agreement, that in implementing the Protocol, countries would choose to also protect secret traditional knowledge.

The African Intellectual Property Organization (*Organisation Africaine de la Propriété Intellectuelle*, "OAPI"), an IP office for seventeen francophone African countries, has no comparable agreement relating to traditional cultural resources or trade secrets. But it does add specific Annexes to its governing instrument, the Bangui Agreement, that provide for the protection of cultural heritage (with no distinction for secret cultural resources) and unfair competition.[166] The unfair competition provision addresses confidential information in

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161. ARIPO, https://www.aripo.org/ [https://perma.cc/V62N-MUFU] (last visited June 16, 2025). English is the or an official language of all 22 ARIPO Member States except for Mozambique and Somalia. *Member States*, ARIPO, https://www.aripo.org/member-states [https://perma.cc/4SJ6-QGCL] (last visited June 16, 2025).

162. Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore, Aug. 9, 2010, *amended* Dec. 6, 2016, WIPO Doc. TRT/AP010/002, https://www.wipo.int/wipolex/en/text/588146 [https://perma.cc/3QM6-HAXT].

163. *Id.* §§ 10, 19.2(a)(ii).

164. *Id.* § 19.2(a)(iv). The Protocol's preamble also provides that the contracting parties "[d]esir[e] to preclude the grant and exercise of improper intellectual property rights in traditional knowledge, associated genetic resources and derivatives thereof, and in expressions of folklore and works and productions derived therefrom." *Id.* at 9.

165. *Id.* § 19.4.

166. Agreement Revising the Bangui Agreement of Mar. 2, 1977, on the Creation of an African Intellectual Property Organization, Feb. 24, 1999, Annex VIII: Protection Against Unfair Competition, https://www.wipo.int/wipolex/en/treaties/details/227 [https://perma.cc/XQ4S-MSW5].

Article 6, with language taken directly from the WIPO Model Provisions on Protection Against Unfair Competition.[167]

E. Trade Secrecy Law in Commonwealth Countries

With the highest GDP on the continent, South Africa, an anglophone country that belongs to neither ARIPO nor OAPI, does not have specific trade secret legislation. But, like other common law jurisdictions, it has developed a body of case law interpreting and applying unfair competition law ("unlawful competition" in South Africa) to trade secrets, which are considered "confidential business or industrial information having particular economic value."[168] South African courts have applied these principles to a typical range of commercial trade secrets, that is, manufacturing techniques and processes, product formulae, databases, price lists, and, interestingly, unpublished trademarks.[169] South Africa has also created a *sui generis* regime for the protection of traditional (also known as Indigenous) knowledge, whether it is public or secret.[170]

Like South Africa, Kenya has *sui generis* protection for traditional cultural resources, whether or not they are secret.[171] Similarly, Kenya's common law protections for confidential information are also applicable to trade secrets.[172] Kenya also protects trade secrets through its Constitution, which in Articles 2(5) and 2(6) recognizes general rules of international law and treaties ratified

167. *Id.* art. 6 (Unfair Competition Concerning Confidential Information) (Prohibits the unauthorized disclosure, acquisition, or use of confidential information in a manner contrary to honest commercial practices.). This includes acts such as industrial espionage, breach of contract or trust, and inducing or knowingly benefiting from these violations. Information qualifies as "confidential" if it is not generally known or easily accessible, has commercial value due to its secrecy, and has been reasonably protected by its lawful holder. Additionally, the dishonest commercial use or unauthorized disclosure of confidential test data required for regulatory approval of pharmaceuticals or agricultural chemicals is also deemed unfair competition unless necessary for public protection or safeguarded against misuse.

168. H Klopper et al., Law of Intellectual Property in South Africa 93 (Durban: LexisNexis 2016).

169. Madelein Kleyn & Joanne van Harmelen, *Trade Secrets—South Africa*, 56 les Nouvelles 137, 137 & n.4 (2021).

170. *See* Protection, Promotion, Development and Management of Indigenous Knowledge Act 6 of 2019 §§ 1, 9–13 (S. Afr.), https://www.wipo.int/wipolex/en/legislation/details/19707 [https://perma.cc/5RS6-JRD8].

171. *See* The Protection of Traditional Knowledge and Cultural Expressions Act, No. 33 (2016), Kenya Gazette Supplement No. 154, *amended by* Statute Law (Miscellaneous Amendments) Act, No. 18 (2018), Kenya Gazette Supplement No. 161.

172. Global Employer Handbook – International (Kenya) (2024); Wetunga Nancy, The Protection of Trade Secrets in Kenya (December 2019) (unpublished manuscript) (on file with the authors).

by Kenya as part of Kenyan law.[173] Thus, formally, Article 39(2) of TRIPS applies directly as a domestic legal rule in Kenya.

Other Commonwealth jurisdictions—Australia, New Zealand, and Canada—are similar to South Africa and Kenya in meeting their TRIPS Article 39(2) obligations through breach of confidence claims.[174] For example, in Australia, it is generally accepted that there are four requirements for a breach of confidence claim:

1. the information in question must be identified with specificity;[175]
2. that information must have the necessary quality of confidence;
3. that information must have been received in circumstances importing an obligation of confidence; and
4. there must be an actual or threatened misuse of the information.[176]

Breach of confidential information in these countries covers a wide array of fact patterns, ranging from private marital facts to government secrets to business information; hence, "trade secrets" are "only a particular subject-matter to which the principles relating to breach of confidence have been applied."[177] This has contributed to Commonwealth jurists declining to label trade secrets as a form of "property."[178] Nonetheless, as Professor Susy Frankel observes, "[o]nce recognised, an obligation of confidence can give rise to many of the obligations that are normally associated with property."[179] This expansive view of eligible subject matter also appears broad enough to encompass breaches of confidence in relation to secret TK and TCEs.

F. Trade Secrecy Law in Other Jurisdictions

We describe a few additional regimes below for an even more fulsome view.

Brazil, China, and South Korea have statutory unfair competition provisions that encompass trade secret protection with varying degrees of complexity. Brazilian law has a dichotomy between misappropriation of confidential

173. Constitution arts. 2(5)–2(6) (2010) (Kenya).

174. Chris Williams, *Protection of Trade Secrets in Australia*, 32 Int'l L. Practicum 11, 11 (2019).

175. *Streetscape Projects (Australia) Pty. Ltd. v City of Sydney* [2013] 295 ALR 760 (Austl.); *American Cyanamid Co. v Alcoa of Australia Ltd.* [1993] 27 IPR 16, 20 (Austl.).

176. *Coco v AN Clark (Engineers) Ltd.* [1969] RPC 41 (Austl.); *Optus Networks Pty. Ltd. v Telstra Corp. Ltd.* [2010] 265 ALR 281, 290 (Austl.).

177. *Ansell Rubber Co. Pty. Ltd. v Allied Rubber Industries Pty. Ltd.* [1967] VicRp 7, [1967] VR 37 (Austl.); *see also Hunt v. A* [2008] 1 NZLR 368 at [90–91] (N.Z.). As Hammond, J. reasoned, "The short point here is that the equitable doctrine is a broad and flexible one, and it would be unwise to constrain it by the narrower concerns of a particular subset of the law. If 'trade secrets' need a more distinct kind of protection, then this could be done by statute." *Id.*

178. LAC Minerals v. International Corona Resources Ltd., [1989] 2 SCR 574 (Can.); Stewart v. R, [1988] 1 SCR 963 (Can.).

