Access to Trade Secret Environmental Information: Are TRIPS and TRIPS Plus Obligations a Hidden Landmine?

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ACCESS TO TRADE SECRET ENVIRONMENTAL INFORMATION: ARE TRIPS AND TRIPS PLUS OBLIGATIONS A HIDDEN LANDMINE?

DALINDYEBO BAFANA SHABALALA¹

ABSTRACT

Freedom of Information Acts (FOIAs) have been fundamental to enabling access to environmental information. The effectiveness of domestic and international environmental regulatory standards has been dependent on ensuring strong information access regimes, especially for information submitted to governments by firms. However, there has been an ongoing tension between providing and accessing complete regulatory information on the one hand, and the interest in maintaining the economic value of trade secrets. Such tensions have historically been managed at the domestic level within constitutional structures balancing access to information, privacy interests, and economic interests. However, the almost simultaneous advent of international norms and treaties containing obligations on ensuring access to information on the one hand (especially environmental treaties) and rules requiring greater scope and stronger protection of trade secrets and confidential business information (e.g. the TRIPS Agreement; the Trans-Pacific Partnership) on the other, may have altered the structure of those domestic processes in ways that privilege private interests in trade secrets over public interests. This article argues that the specificity and strength of trade secret protections in TRIPS (Article 39) and TRIPS-plus regional and bilateral free trade agreements are a hidden landmine that may unravel current access to information regimes e.g. Freedom of Information Acts (FOIAs). The aim of this paper is to delineate the nature and scope of the limits that TRIPS and TRIPS-plus regimes place on domestic access to environmental information regimes for information submitted to governments.

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INTRODUCTION

International environmental law has in the latter part of the 20th century taken on an increasingly regulatory cast, asking states to create regulatory frameworks that impose obligations on domestic actors. One of the core elements of this regulatory mode is the obligation to require economic or other actors to submit information to the state or the treaty implementing bodies to enable the goals of the treaty. Thus an international agreement like the Basel Convention2 requires states to prevent their firms and citizens from exporting hazardous wastes and imposes reporting and information submission requirements (Article 4.1, Article 4.2(f), Annex V A). Similarly, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity3 has requirements to regulate the generation, dissemination and cross-boundary movement of modified biological materials including notification requirements (Article 8, Article 20).4 At the same time, both at the national level in trade secret law5 and at the

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4 See also: International Convention for the Regulation of Whaling, signed 2 Dec. 2 1946, 161 U.N.T.S. 361 (, entry into force 10 November 1948) : Schedule, as amended by the Commission at the 65th Meeting, Portorož, Slovenia, September 2014 (Art. 21(a) requiring inspectors on each ship and allowing for observers; Section VI on information required - on record keeping and reporting requirements of ships operating in conjunction with a factory ship, as

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international level, we have seen the development of rules requiring greater scope and stronger protection of trade secrets confidential business information, in particular, the Agreement on Trade-Related Aspects of Intellectual Property (‘TRIPS Agreement’)\(^6\) and regional trade agreements like the Trans-Pacific Partnership (TPP).\(^7\) Public access to trade secrets and undisclosed information submitted by private actors presents a conflict that has historically been managed within domestic national frameworks, balancing public interest concerns with those of the private actors submitting information. The new moves to provide greater protection to undisclosed information threaten to unravel existing access to information regimes and make the implementation of new ones much more difficult. In fact, I argue that the increasing scale of this conflict has exposed a fundamental flaw and fault line created by Article 39 trade secret obligations in the TRIPS Agreement that have remained hidden until very recently. Countries that have implemented their obligations under the TRIPS Agreement on the protection of information submitted to governments under Article 39.3\(^8\) have failed to pay attention to the way that Article 39.2 on the general requirement to provide trade secret protection may further restrict their ability to disclose such information to the public. I contend that a greater understanding of the relationship between Article 39.3 and 39.2 still allows room for allowing public disclosure of submitted and undisclosed information, if properly implemented, but that this room is much narrower than may have been perceived to this point. Even that little room may be endangered by new obligations that states are taking on in bilateral and regional free trade agreements such as the Trans-Pacific Partnership.

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8 There is a significant literature on the implications of TRIPS for the protection of pharmaceutical test data submitted for marketing approval of new chemical entities, but none have really examined the broader implications of the TRIPS and TRIPS-plus regimes for public access to submitted information and what, in particular this may imply for access to environmental information. For more on Article 39.3 and the debate on the extent of the obligations to protect pharmaceutical test data see: Carlos M Correa, “Data Exclusivity for Pharmaceuticals: TRIPS standards and industry’s demands in free trade agreements” in RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 713-27 (Carlos M. Correa, ed., 2010); Carlos M. Correa “Test Data Protection: Rights Conferred Under the TRIPS Agreement and Some Effects of TRIPS-plus Standards”, in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH (Rochelle C. Dreyfuss & Katherine J. Strandburg, eds., 2011); NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF PATENTS AND TEST DATA (2014).

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Footnotes:
- There is a significant literature on the implications of TRIPS for the protection of pharmaceutical test data submitted for marketing approval of new chemical entities, but none have really examined the broader implications of the TRIPS and TRIPS-plus regimes for public access to submitted information and what, in particular this may imply for access to environmental information. For more on Article 39.3 and the debate on the extent of the obligations to protect pharmaceutical test data see: Carlos M Correa, “Data Exclusivity for Pharmaceuticals: TRIPS standards and industry’s demands in free trade agreements” in RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES 713-27 (Carlos M. Correa, ed., 2010); Carlos M. Correa “Test Data Protection: Rights Conferred Under the TRIPS Agreement and Some Effects of TRIPS-plus Standards”, in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH (Rochelle C. Dreyfuss & Katherine J. Strandburg, eds., 2011); NUNO PIRES DE CARVALHO, THE TRIPS REGIME OF PATENTS AND TEST DATA (2014).
The aim of this paper, then, is to analyze the nature and scope of the limits that TRIPS and TRIPS plus regimes may place on domestic access to information regimes for information submitted to government, and their implications for environmental access in particular. Part I provides a baseline for the traditional balancing framework by examining the rationales for the protection of trade secrets in contrast and comparison to the rationales for access to information regimes. Part II examines the procedural and substantive frameworks that have been used to try and resolve the tension between the two and provides some comparative examples of how specific countries have resolved this tension in their legislation and case law, looking particularly at the US, India and the European Union; all countries with strong access to information regimes but also strong intellectual property regimes as parties to the TRIPS Agreement. Part III analyses the extent to which TRIPS and TRIPS-plus regimes impose specific obligations and may place the current approaches of the studied countries outside the scope of strict compliance with the TRIPS Agreement. Part IV closes with some suggestions for ways in which states can work within these limits to 1) preserve the integrity of existing access to information regimes 2) implement information submission and access rules from environmental treaties.

I.

THE UNDERLYING RATIONALES FOR ACCESS TO INFORMATION AND THOSE FOR PROTECTION OF UNDISCLOSED INFORMATION

At the national level, access to information has generally been assured for such issues as deliberations of standard setting bodies in food regulation, medicines safety, and automobile safety. Where the information sought or provided by governments or their agencies involves or implicates information submitted by private individuals or non-governmental legal entities (corporations, institutes, civil organizations), there has been an ongoing tension between providing sufficient information on the one hand, and the reasonable privacy expectations of individuals and the reasonable interest in maintaining the economic value of confidential information submitted by business and other legal persons on the other. Such tensions have historically been managed at the domestic level within the constitutional structures balancing access to information, privacy interests, and economic interests.

Ensuring access to information has a powerful normative basis. In a democratic society, the ability to access information generated and used by executive and other government bodies is crucial to ensuring an informed citizenry that can participate properly in government decision-making. Where the stakeholders are regulated entities, access to the data and rationales for government decisions that affect their activities is crucial for determining when and how such government action can be challenged. Where the activities of such regulated entities affect third parties, the action or lack of action by government also creates a need for those third parties to have access to such information. This is the strongest and probably least controversial basis for

9 See Shannon M. Roesler, The Nature of the Environmental Right to Know 39 ECOLOGY L.Q. 989, 1011-16 (2012) in her discussion of the U.S. Supreme Court’s First amendment approaches as they relate to self-government justifications for a right to information.
justifying access to information and has generally been the basis for FOIAs world-wide.\textsuperscript{10} However, because it is so diffuse it can also be difficult to carry out a balancing exercise at the agency or court level, with the interests of trade secret protection. Thus this interest has generally been implemented at the legislative level in the manner in which legislation structure the relationship.

However, the past 25 years has also seen an increase in the knowledge intensity of commercial goods and services.\textsuperscript{11} The information relating to these products and services has become increasingly valuable and in some cases constitute the primary means of generating revenue for a firm. This has meant that intellectual property protection, especially patents and trade secrets have become crucial components of firm strategy and survival. The basis of much intellectual property is to address a public goods problem: the generation and dissemination of public goods is unlikely to occur in the absence of intellectual property protection. Absent such protection, actors are likely to keep their innovations and related information secret, impeding research and creating duplicative inefficiencies. Thus intellectual property protection is usually situated in opposition to trade secret protection which is not normally justified as a means of generating public goods, or encouraging innovation.\textsuperscript{12} The difficulties in finding a public interest rationale for trade secrets, beyond those of industrial policy and special interest pleading have significant implications for what should occur when a public interest in disclosure conflicts with, generally, private interest in trade secret protection. The following sections outline the rationales for access to information and for protection of trade secrets and discusses how these have been resolved as a theoretical matter and specifically in key jurisdictions.\textsuperscript{13}

\textbf{A. Trade secrets and Confidential Business Information}

What are the theoretical justifications and limitations of claims over trade secrets and confidential business information? The first thing to note is that the historical roots of such protection lie in unfair competition frameworks.\textsuperscript{14} This is recognized in the Paris Convention\textsuperscript{15}

\textsuperscript{10} Shannon M. Roeiser, \textit{The Nature of the Environmental Right to Know} 39 ECOLOGY L.Q. 989, 1013 (2012).

\textsuperscript{11} See e.g. OECD, THE KNOWLEDGE-BASED ECONOMY (1996).

\textsuperscript{12} See contra Mark A. Lemley, “The Surprising Virtues of Treating Trade Secrets as IP Rights” in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH 109-139 (Rochelle C. Dreyfuss & Katherine J. Strandburg, eds., 2011). Lemley argues that there are significant disclosure and knowledge generation aspects to trade secret protection precisely because it discourages over-investment in secrecy preserving measures.

\textsuperscript{13} In this I adopt Roeiser’s choice of interest theory as the best way of explaining the nature of rights and the means by which rights conflicts are resolved as a practical and legal matter. See Shannon M. Roeiser, \textit{The Nature of the Environmental Right to Know} 39 ECOLOGY L.Q. 989, 997 (2012). More generally, while Roeiser’s article provides a general explanation of how the right to know, and the environmental right to know can be explained, I use the latter part of her analysis of what the underlying interests are for both trade secret protection and the right to access environmental information. However, I expand somewhat on her characterization of the underlying justifications for trade secret protection and am somewhat more skeptical of the strength and nature of the argument than she is.

\textsuperscript{14} As Lemley and other authors point out, this is largely true in civil law countries while this is only a portion of justification for common law countries which also look to contract and tort and general misappropriation theory. Given the relatively sophisticated development of unfair competition law in civil law countries, there is now a much more significant overlap around contract and tort than has historically been the case. See e.g. Mark A. Lemley, “The Surprising Virtues of Treating Trade Secrets as IP Rights” in THE LAW AND THEORY OF TRADE
which requires countries to provide protection against unfair competition in Article 10bis of the Paris Convention (1967).16 Article 10bis(2) protected against “Any act of competition contrary to honest practices in industrial or commercial matters” which has been interpreted in many countries to also mean protection against use of information obtained in a manner that would constitute unfair competition and underlay the means by which trade secret protection was provided.17 Thus the main concern was use of information by competitors that had been obtained by them in some manner that was not necessary unlawful but that was competitively ‘unfair or dishonest’. That information has generally been required to represent an investment, valuable because of it not being generally known, and with significant attempts to ensure its secrecy.18 However, the boundaries of what constitutes a trade secret vary quite significantly not only between countries, but sometimes within countries. In the United States, trade secret law remains a state law issue although there is some uniformity due to adoption of the Model Uniform Trade Secrets Act (UTSA).19 Rowe points out that trade secret protection in some US states has been extended to marketing strategies, contract terms, and human resources.20 In the context of environmental information, trade secret and CBI can essentially extend to the content of products on the market, the nature of the chemicals in the product, the process used to make the product, side effects or impacts on health, or the environment. Thus trade secret information about a chemical solvent, or cleaner, or aerosol spray will contain the identity of the chemicals used in it and even the extent of the proportions of such chemicals. In the absence of any obligation to disclose, such identifying information can be made subject to trade secret or CBI protection.21

There is clearly a competitive advantage to be gained in being able to prevent others from knowing the exact content or formulation of your product. However, that secrecy prevents the generation of information about that product by any but the holder of the information, possibly

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16 Article 10bis(3) specifies three acts which largely revolve around false or misleading statements about sources of products or qualities of one’s own or a competitors products.
17 Such an approach was not required but the Paris Convention never specified any means by which this should be implemented and left countries free to determine their approach. See G. H. C. BODENHAUSEN, GUIDE TO THE APPLICATION OF THE PARIS CONVENTION FOR THE PROTECTION OF INDUSTRIAL POLICY 144 (1968).
preventing study on toxicity or other potential effects. Thus, in terms of environmental and health information, trade secrets may not only impede the disclosure of such information but may actually serve to prevent the generation of such information.\(^{22}\) Coupled with the fears that liability may accrue if such information is disclosed, firms may actively avoid generating internal knowledge about harms related to their products and where they do have such information, may actively work to prevent the generation of confirming information. Trade secrecy and protection of CBI place such information in the hands of those with the strongest interest in preventing the generation of such information. Thus, there is little justification for arguing that trade secret and CBI protection serve the aim of actually generating knowledge generally and environmental and health information specifically.

