

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

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Freedom of Information laws (“FOI laws”) are fundamental to enabling access to environmental information. The effectiveness of domestic and international environmental regulatory standards is dependent on ensuring strong information access regimes, especially for information submitted to governments by firms. However, there is an ongoing tension between providing and accessing complete regulatory information on the one hand, and maintaining the economic value of trade secrets on the other hand. Historically, this tension has been managed at the domestic level, within constitutional structures that balance access to information, privacy interests, and economic interests. However, the almost simultaneous advent of international norms and treaties containing obligations that ensure access to information on the one hand (especially through environmental treaties) and rules that require 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 in access to information. This Article argues that the specificity and strength of trade secret protections in TRIPS (article 39) and TRIPS-Plus regional and

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bilateral free trade agreements (“FTAs”) are hidden landmines that may unravel current access-to-information regimes (e.g. FOI laws). The aim of this Article 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, in the latter part of the twentieth century, has taken on an increasingly regulatory cast, requiring States to create regulatory frameworks that impose obligations on domestic actors. One of the core elements of this regulatory mode is the obligation of each State to require economic and other actors to submit information to the State or the treaty implementing bodies to satisfy the information-sharing and compliance mechanisms of the treaty. Thus an international agreement like the Basel Convention¹ requires that States prevent their firms and citizens from exporting hazardous wastes and imposes reporting and information submission requirements.² Similarly, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity³ requires that parties regulate the generation, dissemination, and cross-boundary movement of modified biological materials, and includes notification requirements.⁴ At the same time, both at the

1. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 126.

2. *Id.* arts. 4.1, 4.2(f), annex V A.

3. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, May 15, 2000, 2226 U.N.T.S. 208 [hereinafter Cartagena Protocol].

4. *Id.* arts. 8, 20; *see also* Int'l Whaling Comm'n, Schedule as Amended of the International Convention for the Regulation of Whaling (Oct. 2016), <https://archive.iwc.int/pages/view.php?ref=3606&k=> (requiring inspectors on each ship and allowing for observers in Paragraph 21(a); Paragraphs 24–30 discuss record keeping and reporting requirements of

national level in trade secret law⁵ and in international treaties,⁶ we have seen the development of rules requiring greater scope and stronger protection of trade secrets and confidential business information, in particular. Public access to trade secrets and undisclosed information presents a conflict that has historically been balanced by domestic, national frameworks. The tendency to provide greater protection to undisclosed information threatens to unravel existing access-to-information regimes and to make the implementation of new ones much more difficult. In fact, this Article posits that the increasingly prevalent conflict between access to information and protection of trade secrets highlights a previously hidden fault line created by TRIPS article 39 concerning trade secret obligations. Countries that have implemented their article 39(3)TRIPS Agreement obligations pertaining to the protection of information submitted to governments⁷ have failed to pay attention to

ships operating in conjunction with a factory ship, as well as for all whaling operations; detailed information on whale takes, ships involved, capacity and methods of capture, etc.); *see generally* Minamata Convention on Mercury, Oct. 10, 2013, UNITED NATIONS ENVIRONMENT PROGRAMME [UNEP], http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata%20Convention%20on%20Mercury_booklet_English.pdf (signed by all parties but not yet in force).

5. *See* 18 U.S.C. §§ 1831, 1832 (2012); 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. (L 157) 1.

6. *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Trans-Pacific Partnership, Feb. 4, 2016, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [hereinafter Trans-Pacific Partnership] (signed by all parties but not yet in force). The Trans-Pacific Partnership is a regional Free Trade Agreement signed in February 2016 by the United States and partner countries along the Pacific Rim. It covers an extensive set of rules and trade elements as is traditional with U.S. FTAs and intellectual property issues are covered in Chapter 18, including: “Protection of Undisclosed Test or Other Data for Agricultural Chemical Products,” *id.* art. 18.47; for Pharmaceuticals, *id.* ch. 18 subsec. C; “Protection of Undisclosed Test or Other Data,” *id.* art. 18.50; “Measures Relating to the Marketing of Certain Pharmaceutical Products,” *id.* art. 18.53; and “Trade Secrets,” *id.* art. 18.78.

7. There is 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 1 RESEARCH HANDBOOK ON THE PROTECTION OF INTELLECTUAL PROPERTY UNDER WTO RULES: INTELLECTUAL PROPERTY IN THE WTO, at 713 (Carlos M. Correa ed., 2010); Carlos M. Correa, *Test Data Protection: Rights Conferred Under the TRIPS Agreement and Some*

the restrictions that article 39(2) on general trade secret protection imposes on their disclosure of such information to the public.⁸ This Article contends that while the relationship between articles 39(3) and 39(2) allows room for properly implemented public disclosure, the room for disclosure is much narrower than previously perceived. Moreover, new bilateral and regional free trade agreements like the Trans-Pacific Partnership (“TPP”) may endanger this already limited ability to disclose information to the public.

The aim of this Article is to analyze the nature and scope of the limits that TRIPS and TRIPS-Plus regimes may place on domestic access-to-information regimes, and, in particular, the implications of these limits on access to environmental information. Part I provides a baseline for the traditional balancing framework by examining the rationales for the protection of trade secrets in comparison to the rationales for access-to-information regimes. Part II examines the procedural and substantive frameworks that States have used to try to resolve the tension between access to information and protection of trade secrets, and provides some comparative examples of how specific countries have resolved this tension through legislative enactments or case law. Part II specifically looks at the United States, India, and the European Union, which are all parties to the TRIPS Agreement and have both strong access-to-information regimes and strong intellectual property regimes. Part III analyzes the extent to which TRIPS and TRIPS-Plus regimes impose specific obligations that may place the approach of some 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 and (2) implement information submission and access rules from environmental treaties.

I. THE UNDERLYING RATIONALES FOR ACCESS TO INFORMATION AND FOR PROTECTION OF UNDISCLOSED INFORMATION

At the national level, countries have generally assured access to information for such issues as deliberations of standard-setting

Effects of TRIPS-Plus Standards, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH* 568 (Rochelle C. Dreyfuss & Katherine J. Strandburg eds., 2011); NUNO PIRES DE CARVALHO, *THE TRIPS REGIME OF PATENTS AND TEST DATA* (4th ed. 2014).

8. See Section III.A.

bodies in food regulation, medicine safety, and automobile safety.⁹ Where the information that governments or their agencies seek or provide involves or implicates information that private individuals or non-governmental legal entities (corporations, institutes, civil organizations) have submitted, there is an ongoing tension between providing sufficient information on the one hand, and preserving both the reasonable privacy expectations and the reasonable interest in maintaining the economic value of confidential information of individuals and non-governmental legal entities on the other hand. Countries have historically managed this tension at the domestic level, within constitutional structures that balance 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 that executive and other government bodies generate and use is crucial to ensuring an informed citizenry that can participate properly in government decision-making.¹⁰ Where the stakeholders are regulated entities, access to the rationales for government decisions that affect the regulated entities' activities is crucial to the determination of when and how government action can be challenged. Where the activities of such regulated entities affect third parties, those third parties may need access to such information as well. This democratic justification is the strongest and probably least controversial means through which parties justify access to information, and is generally the basis for FOI laws worldwide.¹¹ However, the diffuse nature of this justification makes it difficult for agencies or courts to engage in

9. See, e.g., Automobile Information Disclosure Act of 1958, 15 U.S.C. §§ 1231–1233 (2012); Highway Safety Act of 1966, 23 U.S.C. §§ 401–404 (2012) (establishing the National Highway Traffic Safety Administration and its precursor bodies); National Traffic and Motor Vehicle Safety Act of 1966, Pub. L. No. 89-563, 80 Stat. 718, (codified as amended at 49 U.S.C. §§ 30101–03, 30111–26, 30141–47, 30161–69) (same); Regulation 178/2002, arts. 9–10, 2002 O.J. (L 31) 1, 9 (EC) (laying down the general principles and requirements of food law, establishing the European Food Safety Authority, and laying down procedures in matters of food safety).

10. See TOBY MENDEL, FREEDOM OF INFORMATION: A COMPARATIVE LEGAL SURVEY 4 (2nd ed. 2008) (“Information is an essential underpinning of democracy at every level. At its most general, democracy is about the ability of individuals to participate effectively in decision-making that affects them. Democratic societies have a wide range of participatory mechanisms, ranging from regular elections to citizen oversight bodies for example of public education and health services, to mechanisms for commenting on draft policies, laws or development programmes.”); see also Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 *ECOLOGICAL L.Q.* 989, 1011–16 (2012) (discussing the U.S. Supreme Court’s First Amendment approaches as they relate to self-government justifications for a right to information).

11. See, e.g., Roesler, *supra* note 10, at 1013.

a balancing exercise with the interests of trade secret protection. Thus legislators are often responsible for considering this interest at the legislative level and for implementing an appropriate balance through legislative structures.

However, during a twenty-five-year span, there was also an increase in the knowledge intensity of commercial goods and services.¹² The information relating to these products and services has become increasingly valuable and in some cases constitutes the primary means of generating revenue for a firm. Consequently, intellectual property protection—especially patents and trade secrets—has become a crucial component of firm strategy and survival. The basis of much intellectual property law 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.¹³ Absent such protection, actors are likely to keep their innovations and related information secret, impeding research and creating duplicative inefficiencies.¹⁴ 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.¹⁵ The difficulties in finding a public interest rationale for trade secrets, beyond those of industrial policy and special interest pleading, have significant implications for reconciling the public interest in disclosure with the generally private interest in trade secret protection. The following sections outline the rationales for access to information and for protection of trade secrets and discuss how certain jurisdictions have resolved, as a theoretical matter, the conflict between access to information and protection of trade secrets.¹⁶

12. See, e.g., Organization for Economic Co-operation and Development [OECD], *The Knowledge-Based Economy* 9 (1996), <https://www.oecd.org/sti/sci-tech/1913021.pdf>.

13. William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 326 (1989).

14. *Id.*

15. *But see* 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*, *supra* note 7, at 109 (arguing that there are significant disclosure and knowledge generation aspects to trade secret protection precisely because it discourages overinvestment in secrecy-preserving measures).

16. In this Article, I adopt Roesler'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 Roesler, *supra* note 10, at 997. More generally, while Roesler'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

A. Trade Secrets and Confidential Business Information

What are the theoretical justifications for claims to trade secrets and confidential business information (“CBI”)? First, the historical roots of trade secret protection lie in unfair competition frameworks.¹⁷ The Paris Convention¹⁸ recognizes this origin and, through article 10*bis*, requires countries to provide protection against unfair competition.¹⁹ Article 10*bis*(2) protects against “[a]ny act of competition contrary to honest practices in industrial or commercial matters.”²⁰ Many countries have interpreted this provision to also require protection against the *use* of information obtained in a manner that would constitute unfair competition.²¹ This “use” protection was the basis on which many countries provided trade secret protection.²² Thus the main concern of article 10*bis* was the use of information that competitors obtained in some manner that was not necessarily unlawful but was competitively “unfair or dishonest.”²³ Generally, most countries require that the information represent an investment, valuable because it is not generally known.²⁴

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.