179. Susy Frankel, Intellectual Property in New Zealand 11.4.2 (2nd ed. 2011).

information "gained . . . by means of a contractual or employment relationship" and confidential information "obtained by illicit means or when access was gained through fraud."[180]

South Korea defines a protectable trade secret generally,[181] but then seems to condition causes of action on injury to business interests.[182] Like other legal systems, South Korea imposes liability for disclosure of a trade secret only when the party has knowledge of its trade secret status, but unlike other jurisdictions, the statute expressly includes liability for when the disclosing party was "without such knowledge due to gross negligence."[183]

Finally, China protects trade secrets through a patchwork of laws and regulations, including an Anti-Unfair Competition Law, regulations prohibiting infringement of commercial secrets, and provisions of the Supreme People's Court on Several Issues concerning the Application of Law in the Trial of Civil Cases of Trade Secret Infringement.[184]Interestingly, the main form of protection in China for Traditional Chinese Medicine ("TCM") is trade secrecy. TCM "dominates the Chinese pharmaceutical market," with roughly $11 billion in TCM manufacturing in 2022.[185] According to one report, TCM trade secrets often include secret drug formulations, herbal cultivation techniques and processing methods, preparation methods, and more.[186] A government survey of TCM enterprises reportedly found that almost 62 percent relied on trade secret protection.[187] Moreover, confidential information about classic TCM products

180. Lei No. 9.279, de 14 de Maio de 1996, at arts. 195(XI)–195(XII), Diário Oficial da União [D.O.U.] de 15.5.1996 (Braz.) [hereinafter Lei No. 9.279].

181. Bujeonggyeongjaengbangji mit yeongeopbimilbohoe gwanhan beomnyul [Unfair Competition Prevention and Trade Secret Protection Act] art. 2(2) (S. Kor.) [hereinafter Korean Trade Secret Protection Act] ("The term 'trade secret' means information, including a production method, sale method, useful technical or business information for business activities, which is not known publicly, is managed as a secret, and has independent economic value"), https://www.wipo.int/wipolex/en/legislation/details/22266 [https://perma.cc/RWK3-6YNZ].

182. *Id.* art. 10 ("A person who possesses trade secrets, may file a request, with the court, for prohibition or prevention of infringement against any person who infringes or is likely to infringe trade secrets, if business interests of the person who possesses the trade secrets is damaged or is likely to be damaged by such infringement").

183. *Id.* art. 2(3)(c).

184. Nick Beckett, Ulrike Glueck & Panpan Tang, *Trade secret laws and regulations in China*, CMS Expert Guide (May 18, 2022), https://cms.law/en/int/expert-guides/cms-expert-guide-to-trade-secrets/china [https://perma.cc/YQ9S-JBY5].

185. Wenyi Zhang, *Market size of traditional Chinese medicine (TCM) manufacturing in China from 2016 to 2020 with an estimate until 2022*, Statistica (Sept. 20, 2022), https://www.statista.com/statistics/1248945/china-traditional-chinese-medicine-tcm-manufacturing-market-size [https://perma.cc/D9YL-WM3U].

186. Yue Xu & Yumao Wang, *IP Protection of Traditional Knowledge: A Dilemma Faced by the Chinese Traditional Medicine in Global Competition*, *in* Intellectual Property—Global Perspective Advances and Challenges at 10 (Appavoo Umamaheswari & Sakthivel Lakshmana Prabu eds., InTech Open 2023).

187. *Id.*

and processes is registered in a government-maintained database, regarded as "state treasured secrets," and provided with enhanced protections.[188]

However, China has a long history of TCM, and its approach, as just described, is not common in other jurisdictions.

III. How Secret Traditional Culture Can Meet Each Trade Secrecy Requirement

An attorney versed in current trade secrets law, with its focus on commercial activities, might doubt that this law can easily protect secret Indigenous culture and traditional knowledge. We believe, however, that trade secrecy's basic legal *concepts* are broad enough to do this work and that we should not allow customary practices of common law or European legal culture to prevent this sensible and incremental doctrinal expansion. As Thomas More wrote in *Utopia*, "[i]t is certain that all things appear incredible to us in proportion as they differ from known customs."[189] Protecting secret traditional cultural resources using the shield of trade secrecy law would not be incredible; it requires at most only modest tweaks in how we apply customary doctrines. Nonetheless, what we propose is definitely a change in legal thinking.

Evidence of this needed change comes in a 2023 U.S. Government report on "best practices" for federal agencies regarding Native American and Native Hawaiian sacred sites.[190] The report repeatedly cautioned government employees that knowledge and information given to government agencies by Indigenous communities could be subject to disclosure under the U.S. federal government's Freedom of Information Act ("FOIA").[191]

The report elaborated on a series of possible exclusions to FOIA that could be used to protect confidential Indigenous knowledge from disclosure, focusing on when information is "specifically exempted from disclosure by [another] statute."[192] The report concludes that this allows agencies to protect confidential Indigenous knowledge from disclosure under provisions of the National

188. *Id.* at 8.

189. Thomas More, Utopia 95 (1516) (Verso 2016).

190. Bureau of Indian Affairs, Best Practices Guide For Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites (2023) [hereinafter Best Practices], https://www.bia.gov/sites/default/files/media_document/sacred_sites_guide_508_2023-1205.pdf [https://perma.cc/RJQ8-VGKJ].

191. *Id.* at 26 ("When interacting with Tribes and NHOs regarding sacred sites or other sensitive Indigenous Knowledge, federal agencies should always be aware of the requirements of the Freedom of Information Act [FOIA]. The FOIA provides public access to all federal agency records except records that are protected from disclosure by one of the FOIA's enumerated exemptions or exclusions."). The Freedom of Information Act ("FOIA") provisions are at 5 U.S.C. § 552.

192. 5 U.S.C. § 552(b)(3).

Historic Preservation Act, the Archeological Resources Protection Act, the Federal Case Protection Act, etc.[193] But while FOIA expressly permits non-disclosure of matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential,"[194] the inter-agency report does *not* mention this as even a *possible* basis to shield confidential Indigenous knowledge and culture.[195] The group drafting this report—a White House-led inter-agency process with significant input from Indigenous groups—did not view trade secrecy as one of the legal tools available to protect Indigenous knowledge from disclosure.

As another example—from a quite different perspective—when Fikret Berkes, a leading voice on traditional ecological knowledge, writes about "questions of ownership and intellectual property rights," he too makes *no* mention of trade secrecy protection for confidential traditional knowledge.[196]

So, how precisely would trade secret law have to evolve to protect secret TK and TCEs? Not as much as one might think. For example, concepts of the "holder" of a trade secret and trade secret subject matter appear malleable enough to comfortably embrace holders of secret traditional cultural resources.

A. The Holder of the Trade Secret

The development of trade secrecy law coincided with the rise of the modern corporate form and its replacement of guild-based industrial production.[197] While individual persons can have trade secrets, the typical holder of a trade secret is an ongoing business enterprise.[198] That enterprise will typically be a corporation or a partnership with a clear and legally binding management structure. At first blush, this seems quite different from Indigenous and traditional communities.

But the characteristics of TK/TCE holders can be quite similar to commercial entities that own trade secrets. Many jurisdictions have registries of officially recognized and sanctioned Indigenous communities.[199] In the case of

193. Best Practices, *supra* note 190, at 26–27.

194. 5 U.S.C. § 552(b)(4).

195. Best Practices, *supra* note 190, at 27. Instead, the report concludes that "a great deal of sensitive Indigenous Knowledge does not fall within . . . any other FOIA exemption or exclusion," despite FOIA expressly shielding "trade secrets." *Id.*

196. Fikret Berkes, Sacred Ecology 36–38 (3d edition, 2012).

197. *See generally* Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment and the Rise of Corporate Intellectual Property,* 52 Hastings L.J. 441 (2001).

198. Which may, however, be as small as a one-member limited liability company or sole proprietor of a corporation.

199. *See, e.g.*, Ministerio de Justicia Instituto Nacional de Asuntos Indígenas, *Listado de comunidades indígenas—2024*, Datos Argentina (Feb. 26, 2024), https://datos.gob.ar/dataset/justicia-listado-comunidades-indigenas/archivo/justicia_188d8fba-cec1-4ea6-aed1-768a4852b7ea [https://perma.cc/E44A-TXVH] (over 1800 Indigenous communities in Argentina with "personeria juridica registrada" in El Registro Nacional de Comunidades Indígenas); Gobierno de

Native American tribes, the U.S. federal government has approximately 374 binding treaties with individual tribes,[200] and officially recognizes 347 Native American tribes within the lower forty-eight states that are eligible to receive benefits from the U.S. Bureau of Indian Affairs.[201] If a corporation's recognition as a legal person by a *state* government's Secretary of State entitles it to the advantages of trade secrecy law, recognition as a legal *sovereign* by the U.S. federal government should as well.