The weak link to knowledge generation and the lack of disclosure has meant that trade secrets have been seen as lacking core characteristics of traditional intellectual property and thus were to be protected through other mechanisms such as unfair competition. This is the approach taken by the Paris Convention\(^{23}\) and adopted and continued in the TRIPS Agreement.\(^{24}\) There is also scholarly agreement that trade secrets lack core characteristics that justify other forms of exclusive intellectual property rights\(^{25}\) although there is some strong counter-argument that there should be a normative shift to treat trade secrets as intellectual property.\(^{26}\) Those arguments largely revolve around the idea that free-riding discourages investment in new products and processes and thus the protection is necessary to encourage at least a first generation of information. However, such arguments also exist for patent protection for which the trade-off required is disclosure. To the extent that information kept as trade secret may qualify as patent subject matter, the costs of providing exclusivity suggest that it should be patented. The patent system is meant to be calibrated to encourage investment in research that would not otherwise occur, given free riding and scale of investment. Trade secrecy is a redundant mechanism for providing that same level of encouragement unless it is specifically aimed at information that is not itself patentable but represents some small increment above the baseline level of investment in innovation that occurs in a competitive market. Even then, other more limited forms of exclusive rights can be provided such as utility/petty patents that still require disclosure. The necessity for a public grant and protection of trade secrets also suffers from a core inefficiency: that much of the information, although valuable would have been generated anyway in the


\(^{25}\) See generally, THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH (Rochelle C. Dreyfuss & Katherine J. Strandburg, eds., 2011);

course of carrying out competitive business. Such things as customer lists, salaries, human resources, business strategies would be generated regardless and thus on that subject matter, trade secret fail the ‘but-for’ test i.e. would the information not have been generated ‘but-for’ the availability of trade secret protection. This, at a minimum, suggests that the broad subject matter protection that trade secrets provide is overly broad. In general, innovation arguments for providing trade secret protection struggle with this core public policy justification of knowledge generation.

A second more persuasive argument is that trade secrecy prevents firms from over-investing in secrecy measures especially where they may be better invested elsewhere.27 This is a serious cost and is evident in some firms such as in the chocolate and candy industry who impose restrictions on who they hire, internal employee information segregation, cyber and human security just to preserve competitive advantage.28 This is, of course an individual business decision of the value of its secrets, but it is also the case that such activity imposes business costs and there may be many firms that forgo such costs and rely on first mover advantage and branding. Competition has costs and those firms that over-invest in secrecy will be subject to competitive disadvantages if they over-invest. Competition more than a public intervention such as trade secret protection may be the better regulating mechanism for addressing such potential inefficiencies.

While it is understood that trade secret protection should be retained as a business option for firms in a competitive market, the public policy rationale for its protection is much thinner – what remains is largely an argument for special interest protection of business interests, especially small and medium enterprises with few resources to engage in patenting, for example.29 This leads into the one main public policy rationale – that, as Overvalle notes, it allows for inter partes exchange of information so that information does flow, albeit slowly.30 Where the claim is to information that a firm has no other interest in other than the potential for commercial harm, and that has little exchange value in product or process terms, there is little public policy rationale for such protection from a knowledge generation and dissemination standpoint.31 Even in the case where it may have exchange value because it reveals strategy or

human and resource capacity information, the public policy rationale remains thin. On the other side of the public policy ledger, trade secret protection is not costless. Aside from some of the enforcement problems, discussed below, there is a broader problem of the economic costs of providing such protection.\textsuperscript{32} Secrecy induces inefficiency in search costs for both the holder and outsiders, inefficiency in duplicative research and innovation paths, and because of the indefinite term, reduces the diffusion and dissemination of information, limiting the pool of knowledge for second generation innovation.\textsuperscript{33}

The result of the existing relatively thin protection of trade secrets is that in most jurisdictions, but especially common law ones, loss of protection can occur relatively easily and unintentionally. Fundamentally, there is an informational problem with policing trade secrets.\textsuperscript{34} The only way in which a person can give notice to others that a breach is occurring is by revealing the trade secret. In addition, where something is easily kept as a secret this means that it just as easy to infringe upon it in secret. The classic case is a situation where a company uses a secret recipe and it is obtained by another company who uses it to improve its own food product. The secret holder has no way of finding out whether the other person has engaged in infringement without exposing the existence of the secret or communicating it to that person and thus destroying the secrecy. In fact, it may make sense for the holder to tolerate secret infringement that it is aware of, as long as it can ensure no further dissemination. This incentive is even greater because of a general defense in trade secret law of independent derivation or reverse engineering of the same process or technique\textsuperscript{35}, something which again becomes difficult to disprove unless the holder can show breaches of its own secrecy which then may have an effect of destroying the existence of the trade secret.

In fact, to the extent that a third party in possession of the knowledge did not themselves engage in the unfair or illegitimate act of accessing the secret, they are usually free to disseminate and use it and the only recourse that the holder of the trade secret has is to sue for damages against the person who acted in breach of confidence or contract or who acted illegitimately or unfairly in commercial terms in accessing the secret. This has led to several attempts within legislation and new treaties to try and address this, primarily:

1. Reducing the secrecy destroying effect of disclosure to one or only a small group of other parties;\textsuperscript{36}
2. Increasing secondary liability for those receiving the information accessed through illegitimate or unfair means;\textsuperscript{37}
3. Criminalization of disclosure of trade secrets as industrial espionage thus enlarging the scope of traditional industrial espionage law.\textsuperscript{38}

\textsuperscript{32} See Mary L. Lyndon \textit{Secrecy and Innovation in Tort Law and Regulation} 23 N.M. L. REV. 1, 14 (1993).
\textsuperscript{33} See Mary L. Lyndon \textit{Secrecy and Innovation in Tort Law and Regulation} 23 N.M. L. REV. 1, 14 (1993).
\textsuperscript{34} As noted by Mary L. Lyndon \textit{Secrecy and Innovation in Tort Law and Regulation} 23 N.M. L. REV. 1, 2,9 (1993).
\textsuperscript{36} See e.g. Article 3, Directive 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, 2016 O.J. (L157) 59.
\textsuperscript{37} See 18 U.S.C 1832(a)(3).
There remain however basic principles from within trade secret law governing when trade secrets may nevertheless not be used as a justification for preventing certain other acts or activities outside the boundaries of trade secret protection:

- Restrictions on workers’ mobility or ability to compete
  o In general, absolute restrictions on workers’ ability to move to other employment are not permissible except where an employee explicitly signs away such rights. Even in such circumstances, such restrictions must be limited.  
- Freedom of expression
- Public interest relevance to public health or safety

With such exceptions, a key question is whether such disclosure may take place in the absence of compensation for losses. Jurisdictions answer this question differently but for example, in the US, regulatory disclosure is not a compensable taking in terms of the Constitution, except if the regulatory framework creates a reasonable expectation that a property interest in the trade secret will be protected. Where no such expectation is created because the regulation excludes submitted information from trade secret protection, or explicitly endorses disclosure and does not establish an expectation of non-disclosure, no taking of property will be found. In addition, where the nature of the information is such that there is no reasonable expectation that disclosure should be prevented (e.g. health and safety information) absent an affirmative creation of an expectation of confidentiality by the statute, no taking will be found if disclosure takes place.

Thus, even in one of the strongest systems of trade secret protection, there are exceptions that nevertheless allow disclosure and where some categories of information are excluded from protection for specific public policy reasons. The thinness of trade secret protection coupled with relatively weak public policy justifications for providing such protection have generally allowed domestic systems to engage in reasonable balancing of interests in disclosure. Where the tension has been resolved in favor of rightsholders this has generally been a function of state industrial policy or interest groups taking effective advantage of the public choice framework surrounding policy-making on access to information. International obligations have played a

42 See Ruckelhaus v Monsanto Co. 467 U.S. 986 (1984)
minimal role until the more recent expansion of both subject matter in the TRIPS Agreement, and the current expansion of international environmental law into regulatory information submission regimes. The next section now looks to the rationales for access to information.

B. Access to information and the environment

As noted above, access to information has a powerful normative basis in democratic governance.45 This has been the basis for a whole host of freedom of information act (FOIA) like measures in many different countries. It has had very specific implementation in the environmental and health risk arena, rooted in two main considerations – the need for regulated entities and their stakeholders to understand how, and on what basis, the government is regulating them; ensuring that negative externalities are disclosed to ensure that third parties understand the harms that others may be causing them. This creates a range of different disclosure measures that the government can engage in. The first thing to note is that we can make a distinction between measures that are an expression of an affirmative obligation or action on the part of the government to disclose information; and those that require an affirmative request to the government to disclose.

- Affirmative Disclosure measures and obligations
- Motivated and affirmative requests
  - requiring a showing of standing or interest
  - no requirement of a showing of interest

In addition, we need to distinguish between those situations where firms or entities are submitting information to the government that is required of them, placing them in a situation where the government is forcing them to disclose as a prerequisite for either participating in the market (certain food and drug rules for example, as well as the whole field of pharmaceutical marketing approval) or health and safety requirements (such as occupational safety and exposure to chemicals)46 and those situations where they are requested to provide such information to the government but are not necessarily required to do so.47

In the first situation, the element of coercion means that a strong public policy justification is usually required and the loss of protection for secrets implied in the disclosure of information submitted under such a requirement may implicate commercial and financial losses, if not the viability of the firms so affected. This therefore may lead to a weighing of interests. The situation where government has requested information that is not required presents a different issue in that incentives will be needed in order to encourage the generation of, and the

47 This excludes those information sets that may indeed be relevant but that firms are neither required nor requested to provide and which Wagner argues may constitute the vast majority of relevant information regarding environmental harms. See Wendy E. Wagner, Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment 53 DUKE L.J. 1619, 1670-1677 (2003-2004)
willingness to share information. In such situations, regulators may argue a stronger need to bargain for access to such information with promises to keep such information secret. As Rowe discusses, in the absence of assurances that the secrecy of information will be kept, firms may simply refuse to submit such information absent a court ordering them to do so. If a requester challenges such a framework or decision to refuse to disclose, then a court will have to determine if there is a sufficient public interest that nevertheless outweighs the interest of the trade secret holder. This threshold will generally be higher than that for mandated information and may involve examination of the legitimate expectations of submitters as well as the urgency of the need for such information on the part of the requester or the public generally.

The categories of information inflow to public authorities therefore constitute:

1. Information required to be submitted to government by a legislative or regulatory act
2. Information not required to be submitted to government,
   • voluntarily disclosed
   • involuntarily disclosed due to court order

The category of information affects the rights of the submitter and the extent to which it can be disclosed to and used by parties other than the government agency. The justifications for disclosure also play out differently where the information is involuntarily disclosed or needs to be voluntarily disclosed. The extent of access to each category of information will be influenced by the kinds of rationales being put forward for systematic disclosure in each specific case.

1. Utilitarian arguments

Information should be disseminated to those best situated and motivated to generate information about the possible harms of a particular product.

While this clearly includes the government, it also implicates the broader scientific community. While users or communities of users are directly implicated, they are probably least capable to engage in this kind of knowledge generation. This rationale is somewhat attenuated in the circumstance where the government requires the holder of the information to generate and report such information to the government itself. Then the rationale primarily relates to the

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She characterize this as part of a broader interest in the advancement of intellectual knowledge, although later in her article she focuses on the interest in generating health and environmental knowledge generally. She concludes that the interest in public access is weaker given the lack of knowledge in the general population. I argue, as does Wagner that this discounts the broader structure of how scientific research occurs and the interest of competitors in generating negative health and safety information. Thus even where government funding is a significant part of information generation, this still justifies ensuring replication studies as well as enabling peer review.
capacity of the government to verify the accuracy of the submitted information and the ways in which dissemination to the public serves to allow the scientific process of falsification and/or verification to take place. Where the scientists in regulating agencies have insufficient resources and capacity, the argument for public dissemination is stronger.\textsuperscript{52} Where resources and capacity are sufficient, the argument for dissemination beyond the government is weaker, although the necessity for replication studies as well as proper peer review may still provide a strong justification for broad dissemination. All of this is based on a basic market analysis: in the absence of requirements to do so, the producer has the least incentive to generate health and safety information related to the product.\textsuperscript{53} As rational actors, where the harms generated are not immediately and specifically obvious and the risk of discovery or causal linkage is weak, the producer is least likely to engage in any behavior that would increase the discovery or liability risk. Where they are required to do so, they have little or no interest in its disclosure; and finally, even where such disclosure takes place they have little incentive to generate more complete and further information than is necessary to participate in the market.\textsuperscript{54} Market incentives may tend to favor externalizing certain types of risks and costs. Regulation or tort law may also provide an incentive to not seek or generate information regarding a product especially where knowledge, or foreseeability of harm may generate liability and ignorance of the link between the effects and the exposure mitigates responsibility.\textsuperscript{55} This means that short term immediate and visible harms are prioritized over diffuse, long term harms such as in the case of exposures that may lead to cancers in old age.\textsuperscript{56} It implicates the timing of disclosure, in that producers have an incentive to also delay disclosure, whereas immediate and even pre-market disclosure of information may be crucial to preventing harms rather than simply responding well after the fact of harms having taken place. Wagner also points to another situation: the government could require the producer to generate the information themselves as to the potential harms (both short term and long term).\textsuperscript{57} In such a case, the generation function of disclosure discussed above is clearly weaker.

\textsuperscript{52} As is the case for most regulatory agencies especially in the environmental arena. See Wendy E. Wagner, \textit{Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment} 53 DUKE L.J. 1619, 1689 (2003-2004).