17. As Lemley points out, this is only a portion of the justification, however, which also looks to contract, tort, and general misappropriation theory. See Lemley, *supra* note 15, at 112. Given the relatively sophisticated development of unfair competition law in civil law countries, there is now a much more significant overlap between contract and tort than has historically been the case. See *id.*

18. Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305 [hereinafter Paris Convention].

19. Article 10*bis* specifies three acts which largely revolve around false or misleading statements about sources of products or qualities of one’s own or a competitor’s products. *Id.* art. 10*bis*(3).

20. *Id.* art. 10*bis*(2).

21. World Intellectual Property Organization [WIPO], *Protection Against Unfair Competition: Analysis of the Present World Situation*, WIPO Pub. No. 725(E), at 49–50, 53–54 (1994), ftp://ftp.wipo.int/pub/library/ebooks/wipopublications/wipo_pub_725e.pdf.

22. See *id.* 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 PROPERTY 144 (1969), http://www.wipo.int/edocs/pubdocs/en/intproperty/611/wipo_pub_611.pdf.

23. *Id.* at 145.

24. OECD, *Enquiries into Intellectual Property's Economic Impact: Chapter 1. Synthesis Report*, OECD Doc. DSTI/ICCP(2014)17/CHAP1/FINAL (Aug 10, 2015), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP\(2014\)17/C/HAP1/FINAL&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DSTI/ICCP(2014)17/C/HAP1/FINAL&docLanguage=En) (cancelling and replacing the same document of August 5,

They usually also require significant attempts to ensure the information's secrecy.²⁵ However, the boundaries of what constitutes a trade secret vary quite significantly, not only amongst countries, but also sometimes within countries. For example, although the Model Uniform Trade Secrets Act ("UTSA") imposes some uniformity, in the United States, trade secret law remains a state law issue.²⁶ Professor Rowe points out that some U.S. states have extended trade secret protection to marketing strategies, contract terms, and industry studies.²⁷ In the context of environmental information, trade secrets and CBI can include subject matter like the content of products on the market, the nature of the chemicals in the product, the process used to make the product, as well as the side effects or impacts on health or the environment.²⁸ Thus trade secret information about a chemical solvent, 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, parties can make such identifying information subject to trade secret or CBI protection.²⁹

The ability to prevent others from knowing the exact content or formulation of your product is clearly a competitive advantage. However, secrecy hampers studies on toxicity or other potential effects by others who do not possess the secret. 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.³⁰ Coupled with fears that liability may accrue if such information is disclosed, firms may

2015).

25. Jeanne C. Fromer, *Trade Secrecy in Willy Wonka's Chocolate Factory*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 7, at 3, 13.

26. See Robert Denicola, *The Restatements, the Uniform Act and the Status of American Trade Secret Law*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 7, at 18, 18. See also UNIF. TRADE SECRETS ACT (UNIF. LAW COMM'N 1985).

27. See Elizabeth A. Rowe, *Striking a Balance: When Should Trade-Secret Law Shield Disclosures to the Government?*, 96 IOWA L. REV. 791, 799 (2011); see also Lemley, *supra* note 15, at 112 (discussing the broadening of the scope of trade secret law).

28. See Mary L. Lyndon, *Trade Secrets and Information Access in Environmental Law*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 7, at 442, 442.

29. See *id.*

30. Mary L. Lyndon, *Secrecy and Access in an Innovation Intensive Economy: Reordering Information Privileges in Environmental, Health, and Safety Law*, 78 U. COLO. L. REV. 465, 467-68 (2007).

actively avoid generating internal knowledge about harms related to their products; where they do have such information, firms may actively work to prevent the generation of confirming information. Trade secret protection places the choice of whether to generate 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, as well as the lack of disclosure, has meant that trade secrets lack core characteristics of traditional intellectual property and thus countries have protected this information through other mechanisms, such as unfair competition. The Paris Convention³¹ and the TRIPS Agreement³² adopt this approach. There is also scholarly agreement that trade secrets lack core characteristics that justify other forms of exclusive intellectual property rights.³³ However, there are strong counter-arguments that there should be a normative shift to treat trade secrets as intellectual property.³⁴ These arguments largely revolve around the idea that free-riding discourages investment in new products and processes, and thus trade secret protection is necessary to encourage at least a first generation of information.³⁵ However, such arguments also exist for patent protection, for which the necessary trade-off is disclosure. To the extent that trade-secret-protected information may qualify as patentable subject matter, patenting the information may be a better means of serving the public interest. Patent systems are calibrated to encourage investment in research that would not otherwise occur, due to free-riding and the necessary scales of investment.³⁶ This is innovation over and above that which occurs as part of normal competitive market forces. Trade secrecy would be a

31. Paris Convention, *supra* note 18, art. 10*bis*.

32. TRIPS Agreement, *supra* note 6, art. 39.

33. *See generally*, THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH, *supra* note 7.

34. *See, e.g.*, Lemley, *supra* note 15; *see also* Marco Bronckers & Natalie McNelis, *Is the EU Obligated to Improve the Protection of Trade Secrets? An Inquiry into TRIPS, the European Convention on Human Rights and the EU Charter of Fundamental Rights*, 34 EUR. INTELL. PROP. REV. 673 (2012) (arguing that TRIPS requires protection greater than unfair competition).

35. *See* Lemley, *supra* note 15, at 122; *see also* Bronckers & McNelis, *supra* note 34, at 674.

36. STAFF OF S. COMM. ON THE JUDICIARY, 85TH CONG., AN ECONOMIC REVIEW OF THE PATENT SYSTEM 21 (Comm. Print 1958) (primarily the work of Fritz Machlup).

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 model/petty patents.³⁷ The necessity for a public grant and protection of trade secrets also suffers from a core inefficiency: much of the information, although valuable, would have been generated anyway in the course of carrying out competitive business. Parties would generate such things as customer lists, salaries, human resources, and business strategies regardless of the available protections. As a result, as they pertain to subject matter necessary for everyday business, trade secrets fail the “but-for” test, i.e. the information would not have been generated “but-for” the availability of trade secret protection.³⁸ This, at a minimum, suggests that the scope of subject matter that trade secrets protect 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 providing trade secret protection prevents firms from over-investing in secrecy measures, especially where firms can more efficiently invest resources elsewhere.³⁹ Secrecy measures represent a serious cost. For example, in the chocolate and candy industry, firms expend resources to establish restrictions on who they hire, internal employee information segregation, and cyber and human security just to preserve competitive advantage.⁴⁰ This is, of course, an individual business decision based on the value of a firm’s secrets. Firms may instead 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. As a result, competition, rather than public intervention through trade secret protection, may better regulate potential inefficiencies.

While there is consensus that parties should retain trade secret

37. *Protecting Innovations by Utility Models*, WORLD INTELL. PROP. ORG., http://www.wipo.int/sme/en/ip_business/utility_models/utility_models.htm (last visited June 7, 2017).

38. The “but-for” test is the rationale underlying incentive theory for intellectual property. Incentives are provided to generate information that otherwise would not be generated in the absence of IP protection, i.e. information that would not have been generated or disseminated but for the protection of IP.

39. See Lemley, *supra* note 15, at 124–26.

40. Fromer, *supra* note 25, at 14.

protection—as a business option for firms in a competitive market—the public policy rationale for trade secret protection is somewhat thin. What remains of the rationale for trade secret protection is largely an argument for special interest protection for business, espe-

cially those of small and medium enterprises with few resources to engage in activities like patenting.⁴¹ There is a final public policy rationale for trade secret protection that may have staying power—that, as Professor Overvalle notes, trade secrecy allows for *inter partes* exchange of information.⁴² Firms that are assured of secrecy are more likely to engage in disclosures to each other that allow them to determine the information's value, and to engage in transactions.⁴³ Thus, trade secret protection lowers bilateral transaction costs to allow information to flow between parties to a contract.⁴⁴ This information does flow, albeit slowly and only between firms, but not to the general public.⁴⁵

Where the claim is to information that a firm has no 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 trade secret protection from a knowledge-generation and -dissemination standpoint.⁴⁶ Even in the case where information 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 without costs. 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.⁴⁷

41. Lemley, *supra* note 15, at 123.

42. See generally Geertrui Van Overwalle, *Uncorking Trade Secrets: Sparking the Interaction Between Trade Secrecy and Open Biotechnology*, in *THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH*, *supra* note 7, at 246.

43. *Id.* at 246.

44. *Id.*

45. *Id.*; see also Lemley, *supra* note 15, at 127 (noting that it allows for non-contract-based information exchange that would otherwise not take place due to reluctance to sign broad nondisclosure agreements).

46. See David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 148 (2007).

47. See Mary L. Lyndon, *Secrecy and Innovation in Tort Law and Regulation*, 23 N.M. L. REV. 1, 14 (1993).

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.⁴⁸ The only way a person can give notice that a breach is occurring is by revealing the trade secret. In addition, where something is easily kept as a secret, it is just as easy to intentionally or inadvertently infringe upon it in secret. The classic case is a situation where a company uses a secret recipe; another company obtains that recipe and uses it to improve its own food product. The secret holder has no way of finding out whether the other person 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 as long as the holder can ensure no further dissemination.

Proving infringement is complicated by trade secret law's general defense of independent derivation or reverse engineering of the same process or technique.⁴⁹ It is difficult for a secret-holding firm to disprove independent derivation or reverse engineering without revealing its proprietary information and 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. 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. Parties have attempted to address this dilemma through legislation and new treaties, primarily by:

1. increasing secondary liability for those receiving the information accessed through illegitimate or unfair means;⁵⁰ or
2. criminalizing disclosure of trade secrets as industrial espionage, thus enlarging the scope of traditional industrial espionage law.⁵¹

48. *Id.* at 9.

49. See 18 U.S.C. 1839(6)(b) (2012); 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, art. 3(1)(a)–(b), 2016 O.J. (L 157) 1, 10.

50. See 18 U.S.C. 1832(a)(3) (2012).

51. Trans-Pacific Partnership, *supra* note 6, art. 18.78.

There remain, however, basic principles from within trade secret law that govern when parties may not use trade secret protection as a justification for preventing certain other acts or activities outside the boundaries of trade secret protection. These include restrictions on: workers' mobility or ability to compete;⁵² freedom of expression;⁵³ and public interest relevance.⁵⁴

With such exceptions, a key question is whether disclosure may take place in the absence of compensation for losses. Jurisdictions answer this question differently. Under the U.S. Constitution, regulatory disclosure is not a compensable taking unless there is a regulatory framework that creates a reasonable expectation that a property interest in the trade secret will be protected.⁵⁵ Where regulatory frameworks do not create such an expectation of non-disclosure—because they either exclude information from trade secret protection or explicitly endorse disclosure—courts will not treat disclosure as a compensable taking.⁵⁶ In addition, where the nature of the information is such that there is no reasonable expectation that legal frameworks prevent disclosure (e.g. health and safety information), absent affirmative statutory creation of an expectation of confidentiality, courts will not treat disclosure of information as a taking.⁵⁷

Thus, even in the United States—one of the strongest systems of trade secret protection⁵⁸—there are exceptions that allow disclosure and exclude some categories of information from trade secret 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 enabled domestic systems to engage in reasonable balancing of interests in disclosure. International obligations have played a minimal role until the more recent expansion of subject matter in the TRIPS Agreement and the current expansion of international environmental law into regulatory information submission regimes. The next section looks

52. See, e.g., Directive 2016/943, art. 1(3), 2016 O.J. (L 157) 1, 9.

53. See, e.g., *id.* art. 5(a), 2016 O.J. (L 157) 1, 11; see also *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745 (E.D. Mich. 1999).