Moving beyond official recognition, it might be objected that Indigenous communities are typically larger, more amorphous, and have less clearly defined management structures than corporations. But again, many Indigenous communities are as or *more* organized than small and medium-sized enterprises, whether it is the Navajo Nation with an elected president and national council,[202] or the executive leadership of the Ngāi Tahu iwi on the South Island of New Zealand.[203]

Regarding size, many large corporations are bigger than the largest Indigenous communities. In the 2020 census of the United States, 423,000 people identified themselves as members of the Navajo Nation, 130,000 as Apache, and 127,000 as Sioux.[204] The six officially recognized Indigenous communities in Hualien County, Taiwan, range in size from 53,000 members to less than 700 members.[205] By comparison, Walmart and Amazon globally employ 2.1 million and 1.5 million people, respectively.[206] Large manufacturing and supermarket companies have employment figures that dwarf most Indigenous

México Instituto Nacional de los Pueblos Indígenas (INPI), *Consulta Por Pueblo*, Catalogo Nacional de Pueblos y Comunidades Indigenas y Afromexicanas (2024), https://catalogo.inpi.gob.mx/consulta-por-pueblo/ [https://perma.cc/X3WZ-THTE] (over eighty recognized Indigenous communities in Mexico's Catálogo Nacional de Pueblos y Comunidades Indígenas y Afromexicanas); Hualien Indigenous Peoples Department, *Introduction to the Tribes*, Hualien Country Government, https://ab.hl.gov.tw/en-us/Explore/Ethnic_GroupIntro [https://perma.cc/PM9K-WNEJ] (last visited June 16, 2025) (sixteen officially recognized Indigenous tribes in Taiwan).

200. Best Practices, *supra* note 190, at 55.

201. Indian Entities Recognized by and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112 (Jan. 12, 2023), https://www.govinfo.gov/content/pkg/FR-2023-01-12/pdf/2023-00504.pdf [https://perma.cc/ESK6-TYAH].

202. Navajo Nation Council, *About Us & History*, https://www.navajonationcouncil.org/about-us-and-history/ [https://perma.cc/5DWS-5GDZ] (last visited June 16, 2025).

203. Te Rūnanga o Ngāi Tahu, *Senior Executive Leadership*, https://ngaitahu.iwi.nz/te-runanga-o-ngai-tahu/our-people/senior-executive-leadership/ [https://perma.cc/96VV-JGYM] (last visited June 16, 2025).

204. Hualien Indigenous Peoples Department, *supra* note 199.

205. *Id.*

206. CompaniesMarketCap.com, *Leading companies based on number of employees in 2023 (in 1,000s)*, Statista, https://www.statista.com/statistics/264671/top-50-companies-based-on-number-of-employees/ [https://perma.cc/ZR2H-8T28] (last visited June 16, 2025).

communities: Volkswagen (651,000), Kroger's (430,000), Toyota (377,000), Carrefour (347,000), and Tesco (330,000).[207] We see no reason why these legal persons can hold trade secrets—usually maintained by a limited number of persons in a very large employee pool—and the same cannot be true for legal persons who are Indigenous communities.

At the other end of the spectrum, one-person limited liability companies ("LLCs") and other small business forms are not uncommon. They can also avail themselves of trade secret protections even if, in fact, the business is de facto a single person. The point is that trade secrecy law lacks any particular requirements for size or organizational structure and thus poses no barrier to TK holders on that basis.

One interesting aspect of trade secrecy law in relation to secret traditional culture is the question of the trade secret's "owner." For some Indigenous peoples or local communities, recognition of "ownership" might be highly desirable and important. For others, however, the idea of "ownership" might be antithetical to their traditions; Indigenous people might conceptualize their relationship to traditional practice or knowledge as one of *stewardship* or *safeguarding* or simply *identity*, not as a property-owner relationship.[208]

Trade secrecy law is nicely ambiguous in this respect. While courts and commentators commonly refer to the "owner" of a trade secret, that status is not formally required by TRIPS Article 39, the UTSA, the Trade Secrets Directive, or the WIPO Model Provisions. The directive instead uses the concept of the "trade secret holder," defined as "any natural or legal person lawfully controlling a trade secret."[209] While some state implementations of the UTSA refer to a trade secret "owner," the UTSA itself—as well as many other state implementations—do not.[210] Multiple court decisions interpreting these versions of the UTSA have agreed that "ownership" in the strict property sense is not necessary for a party

207. *Id.*

208. *See, e.g.*, Copyright Protection: Culture, YUROK TRIBAL CODE tit. 14 ch. 20 § 010(a) https://yurok.tribal.codes/YTC/14.20.010 [https://perma.cc/97CY-CR7D] ("Nothing in this chapter shall allow for, or advocate, the copyrighting of certain specific symbols and basket designs. The Yurok Tribe holds these designs sacred as gifts from the Creator to the Yurok people.").

209. Trade Secrets Directive, *supra* note 145, at art. 2(2).

210. UTSA, *supra* note 104, § 1. Compare state implementations of UTSA that recognize an "owner" of the trade secret, e.g., COLO. REV. STAT. § 7-74-102(4) (2025), MINN. STAT. ANN. § 325C.01 (2025), and N.J. STAT. § 56:15-2 (2025) with state implementations of UTSA that do not limit claims to "owners," e.g., CAL. CIV. CODE §§ 3426.1, 3426.11 (2024), GA. CODE ANN. § 10-1-761(2)(A) (2025), HAW. REV. STAT. § 482B-2(2)(B)(iii) (2024), MD. CODE ANN., COM. LAW § 11-1201 (2024), and OKLA. STAT. tit. 78, § 86 (2024).

to be the bona fide holder of a trade secret.[211] The WIPO model law also uses the concept of the "rightful holder" of the trade secret.[212]

B. The Subject Matter of Trade Secrecy

First and foremost, the information protected by trade secrets law must be secret, confidential, or "undisclosed." In the wording of the TRIPS Agreement and the WIPO Model Provisions, this describes information that "is not . . . generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question."[213] National laws and models repeatedly use, with some variation, this kind of "not generally known" standard.[214] In the formulation of Australian courts, the information must "have the necessary quality of confidence about it, namely, it

211. Advanced Fluid Sys. v. Huber, Parking Co., 958 F.3d 168, 177–78 (3d Cir. 2020) (Under Pennsylvania UTSA "lawful possession of a trade secret can, under circumstances like this, be sufficient to maintain a misappropriation claim, even absent ownership" because "the relevant language of the Act . . . on its face lacks any ownership requirement."); DTM Research v. AT&T, 245 F.3d 327, 332 (4th Cir. 2001) (interpreting Maryland UTSA) ("one 'owns' a trade secret when one knows of it, as long as it remains a secret"); Gaedeke Holdings VII v. Baker, 683 F. App'x 677, 683–84 (10th Cir. 2017) (similarly interpreting Oklahoma UTSA); U.S. Trinity Defense v. DTV Arms, 2023 WL 3681686 at *6 (E.D. Tex. 2023) (under Tennessee UTSA, "ownership is not required to succeed on a TUTSA claim. Rather, DTV Arms must show only lawful possession"); DaimlerChrysler Servs. v. Summit Nat'l, 2006 WL 1420812, at *8 (E.D. Mich. May 22, 2006) (similarly interpreting Michigan UTSA); Parking Co. v. Rhode Island Airport, No. Civ. A. P.B. 2004-4189, 2005 WL 419827, at *3 (R.I. Super. Ct. Feb. 18, 2005) (Rhode Island UTSA "does not require ownership . . . . [I]t is possession, not ownership or title, which is the relevant inquiry . . . .").