\textsuperscript{54} See Mary L. Lyndon, “Trade Secrets and Information Access in Environmental Law” in \textit{The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research} 49-50 (Rochelle C. Dreyfuss & Katherine J. Strandburg, eds., 2011). Wagner also argues that in fact, the incentives are such that they have an interest in investing in research aimed directly at obscuring or countering evidence of harms generated by their products. In this she challenges the assumptions underlying much of the regulation in environmental law that information regarding externalities may be reasonably or easily discoverable. Wendy E. Wagner, \textit{Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment} 53 DUKE L.J. 1619, 1623 (2003-2004). One small wrinkle is that where the challenges by producers take place within a transparency framework with full access to underlying datasets and information, such action may be beneficial to evaluations.


The role of the regulatory system is then to ensure that the information generated is sufficiently complete and that government actors have the resources to properly evaluate it. However, even in such cases, disclosure may be justified by the need for proper peer-review of the methodology and scientific basis of the work carried out by the producers and, as discussed below, as a check on regulators by citizens who have a right to know whether such evaluations are being carried out properly and in the public interest.

Consumers should be informed and knowledgeable about the risks that they take when they choose to consume particular products.

In this case, disclosure serves an important market function of allowing consumers to make well-informed purchasing decisions, by requiring information of ingredients to be listed on products.\(^{58}\) This serves to ensure that the market most efficiently serves those products that consumers consider safest and least risky based on the information that is generally known publicly about the ingredients included. This presupposes that there is pre-existing and/or ongoing research into the information regarding those ingredients, which would need to be tested by a motivated actor of some sort.\(^{59}\) For unsophisticated consumers, ingredients listing can only work if accompanied by educational or other materials about those ingredients. Thus consumer market behavior is a tenuous and at best secondary justification for public disclosure except where it allows other actors to properly test and evaluate both contents and claims of products and processes. It does however, serve to remove the decision as to whether to generate health and safety information related to such products out of the hands of the producer and into the hands of those who may actually value that information. Thus it may generate a market interest from others to generate such information and compete on safety in the market by showing that a competitor’s product or process may not be as safe as claimed, where such safety information has market value to consumers.

2. Fairness and justice arguments

Tort law

These are arguments relating to who should bear the cost of harms of actions.\(^{60}\) Where a private party engages in behavior that harms others and keeps the information that creates such harms secret, then disclosure creates a disincentive for actors to engage in such activities and properly imposes the burden of preventing harm on the private party making the product. This is a basic tort argument in many ways and disclosure allows the tort system to function and allows for the determination of foreseeability of harm and apportionment of liability appropriately.

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\(^{59}\) As Wagner notes, this may in fact not be the case. She points to significant ignorance regarding even basic facts about the state of environment in the US, largely traceable to lack of information about the existence, nature scale and scope of potential causal factors that have been placed in the environment. Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment* 53 Duke L.J. 1619, 1624 (2003-2004).

Requiring parties to disclose the risks of their actions to the public allows for that. However, in order to be effective such disclosure would need to function both in the pre-market phase and in the post-market entry surveillance phase. As some authors have noted, in the absence of disclosure, tort law has remained, generally speaking, a less than effective tool for preventing environmental harms, as companies can avoid liability by keeping basic information secret and refusing to conduct more than minimal research into harms. Thus they can claim lack of individual and broader scientific knowledge as to the potential harms of their products and the time of production or exposure.

Fraud prevention

Those against whom a person is committing or may be committing a fraud are justified in seeking information and having it disclosed. Where the fraud is general, such as to a broad community of consumers, the rationale for public disclosure is stronger. In many ways, this underlies the reason that firms are required to disclose ingredients on their products in order to show that their product contain the products and has the effects claimed. This is part of protection of consumers not only against harm but against misrepresentation. Thus there is an obligation to ensure the accuracy of representations as to efficacy or other benefits of a product by being able to accurately assess whether the product contains characteristics or is processed in a way that supports such claims. These can include claims that a product is ‘organic’ or ‘natural’, or presents claims that it can reduce digestive problems. Prevention of fraud is enabled by ensuring that ingredients are disclosed that reflect the asserted claims. Additionally, where an actor is engaging in an act of infringement of another’s rights or unduly benefiting from misappropriating another’s work, disclosure will work to reduce such occurrences. To the extent that someone seeks to claim certain information as a trade secret or as confidential business information, the rationale for preventing disclosure of information about violation of the law, or violation of the rights of others is very weak. Thus the state can justify requiring or needing to disclose certain information where such information is necessary to ascertain whether the submitter is violating the law, or violating the rights of others by committing fraud or infringement. Public disclosure may be even more necessary where the search costs for the person seeking to vindicate rights is prohibitive because of the secretive nature of the trade secret regime. In contrast to other intellectual property regimes where disclosure at the pre-grant stage is a key part of providing notice to others of possible infringing activity, trade secrecy does not have that same safety valve built into it.

Rights-based approaches


62 See Mary L. Lyndon Information Economics and Chemical Toxicity: Designing laws to produce and use Data 87 MICH. L. REV. 1795, 1813 (1988).

63 See Mary L. Lyndon Information Economics and Chemical Toxicity: Designing laws to produce and use Data 87 MICH. L. REV. 1795, 1817 (1988).

64 As is the case in patent and trademark applications. Copyright is different in that the right adheres automatically upon publication.
Access to information is also invoked as a part of the right to freedom of expression or some other right. In the context of freedom of expression this is framed as a right to receive information to enable participation in public life and democratic governance. An example of this is Article 10 of the European Convention on Human Rights, which in a series of interpretations by the European Court of Human Rights has consistently been found to exist, although it must be balanced with other rights in the broader European framework. In the case of the European Convention on Human Rights, intellectual property is treated as a human right and where trade secrets are within the intellectual property framework of a particular state, they then become human rights subject matter, requiring balancing with rights to access information. As Roesler points out, the right to access information in this way has not found purchase in the US.

Related to the above discussion regarding consumer rights and decision-making is what Roesler characterizes as justification of personal liberty and autonomy. Broader than simply the narrow consumer right to make decision, this is a fundamental liberty right to choose with whom and which products and goods to engage. As such, it justifies labelling laws, information regarding comparative efficacy of products and imposes duties of accuracy on those making statements into the market. Where the information is about health and environmental risks, this can implicate decisions regarding whether to live near a specific site, or to seek health treatments based on risk of exposure. Again, Roesler notes that this argument has found little purchase in the US except in the realm of restrictions on commercial speech and even there it has not been found to justify positive obligations to disclose beyond the realm of labelling laws.

A derivative right of access to information can also be drawn from the other rights such as the right to health and the right to a healthy environment. Roesler is ‘disheartened’ by the

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72 Roesler makes the argument this justification can sometimes be stronger than advancing intellectual knowledge or self-expression. Shannon M. Roesler, *The Nature of the Environmental Right to Know* 39 ECOLOGY L.Q. 989, 1010 (2012).
74 For an extensive discussion of the US domestic implementation of this in the labor environment see Shannon M. Roesler, *The Nature of the Environmental Right to Know* 39 ECOLOGY L.Q. 989, 1016-27 (2012). Roesler comes to the conclusion that, at least within the US framework, the right to health and the right to a healthy environment do not provide a strong justification for broad public disclosure. While she believes it is stronger in the context of employees right to know whether they are exposed to certain chemicals in the course of their work and the nature and extent of the exposure risk, she find much less purchase for a broader individual right to know about use and extent of chemicals unless there is an actual exposure risk and the risk is known such that individuals could make the assessment themselves. Thus the right to health would only justify disclosure to those scientists and agencies with the expertise and knowledge to carry out studies evaluating the risks but not to the population at large.
failure of the right to health to achieve the kind of disclosure necessary in the US context, where it seems limited primarily to justifying disclosure to the government but not broader disclosure to individuals. As I argued earlier in Part I.B.1, disclosure may better enable the process of scientific assessment and knowledge generation by independent scientists and for carrying out peer review in ways that the trade secret holder may not be willing to do. Additionally, the failure of current US legislation to provide sufficient levels of information or generate the kind of information necessary may not necessarily weaken the justification coming from the right to health. This reflects a failure of the legislation to give proper weight to the justification and actually argues for placing an obligation on firms and the government to require the generation of such information in a manner understandable and communicable to the individual so that they may make their own health decisions.

C. The structure of submission and disclosure implied by the rationales

The framework for access to information has always been defined in opposition to those interests in not disclosing. This is not to say that the primary way in which such disclosure has been opposed is by private third party interests: the primary vector for justifying such access to information has been to government action or failure to act and the underlying facts and rationales for such: the third party interests have historically been secondary, relating to the interests in information submitted to the government. There does however remain a third vector which is the direct interest by third parties in privately held information. That interest can be expressed by the creation of an explicit mandate for private sector actors to engage in disclosure themselves or to submit information to the government itself which will engage in that disclosure. Examples of this include ingredients lists on food packaging or cleaning solvents. It seems appropriate to discuss those elements and examples that require actors to engage in disclosure to the public at large either themselves or through the government separate from other specific purposes for which the government itself may require information to be submitted. Thus we can add a third category to the two discussed above:

3. Information required to be disclosed to the public:
   - by the private parties themselves
   - by submitting to a government entity which will then disseminate the information via publicly accessible databases and other mechanisms.

This overlaps with the categories of outflow of information as well of course:

1. Information affirmatively disclosed by the government
   - Of information submitted voluntarily
   - Of information submitted as part of a mandatory requirement
2. Information disclosed on request by the government
   - Of information submitted voluntarily
   - Of information submitted as part of a mandatory requirement
3. Information disclosed by the private party
   - As required by the government

Given the nature of the claims for protection of trade secrets and the claims for access to information, it seem natural that state agencies and governments have taken diverse approaches to addressing the tension between them. The resolutions have been targeted at either specific problems in specific sectors (e.g. pharmaceuticals or environmental pollutants) or have been generated out of common law application by courts resolving disputes. Even domestic access to information regimes have varied both as a matter of general application, and in specific areas where they try to take trade secret concerns into account. The application of external obligations, such as the TRIPS Agreement, to provide greater protection for trade secrets may have distorted the broad regulatory and sectoral specific bargains that in many countries have previously applied.

The next section provides a general overview of the nature of the tension or conflict and provides some concrete domestic examples from the US, India and Europe, India.

II. SUBSTANTIVE FRAMEWORKS FOR RESOLVING THE TENSION BETWEEN ACCESS TO INFORMATION AND THE PROTECTION OF UNDISCLOSED INFORMATION

A. The Nature of the Conflict

From the discussion in Part I, we can see that there can be common purposes in protection of trade secrets and that of access to information. Where protection of trade secrets results in the generation and greater availability of information, it aligns itself with the broader aim of ensuring better information on environmental and health risks. The generation of such information has a corollary in that it needs to be disseminated to where it is likely to be most useful. Thus, to the extent that trade secret protection restricts the flow of such information to those best situated to assess and address environmental and health risks, and thus formulate policy and make decisions, it remains in fundamental conflict with access to information measures. However, this means that it is not always essential to the assessment of environmental and health risks that information is always disseminated to the public as a whole. Thus where there is an argument that such information is not needed by the general public in order for either the public or the government to engage in risk assessment and policy formulation, there may be no need for public dissemination.

We may also need to distinguish between knowledge dissemination and the right to use such information. Where there is a need to provide an incentive to disclose there may be a need to provide an exclusive right of use – for where we want information volunteered as fully as possible. Thus there may be circumstances under which disclosure is appropriate but allowing use by the public generally, or competitors specifically, may be inappropriate. However, where
such information disclosure is mandated, such a need may be obviated. Nevertheless, such a distinction may still be needed where the use that is desired reaches beyond the issues of determining government policy or making risk assessments into concerns relating to industrial policy. Thus, for example, what role does the rationale for allowing competitors to use pharmaceutical test data for generic approval play within the traditional justification for enabling access to information? This requires a separate framework for allowing use, even where ensuring disclosure may allow for assessment of health and safety claims.

Acknowledging there is may be a double interest in disclosure both in the generation and dissemination of the information; and in the disclosure to the public for environment and other purposes – what is the countervailing interest besides that of the personally harmed firm? What if the public interest is specifically about disclosing a harm or risk of harm - to rights in particular, such as the harm to the rights of a third party, thus revealing that a firm has indeed been using another party’s intellectual property without permission? Absent criminal concerns, is there a need to prevent such self-incrimination? Where the goal of the instrument is to prevent such action it cannot be that the very information sought would then be classified as a trade secret or CBI.

More directly environmental harms and risks imposed by some actors on others present a significant countervailing interest against maintaining a trade secret. Thus it is crucial that where trade secrets are exempted from certain kinds of information disclosure that there is a balancing of harms. However, it is not always the case that such a balancing takes place, especially where such an exemption can be unilaterally claimed and cannot be questioned by the government receiver of the information, or the requester for the information.\(^75\) In particular, if the trade secret is specifically about the harm or the risk being imposed rather than any other commercially advantageous characteristic of the product or process, can there be any justification for maintaining such secrecy other than the fact of reputational harm to the company were such information to be released to the public?\(^76\) How should this play out where the information about the harm is a probability rather than a certainty? What is the appropriate risk calculus between the relative certainty of damage to the trade secret holder, and the potential harm that can only be confirmed once the information being disclosed has been assessed?

Another issue in trying to resolve the tension between trade secret protection and access to information is who should be the one to make a decision about which risks are acceptable to take on regarding environmental and health harms. An autonomy approach suggests that individuals should have that information\(^77\) and make that decision as actors in the market who should have complete information about which products and services to purchase. Where damage to the commons is at risk, other actors on the commons have an interest in any risks being posed to the commons by other stakeholders. In the absence of a direct legislative act that

\(^{75}\) As Wagner notes, such claims are common in the environmental and health safety arena. See Wendy E. Wagner, *Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment* 53 DUKE L.J. 1619, 1700 (2003-2004).