54. See, e.g., Directive 2016/943, art. 1(2)(b), 2016 O.J. (L 157) 1, 9.

55. See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

56. *Id.* at 1005–06.

57. See *id.*

58. Douglas C. Lippoldt & Mark F. Schultz, *Uncovering Trade Secrets—An Empirical Assessment of Economic Implications of Protection for Undisclosed Data* 27 tbl.1 (OECD Trade Policy Paper No. 167, 2014), <http://www.oecd-ilibrary.org/docserver/download/5jxz15w3j3s6-en.pdf>.

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.⁵⁹ This has been the basis for a whole host of measures like Freedom of Information laws in many different countries. Countries implement these measures in the environmental and health risk arena, with two main considerations in mind: (1) the need for regulated entities and their stakeholders to understand how, and on what basis, the government is regulating them; and (2) the need to ensure that firms disclose negative externalities to third parties in order to help those parties understand the harms that others may inflict on them. These needs have led to a range of different potential governmental disclosure measures. There is a distinction between those measures that affirmatively obligate the government to disclose information and those measures that require that a third party request information from the government. We can characterize them in this manner:

- affirmative disclosure measures and obligations; or
- motivated and affirmative requests:
 - requiring a showing of standing or interest; or
 - not requiring a showing of interest.

In addition, we need to distinguish between those situations where the government is forcing firms to disclose as a prerequisite for participating in the market (e.g. certain food and drug rules, as well as the whole field of pharmaceutical marketing approval)⁶⁰ and those situations where the government only requests disclosure (e.g. the exact formulas of fracking chemicals).⁶¹

In those situations in which firms must disclose information in order to participate, the element of coercion is usually grounded upon a strong public policy justification. However, the disclosure, and the accompanying loss of protection for secrets that firms submit to the government, may lead to commercial and financial losses and,

59. See Roesler, *supra* note 10, at 1011–16.

60. For a comprehensive list of U.S. regulations imposing both generation and submission requirements, 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, 1664 n.152 (2004).

61. 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 *id.* at 1670–77.

in some cases, may dramatically impact the viability of the firm. However, where such costs are equally borne by all participants, the public interest will largely prevail. Disputes may revolve around the exact level and scope of disclosure required, but the general principle of disclosure will be maintained. In contrast, those situations in which the government has requested information that is not required present different issues. In these situations, incentives are needed to encourage firms to generate and share information. For example, regulators may issue promises to keep protected information secret.⁶² As Professor Rowe discusses, in the absence of assurances that the secrecy of information will be maintained, firms may simply refuse to submit such information absent a court order.⁶³ If a requester challenges such a framework or decision to refuse to disclose, a court will have to determine if there is a sufficient public interest that so outweighs the interest of the trade secret holder that disclosure is required. This threshold may 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; or
2. information not required to be submitted to government that is either:
 - voluntarily disclosed; or
 - involuntarily disclosed due to court order.

The category of information affects the rights of the submitter and the extent to which parties other than the government agency can use the information the submitter discloses. Moreover, justifications for disclosure play a different role in the analysis of whether disclosure is required, depending upon whether disclosure of the information is mandatory or voluntary.⁶⁴ The extent of access to each category of information will be influenced by the kinds of rationales put forward for systematic disclosure in each specific case. This next section discusses these rationales and how they impact the rights of the submitter.

62. See Rowe, *supra* note 27, at 803.

63. *Id.*

64. Roesler, *supra* note 10, at 1042.

1. Rationales for Disclosure

There are several rationales for disclosure, ranging from utilitarian to human rights. These are not always reconcilable, but represent several strains in public policymaking that can serve to explain different countries' approaches.

a. Utilitarian Arguments

i. Information Should Be Disseminated to Those Best Situated and Motivated to Generate Information About the Possible Harms of a Particular Product

Based on Professor Wagner's analysis of incentives, the utilitarian argument for dissemination of information is that information should be disseminated to those best situated and motivated to generate information about the possible harms of a particular product.⁶⁵ While this rationale clearly includes the government as a generator of information through government-employed scientists, it also implicates the broader scientific community. While end-users or communities of users benefit from the dissemination of information by this rationale, they are probably least capable of engaging in this kind of knowledge generation.⁶⁶

This utilitarian rationale is somewhat attenuated in circumstances in which the government requires the holder of the information to generate and report such information to the government. In these situations, the rationale primarily relates to the 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

65. See generally Wagner, *supra* note 60.

66. See *id.* at 1004. Roesler characterizes 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. Roesler, *supra* note 10, at 1042. She concludes that the interest in public access is weaker given the lack of knowledge in the general population. *Id.* I argue 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.

dissemination is stronger.⁶⁷ 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. These rationales are 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.⁶⁸ As rational actors, where harm is not immediately obvious and the risk of discovery or causal linkage is weak, producers are least likely to engage in any behavior that would increase the discovery or liability risk. Producers have little or no interest in disclosure of health and safety information, and even where such disclosure takes place, they have little incentive to generate more complete information than is necessary to participate in the market.⁶⁹ Regulation or tort law may also provide an incentive not to 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.⁷⁰ This means that producers prioritize short-term, immediate, and visible harms over diffuse, long-term harms like exposures that may lead to cancers in old age.⁷¹ This also means that producers have an incentive to delay disclosure, whereas immediate and even pre-market disclosure of information may be crucial to preventing harms rather than simply responding to harms that have already occurred. Professor Wagner also points to another situation: the government could require the producer to generate the information regarding both potential short-term and long-term harms of products.⁷² The role of the regulatory system is then to ensure that the information firms provide is sufficiently complete and that government actors have the resources to properly evaluate it.

67. As is the case for most regulatory agencies, especially in the environmental arena. See Wagner, *supra* note 60, at 1689.

68. See *id.* at 1622.

69. See Lyndon, *supra* note 28, at 449–50. 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. Wagner, *supra* note 60, at 1631–33. In this, she challenges the assumptions underlying much of the regulation in environmental law that information regarding externalities may be reasonably or easily discoverable. *Id.* at 1623–24. 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.

70. See Wagner, *supra* note 60, at 1640.

71. Lyndon, *supra* note 28, at 450–52.

72. See Wagner, *supra* note 60, at 1624–25.

However, even in such cases, disclosure may be justified by the need for proper peer review of the methodology and scientific basis the producers employ and, as discussed below, as a check on regulators by citizens who have a right to know whether regulators are properly carrying out such evaluations in a manner that protects the public interest.

ii. Consumer Protection: Consumers Should Be Informed About the Risks of Consuming Particular Products

Consumers should be informed and knowledgeable of the risks that they take when they choose to consume particular products. Disclosure of information serves an important market function in that it allows consumers to make well-informed purchasing decisions by requiring producers to list ingredients on products.⁷³ This ensures that the market most efficiently serves those products that consumers consider safest based on the information regarding ingredients that producers must disclose to the public. This presupposes that there is pre-existing research on ingredients by a motivated actor of some sort.⁷⁴ For unsophisticated consumers, ingredient lists are only effective 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 disclosure allows other actors to test and evaluate both the contents and the claims of products and processes. Disclosure does, however, serve to remove the decision as to whether to generate health and safety information 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 in others to create such information and to 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.

73. Mary L. Lyndon, *Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data*, 87 MICH. L. REV. 1795, 1795 n.2 (1989).

74. As Wagner notes, this may in fact not be the case. She points to significant ignorance regarding even basic facts about the state of the environment in the United States, largely traceable to lack of information about the existence, nature, scale, and scope of potential causal factors that have been placed in the environment. Wagner, *supra* note 60, at 1624 ("The quality of most air, water, and land in the U.S. is unknown, even though the country has devoted hundreds of pages of laws to regulating activities that threaten the environment.").

b. Fairness and Justice Arguments in Tort Law

Arguments grounded in tort law are focused on the question of who should bear the cost of harms.⁷⁵ Disclosure prevents situations in which private parties can engage in harmful, secret behavior, and properly imposes the burden of preventing harm on the private party making the product. This is a basic tort argument in many ways; disclosure allows the tort system to function and allows for the determination of foreseeability of harm and apportionment of liability appropriately.⁷⁶ 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.⁷⁷ 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.⁷⁸ Thus, companies can claim a lack of individual and broader scientific knowledge as to the potential harms of their products at the time of production or exposure.⁷⁹

c. Rights-Based Arguments

Access to information is a part of the right to freedom of expression.⁸⁰ The right to receive information to enable participation in public life and democratic governance is part of the freedom of expression. For example, the European Court of Human Rights

75. See Lyndon, *supra* note 28, at 456.

76. See, e.g., RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 9 (AM. LAW INST. 1998) (“One engaged in the business of selling or otherwise distributing products who, in connection with the sale of a product, makes a fraudulent, negligent, or innocent misrepresentation of material fact concerning the product is subject to liability for harm to persons or property caused by the misrepresentation.”); RESTATEMENT (SECOND) OF TORTS § 525 (AM. LAW INST. 1977) (“One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.”).

77. To address foreseeability, disclosure in the pre-market phase is necessary to ensure that the producer knew or should have known about the risk of harm. In the post-market surveillance phase, disclosure would be necessary to enable traceability of harms and causal vectors.

78. See Lyndon, *supra* note 28, at 457; Lyndon, *supra* note 73, at 1813; see also Wagner, *supra* note 60, at 1632–39.

79. See Lyndon, *supra* note 73, at 1817.

80. See Roesler, *supra* note 10, at 1005–06.

(“ECtHR”) has consistently found that this right exists in a series of interpretations of article 10 of the European Convention on Human Rights.⁸¹ The European Convention on Human Rights treats intellectual property as a human right,⁸² and, where trade secrets are within the intellectual property framework of a particular State, they then become human rights subject matter, which parties should balance with the right to access information. As Professor Shannon Roesler points out, the United States does not similarly treat the right to access information as a fundamental human right.⁸³

Roesler also points to personal liberty and autonomy as a justification for the dissemination of information.⁸⁴ While this justification relates to the above discussion regarding consumer rights and decision-making, it applies beyond the narrow consumer right to make a decision, and more broadly applies to an individual’s fundamental liberty right to choose the parties with whom one engages and the products and goods with which one engages. This fundamental liberty right underscores the need for: labeling laws,⁸⁵ information regarding comparative efficacy of products, and imposition of duties of accuracy on those making statements to the market.⁸⁶ Information about health and environmental risks may impact important decisions, like whether to live near a specific site, or whether to seek health treatments based on risk of exposure.⁸⁷ Again, Roesler notes that this argument has little purchase in the United States except in the realm of restrictions on commercial speech, and even there it does not justify positive obligations to

81. Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms art. I, Mar. 20, 1952, E.T.S. 9 [hereinafter Additional Protocol 1]; see also *Társaság a Szabadságjogokért v. Hungary*, App. No. 37374/05, ECtHR, Judgement of 14 Apr. 2009, <http://hudoc.echr.coe.int/eng?i=001-92171>; *Kenedi v. Hungary*, App. No. 31475/05, ECtHR, Judgement of 26 May 2009, <http://hudoc.echr.coe.int/eng?i=001-92663>; U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 34, U.N. Doc. CCPR/C/GC/34 (2011) (discussing article 19 of the International Covenant on Civil and Political Rights on freedom of expression).