212. 1996 WIPO Model Provisions, *supra* note 97, at 46, n.6.03 ("The 'rightful holder' of secret information means the natural or legal person who is lawfully in control of the information (see Article 39.2 of the TRIPS Agreement).").

213. TRIPS Agreement, *supra* note 83, at art. 39(2)(a); 1996 WIPO Model Provisions, *supra* note 97, at art. 6(3)(i).

214. In the United States, the DTSA requires the information must have value "from not being generally known to, and not being readily ascertainable through proper means by" other persons. 18 U.S.C. § 1839(3). Meanwhile, the UTSA captures this idea by connecting the information's value to its lack of widespread distribution; the information "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons." UTSA, *supra* note 104, § 1(4)(i). Canada's Uniform Trade Secrets Act requires that the information "is not generally known in that trade or business." Uniform Law Conference of Canada, Uniform Trade Secrets Act, arts. 1(1)(b), 41.1-1 (1989), https://ulcc-chlc.ca/ULCC/media/EN-Uniform-Acts/Uniform-Trade-Secrets-Act_1.pdf [https://perma.cc/B3UQ-JXK4]; *see also, e.g.*, Code de commerce [C. Com] [Commercial Code] art. L151-1 (Fr.) ("Elle n'est pas, en elle-même ou dans la configuration et l'assemblage exacts de ses éléments, généralement connue ou aisément accessible pour les personnes familières de ce type d'informations en raison de leur secteur d'activité."); Cândida Caffé, Mariana Abenza & Rodrigo Torres, *Trade Secrets—Brazil*, 56 les Nouvelles 93, 95 (2021) (protectable information "shall not be of general knowledge or of easy access").

must not be something which is public property or public knowledge,"[215] while Japanese law says that a trade secret is information "that is kept secret, and is not publicly known."[216] Older American cases frequently framed this as a question of "the extent to which the information is known outside the business."[217] This is both a general determination about the information in the world at large and, as discussed below, a reflection on the steps the plaintiff has taken to ensure that the information did not become "public property or public knowledge."[218] Of course, being limited to *secret* traditional knowledge and traditional cultural expressions, our proposal meets this general characteristic of protectable confidential information. Several other aspects of the subject matter of trade secrets law merit attention in considering how slight modifications to this familiar law can ensure coverage for secret traditional cultural resources.

1. Easy Fit Between Trade Secrecy Law and Secret TK and TCE

The extent to which the information is "public" (or known outside the entity claiming the trade secret)[219] is, of course, a relative and contextual question.[220] For example, imparting confidential information to licensees or prospective business partners under express or implied conditions of confidentiality will not rob the information of its trade secret status.[221] This would be analogous to Indigenous communities sharing secret TK or TCEs under express or implied

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215. *O'Brien v Komesaroff* [1982] 150 CLR 310, 326–8 (Austl.); *Johns v Australian Securities Commission* [1993] 178 CLR 408, 460–461 (Austl.); Saltman Engineering Co. v. Campbell Engineering Co. [1948] 65 RPC 203, 215 (UK).

216. Fusei kyōsō bōshihō [Unfair Competition Prevention Act], Act No. 47 of 1993, art. 2(6) (Japan) [hereinafter Unfair Competition Prevention Act], https://www.japaneselawtranslation.go.jp/en/laws/view/3629 [https://perma.cc/V7KR-7PRS].

217. Restatement (First) Torts § 757 (Am. L. Inst. 1939) ("[T]he extent to which the information is known outside of his business."); Gates Rubber Co. v. Bando Chem. Industries, 9 F.3d 823, 848 (10th Cir. 1993) ("[T]he extent to which the information is known outside the business."); Speedry Chem. Products v. Carter's Ink Co., 306 F.2d 328, 331 (2d Cir. 1962) (same); Pressure Sci. v. Kramer, 413 F. Supp. 618, 626 (D. Conn. 1976) (same), *aff'd*, 551 F.2d 301 (2d Cir. 1976).

218. *See infra* Part III.D.

219. This formulation is used repeatedly in Anglo-American trade secrecy and breach of confidence case law. *See, e.g.*, Great Am. Opportunities v. Kent, 352 F. Supp. 3d 1126, 1134–35 (D. Colo. 2018).

220. *See, e.g.*, *Australian Medic-Care Co. Ltd. v Hamilton Pharmaceutical Pty. Ltd.* [2009] 261 ALR 501, 639 (Austl.) ("relative secrecy").

221. The importance of licensing trade secrets was discussed at length by the U.S. Supreme Court in Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 486–87 (1974). *See also* The Uniform Trade Secrets Act—Elements of proof, 3 Trade Secrets Law § 65:2 ("Absolute secrecy is not required. Also, a trade secret does not lose its protection under the Act by its disclosure to a licensee or employee, or to others provided that the disclosure is made with express or implied obligation of confidence."); Bondpro Corp. v. Siemens Power Generation, Inc., 463 F.3d 702, 704, 708 (7th Cir. 2006) (holding that plaintiff, which had confidentiality agreements with employers, customers, suppliers and a prospective licensee,

conditions of confidentiality with academic researchers or government officials (who can support the Indigenous community's activities, such as by closing public lands for sacred ceremonies).

Trade secrecy jurisprudence additionally requires that the claimed confidential information be sufficiently specific, that is, it must be described with "sufficient particularity."[222] This is a practical requirement both as to determining breach of any duty and as to the relief that should be granted. Some TK and TCEs may have difficulty meeting this requirement. For example, it might be difficult to adequately mark the parameters of an Indigenous group's complex and nuanced knowledge of local weather patterns.[223] But this may not be any harder for some IPLCs than it is for some companies. On the other hand, complex, undocumented TK may—like undocumented corporate know-how— be quite specific and subject to delineation, as with knowledge of local fish species and their annual development in relation to climatic conditions.[224]

On this count, we think that a jurisdiction's standards for the specificity required in trade secrecy or breach of confidence actions can be applied to most secret TK and TCEs. Secret ceremonies, dances, medicinal treatments, ancestral information, artistic patterns, and membership and leadership rosters—all of these can be just as specific as standard examples of trade secret information (for example, formulae, industrial processes, or client lists).

Another generally accepted aspect of trade secrecy law is that if various components of a complex trade secret are publicly known, such as particular steps in an industrial process or the ingredients in a formula, that need not prevent the plaintiff's particular assemblage and variation of those steps from being a trade

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did not destroy its trade secret merely by disclosing it to the prospective licensee) (applying Wisconsin UTSA).

222. Imax Corp. v. Cinema Techs., 152 F.3d 1161, 1164–65 (9th Cir. 1998) (plaintiff "should describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons . . . skilled in the trade"); *Streetscape Projects (Australia) Pty. Ltd. v City of Sydney* [2013] NSWCA 2 ¶ 159 (Austl.) ("The need for specificity in the identification of the information said to be confidential in respect of which relief is sought comes from the fact that the court must make an assessment of the quality of that information, that is, whether it is in truth of a confidential nature . . . . Precise delineation of the subject matter is accordingly essential.").

223. *See generally* Fikret Berkes, Sacred ecology (4th ed. 2017).

224. Mercedes McLean, et al., *Connecting Conservation & Culture: The Importance of Indigenous Knowledge in Conservation Decision-Making and Resource Management of Migratory Marine Species*, 155 Marine Policy, no. 105582 (2023); P. Sahadevan, *Indigenous Technical Knowledge of the Fisher Folk of Kerala (South India)*, 4 Int. J. Fisheries & Aquatic Stud. 334 (2016); *see also* U.S. Fish & Wildlife Service, Traditional Ecological Knowledge for Application by Service Scientists 2 (2011), https://www.fws.gov/sites/default/files/documents/TEK-Fact-Sheet.pdf [https://perma.cc/3GEX-NGUT] ("In Alaska, the Service, as well as the State of Alaska … collect and use TEK for research and monitoring fish populations under the Federal Subsistence Management Program.").

secret.[225] This principle of trade secrecy law may be helpful where some specific secret TK or TCEs shares elements or features with the TK or TCEs of other Indigenous groups or local communities. Indeed, one of the examples given by two commentators on German trade secrecy law fits TK and TCEs quite well: A trade secret is possible where "the individual ingredients of a secret spice rub are known but the mixing ratio of the individual spices is not."[226] In these ways, we believe that protection of secret TK and TCEs under trade secrecy regimes would require only a very modest 'reimagining' of existing law.