\(^{77}\) Mary L. Lyndon *Secrecy and Innovation in Tort Law and Regulation* 23 N.M. L. Rev. 1, 45 (1993).
the information disclosed is not subject to trade secret protection, the issue of how to balance between trade secret claims and disclosure interests falls to the regulatory agency and to the court system, where the public policy interest is determined by the regulatory agency and then likely re-balanced or recalibrated by the court. This presents a significant problem in terms of the public policies underlying both trade secret protection and those providing access to information. Specifically, in the trade secret context, the evaluation of trade secret viability (whether something is a trade secret, whether something should be a trade secret, and whether a third party should be allowed to access it due to a doctrinal exception) is very different in the context of disputes between commercial rivals compared to determinations by regulatory agencies. As Lyndon points out, regulatory agencies have a very different set of facts before them and are not in a position to assess issues around the effectiveness of secrecy measures used to maintain the trade secret, nor to assess whether the information submitted is generally known in the industry. This lack of capacity means that agencies are both ill-suited and reluctant to make such determinations themselves and would prefer to leave it to courts to do so. Even in the case of a court, however, absent participation by a commercial rival who has an interest, the generation of evidence regarding trade secret validity by the requester of the information is always going to be weaker.

In doing such an assessment, other challenges arise in the context of disclosure of information generally. In general, each of these has different scope in the legislative act, in the practice and within the constitutional framework in which they operate. For example, whether compensation is required depends on a country's rules on whether requiring disclosure of a trade secret is tantamount to expropriation that must be compensated. This depends on whether the trade secret or CBI is considered an object of property under the national constitutional framework. If so, it may still be capable of being expropriated, but then the question is whether a regulation that requires submission and disclosure of information is tantamount to transferring ownership, or destroying ownership and enjoyment of the trade secret. In the European context, for example, intellectual property is established as a fundamental right in the European Fundamental Charter of Rights in Article 17(2), in the same way as property in Article 17(1). The European Convention on Human Rights has also acknowledged that intellectual property is a human right covered under the right to property in Article 1 of the 1st Protocol to the ECHR. What remains under dispute within the European framework is whether undisclosed information, in particular trade secrets are objects of property and are protected as intellectual property. A study commissioned by the European Commission has shown that the vast majority of member

78 For examples, see Wendy E. Wagner, Commons Ignorance: The Failure of Environmental Law to Produce Needed Information on Health and the Environment 53 DUKE L.J. 1619, 1700 (2003-2004).
79 Independent derivation, for example.
80 See Mary L. Lyndon, Secrecy and Innovation in Tort Law and Regulation 23 N.M. L. Rev. 1, 35 (1993). These are core criteria in the determination of something is a trade secret under US law.
81 In the US for example, there is some argument, countered by Lyndon, that the Supreme Court decision in Ruckelhaus v Monsanto Co. 467 U.S. 986 (1984), recognized trade secrets as a type of property requiring compensation. While the court did establish that there could be a taking of property in a limited sense, this was dependent on the creation by the relevant legislation that no disclosure would take place. In that sense, as I note below, the absolute prohibition in Exemption 4 of the US FOIA would seem to create such an expectation and disclosure under the FOIA would constitute a taking. See Mary L. Lyndon Secrecy and Innovation in Tort Law and Regulation 23 N.M. L. Rev. 1, 8 (1993).
states do not protect undisclosed information as intellectual property per se but provide contract, unfair competition or criminal law protection. The 2016 Directive on the Protection of Undisclosed Information does not require states to establish trade secrets as IP protection as such, but neither does it clearly establish that they are not intellectual property under the broader European framework that includes the ECHR. Countries that implement it as a form of intellectual property may end up triggering the obligations regarding recognition and compensation under the ECHR and the Charter on Fundamental Rights. However, at the same time, recitation 11 of the Directive makes it clear that the protection it provides and harmonizes “should not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities.” Article 2 of the Directive specifically ensures that existing public disclosure rules are not impacted by the directive.

It is important to note that even within this framework of treating intellectual property as property, significant and frequent instances of interference with the right to property are allowed. In the ECHR several concerns have to be addressed as Helfer notes, including “the owner's reasonable expectations; imposition of an inequitable or excessive burden; the provision of compensation; the uncertainty created by the regulation; and the speed and consistency with which the state acts.”

If these concerns are addressed, then interference with real property has traditionally been countenanced. Logically this would extend to the treatment of intellectual property and thus states are indeed free to establish interferences for public interest reasons, although the need for...

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compensation may present an insurmountable barrier for many access to information regulations, which is what lies at the heart of most of the conflict between protection of undisclosed information and access to information. A rights-based approach to intellectual property makes it very difficult to envision a regulatory action that takes or interferes with a right but that does not provide compensation of some reasonable kind, increasing the costs of transparency to the state considerably. The peculiar nature of undisclosed information is exactly that the need for disclosure directly destroys the undisclosed nature of the information and thus implicates an absolute right so there can rarely be any balancing of harms.

The danger in attempts to resolve the conflict is that a default process is followed where such a balancing takes place on a case by case basis rather than through a systematic framework, creating a presumption driven by specific policy outcomes and goals. This then favors those parties with strong personal interests and financial capacity, primarily the parties claiming confidentiality. How are these tensions to then be resolved? The examples below point to some of the universe of possibilities, both generally and in the specific arena of environmental and health information. Looking at examples of general access to information laws and how they manage the conflict with commercial information we can point to four experiences of relevance: the US Freedom of Information Act; the Indian Right to Information Act; and the European framework for access to information.

B. Comparative examples of how to resolve the tension between access to environmental information and protection of trade secrets: Domestic Examples

1. The United States

General FOIA issues in the US turn on the resolution of tension between FOIA and trade secret protection as found in Exemption 4, in particular. Exemption 4 notes that the obligations to provide public access to information in 5 USC 552(a), do not apply to the list of material covered in 552(b). 552(b)(4) states:

“trade secrets and commercial or financial information obtained from a person and privileged or confidential;”

It provides for no exception to this exception. Where the material is deemed trade secret, the agency is not required to disclose. However, the language would seem to suggest that it remains within the discretion of the agency to disclose it. The Department of Justice Guide to

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the Freedom of Information Act notes however that in interaction with the Trade Secrets Act, the discretion of the agency to disclose such information is severely limited. As several courts have found the exemption and the Trade Secrets Act (TSA) to cover the same subject matter, the limitations of the TSA on disclosure of such information apply to agency exercise of its discretion under FOIA and Exemption 4. Those obligations subject any such disclosure to fines and criminal sanctions if carried out improperly and absent a specific legislative mandate to allow the release of such information under specific circumstances, the bare language in Exemption 4 is insufficient in and of itself to provide a lawful basis for release of trade secret or confidential information under the Trade Secrets Act. In fact, as the Guide notes and as Guidance from the Office of Information Policy has noted, a claim of a trade secret covered by exemption 4 effectively precludes any disclosure. This is the only limitation in the US FOIA on the discretion of agencies under 552(b) and exists only because of the specific and broad prohibition in the Trade Secrets Act.

In terms of coverage, the FOIA Exemption 4 also covers confidential information that has the following characteristics: privileged or confidential, obtained from a person and commercial or financial. Thus it is not limited to trade secrets per se. The determination of whether the claimed information qualifies as trade secret is usually assessed minimally by the agency when it considers release but this has largely been left to the courts when a requester seeks to challenge the release of the information (an impossibility given that the requester does not know the nature of the information that they are being denied) or in the context of reverse FOIA claims where the agency has determined that it does not qualify as a trade secret or confidential information under exemption 4 and the submitter has challenged this finding. The Trade Secrets Act limitation on disclosure also applies to this information as well and significant litigation has revolved around

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96 18 U.S. C. § 1905 (2006) – Disclosure of Confidential Information Generally - whoever, being an officer or employee of the United States or of any department or agency thereof, any person acting on behalf of the federal housing finance agency, or agent of the Department of Justice as defined in the Antitrust Civil Process Act (15 U.S.C. 1311-1314), being an employee of a private sector organization who is or was assigned to an agency under Chapter 37 of title 5, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined under this title, or imprisoned not more than one year, or both; and shall be removed from office or employment.
97 Bartholdi Cable Co. v. FCC, 114 F.3d 274, 281 (D.C. Cir. 1997); CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1144 (D.C. Cir. 1987).
98 UNITED STATES DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 356 (2016) and FOIA Update, Vol. VI, No. 3, at 3 (“OIP Guidance: Discretionary Disclosure and Exemption 4”)
when and how information falls within this framework. Of key concern is the distinction that the line of cases\textsuperscript{100} makes between expectations of confidentiality of information voluntarily submitted to the government and of information required to be submitted. From \textit{National Parks},\textsuperscript{101} the key determinant of confidentiality is whether: “disclosure of the information is likely (1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.”\textsuperscript{102} While the first prong remains in operation, the majority of cases, as the Guide points out, are on the second prong.\textsuperscript{103} The key point here is that the harm is that from action by competitors, therefore use of access by competitors rather than generalized harm in the market. This has been a case by case, extremely fact dependent analysis by courts. Most importantly, courts have rejected any additional public policy balancing in this analysis.\textsuperscript{104}

The \textit{Critical Mass} decision limited the \textit{National Parks} framework to information required to be submitted to the government, under which the expectation of confidentiality would be somewhat less, and some releases envisioned and created a new standard for information voluntarily submitted, for which the expectation of confidentiality would be higher. Thus only if it was “customarily disclosed to the public by the submitter”\textsuperscript{105} would it be subject to release under Exemption 4. This suggests that, to the extent that a submitter has a legitimate expectation of confidentiality, no releases of information are allowed under either part of Exemption 4. Thus under FOIA, the balance of justification falls in favor of CBI protection even where the basis of the law is the interest in self-governance. The interest in trade secret health and safety information, including as it relates to the environment, is therefore something that has generally taken place outside the FOIA framework.

Several pieces of US legislation simply exclude health and safety information from being claimed as trade secret.

The National Environmental Policy Act (NEPA)\textsuperscript{106} requires government disclosure of both environmental impacts and the process for reaching decisions relating to those environmental impacts. It places no limitation on any disclosure of trade secrets within this process and so any federal action that relies on data or information for its environmental impact statement would nominally be allowed to disclose except that, again, in interaction with the Trade Secrets Act\textsuperscript{107} such disclosure would likely be prohibited. Unlike the FOIA there is no explicit exemption, but there is neither an explicit authorization in the law for such disclosure which would comply more clearly with the TSA requirement. In any case, the federal government views its disclosure

\begin{footnotesize}
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\item[\textsuperscript{100}] Most importantly \textit{National Parks & Conservation Ass’n v. Morton} 498 F.2d 765 (D.C. Cir. 1974) and \textit{Critical Mass Energy Project v. NRC} 931 F.2d 939 (D.C. Cir.) (Randolph & Williams, JJ. concurring), vacated & rehearing en banc granted, 942 F.2d 799 (D.C. Cir. 1991), grant of summary judgment to agency affirmed en banc, 975 F.2d 871 (D.C. Cir. 1992).
\item[\textsuperscript{101}] \textit{National Parks & Conservation Ass’n v. Morton} 498 F.2d 765 (D.C. Cir. 1974)
\item[\textsuperscript{102}] \textit{National Parks & Conservation Ass’n v. Morton} 498 F.2d 765, 770 (D.C. Cir. 1974).
\item[\textsuperscript{103}] \textit{UNITED STATES DEPARTMENT OF JUSTICE GUIDE TO THE FREEDOM OF INFORMATION ACT 305} (2016)
\item[\textsuperscript{104}] \textit{Public Citizen Health Research Group v. FDA} 704 F.2d 1280, 1288 (D.C. Cir. 1983).
\item[\textsuperscript{105}] \textit{Critical Mass}, 975 F.2d at 879.
\item[\textsuperscript{106}] \textit{42 U.S.C 4332(2)(C)}
\end{itemize}
\end{footnotesize}
requirements under the NEPA through the lens of FOIA and thus brings most of its disclosure obligations under NEPA under the FOIA framework.\textsuperscript{108}

Under the Emergency Planning and Community Right-to-Know Act (ECPRA)\textsuperscript{109} in the context of emergency planning and response, the government requires firms to disclose any discharges of hazardous chemical substances above a certain threshold, as well as amounts of such chemicals stored.\textsuperscript{110} This information must be released to local authorities and states.\textsuperscript{111} The federal government is also required to maintain and provide public access to a Toxics Release Inventory (TRI)\textsuperscript{112} based on this information. This must identify the chemicals, the quantities in which they are used or released as well as methods of storage and disposal. However, the location of Tier 2\textsuperscript{113} information may be withheld from disclosure at the request of the submitter.\textsuperscript{114} Tier 2 information is more detailed than Tier 1\textsuperscript{115} information which only describes the chemicals in aggregate terms and categories of hazard rather than specific chemical name, or use. Tier 2 information is also only required to be submitted to state and local authorities on request\textsuperscript{116} and its availability to the public is relatively restricted.\textsuperscript{117} Where state and local authorities have the information in hand they are required to disclose it to a requester and if not, they are required to request it from the firm, where the amount of chemicals stored is above 10,000 pounds.\textsuperscript{118} Below that threshold, disclosure is discretionary on the part of state and local authorities and must be justified by the requester. ECPRA also protects trade secrets from disclosure.\textsuperscript{119} Thus a firm can designate the specific chemical identity of the chemicals it uses and stores as a trade secret and is not required to submit it. Instead it can provide "the generic class or category of the hazardous chemical, extremely hazardous substance, or toxic chemical.

\begin{footnotesize}
\textsuperscript{108} Council on Environmental Quality FREEDOM OF INFORMATION ACT HANDBOOK 1 (2014) Available at: https://www.whitehouse.gov/sites/default/files/microsites/ceq/foia_handbook_2-27-12.pdf


\textsuperscript{110} 42 U.S.C. § 11002.

\textsuperscript{111} 42 U.S.C. § 11003.

\textsuperscript{112} 42 U.S.C. § 11023(h), 11044.

\textsuperscript{113} 42 U.S.C. § 11022(d)(2).

\textsuperscript{114} See 42 U.S.C § 11044(a). Tier 2 information is the following:

(A) The chemical name or the common name of the chemical as provided on the material safety data sheet.