82. See *Dima v. Romania*, App. No. 58472/00, ECtHR, Judgment of 26 Mar. 2007, <http://hudoc.echr.coe.int/eng?i=001-78042>; *Anheuser-Busch Inc. v. Portugal*, 2007-I Eur. Ct. H.R. 39; *Melnychuk v. Ukraine*, 2005-IX Eur. Ct. H.R. 397.

83. Roesler, *supra* note 10, at 1006.

84. *Id.* at 1007.

85. *Id.* at 1033–36.

86. *Id.* at 1016–28.

87. Roesler makes the argument that this justification can sometimes be stronger than advancing intellectual knowledge or self-expression. *Id.* at 1009.

disclose beyond the realm of labeling laws.⁸⁸

One can also draw a derivative right of access to information from other rights such as the right to health and the right to a healthy environment.⁸⁹ Roesler is “dishearten[ed]” by the failure of the right to health to achieve the kind of disclosure necessary in the United States, where the right seems only to justify disclosure to the government but not more broadly to individuals.⁹⁰ As this Article argues in Section I.B.1, disclosure may better enable scientists to assess products, generate knowledge, and peer review, in ways that the trade secret holder may not be willing to do. Additionally, the failure of current U.S. legislation to provide sufficient levels of information or generate the requisite type of information may not necessarily weaken the justification provided by the right to health. The failure of current legislation to give proper weight to the right to health for disclosure purposes actually supports arguments 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. Thinking About the Structure of Submission and Disclosure Implied by the Rationales

The framework for access to information can be defined in opposition to those interests in nondisclosure. Government action or inaction and the underlying rationales supporting the decision have traditionally been the primary vector for justifying such access to information; the third-party interests have historically been secondary, relating to the interests in information submitted to the government.⁹¹ However, a third vector remains, which is the direct

88. *Id.* at 1033–34.

89. For an extensive discussion of the U.S. domestic implementation of this in the labor environment see *id.* at 1016–27. Roesler comes to the conclusion that, at least within the U.S. framework, the right to health and the right to a healthy environment do not provide a strong justification for broad public disclosure. *Id.* at 1023. 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 finds much less purchase for a broader individual right to know about the 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. *Id.* at 1017, 1023. 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.

90. *Id.* at 1024.

91. As Mendal discusses, exceptions to disclosure of third-party information are

interest of 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, which will engage in that disclosure. Examples of this include ingredients lists on food packaging or cleaning solvents. It seems appropriate to discuss those examples that require actors to disclose to the public at large separately from other specific purposes for which the government itself may require submission of information. 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. the government's affirmative disclosure of:
 - information submitted voluntarily;
 - 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 diverse nature of the claims for protection of trade secrets and the diverse claims for access to information, it seems natural that state agencies and governments have taken differing approaches to addressing the tension between them.⁹² The resolutions have either been targeted at specific problems in specific sectors (e.g. oil wells, financial and economic information), or generated out of common law application by courts resolving disputes.⁹³ The application of external obligations, such as the

primarily covered in "commercial or other economic interests" or "privacy and other legitimate private interests," but these are secondary to the broader interest in disclosure and are generally limited. MENDEL, *supra* note 10, at 34–36.

92. *Id.* at 148–50.

93. *Id.*

TRIPS Agreement, to provide greater protection for trade secrets may have distorted the broad regulatory and sectoral-specific bargains that previously applied in many countries.

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

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

A. The Nature of the Conflict

The discussion in Part I illustrates that there can be common purposes in protection of trade secrets and 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. Parties tend to disseminate that information 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 address environmental and health risks, and thus formulate policy, it remains in fundamental conflict with access-to-information measures. However, this means that dissemination of information to the public as a whole is not always essential to the assessment of environmental and health risks. Thus, where there is an argument that the general public does not need such information 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.

It is important 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. Thus, there may be circumstances under which disclosure is appropriate, but allowing use by the public generally, or competitors specifically, may be inappropriate. 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 that there are strong disclosure rationales both for the generation and dissemination of the information and in the disclosure to the public for environmental protection and other purposes—what is the countervailing interest besides that of the personally harmed firm? What if the public interest is specifically the disclosure of a harm or risk of harm, e.g. the revelation 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 infringement of rights, 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 on the public present a significant countervailing interest against maintaining a trade secret. Where trade secrets are exempted from certain kinds of information disclosure, a balancing of harms is crucial. However, balancing does not always occur, especially where an exemption can be unilaterally claimed and cannot be questioned by the government receiver of the information or the requester of the information.⁹⁴ In particular, if the trade secret is specifically about the harm or the risk 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 prevention of reputational harm to the company?⁹⁵ How should this play out where 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 disclosed has been assessed?

Another issue in trying to resolve the tension between trade secret protection and access to information is who should make the decision about which risks are acceptable to take on regarding environmental and health harms. An autonomy approach suggests that individuals should have that information and make that decision as actors in the market who have complete information about which products and services to purchase.⁹⁶ Where damage to the commons—such as the environment—is at risk, other actors have an interest in any risks being posed by other stakeholders. In the absence of a direct legislative act that the information disclosed is not subject to trade secret protection,⁹⁷ the issue of how to balance

94. As Wagner notes, such claims are common in the environmental and health safety arena. See Wagner, *supra* note 60, at 1700.

95. For an analysis of this question, see generally Lyndon, *supra* note 28.

96. Lyndon, *supra* note 47, at 45.

97. For examples, see Wagner, *supra* note 60, at 1700 n.278.

between trade secret claims and disclosure interests could fall to the regulatory agency and to the court system, where the regulatory agency determines the public policy interest and then the court likely rebalances or recalibrates that interest. This presents a significant problem in terms of the public policies underlying trade secret protection and 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, e.g. independent derivation) is very different in the context of disputes between commercial rivals compared to determinations by regulatory agencies.⁹⁸ As Professor 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.⁹⁹ This lack of capacity means that agencies are both ill-suited and reluctant to make such determinations themselves and would likely prefer to leave them to the courts. 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 will always be weaker.

Other challenges arise in the context of disclosure of information generally. In general, each of these challenges has a different scope: in the legislative act, in 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.¹⁰⁰ If so, the secret may still be capable of being expropriated, but then the question would be whether a regulation that requires submission and disclosure of

98. See Lyndon, *supra* note 47, at 35.

99. *Id.* These are core criteria in the determination of whether something is a trade secret under U.S. law. UNIF. TRADE SECRETS ACT §§ 1(2), 1(4) (UNIF. LAW COMM'N 1985).

100. In the United States, for example, there is some argument, countered by Lyndon, that the Supreme Court decision in *Ruckelshaus 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. *Id.* at 1005–08. In that sense, as I note below, the absolute prohibition in Exemption 4 of the U.S. FOIA would seem to create such an expectation and disclosure under FOIA would constitute a taking. See Lyndon, *supra* note 47, at 8.

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),¹⁰¹ in the same way as property in article 17(1).¹⁰² The ECtHR has also acknowledged that intellectual property is a human right covered under the right to property in article 1 of the First Protocol to the European Convention on Human Rights (“ECHR”).¹⁰³ 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 shows that the vast majority of Member States do not protect undisclosed information as intellectual property per se, but provide contract, unfair competition, or criminal law protection.¹⁰⁴ The 2016 Directive on the Protection of Undisclosed Information does not require that States classify trade secrets as a form of IP as such, and also fails to clearly establish that trade secrets are not a form of IP under the broader European framework that includes the ECHR.¹⁰⁵ Countries that implement a trade secrets framework as a form of intellectual property¹⁰⁶ may end up triggering the obligations regarding recognition and compensation under the ECHR and the Charter on Fundamental Rights.¹⁰⁷ However, at the same time, Recitation 11 of

101. Charter of Fundamental Rights of the European Union, art. 17(2), 2012 O.J. (C 326) 392, 399.

102. *Id.* art. 17(1), 2012 O.J. (C 326) 392, 399.

103. *Dima v. Romania*, App. No. 58472/00, ECtHR, Judgment of 26 Mar. 2007, <http://hudoc.echr.coe.int/eng?i=001-78042>; *Anheuser-Busch Inc. v. Portugal*, 2007-I Eur. Ct. H.R. 39; *Melnychuk v. Ukraine*, 2005-IX Eur. Ct. H.R. 397; *see also* Additional Protocol 1, *supra* note 81, art. 1.

104. HOGAN LOVELLS INT’L LLP, REPORT ON TRADE SECRETS FOR THE EUROPEAN COMMISSION 1 (2010), http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/120113_study_en.pdf.

105. *See* 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. (L 157) 1 (distinguishing between intellectual property generally, and trade secrets specifically, in Recitations 1 and 2).

106. For the example of Italy, *see* Gustavo Ghidini & Valeria Falce, *Trade Secrets as Intellectual Property Rights: A Disgraceful Upgrading—Notes on an Italian ‘Reform’*, in THE LAW AND THEORY OF TRADE SECRECY: A HANDBOOK OF CONTEMPORARY RESEARCH, *supra* note 7, at 140.

107. Charter of Fundamental Rights of the European Union, *supra* note 101, art. 17(2), 2012 O.J. (C 326) 392, 399; Additional Protocol 1, *supra* note 81, art. I; *see generally* Bronckers & McNelis, *supra* note 34.

the 2016 Directive on Undisclosed Information 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.”¹⁰⁸ Article 2 of the 2016 Directive on Undisclosed Information specifically ensures that existing public disclosure rules are not impacted.¹⁰⁹

It is important to note that even this framework—which treats intellectual property as property—permits significant and frequent instances of interference with the right to property.¹¹⁰ States are indeed free to establish interferences for public interest reasons, although the need for compensation may present an insurmountable barrier for many to access-to-information regulations. This insurmountable barrier often lies at the heart 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 does not provide compensation of some reasonable kind. Compensation dramatically increases the costs of transparency to the State. The peculiar nature of undisclosed information is that the need for disclosure directly destroys the undisclosed nature of the information and thus implicates an absolute right. In light of this inherent destruction, there can rarely be any balancing of harms.