2. Where Trade Secrecy Law May Need Modification

While *all* trade secrecy law has traditionally been focused on commercial activities, some jurisdictions *define* protectable confidential information in terms of "commerce" or "business." The French implementation of the EU directive expressly describes its subject matter as "business secrets."[227] Similarly, Japanese law defines a trade secret as "technical or business information useful for business activities, such as manufacturing or marketing methods;"[228] Chinese law defines a trade secret as "commercial information";[229] and Brazil offers its form of trade secrecy protection to "confidential knowledge, information or data that could be used in industry, commerce or rendering of services."[230]

Other jurisdictions define the protectable information without reference to it being "business" or "commercial" information. This describes the operative

225. *See* Rivendell Forest Products v. Georgia–Pacific Corp., 28 F.3d 1042, 1046 (10th Cir. 1994); Integrated Cash Management Serv., Inc. v. Digital Transactions, Inc., 920 F.2d 171 (2d Cir.1990) ("[A] trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which, in unique combination, affords a competitive advantage and is a protectable secret") (quoting Imperial Chem. Indus. Ltd. v. National Distillers and Chem. Corp., 342 F.2d 737, 742 (2d Cir. 1965)).

226. Sebastian Heim & Christian Hess, *The New German Trade Secrets Act—Germany Modernizes Its Laws on Trade Secret Protection*, 32 Int'l L. Practicum 29, 30 (2019).

227. Code de commerce [C. Com] [Commercial Code] art. L151-1 (Fr.) ("secret des affaires").

228. Unfair Competition Prevention Act, *supra* note 216, at art. 2(6).

229. Anti-Unfair Competition Law of the People's Republic of China, art. 9 (last amended April 23, 2019) (China) ("'[A] trade secret' means any commercial information unknown to the public, including but not limited to technology or business information, with commercial value and for which its lawful holder has taken proper confidentiality measures."), https://www.wipo.int/wipolex/en/legislation/details/19557 [https://perma.cc/LY25-FCGV].

230. Lei No. 9.279, *supra* note 180, at art. 195(XI); *see also* Caffé, et al., *supra* note 214, at 95; Milton Lucídio Leão Barcellos, *Mercado Común del Sur (Mercosur)*, *in* Status Report on the Protection Against Unfair Competition in WIPO Member States 72, 80–81, WIPO Doc. WIPO/Strad/INF/8 Prov. (Martin Senftleben ed., 2022) [hereinafter Status Report], https://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo-strad-inf-8-prov.pdf [https://perma.cc/2FCG-A52R].

provisions of the EU Trade Secrets Directive.[231] In implementing the directive, German lawmakers chose to define a trade secret as information being kept secret and for which "there is a legitimate interest in keeping it confidential"[232] without any reference to it pertaining to business or commerce.[233] South Korean law also describes a trade secret generally, giving "business information for business activity" as *one type* of eligible "information."[234]

We recognize that, where they exist, limitations on protectable information being "commercial" or "business" may pose an obstacle to expanding the notion of trade secrets to secret TK and TCEs. Indeed, there may be a special problem on this count with the United States. While both the state-level UTSA and the federal-level DTSA define trade secrets generally as having "independent economic value, actual or potential, from not being generally known," because of Congress's limited power under the Commerce Clause, a civil action under the DTSA is currently only possible when "the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce."[235]

Nevertheless, even this requirement may not be a barrier to protection if "used in, or intended for use in, interstate or foreign commerce" is understood to encompass the defendant's use. In other words, if a third party incorporates the secret TK or TCEs in a product or service without the holder's permission, that arguably still should meet the definitional requirements of the DTSA. However, if the phrase refers only to the plaintiff's use, then we believe this

231. Trade Secrets Directive, *supra* note 145, art. 2(1). But the recitals of the directive indicate that the focus is protection of "business and non-commercial research institutions," *id.* at recital 1, "commercial data," *id.* at recital 2, and "the commercial interests of the trade secret holder," *id.* at recital 28.

232. Geschäftsgeheimnisschutzgesetz [GeschGehG] [Act on the Protection of Trade Secrets], Apr. 26, 2019, BGBl I, S. at 466, § 2(1)(c) (Ger.).

233. In contrast to the "legitimate interest in keeping it confidential" definition in German law, the EU directive says a trade secret is information which "has commercial value because it is secret." *Compare* Geschäftsgeheimnisschutzgesetz [GeschGehG] [Act on the Protection of Trade Secrets], Apr. 26, 2019, BGBl I, S. at 466, § 2(1)(c) (Ger.) *with* Trade Secrets Directive, *supra* note 145, at art. 2(1)(b). Some have expressed concern about the inconsistency between these definitions, as the directive was intended to produce an EU-wide "homogenous definition of a trade secret." Trade Secrets Directive, *supra* note 145, at recital 14; *see also* Heim & Hess, *supra* note 226, at 30.

234. Korean Trade Secret Protection Act, *supra* note 181, art. 2(2) ("'Trade secret' means information, including a production method, sale method, useful technical or business information for business activity, that is not known publicly, is the subject of considerable effort to maintain its secrecy and has independent economic value."). But, as noted above, the cause of action for misappropriation of a trade secret in Korea may require losses in commercial activities. *See supra* note 182.

235. 18 U.S.C. § 1836(b)(1) ("In general.—An owner of a trade secret that is misappropriated may bring a civil action under this subsection if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce.").

statutory hurdle can also be addressed.[236] Secret traditional cultural resources are, by definition, *not* already in commerce, and Congress has the power to say what things may *not* be introduced into the commerce it can regulate.[237] But as it is not definitively clear which of these interpretations is correct, extending protection to secret TK and TCEs may be simpler in jurisdictions that have a more open-ended statutory definition of trade secrets and confidential information.

Common law jurisdictions that have not codified trade secrecy or confidential information laws may have the easiest time expanding their breach of confidence claims to cover secret TK and TCEs. Indeed, Anglo-Australian courts tend to use the expression "confidential information" as the broad umbrella concept for what is protected in a breach of confidence action; "trade secrets" are a specific type of confidential information, namely, that of a commercial character.[238] For example, the United Kingdom implemented the 2016 EU Trade Secrets Directive with the *Trade Secrets (Enforcement, etc) Regulations 2018* (SI 2018 No. 597),[239] but after defining a "trade secret," this statutory provision simply says "[t]he acquisition, use or disclosure of a trade secret is unlawful where the acquisition, use or disclosure constitutes a breach of confidence in confidential information,"[240] leaving the entire common law machinery of breach of confidence in place. Thus, protection of secret TK and TCEs might already be available through a common law breach of confidence action in Britain, Australia, Canada, New Zealand, and other commonwealth jurisdictions.

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236. The Commerce Clause gives Congress the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," U.S. CONST. art. I, § 8, cl. 3. There is no reason that Indigenous peoples cannot be added to "interstate or foreign commerce," 18 U.S.C. § 1836(b)(1).

237. Emily Cox et al., *Module 8: Traditional Knowledge*, BERKMAN KLEIN CTR., https://cyber.harvard.edu/copyrightforlibrarians/Module_8:_Traditional_Knowledge [https://perma.cc/A2P2-KNJU] ("Many cultural expressions do not have a direct link to commerce and are not used as designations of source to the consuming public."); U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause).