(B) An estimate (in ranges) of the maximum amount of the hazardous chemical present at the facility at any time during the preceding calendar year.

(C) An estimate (in ranges) of the average daily amount of the hazardous chemical present at the facility during the preceding calendar year.

(D) A brief description of the manner of storage of the hazardous chemical.

(E) The location at the facility of the hazardous chemical.

(F) An indication of whether the owner elects to withhold location information of a specific hazardous chemical from disclosure to the public under section 11044 of this title.

\textsuperscript{115} 42 U.S.C. § 11022(d)(1). This covers:

(i) An estimate (in ranges) of the maximum amount of hazardous chemicals in each category present at the facility at any time during the preceding calendar year.

(ii) An estimate (in ranges) of the average daily amount of hazardous chemicals in each category present at the facility during the preceding calendar year.

(iii) The general location of hazardous chemicals in each category.

\textsuperscript{116} 42 U.S.C. § 11022(d)(2)

\textsuperscript{117} 42 U.S.C. § 11022(e)(3)

\textsuperscript{118} 42 U.S.C. § 11022(e)(3)(B)

\textsuperscript{119} 42 U.S.C. § 11042
\end{footnotesize}
(as the case may be).” Determination of whether a trade secret is validly claimed is at the discretion of the Administrator designated under the Act. The determination that something is a trade secret can be reviewed on request and is subject to judicial review. The same is true for the trade secret claimant. ECPRA also explicitly limits disclosure by making it subject to the Trade Secrets Act. Thus, much like FOIA, ECPRA envisions no release of trade secrets. This makes it difficult for requesters to challenge in court given that challenging the existence of a trade secret requires knowledge of what the trade secret actually is and what measures the firm has taken (information which is in the hands of the firm and not the requester.) The limitations are somewhat attenuated by the obligation on the local, state, or federal authorities to provide, where known, information on known adverse effects or toxicity of chemicals claimed to be trade secret to any requester. As both Roesler and Wagner point out, it is the very lack of such information that should drive disclosure of the chemical names and identities given that the vast majority of chemicals in use in industry have no such information developed about them.

While useful for emergency planning, the ECPRA and the associated TRI (along with high thresholds for reporting and associated exemptions) have generally not provided the kind of specific information that the public would consider necessary to make determinations about actual health risks and toxicity, nor has it enabled the development of knowledge and scientific information about specific chemicals and their risks.

2. India

The Indian Right to Information Act (RIA) is one of the more extensive FOIA-like structures out there with regional and national information commissions and commissioners, independent of the government to whom appeals may be made for refusals. In looking at the grounds for refusal in the Indian RIA, the issue of confidential information is addressed in Article 8(1)(d) of Chapter II. That states that there shall be no obligation to provide:

“information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;”

120 42 U.S.C. § 11042(a)(1)(B)
121 42 U.S.C. § 11042(a)(3)
122 42 U.S.C. § 11042(d)
123 42 U.S.C. § 11042(d)
124 18 U.S.C. § 1905
125 42 U.S.C. § 11042(h)
129 Right to Information Act (2005) (Act No. 22 of 2005 as modified up to 1st of February 2011.) (India)
Thus under the RIA, publication is still possible based on a weighing of the public interest. There is very little available case law on how this has been interpreted and managed, but at a minimum a balancing exercise seems to be mandated. At least one court has dealt with interpreting Article 8(1)(d) in a case that dealt with documents submitted in a tender by private parties to carry out consulting work for the state. The court in that case gave great weight to the object and purpose of the Act in ensuring access to public information and scrutiny of public acts. In particular, the court noted the need for special scrutiny of commercially significant public acts as implicating the very dangers that the act was meant to address i.e. secrecy relating to public funds and possible corruption. The court noted that once a decision was made regarding a tender, the public had a right to know the basis of the decision and thus documents submitted in order to win the tender must of necessity be made available to allow the public to perform its scrutiny function. The court also saw no justifiable countervailing interest on the part of the private actor claiming confidentiality as participating in tenders was a voluntary process. The court ruled that the information did not fall within the exemption of article 8.1(d).

The key distinction in the India case, was the fact that participation in the market for tenders was voluntary and not a necessity for firm. To the submission that participation was necessary to participate in the firm’s sector at all, the court provided little guidance, but is seems that the court’s rationale would not extend to such cases.

3. The European Union

The EU Transparency Regulation makes the refusal to disclose mandatory in the case of confidential information, subject only to an over-riding public interest, and in any case subject to consultation with the private party submitter of the information. Historically, the EU bodies have been deferential to refusals by third parties to allow disclosure.

In the environmental arena, the defining access to information regulation in the EU is based on the implementation of the Aarhus Convention. The Aarhus Convention is the primary international/regional instrument framing the direct right to access information on environmental matters and both the European Union and all of its member states are parties to it. As a primarily European instrument to which the EU as an institution is also a signatory, the case law of the European Court of Justice (ECJ) (now the Court of Justice of the European Union (CJEU)) is key to its implementation. For our purposes, it is important to understand the triggers for when information falls under the Aarhus Convention and then what framework the Convention provides for the protection of trade secrets and confidential information if any.

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131 Citing the Indian Supreme Court decision in The State of Uttar Pradesh v. Raj Narain and Others. All India Reporter 1975 Supreme Court S65
The rationale for the treaty is very clear and is embodied in the preambles and the objective in Article 1:

“In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

Thus access to information here reflects not just a utilitarian function but is seen as a contribution to the right of each and every person, present and future to a healthy environment. This is fundamental as it frames access to information as a human right, rather than simply as a means to an end. This is in line with broader human rights jurisprudence on the freedom of expression that notes that access to information is a primary element of the right to engage in free expression and participate in the democratic process.136

Regarding the trigger for action, Article 2(3) defines the very broad scope of what constitutes environmental information subject to disclosure:

“Environmental information” means any information in written, visual, aural, electronic or any other material form on:
(a) The state of elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(b) Factors, such as substances, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programmes, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;
(c) The state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;

This is generally not read to include information on pharmaceutical products, particularly new chemical entities (NCEs). In Article 2(5) a broad definition of what constitutes the public is also used. Article 4, imposes an obligation to provide information upon request. States may not impose a standing requirement or require an interest to be stated.

There are circumstances under which such a request may be refused outlined in Article 4(4) if they would have an adverse effect. In particular, we are concerned here with the exceptions in 4(4)(d) –(g):

(d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall (my emphasis) be disclosed;
(e) Intellectual property rights;
(f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
(g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material;

First, generally, the exclusions are discretionary and are to be decided by the public authority. They are not mandatory, nor do they require the consent of third parties if the government nevertheless determines either on a case by case basis, or on a broader basis that disclosure is appropriate. In addition, the final paragraph of article 4 notes that these exceptions should be construed narrowly, given the strong public interest in access to the information, especially where it may address emissions to the environment:

The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.

This more broadly reflects the rationale and conviction that trade secrets should not protect those responsible for engaging in potentially harmful behavior from claiming information about that behavior as confidential or trade secret. The Aarhus Convention Implementation Guide also notes that restrictive treatment implies a higher burden of proof in order to exercise the discretion to refuse such as: showing of actual harm from the release rather than the mere possibility thereof\textsuperscript{137}, including that the harm cannot be remedied by other compensatory mechanisms. The existence of the harm may still be countenanced as long as the adverse effect is not so severe when balanced against the existence of the right, or against, as the implementation guide notes, the public interest in disclosure. Thus some measure of adverse effect must be allowed when weighed against strong interests in disclosure.\textsuperscript{138} The weaker the public interest the easier it may be to invoke the exceptions.

Looking specifically at the exceptions, Article 4(4)(d) expresses the paradigmatic concern over the disclosure of trade secrets or CBI. Such information must however be explicitly stated and protected by law\textsuperscript{139} as trade secrets or undisclosed information in some fashion. Where such information is protected under different systems such as unfair competition, it remains unclear whether that would reach the threshold under the convention as ‘protected by law’. The

\textsuperscript{138} “Thus, in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure.” European Community ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1, 11 December 2009, para. 30
implementation guide argues that the protection must be explicitly as commercial or industrial secrets\(^{140}\), meaning that normal unfair competition law protection may not qualify as such. As stated, it appears quite broad and foresees a relatively deferential approach. That said, the authority will have to assess the legitimacy of the economic interest claimed (thus to some extent the validity of the information as a trade secret or as CBI). As with other international treaties, legitimacy has both an economic and normative framework suggesting already that legitimacy must be examined in the context of legitimate claims by others to that same information. In addition, it makes clear that no such claim can be made regarding undisclosed information related to emissions into the environment. This reflects the absolute barrier that Aarhus presents to confidentiality claims related to information regarding environmental harms.

Article 4(4)(e) presents a puzzling claim except perhaps to address the lacuna where trade secrets in particular are treated as intellectual property. If so, it seems to impinge on the scope of article 4(4)(d). If it refers to other intellectual property rights then a category mistake seems to have been made as all other such rights must by definition involve disclosure to the public in order for such a right/grant to exist in the first place. However, the implementation guide points to copyright claims as a possible barrier to disclosure where an author may wish to prevent dissemination of a work, such as a study or report.\(^ {141}\) It also points to a decision by the compliance committee that such claims should not prevent disclosure of documents created specifically for public purposes such as environmental impact assessments.\(^ {142}\)

Article 4(4)(f) relates to personal information which is protected under privacy and data protection regimes and impinge upon core personal autonomy rights. It is however, limited only to natural persons.

Finally, Article 4(4)(g) reflects one of the other rationales discussed above, that in order for a state to encourage voluntary submission of environmental information for its own regulatory processes, it may limit disclosure. This article is a clear expression of that claim, the utility of which, as I noted above, may not always be as clear, given the structural incentives of market actors.

The discretion to agree to disclose is absolute under the convention and expressly does not allow for third parties to object to its release,\(^ {143}\) but the discretion to refuse to disclose is restricted by a requirement of justification under article 4(7) and the obligation to make available a review procedure under Article 9. Such a review must be conducted by a body independent of the public authority and should be judicial or quasi-judicial. Where it is judicial, an intermediate review body should also be available for expedited, cost-effective decisions. The procedure does not require the participation of the affected third parties or submitters of information under Article 4(4).

\(^{143}\) ECE/MP.PP/C.1/2009/2/Add.1 (Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community), para. 31 (b).
Importantly, the Aarhus Convention imposes not just a right to access information but imposes several positive obligations for the public authorities to engage in disclosure of specific kinds of information even absent requests to do so in Article 5(7) but still subject to the discretion to refuse to disclose information covered in article 4(4).

The implementation of these rules in national law has varied.\textsuperscript{144} At the national level of course, the directions on how to address trade secrets and undisclosed information above have been very specific. Article 3(1) does mandate states to ensure the compatibility of other provisions of law with the convention and to alter those incompatible laws. While not creating a hierarchy, this does specify that laws inconsistent with the obligation must be harmonized or justified and that the Convention must nevertheless be made effective and incompatibilities removed or adjusted for while engaging in the proper public interest balancing mandated by the Convention.

The Aarhus Convention has been implemented by the member states of European Union as has the EU itself, as well as the European Economic Area countries (including Norway and Switzerland). The interpretations of the compliance committee and the implementation guide have significantly framed the implementation of the Aarhus Convention. In the EU, implementation took place through the Aarhus Regulation\textsuperscript{145} as well as in the Environmental Information Directive.\textsuperscript{146} In that context they have also had to deal with claims of confidentiality and when to disclose such information and to determine how the Aarhus Convention should relate to other access to information legislation in the EU such as the Transparency Regulation.\textsuperscript{147} Most significantly, the Aarhus Regulation applies the Transparency Regulation to environmental information.\textsuperscript{148} In addressing the Transparency Regulation’s treatment of confidential information, the Aarhus regulation, Article 6(1) shifts the traditionally restrictive approach to one that is more broadly favorable to release of information. Thus environmental information relating to emissions is defined as coming under the over-riding public interest necessary for the release of confidential information in the Transparency Regulation.

In addition, the other grounds for refusal in the Transparency Regulation will be interpreted restrictively according to the Aarhus Convention. The Aarhus Convention does not establish a requirement that the concerned third party be consulted or have a right of review as in reverse FOIA-type frameworks, but the continuing applicability of the Transparency Regulation means that Article 4.4 still applies and consulting with the concerned third party is required even for environmental information. One recent case dealt directly with this issue, regarding a request

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for access to testing data and production methods submitted by firms seeking market entry of glyphosphate into the EU. The Commission had refused to release the documents based on concerns that intellectual property and trade secrets would be disclosed.\footnote{Judgment of the General Court of the EU on Access to Information under Substance Law Case T-545/11, Judgment of 08 October 2013.} The case revolved around the mandatory disclosure element that required information relating to emissions to be disclosed in which the Commission argued that part of the information on methods and identity of the impurities and products was not related to emissions and was therefore not an over-riding interest under the Transparency Regulation.\footnote{Horst von Holleben, Judgment of the General Court of the EU on Access to Information under Substance Law: Case T-545/11, Judgment of 08 October 2013 4 EUR. J. RISK REG. 565 (2013).} The Court ruled against the Commission arguing that the Aarhus regulation overruled and governed any other measures in any directive or regulation if it related to environmental information related to emissions.\footnote{See Horst von Holleben Judgment of the General Court of the EU on Access to Information under Substance Law: Case T-545/11, Judgment of 08 October 2013 4 EUR. J. RISK REG. 565, 566 (2013)} In addressing the relationship of the Aarhus Regulation to the EU Fundamental Charter of Rights and the ECHR on property, the Court essentially argued that the Aarhus Regulation is not in contradiction to these, especially given how clearly and unequivocally the Regulation addresses the balance between the public interest and the right to property in its text.\footnote{Para 44, Judgment of the General Court of the EU on Access to Information under Substance Law Case T-545/11, Judgment of 08 October 2013} The decision has raised concerns that it fundamentally changes the expectations of firms submitting confidential information for marketing approval.\footnote{Horst von Holleben Judgment of the General Court of the EU on Access to Information under Substance Law: Case T-545/11, Judgment of 08 October 2013 4 EUR. J. RISK REG. 565, 569 (2013)} However, given the clarity of purpose of the Aarhus Convention, this very outcome was foreseen and intended by the drafters of the treaty and the regulation. Whereas all access to information regulations in the EU had previously been submitted to the Transparency Regulation, the Aarhus Regulation made the Transparency Regulation subsidiary in the specific case of environmental information. Thus much of the debate now in the EU will largely revolve around what is environmental information, and what is information that relates to emissions into the environment with reference to practice in the Aarhus Compliance Committee.