Where courts or government agencies are left to resolve the conflict between disclosure and preservation of trade secrets, the danger is that balancing takes place on a case-by-case basis without

108. Directive 2016/943, 2016 O.J. (L 157) 1, 3 (referencing Regulation 1367/2006, of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006 O.J. (L 264) 13 (EC); Directive 2003/4/EC, of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, 2003 O.J. (L 41) 26; Regulation 1049/2001, of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43 (EC)).

109. Directive 2016/943, art. 2, 2016 O.J. (L 157) 1, 9.

110. Laurence R. Helfer, *The New Innovation Frontier? Intellectual Property and the European Court of Human Rights*, 49 HARV. INT’L L.J. 1, 10 (2008). In the ECtHR, parties must address several concerns, as Helfer notes, including “the owner’s reasonable expectations; whether the restriction imposes an inequitable or excessive burden (especially on non-nationals); the amount of compensation (if any) paid by the government; the uncertainty created by the regulation; and the speed and consistency with which the state acts.” *Id.* (footnotes omitted).

strong policy guidance.¹¹¹ This then favors those parties with strong personal interests and financial capacity, primarily the parties claiming confidentiality.¹¹² Alternatively, the tension can be resolved legislatively through political and social bargains. While such bargains may favor those lobbying groups with strong interests, legislation nevertheless may better reflect a public choice that explicitly considers the proper relationship between disclosure and trade secret protection. What are the ways in which these tensions are resolved in practice? The examples below point to some of the 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 three experiences of relevance: the U.S. 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

One common issue presented in Freedom of Information Act (“FOIA”) cases in the United States turns on the resolution of tension between FOIA and trade secret protection as found in Exemption 4,¹¹³ in particular. Exemption 4 notes that the obligations to provide public access to information in 5 U.S.C. § 552(a) do not apply to the list of materials covered in § 552(b). Section 552(b)(4) exempts “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”¹¹⁴

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 the Freedom of Information Act (“Guide”)¹¹⁵ notes, however, that in interaction with the Trade

111. Lyndon, *supra* note 30, at 466–67.

112. *See* Lyndon, *supra* note 30, at 466.

113. 5 U.S.C. § 552(b)(4) (2012).

114. *Id.*

115. U.S. DEP’T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT,

Secrets Act (“TSA”),¹¹⁶ the discretion of the agency to disclose such information is severely limited.¹¹⁷ As several courts have found the exemption and the Trade Secrets Act to cover the same subject matter, the limitations of the TSA on disclosure of such information apply to the agency’s exercise of its discretion under FOIA and Exemption 4.¹¹⁸ Those obligations subject any such disclosure to fines and criminal sanctions¹¹⁹ 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.¹²⁰ 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.¹²¹

<https://www.justice.gov/oip/doj-guide-freedom-information-act-0> (last updated July 11, 2016).

116. 18 U.S.C. § 1905 (2012).

117. U.S. DEP’T OF JUSTICE, *supra* note 115, at 354 (citing *Canadian Commercial Corp. v. Dep’t of the Air Force*, 514 F.3d 37, 39 (D.C. Cir. 2008); *McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force*, 375 F.3d 1182, 1185–86 (D.C. Cir. 2004); *CNA Fin. Corp. v. Donovan*, 830 F.2d 1132, 1140 (D.C. Cir. 1987)).

118. *McDonnell Douglas Corp.*, 375 F.3d at 1185–86; *Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997); *CNA Fin. Corp.*, 830 F.2d at 1140; *Boeing Co. v. U.S. Dep’t of the Air Force*, No. 05-365, 2009 WL 1373813, at *4 (D.D.C. May 18, 2009).

119. 18 U.S.C. § 1905 (2012) (“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), or 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.”).

120. *Bartholdi Cable Co.*, 114 F.3d at 281; *CNA Fin. Corp.*, 830 F.2d at 1144.

121. U.S. DEP’T OF JUSTICE, *supra* note 115, at 355–56; *FOIA Update: OIP Guidance: Discretionary Disclosure and Exemption 4*, U.S. DEP’T JUSTICE (Jan. 1, 1985), <https://www.justice.gov/oip/blog/foia-update-oip-guidance-discretionary-disclosure-and-exemption-4>.

In terms of coverage, FOIA Exemption 4 also covers confidential information that has the following characteristics: “commercial or financial information obtained from a person and privileged or confidential.”¹²² Thus, it is not limited to trade secrets per se. A court is logically confronted with two situations: (1) when a requester seeks to challenge the decision not to release the information (very difficult given that the requester does not know the nature of the information that they are being denied) and (2) in the context of reverse FOIA claims where the agency has determined that the information does not qualify as a trade secret or confidential information under Exemption 4 and the submitter has challenged this finding. The Trade Secrets Act’s limitation on disclosure also applies to this information. Of key concern is the distinction that case law makes between expectations of confidentiality of information parties voluntarily submit to the government and of information parties are required to submit to the government.¹²³ In *National Parks & Conservation Association v. Morton*, the D.C. Circuit suggests that the key determinant of confidentiality is whether “disclosure of the information is likely to have either of the following effects: (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.”¹²⁴ While the first prong remains in operation, the majority of cases, as the Guide points out, fall under the second prong.¹²⁵ The key point here is that the harm derives from action 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.¹²⁶

The *Critical Mass* decision limited the *National Parks* framework to information that parties are required to submit to the government.¹²⁷ *Critical Mass* further explained that the expectation of confidentiality attaching to information parties are required to submit would be somewhat less stringent than that attaching to

122. 5 U.S.C. § 552(b)(4) (2012).

123. *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 880 (D.C. Cir. 1992); *Nat’l Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

124. *Nat’l Parks*, 498 F.2d at 770 (footnote omitted).

125. U.S. DEP’T OF JUSTICE, *supra* note 115, at 305.

126. *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

127. *Critical Mass*, 975 F.2d at 880.

information parties voluntarily submit.¹²⁸ Thus, only information that a submitter “customarily” disclosed to the public would be subject to release under Exemption 4.¹²⁹ 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 arisen outside the FOIA framework.

Several pieces of U.S. legislation prevent parties from claiming health and safety information as trade secrets. For example, the National Environmental Policy Act (“NEPA”)¹³⁰ requires government disclosure of both environmental impacts and the process for reaching decisions relating to those environmental impacts.¹³¹ NEPA places no limitation on any disclosure of trade secrets within this process. Any federal action that relies on data or information for its environmental impact statement would nominally entail disclosure. However, the interaction between NEPA and the Trade Secrets Act would likely prohibit such disclosure. Unlike FOIA, there is no explicit exemption, but there is also not 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 requirements under NEPA through the lens of FOIA.¹³²

Under the Emergency Planning and Community Right-to-Know Act (“EPCRA”),¹³³ 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.¹³⁴ This information must be released to local authorities and states.¹³⁵ EPCRA also requires the

128. *Id.* at 878–79.

129. *Id.*

130. National Environmental Policy Act of 1969, Pub. L. No. 90-190, 83 Stat. 852 (codified as amended in scattered sections of 42 U.S.C.).

131. 42 U.S.C § 4332(2)(C) (2012).

132. EXEC. OFFICE OF THE PRESIDENT, COUNCIL ON ENVTL. QUALITY, FREEDOM OF INFORMATION ACT HANDBOOK 1 (2012), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ceq/foia_handbook_2-27-12.pdf.

133. Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. §§ 11001–11050 (2012).

134. *Id.* §§ 11002(e), 11002(g).

135. *Id.* § 11003.

federal government to maintain and provide public access to a Toxics Release Inventory (“TRI”) based on this information.¹³⁶ The information each firm discloses must identify the chemicals and the quantities in which the firm uses or releases those chemicals, as well as the methods of storage and disposal the firm employs.¹³⁷ However, the location of Tier 2 information¹³⁸ may be withheld by the government from disclosure at the request of the submitter.¹³⁹ Tier 2 information is more detailed than Tier 1 information, which describes the chemicals in aggregate terms and the categories of hazard rather than specific chemical names or uses.¹⁴⁰ EPCRA also only requires Tier 2 information to be submitted to state and local authorities on request¹⁴¹ and its availability to the public is relatively restricted.¹⁴² Where state and local authorities have the information in hand, they are required to disclose it to a requester.¹⁴³ Where state and local authorities do not have the information in hand, they are required to request it from the firm where the amount of chemicals stored is above 10,000 pounds.¹⁴⁴ Below that threshold, state and

136. *Id.* § 11023(h), 11044.

137. *Id.* § 11023(g)(1)(C).

138. 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.

Id. § 11022(d)(2)(A)–(F).

139. *Id.* § 11022(d)(2)(F).

140. 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.

Id. § 11022(d)(1)(B).

141. *Id.* § 11022(d)(2).

142. *Id.* § 11022(e)(3).

143. *Id.* § 11022(e)(3)(B).

144. *Id.* § 11022(e)(3)(C).

local authorities are given discretion to decide when a request for the information is appropriate, and the requester must justify any requests for information.¹⁴⁵

EPCRA also protects trade secrets from disclosure.¹⁴⁶ 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 (as the case may be).”¹⁴⁷ The EPCRA designates an Administrator who determines whether a trade secret is validly claimed.¹⁴⁸ Any party can request general or judicial review of the determination that information is a trade secret.¹⁴⁹ EPCRA also explicitly limits disclosure by making it subject to the Trade Secrets Act.¹⁵⁰ Thus, much like FOIA, EPCRA 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 a firm has taken to protect its trade secrets. 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 a trade secret to any requester.¹⁵¹ 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.¹⁵²

While useful for emergency planning, the EPCRA 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

145. *Id.*

146. *Id.* § 11042.

147. *Id.* § 11042(a)(1)(B).

148. *Id.* § 11042(a)(3).

149. *Id.* § 11042(d).

150. *Id.* § 11042(f).

151. *Id.* § 11042(h).

152. Roesler, *supra* note 10, at 1021 n.154 (citing EPA OFFICE OF POLLUTION PREVENTION & TOXICS, CHEMICAL HAZARD DATA AVAILABILITY STUDY: WHAT DO WE REALLY KNOW ABOUT THE SAFETY OF HIGH PRODUCTION VOLUME CHEMICALS? 7 (1998), https://noharm-uscanada.org/sites/default/files/documents-files/915/Chemical_Hazard_Data_Availability_Study_1998.pdf); Wagner, *supra* note 60, 1663–77.

enabled the development of knowledge and scientific information about specific chemicals and their risks.¹⁵³

2. India

The Indian Right to Information Act (“RIA”)¹⁵⁴ is one of the more extensive FOI laws in existence, with regional and national information commissions and commissioners, independent of the government, to whom parties may appeal for refusals.¹⁵⁵ In looking at the grounds for refusal in the Indian RIA, the issue of confidential information is addressed in section 8(1)(d) of Chapter II. Section 8(1)(d) 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.”¹⁵⁶

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 courts have interpreted and managed this, but at a minimum a balancing exercise seems to be mandated. At least one court has interpreted section 8(1)(d) in a case that dealt with documents that private parties submitted in a tender to carry out consulting work for the State.¹⁵⁷ 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.¹⁵⁸ In particular, the court noted the need for special scrutiny of commercially significant public acts,¹⁵⁹ which implicate 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.¹⁶⁰ The

153. See Roesler, *supra* note 10, at 1023.

154. Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (India).