238. *Streetscape Projects (Australia) Pty. Ltd. v City of Sydney* [2013] NSWCA 2 at ¶ 160 (Austl.) ("The confidential quality of information does not depend on its being in the nature of a trade secret."); *Ansell Rubber Co. Pty. Ltd. v Allied Rubber Industries Pty. Ltd.* [1967] VR 37, 46 (Austl.); *see also* Chris Williams, *Protection of Trade Secrets in Australia,* 32 INT'L L. PRACTICUM 11, 11–12 (2019); ANDREW STEWART ET AL., INTELLECTUAL PROPERTY IN AUSTRALIA 858 (6th ed. 2018).

239. Trade Secrets (Enforcement, etc.) Regulations 2018, SI 2018/597 (UK), https://www.legislation.gov.uk/uksi/2018/597/pdfs/uksi_20180597_en.pdf [https://perma.cc/W7YL-KB4Q].

240. *Id*. Section 3(1). For more on the UK law, see Dev Gangjee, *United Kingdom*, *in* STATUS REPORT, *supra* note 230, at 161, 161–69.

Lastly, while most jurisdictions allow for open-ended conceptions of confidential information,[241] a few arguably impose IP-like thresholds (e.g., novelty, originality) for trade secrecy protection.[242] These thresholds would be problematic for TK and TCEs, just as they would be for many kinds of commercial information protected under most trade secrecy laws, such as client lists or information about pricing, hiring, or corporate reorganization.

C. *The Value of Trade Secrets and the Question of Harm*

Another potential challenge in fitting secret TK and TCEs into trade secrecy law is that a protected trade secret is typically confidential information with *commercial* value.[243] This issue—quantifying the information's *value*—overlaps but is somewhat different from the concern immediately above as to the nature of the *information*.

TRIPS Article 39(2) expressly embodies this problem by requiring WTO members to provide legal protection to undisclosed information that "has commercial value because it is secret."[244] That "commercial value" language is replicated in the EU 2016 directive, the WIPO Model Provisions, and different national laws, such as Ghana's.[245] Chinese law requires a trade secret to be "commercial information . . . with commercial value."[246] Japanese trade secret law replaces this "value" requirement with a sort of utility requirement that the information be "useful for business activities."[247] Mexican law expresses the

241. *Ansell Rubber Co. Pty. Ltd. v Allied Rubber Industries Pty. Ltd.* [1967] VR 37 (Austl.) ("There is no suggestion of the need for invention."); FRANKEL, *supra* note 179, at 11.4.3(a)(i) ("[T]here is no particular requirement that information be sophisticated.").

242. In Brazil, the Law on Industrial Property provides that a trade secret is "confidential knowledge, information or data that could be used in industry, commerce or rendering of services, other than that which is of public knowledge *or that would be evident to a technician versed in the subject*." Lei No. 9.279, *supra* note 180, at art. 195(XI) (italics added). This may impose a low threshold non-obviousness requirement for a protectable trade secret.

243. *See supra* Part II.A; *see also* UTSA, *supra* note 104, at 5 § 1(4) ("'Trade secret' means information … that … derives independent economic value.").

244. We recognize that, as Deepa Varadarajan has noted "[a] trade secret approach to traditional knowledge at the international level would require clarifying—and broadening—Article 39's commercial value requirement." *See* Varadarajan, *supra* note 8, at 408. Ensuring that the commercial value requirement is understood as 'actual or potential' helps—and is not inconsistent with the statutes we have studied—but this is best understood as 'actual or potential' commercial value for the *defendant*, not the holder of the secret TK or TCE. Even then, this is not a complete answer. There will always be tension between, on the one hand, any objective 'value' or proven harm requirement and, on the other hand, the cultural, spiritual, and often sacred nature of secret TK and TCE.

245. Protection Against Unfair Competition Act 2000, Act No. 589, § 5(3)(b), https://www.wipo.int/wipolex/en/legislation/details/1782 [https://perma.cc/9TDE-DFFU].

246. Anti-Unfair Competition Law of the People's Republic of China, *supra* note 229, art. 9.

247. Unfair Competition Prevention Act, *supra* note 216, art. 2(6).

commercial value idea by stating that a protectable trade secret is information associated with "obtaining or maintaining a competitive or economic advantage over third parties in the conduct of economic activities."[248]

The United States uses a broader conception of the requisite value. In the UTSA and DTSA regimes, a protected trade secret need only have "actual or *potential*" value.[249] Equally important, the UTSA and DTSA regimes use a standard of "independent *economic* value," not "commercial value."[250] Korean law follows the United States in only requiring the protected information to have "independent economic value."[251]

Laws in other jurisdictions may not require "value" at all, including Commonwealth jurisdictions that provide an equitable cause of action requiring only that the protected "information must have the necessary quality of confidence about it."[252] As a flip side of the "value" question, commentators have noted that Commonwealth courts often do not require that the plaintiff in a breach of confidence case prove harm or loss.[253] Again, the fact that the information has perceived economic value to the defendant and potential value to the holder should provide a way to meet such a requirement.

D. Reasonable Steps to Maintain Secrecy

All trade secrecy laws require the trade secret holder to take appropriate measures to maintain the undisclosed or confidential status of the information being protected. The TRIPS Agreement and EU directive express this as "reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret,"[254] while the DTSA uses the phrase "the owner thereof has taken reasonable measures to keep such information secret."[255]

Typical examples of these types of measures in the commercial context are locked offices, locked file cabinets, password-protected computers, and digital files, all of which limit the disclosure of information to only those employees

248. Ley Federal de Protección a la Propiedad Industrial [LFPPI] art. 163(I), Diario Oficial de la Federación 01-07-2020 (Mex.).

249. UTSA, *supra* note 104, § 1(4)(i); 18 U.S.C. § 1839(3)(B).

250. UTSA, *supra* note 104, § 1(4)(i); 18 U.S.C. § 1839(3)(B).

251. Korean Trade Secret Protection Act, *supra* note 181, art. 2(2).

252. *Coco v AN Clark (Engineers) Ltd.* [1969] RPC 41, 47 (Austl.).

253. Chris Williams, *Protection of Trade Secrets in Australia*, 32 Int'l L. Practicum 11, 13 (2019) ("Australian courts have recognised that a strict requirement of detriment may be overly constraining having regard to the range of interests (including non-commercial, private interests) found to be protectable by an action for breach of confidence."); Frankel, *supra* note 179, at 11.4.3 ("There appears to be no requirement that the plaintiff suffer any detriment; the fact something confidential has been revealed is itself enough to justify a cause of action.").

254. TRIPS Agreement, *supra* note 83, art. 39(2)(c).

255. 18 U.S.C. § 1839.

who need to use the information, as well as confidentiality or non-disclosure agreements.[256]

Even assuming that most secret traditional culture will *not* be kept in locked file cabinets and password-protected digital files, there are still strong analogies between business practices that are treated as indicia of trade secrecy and Indigenous community practices to keep communal knowledge and culture private. For example, in *Anaconda Co. v. Metric Tool & Die Co.* (1980), limiting visitors' physical access to areas of a factory and "erect[ing] screens and barriers around the machines when tours were to be conducted" were accepted by the court as reasonable measures to keep the machines' design secret.[257] In that dispute, although the company's "employees were never specifically instructed in *ipsis verbis* as to the proprietary nature of the P&W machine," the measures taken were "such that except by the use of improper means, [the] defendant would have had difficulty in acquiring the information."[258]

Indigenous groups and local communities may rarely be able to point to express non-disclosure agreements undertaken by group members,[259] but these agreements are hardly necessary for a trade secret holder to have taken adequate "reasonable steps." Case law in the United States establishes that trade secrecy can be maintained when information is shared with employees, licensees, or outsiders without the need for written confidentiality agreements—*as long as there is an express or implied relationship of confidentiality.*[260] Similarly, the commentary accompanying WIPO's model provisions offers that "contractual obligations are not required;" what is required is that "the rightful holder must have shown his intention to have the information treated as secret."[261] These cases and statements of principle show that as long as

256. G&L Plumbing v. Kibbe, 699 F.Supp.3d 96, 107 (D. Mass. 2023) (password-protected computers, encryption, locked workstations); Siegel v. Arter & Hadden, 707 N.E.2d 853 (Ohio 1999) (password-protected computer, locked file cabinet, and employees told not to remove information from office).