5. Conclusion

While significant similarities exist among the different states, it is clear that the main vector that they differ on in resolving the conflict between trade secret protection and access is the extent to which the prohibition on disclosure of trade secrets is absolute. In the US, it appears absolute in the context of the FOIA. However, where a statute explicitly requires disclosure in a specific case as part of a regulatory framework, neither the FOIA nor the Trade Secrets Act appear to be barriers. Most importantly while the FOIA creates an expectation of non-disclosure, specific regulatory acts that explicitly require disclosure do not do so.

The EU, as a general rule does not envision disclosure of trade secrets, unless an overriding public interest can be found, and has a specific and overriding obligation to disclose for information related to ‘emissions into the environment”. Thus for environmental information
the EU creates no expectation of non-disclosure and for other information more generally, the explicit rule is that the disclosure may be allowed when there is an overriding public interest.

In contrast to these, the Indian FOIA makes it clear that where a larger public interest is identified, the FOIA authority may, at its discretion disclose the information. Thus for all information there is an explicit statement in the law that there can be no expectation of non-disclosure as the claim will always be balanced against the larger interest. The Indian approach constitutes the broadest approach, although, within the narrow scope of environmental information, the Aarhus Convention may be stronger in requiring disclosure.

In none of the cases, does it appear that the legislation provides for an expectation of non-disclosure by excluding trade secrets from the scope of the FOIA, and the regulatory authority or the courts have nevertheless carried out a balancing against the public interest in deciding whether or not to disclose trade secret information. There is no reason in principle that the authorities or the bodies should refrain from carrying out such balancing. To a significant extent, while the FOIAs represent and make explicit most of the rationales for access to information, in and of themselves they are not a complete reflection of the public policy bargain regarding the tension between access to information and protection of undisclosed information. The FOIA itself is not the place where specific interests, especially those relating to health and environment are articulated. These are usually articulated in separate legislation within the constitutional framework and are considered sufficient means of protection which are taken into account by other legislation. The inclusion of trade secrets in most FOIA legislation is therefore a means of preventing automatic disclosure of such information but is not itself sufficient as a total prohibition against balancing the trade secret interests against other interest expressed within the broader legislative and constitutional framework. The claim of trade secret protection, in the access to information framework is, conceptually, the beginning of the analysis, not the end. This can be seen in the US where the strengthening of the prohibition on disclosure of trade secrets came from interaction with another legislative act, the Trade Secrets Act, rather than a specific amendment and addition to the FOIA. The informational interests protected by the FOIA were always intended to interact with the interests in other legislation. There is nothing, therefore, that should, in principle prevent states from carrying out such balancing. However, the very fact of the creation of an expectation of non-disclosure is something that, under the TRIPS Agreement, forecloses the possibility of such balancing and thus may require more explicit and detailed statements regarding the manner in which public interests may, if at all, be balanced against trade secret interests in the FOIA context in implementing legislation. The next section details how and why this may be the case.

III.
TO WHAT EXTENT DO TRIPS AND TRIPS-PLUS REGIMES LIMIT THE UNIVERSE OF APPROACHES TO RESOLVING THE TENSION BETWEEN ACCESS TO INFORMATION AND PROTECTION OF TRADE SECRETS?

A. The TRIPS Agreement
1. The Nature and Scope of Protection in Article 39

The TRIPS Agreement is the primary international set of rules for the protection of trade secrets and undisclosed information. It incorporates the previous major international treaty on the same subject matter, the Paris Convention on Industrial Property.\(^{154}\) In addition, in the period following the TRIPS Agreement, many countries have signed onto bilateral and regional free trade agreements with more extensive protections for trade secrets and undisclosed information. In the TRIPS Agreement, the rule for protection of undisclosed information can be found in Article 39.

Article 39(1) states:

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis 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.

Paragraph 1 requires governments to protect such information against three core acts identified in the Paris Convention: false allegation, confusion, and misleading statements regarding quality, source, processes, and manufacturing. In the final case, the aim of the Paris Convention may have been to try and prevent the use of statements regarding equivalence and source e.g. that generic medicines come from the same source to the branded protected medicines. The Paris Convention only protected against use but not disclosure. In contrast, the TRIPS Agreement states in Article 39(2):

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\(^{10}\) 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.

This is the paragraph that adopts the current framing in most jurisdictions (and primarily drawn from the US Uniform Trade Secrets Act) regarding protection of trade secrets. It requires all member states to provide protection not simply against use but also against disclosure. It also embodies a softer requirement that continues to protect the information even if it is known to

some in the field as long as it is not 'generally' known. In addition, the footnote provides even more detail noting that:

“For the purpose of this provision, “a manner contrary to honest commercial practices” shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.”

This expands the scope of covered activities beyond the list identified in the Paris Convention, as referenced in Article 39.1.

The manner of implementing such protection is not addressed but left up to states, as long as it is at least based in unfair competition law as defined by the Paris Convention and Footnote 10 of Article 39.2. This reflects the basic viewpoint of the majority of states at the time of signing the TRIPS Agreement that trade secrets were not objects of property in the same way as traditional intellectual property. There is some argument, most notably from Bronckers and McNelis\(^{155}\), that TRIPS actually requires that trade secrets be protected as intellectual property and not simply through unfair competition law. They argue that to provide protection through unfair competition law would be to negate the meaning of Article 39.2 since article 10bis of the Paris Convention is not intended to provide protection for trade secrets. A counter to their argument is that article 39.2 is meant to create precisely that link between unfair competition law and trade secrets that the Paris Convention failed to do and that the aim was to justify being able to place these further rights and restrictions in the TRIPS Agreement. Without reference to the Paris Convention, the article 39 obligations would have been \textit{sui generis} for most states, in a similar way that obligations on geographical indications were. Treating trade secrets as intellectual property would then bring them under the protection of the European Convention on Human Rights and the European Charter of Fundamental Rights, which would require compensation for any disclosure or use, a key conclusion of Bronckers' and McNelis' paper.

Article 39.2 is crucial in several respects. It classifies any and all such information as trade secrets, with no exceptions, or subject matter exclusions. This means that no information may be excluded from the ambit of trade secret protection as long as it meets these essential criteria. Article 39.2 is broader than Article 39.3 which covers only information submitted to governments and only information submitted for marketing approval of pharmaceutical and agricultural new chemical entities. Article 39 as a whole and the TRIPS Agreement generally have no directly applicable exceptions that would allow for interferences with the right to prevent disclosure, acquisition or use. Thus the only limitation on the right in Article 39.2 is the extent to which the action by the government which resulted in disclosure, acquisition or use was contrary to honest commercial practices. The disclosure by a government of submitted information (not covered by Article 39.3) is therefore dependent on whether we can argue that such disclosure of such information would not be contrary to honest practices.

The possibility to prevent disclosure does not, at first glance, seem to encompass action by the government to use, or to require submission of trade secret information. Thus the possibility to prevent acquisition by others does not necessarily extend to the possibility to prevent the government from requiring submission of the information, or from using or disclosing the information itself, provided it was not acting as a commercial actor or in breach of contract or confidence. There may however, be an argument that the right does extend to the government itself, where the actions of the government can be characterized as acting in a manner contrary to honest commercial practices i.e. as engaging in unfair competition. As such, if the government were to act as a commercial actor capable of engaging in the four behaviors outlined in footnote 10:
- breach of contract
- breach of confidence
- inducement to breach
- acquisition by third parties who know, or were grossly negligent in failing to know, that such practices were involved in the acquisition
then a claim could be made that, not only was the state not in compliance with its obligations under the TRIPS Agreement, but that under national law it could be sued as a violator of the rights itself. Thus, for information, beyond the scope of pharmaceutical and agricultural test and other data necessary for marketing approval (see article 39.3) Article 39.2 is still very much relevant as a potential limitation to disclosure specifically. One can only conclude that Article 39.2 places an absolute barrier to use or disclosure where such disclosure entails one of the breaches above.

For the government to justify such action only three avenues would be allowed since simply stating a public justification would not seem to be available under the TRIPS Agreement:

1. that the government cannot be a commercial actor capable of unfair competition or dishonest commercial practices
2. that the government in the specific case is not acting as a commercial actor in the specific sector
3. that the government can sometimes be considered a commercial actor but that the specific circumstances of the legislation authorizing disclosure are such that the government owes no duty with respect to breach of contract, breach of confidence or the other factors.

The first is fundamentally incoherent given the role that governments play in commerce and contracts, especially in the sphere of procurement. Additionally, the language of Article 39.2 does not per se exclude governments from the ambit of the provision. Natural and legal persons can exclude “others”, not just third parties. The second one looks to the specific role that the information disclosure legislation requires the government to play. As a regulator that perhaps defines market entry, those clear circumstances may allow an argument that a regulator is a market definer rather than a market participant and thus cannot act as a commercial actor. Thus where the reason for the disclosure is that the legislation specifically excludes certain categories of information from such protection, in the service of some other government public purpose, or in the service of creating a market e.g. in the case of government procurement through tenders, it would not be covered. However this reasoning is somewhat circular as by definition under the
provision, the actions that are considered dishonest practices are those outlined. Thus it is not the ‘commercial’ nature of the act with which the provision concerns itself but the breach itself, which defines the ‘commerciality’. It is not unreasonable that where the government engages in one of these breaches it would be considered to be violating the provision and subject to complaints by other countries that they were not meeting their TRIPS obligations.

Thus we are left with the third option. This is based on the understanding that the existence of a contract, or the existence of a confidence, creates a legitimate expectation that information will not be disclosed and if such information is disclosed then there is a violation. This leaves no real room for justification by reference to public policy, as the existence of breaches itself provides what seems to be strict liability, at least within the TRIPS framework. I argue that this does however leave room for legislative action that does NOT create such an expectation of confidence when information is submitted or is required to be submitted. Legislation that by definition ensures that it creates no expectation of contractual rights, or rights relating to confidence in the information submitted would fall outside the ambit of Article 39.2 because it would not create an expectation. This is important because, under TRIPS, the trade secret protection is triggered by one of the breaches. Even where the requirements for qualifying as a trade secret are met (Article 39.2a-c), the ability to prevent use, disclosure or acquisition is limited by those occurring through dishonest practices i.e. one of the breaches in footnote 10. The expectation of confidentiality is not created by the coming into existence of the trade secret but by the existence of an obligation on the part of the acquirer to keep it secret, therefore creating a legitimate expectation on the part of the trade secret holder. Appropriate legislation that either entirely excludes a category of information from trade secret protection for specific purposes or that allows for trade secret protection to be balanced against the public interest would not be in violation of the TRIPS standard. However, this still leaves the disclosure through specific exceptions under each law in danger. Where the exception simply states that information protected as trade secrets will not be disclosed, absent an explicit counter-statement that this will be balanced against any over-riding public policy interest, it will be difficult to avoid the creation of an expectation that the information will be held in confidence, or some quasi-contractual expectation that this is the case. So for FOIAs that do not ensure that public policy justifications are formally and explicitly counter-balanced against claims of trade secrecy, any disclosure under such legislation would fall afoul of the requirements of Article 39.2 for protection of trade secrets. This would therefore have the same effect on a FOIA provision as the US Trade Secrets Act does in the US: preventing any disclosure of a trade secret by a government agency.

The absence of an exception to Article 39.2, even for the public interest,\textsuperscript{156} means that there is a significant possibility that many states are not in compliance with their TRIPS obligations, at least outside the ambit of marketing approval for pharmaceutical and agricultural products. Even where this is not the case, it implicates the means by which they will implement their obligations under newly signed international environmental treaties which both require submission of information to state and international institutions but also provide for unqualified exemptions for trade secrets. Many of these seem to have been adopted with the presumption that some type of

\textsuperscript{156}There is a possibility of using Article 7 and 8 a broad justification for public interest measures in TRIPS but as I point out in Chapter 6, Dalindyebo Shabalala Climate Change, Technology Transfer and Intellectual Property: Options for Action at the UNFCCC (2014), current WTO jurisprudence does not recognize such a role. I elaborate on what such an analysis could look like but that is beyond the ambit of this paper.
public interest balancing would take place in considering whether to disclose trade secrets, but have not made this explicitly the case in the treaty or in guidance to member states in implementing the treaty.

Some support for at least a balancing with the public interest can be found in Article 39.3 which addresses marketing approval for pharmaceutical and agricultural products. It states’’

Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

Thus a first look at Article 39.3 notes that it only imposes obligations of governments regarding the protection of such information in very specific circumstances: only when they require that such information be submitted for marketing approval of agricultural and pharmaceutical products which use new chemical entities. Thus when the information is submitted for purposes other than marketing approval, the obligations in Article 39.3 are not triggered. Where the data does not concern new chemical entities, the obligation is not triggered. Where the data is not about agricultural or pharmaceutical products the obligation in Article 39.3 is not triggered.

The first question that arises is the scope of the information to be protected. The same term, “undisclosed”, is used to describe the data or information suggesting that therefore the same definition of undisclosed information is being used for Article 39.2 and 39.3. Article 39.2 uses the term ’information lawfully in their control from being disclosed to’ in its chapeau, whereas secrecy is defined in the subprovisions below. Does this actually mean that Article 39.3 protection extends to information that is undisclosed but that does not necessarily meet the standard of secrecy in Article 39.2(a), (b) and (c)? That seems to be an absurd reading of an article that should be taken to be using similar terms to have similar meaning. This may be borne out by the fact that the only requirements for triggering the obligation in 39.3 is that the information be undisclosed, and that the origination of the data required considerable effort.