155. *Id.* §§ 12–18.

156. *Id.* § 8(1)(d).

157. State of Jharkhand v. Navin Kumar Sinha, AIR 2008 (Jharkhand) 19 (India).

158. *Id.* para. 21.

159. *Id.* para. 23 (citing The State of Uttar Pradesh v. Raj Narain, (1975) 3 SCR 333 para. 74 (India)).

160. Navin Kumar Sinha, AIR 2008 (Jharkhand) 19 para. 27.

court also saw no justifiable countervailing interest on the part of the private actor claiming confidentiality.¹⁶¹ The court ruled that the information did not fall within the exemption of section 8(1)(d).¹⁶² Thus, the key distinction was the fact that participation in the market for tenders was voluntary and not a necessity for the firm.

3. The European Union

The EU Transparency Regulation makes the refusal to disclose mandatory in the case of confidential information, subject only to an overriding public interest, and in any case subject to consultation with the private party submitter of the information.¹⁶³

In the environmental arena, the defining access-to-information regulation in the EU is based on the implementation of the Aarhus Convention.¹⁶⁴ 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.¹⁶⁵ 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 a part of the Court of Justice of the European Union (“CJEU”)) is key to its implementation. For our purposes, it is important to understand what information triggers application of the Aarhus Convention, and what framework the Convention provides for the protection of trade secrets and confidential information, if any.

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-

161. *Id.* para. 26.

162. *Id.*

163. Regulation 1049/2001, of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, art. 4, 2001 O.J. (L 145) 43, 45 (EC).

164. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

165. *Introduction*, UNECE, <https://www.unece.org/env/pp/introduction.html> (last visited June 7, 2017).

making, and access to justice in environmental matters in accordance with the provisions of this Convention.¹⁶⁶

Thus, access to information here reflects not only a utilitarian function, but also 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 considers access to information a primary element of the right to engage in free expression and participate in the democratic process.¹⁶⁷

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.¹⁶⁸

In article 2(5) a broad definition of what constitutes the public is

166. Aarhus Convention, *supra* note 164, art. 1.

167. *See, e.g.*, Leander v. Sweden, App. No. 9248/81, 9 Eur. H.R. Rep. 433 (1987); Lingens v. Austria, App. No. 9815/82, 8 Eur. H.R. Rep. 103 (1986).

168. Aarhus Convention, *supra* note 164, art. 2(3).

used.¹⁶⁹ Article 4 imposes an obligation to provide information upon request.¹⁷⁰ States may not impose a standing or interest requirement.¹⁷¹

Article 4(4) outlines circumstances under which such requests may be refused 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* 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 material¹⁷²

First, generally, the exclusions are discretionary. The public authority is responsible for the decision.¹⁷³ The exclusions are not mandatory, and third-party consent to disclosure is not necessary if the government 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(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 into the environment, stating, “The aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public

169. *Id.* art. 2(5) (“‘The public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”).

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

171. *Id.* art. 4(1)(a).

172. *Id.* art. 4(4)(d)–(g) (emphasis added).

173. *Id.* arts. 1, 3–4.

interest served by disclosure and taking into account whether the information requested relates to emissions into the environment.”¹⁷⁴

Article 4 more broadly reflects the rationale and conviction that trade secrets should not protect those responsible for engaging in potentially harmful behavior by protecting information regarding the harmful behavior as confidential trade secrets. The Aarhus Convention Implementation Guide also notes that restrictive treatment implies a higher burden of proof in order to exercise the discretion to refuse disclosure.¹⁷⁵ More specifically, the Aarhus Convention Implementation Guide requires a showing of actual harm from the release rather than the mere possibility thereof,¹⁷⁶ as well as a demonstration that other compensatory mechanisms cannot remedy the harm. 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 the public interest in disclosure, as the Aarhus Convention Implementation Guide notes.¹⁷⁷ Thus, some measure of adverse effect must be allowed when weighed against strong interests in disclosure.¹⁷⁸ 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.¹⁷⁹ Such information must, however, be explicitly stated and protected by law as trade secrets or undisclosed information in some fashion.¹⁸⁰ Where different legal regimes—such as unfair competition—protect such information, it remains unclear whether those protections would be sufficient to classify the information as “protected by law” under the convention. The implementation guide argues that the information must be explicitly

174. *Id.* art. 4(4).

175. U.N. ECON. COMM’N FOR EUROPE, THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at 90, U.N. Sales No. E.13II.E.3 (2d ed. 2014), https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

176. *Id.*

177. *Id.*

178. U.N. ESCOR, Rep. of the Compliance Comm. on Its Twenty-Third Meeting, Addendum: Findings with Regard to Communication ACCC/C/2007/21 Concerning Compliance by the European Community, ¶ 30(c), U.N. Doc. ECE/MP.PP/C.1/2009/2/Add.1 (Feb. 8, 2011) (“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.”).

179. Aarhus Convention, *supra* note 164, art. 4(4)(d).

180. See U.N. ECON. COMM’N FOR EUROPE, *supra* note 175, at 88.

protected as “commercial or industrial secrets,”¹⁸¹ meaning that normal unfair competition law protection may not qualify. As stated, the protection 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 economic and normative connotations, suggesting that authorities must examine legitimacy in the context of legitimate claims others have made to that same information.¹⁸² In addition, the Aarhus Convention makes it clear that no such claim can be made regarding undisclosed information related to emissions into the environment.¹⁸³ This reflects the absolute barrier that Aarhus presents to confidentiality claims related to information regarding environmental harms.

Article 4(4)(f) relates to personal information, which is protected under privacy and data protection regimes and impinges upon core personal autonomy rights.¹⁸⁴ It is, however, limited only to natural persons.¹⁸⁵

Finally, article 4(4)(g) reflects one of the other rationales discussed above; in order for a State to encourage voluntary submission of environmental information for its own regulatory processes, it may limit disclosure to the general public.¹⁸⁶ Article 4(4)(g) is a clear expression of that claim, the utility of which, as I noted above, may not always be 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,¹⁸⁷ 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 9.¹⁸⁸ A judicial or quasi-judicial body independent of public authority should conduct such a review. The procedure does not require the participation of

181. *Id.*

182. See Panel Report, *United States—Section 110(5) of the US Copyright Act*, ¶¶ 6.226–6.228, WTO Doc. WT/DS160/R (adopted June 15, 2000).

183. Aarhus Convention, *supra* note 164, art. 4(4)(d).

184. *Id.* art. 4(4)(f).

185. *Id.*

186. *Id.* art. 4(4)(g).

187. U.N. ESCOR, *supra* note 178, ¶ 31(b) (relating findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community).

188. Aarhus Convention, *supra* note 164, arts. 4(7), 9.

the affected third parties or submitters of information under article 4(4).

Importantly, the Aarhus Convention imposes not just a right to access information, but also imposes several positive obligations for the public authorities to engage in disclosure of specific kinds of information. Such disclosure is required, even absent a requirement to do so in article 5(7), but still subject to the discretionary option to refuse to disclose information covered by article 4(4).¹⁸⁹

At the national level, of course, the directions on how to address trade secrets and undisclosed information have been very specific. Article 3(1) does mandate that States ensure the compatibility of other provisions of law with the Convention and to alter those incompatible laws.¹⁹⁰ While not creating a hierarchy, article 3(1) specifies that laws inconsistent with the obligation must be harmonized or justified, and that the Convention must nevertheless be made effective while engaging in the proper balancing of public interest that the Convention mandates.¹⁹¹

Member States of the European Union, and the EU itself, have implemented the Aarhus Convention.¹⁹² In the EU, implementation took place through the Aarhus Regulation,¹⁹³ as well as the Environmental Information Directive.¹⁹⁴ In that context, EU Member State legislatures and courts have also had to deal with claims of confidentiality, deciding when to disclose such information and determining how the Aarhus Convention should relate to other access-to-information legislation in the EU, such as the Transparency Regulation.¹⁹⁵ Most significantly, the Aarhus Regulation applies the

189. *Id.* arts. 4(4), 5(7).

190. *Id.* art. 3(1).

191. *Id.*

192. *The EU & the Aarhus Convention: In the EU Member States, in the Community Institutions and Bodies*, EUR. COMMISSION, <http://ec.europa.eu/environment/aarhus/legislation.htm> (last updated May 12, 2017).

193. Regulation 1367/2006, of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies, 2006 O.J. (L 264) 13 (EC).

194. Directive 2003/4/EC, of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, 2003 O.J. (L 41) 26.

195. Regulation 1049/2001, of the European Parliament and of the Council of 30 May 2001 Regarding Public Access to European Parliament, Council and Commission Documents, 2001 O.J. (L 145) 43 (EC).

Transparency Regulation to environmental information.¹⁹⁶ In addressing the Transparency Regulation's treatment of confidential information, article 6(1) of the Aarhus Regulation shifts the traditionally restrictive approach to one that is more broadly favorable to release of information.¹⁹⁷ Thus, environmental information "relat[ing] to emissions" falls under the "overriding public interest" necessary for the release of confidential information.¹⁹⁸

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 some reverse FOIA-type frameworks,¹⁹⁹ but the continuing applicability of the Transparency Regulation likely means that article 4(4) still applies and consulting with the concerned third party is required even for environmental information. The ECJ dealt directly with this issue in a case regarding a request for access to testing data and production methods submitted by firms seeking market entry of glyphosate into the EU.²⁰⁰ The Commission refused to release the documents based on concerns that intellectual property and trade secrets would be disclosed.²⁰¹ The case revolved around the mandatory disclosure element that required information relating to emissions to be disclosed; 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 overriding interest under the Transparency Regulation.²⁰² 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.²⁰³ In addressing the relationship of the Aarhus Regulation to the Fundamental Charter of Rights of the European Union and the

196. Regulation 1367/2006, 2006 O.J. (L 264) 13, 13.

197. *Id.* art. 6(1), 2006 O.J. (L 264) 13, 17.

198. *Id.*

199. U.S. DEP'T OF JUSTICE, *supra* note 115, at 863–80.

200. Case T-545/11, *Stichting Greenpeace Nederland v. Comm'n*, 2013 ECJ EUR-Lex LEXIS 4015 (Oct. 8, 2013).

201. *Id.* at *5.

202. Horst von Holleben, Case Note, *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).

203. Case T-545/11, *Stichting Greenpeace Nederland*, 2013 ECJ EUR-Lex LEXIS 4015, at *1; *see also* von Holleben, *supra* note 202, at 566.

ECHR on property, the Court argued that the Aarhus Regulation is not in contradiction to the Fundamental Charter of Rights of the European Union and the ECHR, especially given how clearly and unequivocally the Regulation addresses the balance between the public interest and the right to property in its text.²⁰⁴ Some are concerned that the decision fundamentally changes the expectations of firms submitting confidential information for marketing approval.²⁰⁵ However, given the clarity of purpose of the Aarhus Convention, the drafters of the treaty and the regulation presumably foresaw and intended this very outcome. Whereas all access-to-information regulations in the EU were previously submitted to the Transparency Regulation, the Aarhus Regulation made the Transparency Regulation subsidiary in the specific case of environmental information.