257. 485 F. Supp. 410, 415 (E.D. Pa. 1980).

258. *Id.* at 422.

259. Causing at least one commentator to think "the steps to keep the information secret may not be sufficient under established common law or civil law rules." Gervais, *supra* note 11, at 968.; *see also* Munzer & Raustiala, *supra* note 40, at 61 (noting "contractual control over disclosure in commercial settings has no clear analog in tribal contexts").

260. Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 475 (1974); G&L Plumbing v. Kibbe, 699 F.Supp.3d 96, 107 (D. Mass. 2023) (trade secret recognized although plaintiff acknowledged that it did not require defendant to sign a confidentiality agreement); Clasby v. Ivanovic, 2019 WL 8065862, *3 (C.D. Cal. 2019) (same); MicroStrategy v. Bus. Objects, 331 F.Supp.2d 396, 416 (E.D. Va. 2004) (same); Catalyst & Chemical Services v. Global Ground Support, 350 F.Supp.2d 1, 11 (D.D.C. 2004) (single disclosure on fax marked confidential to potential licensee did not lose trade secret status); Anaconda Co. v. Metric Tool & Die Co., 485 F. Supp. 410, 415 (E.D. Pa. 1980).

261. 1996 WIPO Model Provisions, *supra* note 97, at 56, n.6.20.

there were implied confidentiality commitments, a traditional community could reveal traditional knowledge or cultural expression—such as a secret ceremony—to an outside researcher without negating the confidentiality of that information.

A traditional community *not* allowing those outside the community to participate in certain ceremonies or activities; limiting certain knowledge, techniques, or technology to elders or selected practitioners or ceremonial participants;[262] or limiting the teaching of certain knowledge to specific subgroups—all these are analogous to the "reasonable precautions" that can establish a trade secret because these measures are "such that it would be difficult for others to obtain the information without using improper means."[263]

IV. A Doable International Instrument

Given that TRIPS Article 39 applies to all WTO members, legal protection for trade secrets and confidential information is effectively universal, albeit with variations from jurisdiction to jurisdiction. The fact that traditional cultural resource holders and creators seek *perpetual* protection for their information is not a barrier, as trade secret protection is generally available in perpetuity as long as the stated legal requirements are met. As such, explicitly incorporating secret traditional cultural resources into the kinds of information protectable under these extant laws seems eminently doable and could take one of several forms. Below, we provide four possible approaches.

A. WTO Declaration on the Interpretation of TRIPS Article 39

The WTO TRIPS Agreement already requires member states to protect undisclosed information in TRIPS Article 39, so all that may be required is clarification that the scope of protectable information is broad enough to include secret traditional cultural expressions and a broadening of the type of commercial value required. But how can this be done? The early history of the TRIPS Agreement has shown that actual amendment of the agreement is a long and difficult process. In the face of the HIV/AIDS epidemic, it took WTO Member States effectively two decades to amend the TRIPS Agreement to add Article 31*bis,*

262. But we agree with Deepa Varadarajan's observation that the number of people within an Indigenous group who know confidential information does not have to be particularly small given that "customer lists, marketing data, and similar information may be known or available to many employees without destroying its status as a trade secret." Varadarajan, *supra* note 8, at 405.

263. Greenberg v. Croydon Plastics Co., 378 F. Supp. 806, 812 (E.D. Pa. 1974).

intended to make cross-border compulsory licensing of pharmaceuticals easier;[264] even today, many countries have not ratified the amendments.[265]

For our purposes, the path leading up to TRIPS Article 31*bis* is more important than the amendment itself. In November 2001, the WTO Ministerial Council—the highest governing council of the World Trade Organization—released what has come to be called the "Doha Declaration."[266] This declaration acknowledged—and, thereby, galvanized—some of the sovereign decisions left to WTO Members to determine what constitutes a public health "national emergency"[267] and how to structure national rules for the exhaustion of intellectual property rights.[268] More importantly, the declaration instructed the WTO "General Council" to "find an expeditious solution" to the difficulties "WTO members with insufficient or no manufacturing capacities in the pharmaceutical sector . . . face . . . in making effective use of compulsory licensing under the TRIPS Agreement."[269]

Two years later, the WTO General Council took a "decision" in August 2003 to waive some of the restrictions on compulsory licensing under TRIPS Article 31 to allow pharmaceuticals produced under compulsory licenses to be exported to least-developed countries and other jurisdictions facing public health national emergencies.[270] The 2003 decision further provided that WTO Members would not "challenge any measures taken in conformity with the provisions of the waivers contained in this Decision."[271] In other words, in the

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264. It was actually 35 years between the first *reported* AIDS cases in 1981 and amendment of the TRIPS Agreement to add Article 31*bis*. *The AIDS Epidemic in the United States, 1981–early 1990s*, CDC (July 8, 2024), https://www.cdc.gov/museum/online/story-of-cdc/aids/index.html [https://perma.cc/SK7M-4SCK]; *Amendment of the TRIPS Agreement*, WTO (Dec. 6, 2005), https://www.wto.org/english/tratop_e/trips_e/wtl641_e.htm [https://perma.cc/MH7B-82S2].

265. Press Release, WTO, Members OK amendment to make health flexibility permanent, Press/426, Dec. 6, 2005, https://www.wto.org/english/news_e/pres05_e/pr426_e.htm [https://perma.cc/PR4J-NPHN] (noting initial waiver and TRIPS amendment were intended to make it "easier for poorer countries to obtain cheaper generic versions of patented medicines by setting aside a provision of the TRIPS Agreement that could hinder exports of pharmaceuticals manufactured under compulsory licenses to countries that are unable to produce them."). According to the WTO, most of the WTO Members who have not ratified the Article 31*bis* amendment are in sub-Saharan Africa, but these non-ratifying Members also include Guatemala, Haiti, Kazakhstan, Turkmenistan, and Venezuela. *Amendment of the TRIPS Agreement*, WTO (Nov. 5, 2024), https://www.wto.org/english/tratop_e/trips_e/amendment_e.htm [https://perma.cc/LZJ5-ENC6].

266. WTO Ministerial Conference, Fourth Session, *Declaration on the TRIPS Agreement and Public Health*, WT/MIN(01)/DEC/2 (Nov. 20, 2001) (adopted Nov. 14, 2001).

267. *Id.* ¶ 5(c).

268. *Id.* ¶ 5(d).

269. *Id.* ¶ 6.

270. WTO General Council, *Implementation of paragraph 6 of the Doha Declaration*, WT/L/540 (Sept. 2, 2003) (decided Aug. 30, 2003).

271. *Id.* ¶ 10.

period between August 2003 and the successful addition of Article 31*bis* in 2017, the TRIPS Agreement was already de facto modified.

The struggles over the Doha Declaration and TRIPS Article 31*bis* centered on fundamental issues about patent law and disparities in public health between developed and less developed countries. In comparison, protecting secret TK and TCE should be completely non-controversial; no one (we hope) questions the right of Indigenous peoples and local communities to keep information and cultural resources confidential, undisclosed, and secret.

TRIPS Article 39(2) provides that:

> Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices[272]

and requires countries to provide this protection "as long" as the information is kept secret and "has actual or potential commercial value because it is secret."[273]

At the appropriate level—either the TRIPS Council or the General Council—the WTO could promulgate a short "declaration" on the proper interpretation of TRIPS Article 39(2), clarifying that:

- "[n]atural and legal persons" should be understood to include Indigenous peoples and local communities;
- "honest commercial practices" should be understood to include all activities, professional or otherwise, that could lead to commercialization or publication of information; and
- "has commercial value because it is secret" should be interpreted to mean "has actual or potential commercial value because it is secret."

A revision of this nature addresses situations where the secret traditional cultural resources have not been used commercially but could have value to the holders or third parties. It also makes clear that this subject matter is of a kind that can be protected as long as it meets the other trade secrecy requirements.