Thus the undisclosed information that must be protected under Article 39.3 must conform at least to the requirements of undisclosed information that must be protected under Article 39.2. However, Article 39.3 adds an additional criterion that the origination of the information must have involved considerable effort. A plain reading would suggest that this is an additional requirement for such information to meet, rather than an alternative to the one already described in article 39.2. There is no compelling reason anywhere else in the text that requires us to believe that the meaning of undisclosed data or information as used in Article 39.2 is not at least bounded by what is required in article 39.2.157

Article 39.3 then requires states to protect such information from not just unfair competition but from actual disclosure, thus going beyond simply preventing use. Disclosure

can thus only be justified in the interests of protecting the public. The last line also suggests that disclosure can be allowed provided that unfair commercial use is prevented, suggesting that disclosure is allowed as long as the rules allow a trade secret holder to nevertheless prevent others from making use of the data under article 10bis of the Paris Convention and footnote 10 of article 39.2. There has been no interpretation of this provision in the WTO Dispute Settlement process.\textsuperscript{158} However, several commentaries have outlined what they believe to be the content and extent of this requirement. Gervais addresses the negotiating background. He does not specifically address the issue of what would constitute 'protection of the public' except to note that it should be commensurate with the exceptions in GATT article XX(b). However, given that TRIPS has its own general exceptions, in Article 7 and 8, as well as article 30 and 31 on patents, and Article 13 on copyright, it would seem more appropriate to refer to those rather than the GATT. In that context, given the lack of a specific exception in Article 39, it is appropriate to refer to the manner in which the public interest is defined in Article 8.1 which is:

\begin{quote}
Article 8 - Principles
1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
\end{quote}

Thus the public interest, or protection of the public, encompasses measures to protect public health and nutrition. To the extent that promotion of the public interest encompasses environmental regulation it is also covered, although this is measured by the extent to which such an interest is vital to socio-economic and technological development. Some further guidance on Article 39.3 framing of “protection of the public” can also be found in looking at the evolution of this phrase and related concepts in the various drafts preceding the final TRIPS text. The Brussels Draft Article 4A, provided for a five year exclusivity against use by the agency (e.g. relying on the data for approval of drugs), and additionally protection against disclosure with the same exact wording of “except where necessary to protect the public”.\textsuperscript{159} However, almost all of the article was bracketed meaning that it was a proposal but not part of the text per se. In the Draft of July 23, 1990; the conditions under which disclosure could take place were elaborated in articles 3Ab.1 – 3Ac.2 Thus 3A.b.2 allowed disclosure only to the extent “required to carry out necessary government functions”.\textsuperscript{160} This seems somewhat broader than the language restricting it to those conditions necessary to protect the public. On the other hand, a governmental interest may be construed somewhat more narrowly than a public interest, thus affecting the standing of those who seek information. Thus under that formulation, individuals, especially under FOIA frameworks, would likely not have standing to seek disclosure. In any case, the proposed text would provide for confidentiality obligations or agreements to be imposed or negotiated with the person to whom the information was disclosed. Thus broad public dissemination was clearly not

\textsuperscript{158} WTO Analytical Index. Available at: http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_03_e.htm#article39B


envisioned as part of what would be allowed. This is especially clear in Article 3Ab.3, which allows disclosure to protect human health or safety or to protect the environment, but also allows limits to be placed on the person to whom the information is disclosed. On the other hand, proposed text in Article 3Ac.1 offered an alternative that general disclosure is allowed but only to the degree indispensable to inform the public of the actual or potential danger of a product. This at least seemed to envision release to the public as a whole, without any compensation. Finally, Article 3Ab.1 at least envisioned that the use of the information by a third party under a government permission or license would be appropriately compensated suggesting at least that it was understood that trade secrets could indeed be made available under a compulsory license as long as confidentiality obligations were imposed.

The question then is whether the final text is narrower or broader than the original drafts. The lack of a requirement to allow for confidentiality obligations or the opportunity to negotiate such obligations suggests that the limits on receivers of such information have been removed from the final text. The rationales for such release may however be narrowed where protection of the public is not framed in particular as action necessary to protect human health and safety or the environment. However, what is finally clear is that disclosure for the needs of protection of the public was the final text that won out, likely encompassing protection of human health and safety and protection of the environment. Broader disclosure to the general public is also envisioned as part of this article as the proposals to limit such disclosure did not survive the negotiating process. The article even provides a dual framework for disclosure: thus where steps are taken to ensure protection against unfair commercial use, there may be no need to actually show a need to protect the public.

Looking at “sufficient protection against unfair commercial use”, a key question is whether the unfair commercial use described in 39.3 has the same meaning as “a manner contrary to honest commercial practices” as used in 39.2. This is key as the definition of the latter is provided by a minimum level in Footnote10. The definition thus includes at a minimum:

- breach of contract
- breach of confidence
- inducement to breach
- acquisition by third parties who know, or were grossly negligent in failing to know, that such practices were involved in the acquisition.

The protection must be against:
- disclosure
- acquisition and
- use

through any of the methods above.

There is little guidance as to whether ‘unfair commercial practices’ and ‘dishonest practices’ are indeed the same concept i.e. that “unfair commercial practices” amount to the same thing as “contrary to honest practices.” This wording is drawn directly from the Paris

Convention Article 10bis2, and to which many countries responded by applying their law on unfair competition. However, at the very least it is clear that while unfair commercial 'use' is limited to use of the information by third parties, as is logically implicated by the text, Article 39.2 provides broader protection including both acquisition and disclosure of the information. More interesting is that the obligation in Article 39.3 does not simply directly refer to the scope of protection in 39.2 suggesting that a different scope of protection was truly meant. Some clue may however be gleaned from the phrasing in 39.1, that the obligation to protect under paragraph 2 and 3, is done so in pursuance of the obligation to protect against unfair competition from Article 10bis of the Paris Convention. Thus, it may be that the specific obligations of article 39.2 are subsets of the general protection afforded by unfair competition law or that they are specific implementations of the unfair competition obligation in Article 10bis of the Paris Convention. It is not clear that we should apply the definition in Article 39.2 rather than the standard in Article 10bis of the Paris Convention which extends at a minimum to:

(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.

The minimum standard in Article 10bis remains very different from that articulated in article 39.2 which identifies and focuses on the manner of acquisition, disclosure and use. It may be that the basic article 39.2 is additional rather than alternative to article 10bis(3) of the Paris Convention, but they clearly set different thresholds and since article 39.3 very explicitly does not refer to article 39.2, a plain reading suggests that the applicable threshold is more likely to be Article 10bis.

Under 39.2 the disclosure, acquisition and use must be a) without consent and b) contrary to honest practices. This is in contrast to 39.3 which only requires that if the data meets the requirements of:
- being mandatorily submitted data for approval of marketing pharmaceutical and agricultural new chemical entities;
- is undisclosed
- its origination requires investment and effort;
then protection is afforded against
- unfair commercial use
- disclosure (with the exception discussed above)

Where unfair commercial use is a subset rather than an alternative to the broader protection of dishonest practices as defined in 39.2 and Article 10bis of the Paris Convention, then such data must be protected against use that represents at a minimum;
- breach of contract
- breach of confidence
- inducement to breach
This suggests that the minimum level of protection required is relatively narrow but nevertheless that use by third parties not the government is clearly encompassed.\textsuperscript{163} This is not to say that countries may not choose to make the unfair competition protection referred to in Article 39.3 and 39.2 co-extensive with that of broader unfair competition law in the domestic arena, but there is no requirement to do so, given the very carefully narrow approach in article 39 itself to that definition.\textsuperscript{164} That definition must be limited only to acquisition through breach or dishonest practices. Importantly, the unfair commercial use element of article 39.3 has to be read in conjunction with the disclosure element. The article clearly contemplates that the government may engage in disclosure of information but then places an obligation on the government to prevent parties from using such information in ways that meet the unfair commercial use definition in the Paris Convention or Article 39.2. However, in relation to information that the government has in its hands, the requirement to protect against unfair commercial use probably requires the government to at least stand in the place of the holder of the undisclosed information in relation to the breaches referred to in Article 39.2. Thus the government should act against third parties or allow the holder of the information to pursue claims against those who acquire the information from the government in ways that are dishonest, and prevent them from acquiring, disclosing or using the information in dishonest way. At the very least the government may be required to protect such information against use, even where it is disclosed.

This also means that outside the realm of new chemical entities, Article 39 of TRIPS does not present a barrier to government disclosure, provided that the information is not used, acquired or disclosed to third parties in violation of article 39.2. In any case, as long as the government provides a remedy in civil or other law against use by third parties not the government, there is no limit on the government's disclosure of information submitted to it, except in the specific subject area of information submitted for marketing approval of NCEs for pharmaceutical and agricultural products. Thus in the area of toxic chemicals that are not new chemical entities relating to pharmaceutical or agricultural products Article 39.3 of TRIPS does not pose a barrier to government disclosure of submitted information. Even for pharmaceutical and agricultural products information not being submitted for marketing approval but for other purposes such as safety and health management and vigilance, government disclosure is not limited by article 39.3.

The clearest understanding from the foregoing analysis is that, to the extent that unfair commercial 'use' is prevented, Article 39 does not present a barrier to government disclosure of information submitted to it. The article clearly contemplates that disclosure could occur and to the extent that the government imposed conditions on those who receive the information, or the public at large not to use the information in ways that violate domestic unfair competition law, including acts covered under the Paris Convention Article 10 bis, and article 39.2 of TRIPS, then

\textsuperscript{163} The majority of literature concerns itself with the extent to which Article 39.3 requires periods of exclusivity of the data for government use or if it allows government us at all. That discussion is beyond the scope of this paper which concerns itself with use by third parties and with disclosure, but for more on that discussion see: \textsuperscript{164} SATWANT REDDY & GURDIAL SINGH SANDHU, REPORT ON STEPS TO BE TAKEN BY GOVERNMENT OF INDIA IN THE CONTEXT OF DATA PROTECTION PROVISIONS OF ARTICLE 39.3 OF TRIPS AGREEMENT iv (2007).
disclosure is allowed. To the extent that Article 39.3 provides greater protection for information related to pharmaceutical and agricultural test data, then other government submitted information should benefit, at the very least from a disclosure exception that is co-extensive with that in Article 39.3. This relies on the definition of undisclosed information in both Article 39.2 and 39.3 being the same, and in a recognition that Article 39.3 does not encompass the entirety of information submitted to the government.

To conclude, the TRIPS Agreement has not been traditionally interpreted to address the ways in which Article 39 affected disclosure of government submitted information beyond the scope of marketing approval for new chemical entities in agriculture and pharmaceuticals. A closer examination shows that there are significant implications for access to information when Article 39.2 providing for broad trade secret protection encompasses government submitted information not covered by Article 39.3. Most importantly, governments must be aware that in creating and implementing access to information regimes for information submitted to the government they cannot create expectations that such information will be kept secret, while allowing for disclosure. This can only be done where the access to information legislation (in tandem with the trade secret legislation) explicitly states that such disclosure is contemplated. Thus in the cases examined earlier in the article, the current US approach can be seen as compliant because it poses an absolute barrier to the disclosure of trade secrets. The Indian approach, because of the manner in which the FOIA legislation explicitly states that trade secret will be balanced against the public interest is also compliant with the TRIPS framework as is the EU framework in the context of environmental information. Within the realm of environmental information, the EU Transparency and Aarhus Regulations can be seen as compliant, again because of the explicit statements regarding the specific balancing of trade secret protection against the public interest.

As countries negotiate and sign a new generation of TRIPS-plus treaties that address issues such as trade secrets, the extent of this new protection could further serve to limit the narrow window for disclosure provided in TRIPS. The next section examines whether this is the case in the group of early regional and bilateral free trade agreements, primarily by the US and the EU.

B. TRIPS-Plus protections in Regional and Bilateral Free Trade Agreements

In the period subsequent to TRIPS, the US and the EU pursued bilateral and regional free trade agreements containing intellectual property provisions (sometimes called “TRIPS-Plus” provisions) as well as environmental provisions. These generally increased the level of protection and enforcement for intellectual property. These were also at least initially focused on existing developing country partners (e.g. US-Peru and US-Chile) but, also in the case of the US included agreements such as the US Korea FTA, the US Australia FTA and most recently the negotiations for a Transatlantic Trade and Investment Partnership (TTIP) between the US and the EU. These were mostly carried out in the form of model agreements which the US or the EU then negotiated with partners and which were modified in successive negotiations to reflect advantages that had been gained in prior negotiations. In earlier model US agreements, there was

little or no text on trade secrets other than that related to undisclosed test data for pharmaceutical and agricultural products.\textsuperscript{166} The TPP reflects a shift in US policy to address the issue and thus this paper provides an analysis of the extent to which it may alter the TRIPS balance on disclosure of trade secrets. On the side of the European Union, negotiations with the group of African, Caribbean and Pacific (ACP) countries have resulted in agreements only one of which contains any substantive obligations on intellectual property, the EU-Cariforum Economic Partnership Agreement.\textsuperscript{167} That agreement contains no obligations on trade secrets or undisclosed information. Otherwise, the EU has signed agreements with the Andean countries with provisions on exclusivity for pharmaceutical and agricultural test data\textsuperscript{168} but nothing on trade secrets generally. The same can be found in the EU-Canada Trade Agreement\textsuperscript{169} and almost all other EU trade agreements.\textsuperscript{170} Ongoing negotiations with India do not appear to address the issue.\textsuperscript{171} In part, the EU lack of inclusion of trade secrets in its negotiations for TRIPS-Plus FTA may be attributed to the lack of EU harmonization which is only now being addressed with the Directive on the Protection of Undisclosed Information.\textsuperscript{172} The next section examines the key US trade agreement representing a shift in the treatment of trade secrets.