4. Conclusion

While significant similarities exist among the different States, the main vector on which they differ 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 United States, the prohibition 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. The EU also has a specific and overriding obligation to disclose information related to “emissions into the environment.”²⁰⁶ 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.

204. Case T-545/11, *Stichting Greenpeace Nederland*, 2013 ECJ EUR-Lex LEXIS 4015, at *23–*24.

205. von Holleben, *supra* note 202, at 569.

206. Regulation 1367/2006, of the European Parliament and of the Council of 6 September 2006 on the Application of the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community Institutions and Bodies, art. 6(1), 2006 O.J. (L 264) 13, 17 (EC).

In contrast to these, the Indian RIA law makes it clear that where a larger public interest is identified, the RIA authority may disclose the information at its discretion. Thus, for all information, the law explicitly states 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 FOI law. 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 FOI laws 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 FOI law 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.

The inclusion of trade secrets in most FOI laws 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 interests 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 United States, 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 FOIA.

The informational interests protected by FOI laws were always intended to interact with the interests in other legislation. There is nothing in principle that should prevent States from carrying out such balancing. However, the 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 how public interests may, if at all, be balanced against trade secret interests in the FOI-law context in implementing legislation. The next Part details how and why the

TRIPS Agreement may pose a barrier to disclosure in FOI-law contexts.

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: 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 portions of the previous major international treaty on the same subject matter, the Paris Convention on Industrial Property.²⁰⁷ 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.²⁰⁸ In the TRIPS Agreement, the rule for protection of undisclosed information can be found in article 39, stating: “In the course of ensuring effective protection against unfair competition as provided in article 10*bis* of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.”²⁰⁹ 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.²¹⁰ In the final case, the aim of the Paris Convention may have been to try to prevent the use of statements regarding equivalence and source, e.g. that generic medicines come from the same source as the branded, patent- or trademark-protected medicines. The Paris Convention only protected against use, but not disclosure. In contrast, the TRIPS Agreement states in article 39(2):

Natural and legal persons shall have the possibility of

207. TRIPS Agreement, *supra* note 6, art. 2(1).

208. Raymundo Valdés & Maegan McCann, *Intellectual Property Provisions in Regional Trade Agreements: Revision and Update* 13 (WTO Staff Working Paper ERSD-2014-14, 2014), https://www.wto.org/english/res_e/reser_e/ersd201414_e.pdf.

209. TRIPS Agreement, *supra* note 6, art. 39(1).

210. Paris Convention, *supra* note 18, art. 10*bis*(3).

preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.²¹¹

This is the paragraph that adopts the basic U.S. framework from the Uniform Trade Secrets Act.²¹² It requires all Member States to provide protection not simply against use but also against disclosure. It also requires protection of information, even if it is known to some “in the field,” but is not “generally” known. In addition, the footnote provides even more detail:

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.²¹³

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 and is instead left for States to determine, as long as such implementation is based in unfair competition law as defined by the Paris Convention and footnote 10 of article 39(2). Some, most notably Bronckers and McNelis, argue that TRIPS actually requires that trade secrets be protected as intellectual property and not simply through unfair competition law.²¹⁴ They argue that to provide

211. TRIPS Agreement, *supra* note 6, art. 39(2) (footnotes omitted).

212. See UNIF. TRADE SECRETS ACT (UNIF. LAW COMM’N 1985).

213. *Id.* art. 39(2) n.10.

214. Bronckers & McNelis, *supra* note 34, at 674.

protection through unfair competition law would be to negate the meaning of article 39(2) because article 10*bis* of the Paris Convention is not intended to provide protection for trade secrets.²¹⁵

A counter to their argument is that article 39(2) intended to create precisely that link between unfair competition law and trade secrets that the Paris Convention failed to create, and that the aim was to justify placing these further rights and restrictions in the TRIPS Agreement. Without reference to the Paris Convention, the article 39 obligations would have been *sui generis* for most States.²¹⁶ 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's paper.²¹⁷

Article 39(2) is crucial in several respects. It classifies any and all qualifying information as trade secrets, with no exceptions or subject matter exclusions.²¹⁸ This means that as long as information meets the essential criteria of article 39(2), it may not be excluded from the ambit of trade secret protection. 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 products utilizing new chemical entities ("NCEs").²¹⁹ 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 government action that resulted in disclosure, acquisition, or use was contrary to honest commercial practices. The government disclosure of submitted information (not covered by article 39(3)) is therefore dependent on whether such disclosure of information would not be contrary to honest practices.

The possibility of preventing disclosure does not, at first glance, seem to encompass action by the government to use, or to require submission of, trade secret information. There may, however, be an argument that the right does extend to the government itself, where the actions of the government can be

215. *Id.* at 674–75.

216. U.N. CONFERENCE ON TRADE & DEV. & INT'L CTR. FOR TRADE & SUSTAINABLE DEV., RESOURCE BOOK ON TRIPS AND DEVELOPMENT 522 (2005).

217. Bronckers & McNelis, *supra* note 34, at 681–82.

218. TRIPS Agreement, *supra* note 6, art. 39(2).

219. *See id.* art. 39(2)–(3).

characterized as acting in a manner contrary to honest commercial practices, i.e. engaging in unfair competition. Parties could make a claim that the State was acting as a commercial actor if it engaged in any of the four behaviors that footnote 10 outlines:

- breach of contract;
- breach of confidence;
- inducement to breach; or
- acquisition by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition²²⁰

Thus, for information beyond the scope of pharmaceutical and agricultural test and other data necessary for marketing approval,²²¹ 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 disclosure of trade secrets, 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; or
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.²²² Natural and legal persons can exclude “others,” not just third parties. The second justification looks to the specific role that the information disclosure legislation requires the government to

220. *Id.* art. 39(2) n.10.

221. *See id.* art. 39(3).

222. *Id.* art. 39(2) (“Natural and legal person 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 . . .”).

play. As a regulator that perhaps defines market entry, the government would argue that it 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 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; 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 to claim that if the government breached, it would violate the provision and be subject to complaints by other countries that it was not meeting its TRIPS obligations.

Thus, we are left with the third justification. This justification 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 that disclosure is a violation of that confidence. 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 explicitly negates any expectation of contractual rights or rights relating to confidence would fall outside the ambit of article 39(2). This is important because, under TRIPS, one of the breaches triggers the trade secret protection.

Even where the requirements for qualifying as a trade secret are met,²²³ the ability to prevent use, disclosure, or acquisition is limited by those breaches occurring through dishonest practices, i.e. those listed in footnote 10. The expectation of confidentiality is not created by the existence of the trade secret subject matter, but instead 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 violate the TRIPS standard. However, this still leaves the disclosure through specific

223. See *id.* art. 39(2)(a)–(c).

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 overriding public policy interest, it will be difficult to avoid the creation of an expectation. So, for FOI laws 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 run afoul of the requirements of article 39(2) for protection of trade secrets. This would therefore have the same effect on a provision of a FOI law as the U.S. Trade Secrets Act does in the United States: 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,²²⁴ 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, the lack of an exception 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 and provide for unqualified exemptions for trade secrets.²²⁵ Many States that adopted these treaties seem to have presumed that some type of public interest balancing would be necessary to determine whether to disclose trade secrets. However, the necessity of this balance is not explicitly stated in either the treaties or implementation guides for Member States.

Some support for a balancing with the public interest can be found in article 39(3), which addresses marketing approval for pharmaceutical and agricultural products:

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

224. There is a possibility of using articles 7 and 8 as a broad justification for public interest measures in TRIPS, but as I have previously pointed out, current WTO jurisprudence does not recognize such a role. DALINDYEBO SHABALALA, CLIMATE CHANGE, TECHNOLOGY TRANSFER AND INTELLECTUAL PROPERTY: OPTIONS FOR ACTION AT THE UNFCCC 243–303 (2014).

225. See Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity arts. 6(3)(e), 17(1)(a)(iii), Oct. 29, 2010, U.N. Doc. UNEP/CBD/COP/DEC/X/1 [hereinafter Nagoya Protocol]; Cartagena Protocol, *supra* note 3, art. 21; Convention on Biological Diversity art. 14(1)(a), June 5, 1992, 1760 U.N.T.S. 79.

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.²²⁶

Thus, a first look at article 39(3) reveals that the provision imposes obligations on governments to protect such information in very specific circumstances, i.e. *only* when they require that such information be submitted for *marketing approval* of agricultural and pharmaceutical products which use *new chemical entities*. Thus, when parties submit the information 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 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 the same definition of undisclosed information applies in article 39(2) and 39(3). Article 39(2) uses the phrase “information lawfully in their control from being disclosed to,”²²⁷ whereas secrecy is defined in the sub-provisions below.²²⁸ 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)? This seems to be an absurd reading if we presume similar terms to have similar meaning. This may result from the fact that the only requirements for triggering the obligation in article 39(3) are that the information be undisclosed and that the origination of the data required considerable effort.²²⁹

Thus, the undisclosed information that must be protected under article 39(3) must at least conform to the requirements of undisclosed information that must be protected under article 39(2). However, article 39(3) adds the additional criterion that the origination of the information must have involved considerable effort.²³⁰ A plain reading would suggest that this is an additional requirement for such information to meet, rather than an alternative

226. TRIPS Agreement, *supra* note 6, art. 39(3).

227. *Id.* art. 39(2).

228. *Id.* art. 39(2)(a)–(c).

229. *Id.* art. 39(3).

230. *Id.*

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(3) is not at least bounded by what is required in article 39(2).²³¹

Article 39(3) then requires States to protect such information from not only unfair competition, but also from actual disclosure, thus going beyond simply preventing use. Disclosure can thus be justified only in the interests of protecting the public. The last line also suggests that TRIPS allows disclosure, provided that unfair commercial use is prevented.²³² This suggests that TRIPS allows disclosure as long as the rules allow a trade secret holder to nevertheless prevent others from making use of the data under article 10*bis* of the Paris Convention and footnote 10 of article 39(2). There has been no interpretation of this provision in the World Trade Organization (“WTO”) Dispute Settlement process.²³³ 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 the General Agreements on Tariffs and Trade (“GATT”) article XX(b).²³⁴ However, given that TRIPS has its own general exceptions—in articles 7 and 8, as well as articles 30 and 31 on patents and article 13 on copyright—it would seem more appropriate to refer to those rather than to GATT.²³⁵ 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): “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.”²³⁶

231. See DANIEL GERVAIS, *THE TRIPS AGREEMENT: DRAFTING HISTORY AND ANALYSIS* 544 (4th ed. 2012).

232. TRIPS Agreement, *supra* note 6, art. 39(3) (“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.”).

233. *Agreement on Trade-Related Aspects of Intellectual Property Rights*, WORLD TRADE ORG., http://www.wto.org/english/res_e/booksp_e/analytic_index_e/trips_03_e.htm#Article39B (last visited June 7, 2017).