B. WIPO Joint Recommendation on the Interpretation of Paris Convention Article 10bis

Article 10*bis* of the Paris Convention predates the TRIPS Agreement and requires parties to provide effective protection against unfair competition.[274] As described above, the provision was later reimagined by the TRIPS negotiators to expressly encompass the protection of confidential information.

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272. TRIPS Agreement, *supra* note 83, art. 39(2).

273. *Id.* art. 39(2)(b).

274. Paris Convention, *supra* note 87, art. 10*bis*(1) ("The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.").

Although the Paris Convention has not itself been revised since 1967, on more than one occasion, WIPO member states have agreed upon "Joint Recommendations," representing consensus views of the Paris Convention membership on the proper interpretation of Paris Convention obligations.[275] For example, Article *6bis* of the Paris Convention obliges a country to protect internationally "well-known" trademarks from local imitators, even if the well-known trademark is not yet commercially used in that country.[276] WIPO's 1999 "Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks" established specific criteria for determining whether a trademark is a "well-known mark" in a Paris Convention member state,[277] as well as for when a local trademark conflicts with the well-known mark.[278]

The significance of such a "joint recommendation" is that it constitutes a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" under customary rules for treaty interpretation.[279] As such, the joint recommendation becomes essential to the proper interpretation of the treaty obligation.[280]

WIPO Member States could similarly decide to promulgate a "Joint Recommendation" concerning Article 10*bis* of the Paris Convention. At its core, such a Joint Recommendation need only establish that Article 10*bis* (2) be interpreted by member states as follows (clarifying language added in bold):

> (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. **This includes unauthorized use of undisclosed information for commercial purposes. Undisclosed information may include secret traditional knowledge and secret traditional cultural expressions as held by [I]ndigenous peoples and local communities. . . .**

Such an interpretation would further align Article 10*bis* with TRIPS Article 39 and also provide some protection for secret traditional cultural resources, at least when they are used for commercial purposes without authorization.[281]

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275. WIPO, *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* (1999) [hereinafter WIPO, *Joint Recommendation*], https://www.wipo.int/edocs/pubdocs/en/wipo_pub_833-accessible1.pdf [https://perma.cc/S6QX-VY5E]; WIPO, *Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet* (2001), https://www.wipo.int/edocs/pubdocs/en/marks/845/pub845.pdf [https://perma.cc/D9BG-TUZN].

276. Paris Convention, *supra* note 87, art. 6*bis*.

277. WIPO, *Joint Recommendation*, *supra* note 275, art. 3.

278. *Id.* art. 4.

279. These customary rules are embodied in the Vienna Convention on the Law of Treaties art. 31(3)(a), May 23, 1969, 1155 U.N.T.S. 331.

280. *Id.* art. 31.

281. Given the near complete overlap between the membership of WTO and the Paris Convention, TRIPS Article 39 is arguably itself already a "subsequent agreement between the parties regarding the interpretation" of Paris Article 10*bis*. *Id.* at art. 31(3)(a).

C. Revision of WIPO's Model Law on Unfair Competition

In a similar vein, Article 6 of WIPO's Model Law on Unfair Competition could be revised to explicitly include secret traditional cultural resources within the subject matter to be protected by states. As noted earlier, this document was created to assist countries with implementing their Paris Convention Article 10bis and TRIPS Article 39 obligations, so its text may be another appropriate place to embed the norm of protecting secret traditional cultural resources under domestic trade secrecy laws. One possibility for a revised text could be the following addition (proposed new text added in bold):

> **Article 6 (revised):** Any act or practice, in the course of industrial or commercial activities, that results in the disclosure, acquisition or use by others of secret information without the consent of the person lawfully in control of that information (hereinafter referred to as "the rightful holder") and in a manner contrary to honest commercial practices shall constitute an act of unfair competition. **"Secret information" shall be interpreted to include secret traditional knowledge and secret traditional cultural expressions including where there is no direct competition between the party who commits the act of misappropriation and the party whose interests are affected by the act of misappropriation.**[282]

This modification of the text should give countries policy space to provide meaningful protection to secret traditional cultural resources even in the absence of commercial activity.

D. A WIPO Treaty on the Protection of Secret TK and TCEs

The successful adoption of the WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge in May 2024 reinvigorated calls by developing countries for a treaty on the remaining two IGC subject matter areas: TK and TCEs.[283] However, developed countries appear disinclined to bridge the chasms necessary to achieve consensus on the many contentious issues that would have to be settled to create any new, positive rights for traditional cultural resources generally.[284]

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282. TRIPS Agreement, *supra* note 83, at 47.

283. *See* African Group, WIPO IGC, Forty-Ninth Session, *Opening Statement by the African Group During IGC 49*, at 1, WIPO Doc. WIPO/GRTKF/IC/49/STATEMENT AFRICAN GROUP (Dec. 2, 2024), https://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_49/wipo_grtkf_ic_49_statement_african_group.pdf [https://perma.cc/W7DN-9XZN] (the African Group encouraged Member States to continue negotiations on Traditional Knowledge and Traditional Cultural Expressions, which negotiations "would greatly help in narrowing down the gaps toward achieving a legally binding instruments on these important topics.").

284. *See, e.g.*, WIPO IGC, *Decisions of the Forty-Ninth Session of the Committee*, at 2, WIPO Doc. WIPO/GRTKF/IC/49/DECISIONS (Dec. 6, 2024); WIPO IGC, *Decisions of the Fiftieth Session of the Committee*, at 2, WIPO Doc. WIPO/GRTKF/IC/50/DECISIONS (Mar. 7, 2025).

Nevertheless, consensus might be achievable on an agreement with the limited objective of assuring trade secret protection for secret traditional resources. Such an agreement could eventually be the subject of a diplomatic conference if a proposal is submitted to the WIPO General Assembly and approved.

This would be much less than the IGC demandeurs are seeking in this area, so one way to make it more palatable to them could be to combine a binding instrument providing trade secret protection for secret TK and TCE with a soft law project providing guidelines for the protection of non-secret traditional cultural resources. Such guidelines could be a logical first step that, like the Bonn Guidelines, which preceded the Nagoya Protocol on Access and Benefit-Sharing to the Convention on Biological Diversity, paves the way for greater consensus on the overall issues that have plagued the IGC.[285] Separate from that possibility, an agreement on a binding instrument to protect secret traditional cultural resources as trade secrets would demonstrate developed countries' commitment to an inclusive international intellectual property system that serves all.

Conclusion

Expanding the remit of trade secrecy law to protect secret traditional cultural resources is both long overdue and eminently *doable*.

Such an expansion of international intellectual property norms comports with basic notions of justice and fairness. Secret traditional cultural resources have the same potential for value and entitlement to protection as any other kind of confidential information, whether held by an individual, a corporation, or any other organized group of people. Indigenous peoples and local communities equally deserve this form of recognition for their creativity and stewardship.

This expansion of trade secrecy law is also doable because it can be fully consistent with trade secrecy's principles: protection of traditional cultural resources that are not "generally known among or readily accessible"[286] to outside persons, resources that have actual or potential value, and resources that the Indigenous group or local community has taken "reasonable steps under the circumstances"[287] to keep secret or confidential. Any of the above-described international mechanisms could achieve this protection for cultural resources

285. *See generally* Secretariat of the Convention on Biological Diversity, Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization (2002).

286. TRIPS Agreement, *supra* note 83, at art. 39(2)(a).

287. *Id*.

stewarded by Indigenous peoples and local communities with minimal or no disruption to the rest of the global information status quo.

Allowing trade secrecy law to protect secret traditional resources should not signal the end of efforts to address moral and economic rights for other categories of traditional cultural resources. Rather, it would signal the willingness of the international community to tackle diffusion, control, and compensation concerns over traditional cultural resources in a holistic and mutually beneficial way. All that is necessary to make this small step forward is the setting aside of possible biases concerning trade secrecy law's subject matter and beneficiaries—plus the political will to effectuate change on both international and domestic levels.