1. The Trans-Pacific Partnership

The Trans-Pacific Partnership\textsuperscript{173} is the most recent FTA signed by the US with a group of Pacific Rim countries including, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

Language similar to Article 39.3 of TRIPS providing for protection of undisclosed test data (for pharmaceuticals) is covered by Article 18.50 requiring a 5 year exclusivity period before it can be relied upon or used for marketing approval of new chemical entities.\textsuperscript{174} Paragraph 3 provides for an exception for action aimed at protecting public health in line with:

\textsuperscript{166} See e.g. US-Chile FTA, US-CAFTA-DR FTA, US-Korea FTA
\textsuperscript{167} EU-Colombia-Peru FTA Article 231
\textsuperscript{168} Canada – EU Trade Agreement, Article 20.29
\textsuperscript{169} EU-Chile (nothing on trade secrets or undisclosed information), Euro-Mediterranean Partnership (with Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia, Syria, and primarily limited to trade in goods), EU-Korea FTA, EU-Mexico FTA (nothing on trade secrets or undisclosed information), EU-Central America FTA (nothing on trade secrets or undisclosed information), EU-Singapore FTA (protection of test data in Article 11.33-11.34, nothing on trade secrets), EU-Thailand FTA (protection of test data in Article 8, nothing on trade secrets) EU-Vietnam FTA (protection of test data in Article 9, nothing on trade secrets), EU-Ukraine DCFTA (protection of test data in Article 222, nothing on trade secrets).
\textsuperscript{170} EU-Philippines FTA, The EU-Thailand FTA, EU-Tunisia Deep and Comprehensive Free Trade Agreement, EU-Israel Deep and Comprehensive Free Trade Agreement.
\textsuperscript{173} Article 18.47 cover Agricultural products and provides for a 10 year exclusivity period.
(a) the Declaration on TRIPS and Public Health;
(b) any waiver of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement to implement the Declaration on TRIPS and Public Health and that is in force between the Parties; or
(c) any amendment of the TRIPS Agreement to implement the Declaration on TRIPS and Public Health that enters into force with respect to the Parties.

The Declaration does envision countries using exceptions and limitations under TRIPS but since TRIPS itself provides no exceptions to trade secrets except for those in Article 39.3, at the very least disclosure for public interest purposes seems to still be available under the TPP.

Article 18.78 addresses increased protection of trade secrets. The definition of trade secrets remains the same as that in TRIPs Article 39.2 and the obligation to provide protection retains the language of TRIPS Article 39.2 and its footnote 10.\textsuperscript{175} The provision explicitly includes state owned enterprises within the ambit of article 39.2, something which has been considered a major accomplishment by the USTR\textsuperscript{176}, but which suggests at the same time that state enterprises and the state were not necessarily seen by the TPP signatories as covered by article 39.2. As I have argued above, that belief is likely mistaken. The TPP expands criminal penalties for willful and unauthorized access and acquisition over computer systems,\textsuperscript{177} and importantly for the purposes of this paper, it criminalizes “the fraudulent disclosure, or alternatively, the unauthorised and wilful disclosure, of a trade secret, including by means of a computer system.”\textsuperscript{178} This potentially includes such disclosure by a government employee, although not as specific as the US Trade Secrets Act prohibition.\textsuperscript{179} Taken on its face, the specific prohibition against unauthorized disclosure, excludes authorization by law and places such authorization in the hands of the trade secret holder. More specifically, by adopting such a broad prohibition on disclosure of trade secrets it appears that TPP signatories, at the very least have made it more difficult, if not impossible to justify disclosure of trade secrets by reference to the public interest, at least in those cases that operate much like general FOIAs. This presents a conflict for those countries that have such possibilities, e.g. India. To that extent, the TPP countries appear to have committed themselves to a framework that has the same effect as that in the US when it comes to disclosure of information, outside the realm of pharmaceutical (including biologics) and agricultural test data.

Criminal liability, however, may be limited to a small list of activities as enunciated in paragraph 3.\textsuperscript{180} The sanctions are limited to unauthorized acts and a party remains free to exclude acts by government employees from criminal liability because they are not for commercial

\textsuperscript{175} Para 1
\textsuperscript{176} See https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Intellectual-Property.pdf
\textsuperscript{177} Para 2
\textsuperscript{178} Para 2
\textsuperscript{179} See supra note ?
\textsuperscript{180} (a) the acts are for the purposes of commercial advantage or financial gain;
(b) the acts are related to a product or service in national or international commerce;
(c) the acts are intended to injure the owner of such trade secret;
(d) the acts are directed by or for the benefit of or in association with a foreign economic entity; or
(e) the acts are detrimental to a Party’s economic interests, international relations, or national defence or national security
advantage or commercial gain.\textsuperscript{181} It remains unclear the extent to which disclosure by a
government employee within the ambit of legislatively authorized disclosure of a trade secret
would be considered compliant with a country’s obligations under the TPP even under such an
exclusion, where it did not provide for at least civil liability. Given that paragraph 1 of the article
states that the basic non-criminal liability is founded, at a minimum, in article 39.2 of TRIPS, the
analysis of TRIPS above applies to non-criminal liability. Thus, under paragraph 2, states under
the TPP remain free to exclude from criminal liability acts that would otherwise be caught by
paragraph 2, by limiting liability to only one or more of the acts in the closed list. It may be
appropriate for TPP states wishing to maintain their access to information regimes to ensure that
no criminal liability extend to acts that are not for commercial gain or advantage, thus ensuring
that disclosure by government actors does not fall afoul of TPP obligations. At the most, it may
be appropriate to limit criminal liability under the TPP to those acts “[…] directed by or for the
benefit of or in association with a foreign economic entity;” which seems to be the primary
concern driving the criminalization provisions.

The TPP has the potential to be severely limiting even in regard to the room provided by
the TRIPS Agreement. However, to the extent that the opportunity to limit criminal liability to one
of the areas in the closed list, the TPP may be implemented in a manner that does not further close
off access to information.

IV.
IMPLICATIONS FOR IMPLEMENTING CURRENT AND FUTURE ENVIRONMENTAL SUBMISSION AND
ACCESS TO INFORMATION REGIMES

The analysis in the previous section bears out the concern that TRIPS and TRIPS-plus
regimes may have hidden landmines in them for the unwary government. Some of the current
frameworks in different countries have been fortunate to have implemented their access to
information regimes in ways that have, largely accidentally, fallen within the TRIPS framework.
However, it is also clear that, under TRIPS, those countries that impose, in their access to
information regimes, a bald prohibition on disclosure of trade secret information, do so in a way
that is not actually required by the TRIPS Agreement. This means that some countries, such as
the US, provide overly narrow disclosure regimes especially for access to environmental
information. An effective access to information regime can co-exist with trade secret protection
at the domestic level provided that no legitimate expectation of non-disclosure is created by the
legislation implementing the access framework. The analysis however, is less encouraging for
those countries whose legislation is insufficiently specific on this matter and whose courts may
be allowing for disclosure in the public interest despite the existence of legislation the
specifically prohibits disclosure of trade secrets. If that is the case, such countries are likely to be
out of compliance with their obligations under TRIPS Article 39.2. It behooves countries
concerned about the effectiveness of their access to information regimes to revisit their
legislation to ensure that this is not the case.

This issue becomes even more urgent given that countries have signed up, or are planning
to sign up to international environmental treaties with submission and disclosure agreements.

\textsuperscript{181} Harking back to the discussion above on unfair commercial practices.
Precisely because many of these agreements themselves provide little guidance on the extent to which trade secrets can and should be disclosed, an understanding of the TRIPS framework is crucial. The ways in which these agreements interact with trade secret protection vary, although many of the texts show little real thought for what the interaction should be. A key recent example of this is the Convention on Biological Diversity and its several protocols.

The Convention on Biological Diversity\textsuperscript{182} (CBD), is in many ways an access to information treaty in that it aims to regulate the access to, terms of disclosure and use of information related to genetic resources and the distribution of benefits from such disclosure and use. In that sense it should reflect a balance that allows access, but makes effective the ability of all to trace and assess when and how benefit sharing should occur. To do so, transparency about who the holders of genetic resources are and the terms on which they will provide access is fundamental as is transparency about who the users of genetic resources are, the uses to which they put genetic resources, and the terms on which they are willing or able to share the benefits from their use of the genetic resources. The CBD has several provisions where either information is to be shared and submitted to the CBD institutions or parties are mandated to encourage or require submission of information to relevant national institutions.\textsuperscript{183} The CBD contains no guidance or rule on how access to information that it requires or implies should be balanced against protection of undisclosed information. The only guidance may be that, as in many articles, the obligations are limited to those which are ‘practicable’ or are ‘appropriate’ seemingly leaving significant room to determine what is practicable or appropriate. Thus, from a strictly legal viewpoint, these terms seem to pose no barrier to countries placing limits on access to information based on concerns about confidentiality or protection of trade secrets.

The Nagoya Protocol\textsuperscript{184} aims to more explicitly lay out the content of the provisions of Article 15, 16 and 19 of the CBD. It has several provisions requiring the submission of information.

\textbf{Article 6.3(e)}


\textsuperscript{183} Article 14(1)(a) - Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures;

\textsuperscript{184} 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, \textit{signed} October 29, 2010 \textit{entry into force} October 12, 2014.
3. Pursuant to paragraph 1 above, each Party requiring prior informed consent shall take the necessary legislative, administrative or policy measures, as appropriate, to:

[…]  
(e) Provide for the issuance at the time of access of a permit or its equivalent as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms, and notify the Access and Benefit sharing Clearing-House accordingly;

This implies that the body requiring prior informed consent shall create such information, have possession of the contract outlining mutually agreed terms and communicate these to the ABS Clearing House. The language may allow for certification of the existence of these rather than the actual documents themselves but it already creates a provision that requires submission of such information to a national body with an obligation to communicate it to an international clearing house mechanism. Where such information is publicly accessible, the interaction with undisclosed information then comes into play.

The Nagoya Protocol also requires submission of information in other articles but crucially, the submission of information to the ABS is “without prejudice to the protection of confidential information.” The content of this broad brush exception remains to be elaborated but one thing to note is that is embodies a similar construction as that under the Aarhus Convention. Thus while it appears to suggest that any prejudice can prevent submission of information, it may be that, as under the Aarhus Convention, some harm or prejudice may be contemplated and balanced against the interest in accessing the information. Nevertheless, by stating such a broad but vague exception, the protocol is likely to be implemented in such a way that a legitimate expectation of confidentiality in relation to such information is created.

In contrast, the Cartagena Protocol is much clearer and elaborates on what exactly it means for information to be protected from disclosure. Article 21 specifically address confidentiality and states (all italic in bold my emphasis):

1. The Party of import shall permit the notifier to identify information submitted under the procedures of this Protocol or required by the Party of import as part of the advance informed agreement procedure of the Protocol that is to be treated as confidential. Justification shall be given in such cases upon request.  
2. The Party of import shall consult the notifier if it decides that information identified by the notifier as confidential does not qualify for such treatment and shall, prior to any disclosure, inform the notifier of its decision, providing reasons on request, as well as an opportunity for consultation and for an internal review of the decision prior to disclosure.  
3. Each Party shall protect confidential information received under this Protocol, including any confidential information received in the context of the advance informed agreement procedure of the Protocol. Each Party shall ensure that it has procedures to

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185 Article 17(1)(a)(iii) - Such information, including from internationally recognized certificates of compliance where they are available, will, without prejudice to the protection of confidential information, be provided to relevant national authorities, to the Party providing prior informed consent and to the Access and Benefit-sharing Clearing-House, as appropriate;

186 Id.

protect such information and shall protect the confidentiality of such information in a manner no less favourable than its treatment of confidential information in connection with domestically produced living modified organisms.

4. The Party of import shall not use such information for a commercial purpose, except with the written consent of the notifier.

5. If a notifier withdraws or has withdrawn a notification, the Party of import shall respect the confidentiality of commercial and industrial information, including research and development information as well as information on which the Party and the notifier disagree as to its confidentiality.

6. Without prejudice to paragraph 5 above, the following information shall not be considered confidential:
   (a) The name and address of the notifier;
   (b) A general description of the living modified organism or organisms;
   (c) A summary of the risk assessment of the effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health; and
   (d) Any methods and plans for emergency response.

The BCH very clearly states the information that may never be considered confidential, and while it allows for claims of confidentiality to be made it makes clear that:
- Submission of required information and disclosure to the biosafety clearing house is required and that non-disclosure is an exception. Thus in the absence of such a claim of confidentiality, submission of information to the clearing house is automatic.
- The decision on whether to refuse disclosure rests with the national authority and is discretionary, but must be justified by an assessment that the information is confidential, and any review of its decision need only be internal.
- Where the authority does believe that the information is confidential then, unlike in the Aarhus Convention, Article 21 requires that such information be protected absolutely against disclosure. There appear to be no exceptions to this.
- There are no restrictions on standing and access, according to the regulations of the BCH. Access to the BCH information is open to any person willing to register. There is also no need to request information once it has been submitted: it is always available.

Overall, the details of the Cartagena Protocol show greater consideration of problems related to reconciling access to submitted information and claims of confidentiality and addresses them in a manner that balances the interests in confidentiality, but also the interests and goals of the treaty. As such it is much more likely to be implemented in a manner that does not create, at the domestic level, an expectation of confidentiality that would preclude disclosure of the information that is relevant to the effective implementation of the treaty.

The example of the CBD, Nagoya Protocol and the Cartagena Protocol argues for greater and more explicit consideration in the negotiations of environmental treaties of the interaction with trade secret protection beyond simple vague declarations of “no prejudice”. In particular, precisely because domestic systems have such a narrow framework within which to balance both trade secret protection and access to information, domestic legislation that implements these treaties must be clear that for the information necessary to make them effective, no legitimate expectation of non-disclosure should be created. Failure to do so would expose the countries to
complaints at the WTO and would prevent true implementation of the environmental treaties to which they are parties.