234. GERVAIS, *supra* note 231, at 546.

235. TRIPS Agreement, *supra* note 6, arts. 7, 8, 13, 30, 31.

236. *Id.* art. 8(1).

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 the article 39(3) framing of “protection of the public” can also be found 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 additional protection against disclosure, with the same wording: “except where necessary to protect the public.”²³⁷ However, almost all of the article was bracketed, meaning that it was a proposal but not part of the text *per se*.²³⁸ In the Draft of July 23, 1990, the conditions under which disclosure could take place were elaborated in articles 3Ab.1–3Ac.2.²³⁹ Thus, 3A.b.2 allowed disclosure only to the extent required “to carry out necessary government functions.”²⁴⁰ 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.²⁴¹ Under the narrower formulation, individuals, especially under FOI-law 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, the drafters did not envision broad public dissemination 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.²⁴² On the other hand, the 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 seemed to envision release to the public as a whole, without any

237. See GERVAIS, *supra* note 231, at 534.

238. *Id.*

239. *Id.* at 536.

240. *Id.*

241. *Id.*

242. *See id.*

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.²⁴³

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 suggests that the limits on receivers of such information have been removed from the final text. 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 article 39 as the proposals to limit such disclosure did not survive the negotiation 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 to “protect such data against unfair commercial use,”²⁴⁴ 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).²⁴⁵ This is key as the definition of the latter is in Footnote 10, which includes at a minimum:

- breach of contract;
- breach of confidence;
- inducement to breach; and
- acquisition by third parties who know, or were grossly negligent in failing to know, that such practices were involved in the acquisition.²⁴⁶

The protection must be against:

- disclosure;
- acquisition; and
- use²⁴⁷

243. *See id.*

244. TRIPS Agreement, *supra* note 6, art. 39(3).

245. *Id.* art. 39(2).

246. *Id.* art. 39(2) n.10.

247. *Id.* art. 39(2).

of information obtained through any of the methods above.

There is little guidance as to whether “unfair commercial practices” and “a manner contrary to honest practices” are indeed the same concept. The wording, “contrary to honest practices,” is drawn directly from article 10*bis*(2) of the Paris Convention, to which many countries responded by applying their law on unfair competition.²⁴⁸ However, at the very least, it is clear that while unfair commercial “use” is limited to third party use of the information—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 directly refer to the scope of protection in article 39(2), suggesting that the drafters intended a different scope of protection. However, one may glean some clue from the phrasing of article 39(1). Article 39(1) indicates that the obligation to protect under paragraphs 2 and 3 is intended to support the obligation to protect against unfair competition from article 10*bis* of the Paris Convention.²⁴⁹ 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 10*bis* of the Paris Convention. It is not clear that we should apply the definition in article 39(2) rather than the standard in article 10*bis* 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

248. Marcus Höpperger & Martin Senftleben, *Protection Against Unfair Competition at the International Level—The Paris Convention, the 1996 Model Provisions and the Current Work of the World Intellectual Property Organisation*, in *LAW AGAINST UNFAIR COMPETITION: TOWARDS A NEW PARADIGM IN EUROPE?* 61, 67 (Reto M. Hilty & Frauke Henning-Bodewig eds., 2007).

249. *Id.* art. 39(1) (“In the course of ensuring effective protection against unfair competition as provided in Article 10*bis* of the Paris Convention (1967) . . .”).

goods.²⁵⁰

The minimum standard in article 10*bis* 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) requirement is additional rather than alternative to article 10*bis*(3) of the Paris Convention. However, article 39(2) and article 10*bis*(3) of the Paris Convention clearly set different thresholds, and since article 39(3) very explicitly does not refer to article 39(2), a plain reading suggests that article 10*bis* is more likely the applicable threshold.

Under article 39(2), the disclosure, acquisition, and use must be (a) without consent and (b) contrary to honest practices.²⁵¹ This is in contrast to article 39(3) which only requires that data:

- is mandatorily submitted for approval of marketing pharmaceutical and agricultural products utilizing new chemical entities;
- is undisclosed; and
- originate in a manner requiring investment and effort;

then protection is afforded against

- unfair commercial use; and
- disclosure (with the exception discussed above).²⁵²

Where unfair commercial use is a subset rather than an alternative to the broader protection of dishonest practices as defined in article 39(2) and article 10*bis* of the Paris Convention, such data must be protected against use that represents at a minimum:

- breach of contract;
- breach of confidence;
- inducement to breach; or
- use of information acquired by third parties who know, or were grossly negligent in failing to know, that such practices were involved in the acquisition.²⁵³

This suggests that the minimum level of protection required is relatively narrow, but nevertheless that non-governmental, third party use is clearly encompassed.²⁵⁴ This is not to say that countries may

250. Paris Convention, *supra* note 18, art. 10*bis*(3).

251. TRIPS Agreement, *supra* note 6, art. 39(2).

252. *Id.* art. 39(3).

253. *Id.* art. 39(2) n.10.

254. The majority of the 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 use

not choose to make the unfair competition protection referred to in articles 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 structured, narrow approach in article 39 itself to that definition.²⁵⁵ 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 a 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, 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*

at all. That discussion is beyond the scope of this Article—which concerns itself with use by third parties and with disclosure—but for more on that discussion see Carlos María Correa, *Unfair Competition Under the TRIPS Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals*, 3 *CHI. J. INT'L L.* 69 (2002); G. Lee Skillington & Eric M. Solovy, *The Protection of Test and Other Data Required by Article 39.3 of the TRIPS Agreement*, 24 *NW. J. INT'L L. & BUS.* 1 (2003).

255. 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, at iv (May 31, 2007), <https://www.indiaoppi.com/sites/default/files/PDF%20files/data%20protection.pdf>.

not pose a barrier to government disclosure of submitted information. Even for pharmaceutical and agricultural products, article 39(3) does not limit disclosure of information parties submit for purposes other than marketing.

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. 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 article 10*bis* of the Paris Convention and article 39(2) of TRIPS, disclosure is allowed. To the extent that article 39(3) provides greater protection for information related to pharmaceutical and agricultural test data, 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 article 39(3) being the same, and on 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, they cannot create expectations that information submitted to the government will be kept secret, while also 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 this Article, the current U.S. approach can be seen as compliant because it poses an absolute barrier to the disclosure of trade secrets.²⁵⁶ The Indian approach is also compliant with the TRIPS framework, given the manner in which the RIA explicitly states that trade secrets will be balanced

256. See *supra* Section II.B.1.

against the public interest.²⁵⁷ Within the realm of environmental information, the EU Transparency and Aarhus Regulations can be seen as compliant, again because of the explicit statements balancing trade secret protection against the public interest.²⁵⁸

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 disclosure is actually narrowed by the group of early regional and bilateral free trade agreements, primarily by the United States and the EU.

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

In the period subsequent to TRIPS, the United States and the EU pursued bilateral and regional free trade agreements containing intellectual property provisions (sometimes called “TRIPS-Plus” provisions) as well as environmental provisions.²⁵⁹ These generally increased the level of protection and enforcement for intellectual property.²⁶⁰ These bilateral and regional free trade agreements were initially focused on existing developing country partners (e.g. U.S.-Peru²⁶¹ and U.S.-Chile²⁶²), but then grew to include agreements such as the U.S.-Korea FTA,²⁶³ the U.S.-Australia FTA,²⁶⁴ and most recently the negotiations for a Transatlantic Trade and Investment Partnership between the United States and the EU.²⁶⁵ These

257. See *supra* Section II.B.2.

258. See *supra* Section II.B.3.

259. Anselm Kamperman Sanders & Dalindyabo Shabalala, *Intellectual Property Treaties and Development*, in INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS-PLUS ERA 41, 65–69 (Daniel Gervais ed., 2d ed. 2014).

260. See *id.*

261. *Peru Trade Promotion Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/peru-tpa> (last visited Apr. 16, 2017).

262. U.S.-Chile Free Trade Agreement, U.S.-Chile, June 6, 2003, 42 I.L.M. 1026.

263. *U.S.-Korea Free Trade Agreement*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Apr. 16, 2017).

264. *Free Trade Agreements Australia*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/australian-fta> (last visited Apr. 16, 2017).

265. *Transatlantic Trade and Investment Partnership*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/ttip> (last visited Apr. 16, 2017).

agreements were mostly carried out in the form of model agreements, which the United States or the EU then negotiated with partners, and which were modified in successive negotiations to reflect advantages gained in prior negotiations.²⁶⁶ In earlier model U.S. agreements, there was little or no text on trade secrets other than that related to undisclosed test data for pharmaceutical and agricultural products.²⁶⁷

TPP reflects a shift in U.S. policy to address the issue and thus this Article provides an analysis of the extent to which TPP 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 not containing any substantive obligations on intellectual property, with the exception of the EU-Cariforum Economic Partnership Agreement.²⁶⁸ 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, but nothing on trade secrets generally.²⁶⁹

The same can be found in the Comprehensive Economic and Trade Agreement²⁷⁰ and almost all other EU trade agreements.²⁷¹

266. Valdéz & McCann, *supra* note 208, at 36.

267. See, e.g., U.S.-Chile Free Trade Agreement, *supra* note 262; *CAFTA-DR* (Dominican Republic-Central America FTA), OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta> (last visited Apr. 16, 2017); *U.S.-Korea Free Trade Agreement*, *supra* note 263.

268. Economic Partnership Agreement Between the CARIFORUM States, of the One Part, and the European Community and Its Member States, of the Other Part, 2008 O.J. (L 289/I) 3.

269. Trade Agreement Between the European Union and its Member States, of the One Part, and Columbia and Peru, of the Other Part art. 231, June 26, 2012, http://trade.ec.europa.eu/doclib/docs/2011/march/tradoc_147704.pdf.

270. Comprehensive Economic and Trade Agreement art. 20.29, Oct. 30, 2016, 2017 O.J. (L 11) 23.

271. Association Agreement Between the European Union and Its Member States, of the One Part, and Ukraine, of the Other Part art. 222, June 27, 2014, 2014 O.J. (L 161) 3 (protecting test data, but saying nothing on trade secrets); Agreement Establishing an Association Between the European Union and Its Member States, on the One Hand, and Central America on the Other, Dec. 15, 2012, 2012 O.J. (L 346) 3 (discussing nothing on trade secrets or undisclosed information); Free Trade Agreement Between the European Union and its Member States, of the One Part, and the Republic of Korea, of the Other Part art. 3, EU-S. Kor., Oct. 6, 2010, 2011 O.J. (L 127) 6; Agreement Establishing an Association Between the European Community and Its Member States, of the One Part, and the Republic of Chile, of the Other Part, Dec. 30, 2002, http://eur-lex.europa.eu/resource.html?uri=cellar:f83a503c-fa20-4b3a-9535-f1074175eaf0.0004.02/DOC_2&format=PDF (discussing nothing on trade secrets or undisclosed information); Economic Partnership, Political Coordination

Ongoing negotiations with India do not appear to address the issue.²⁷² In part, the EU's lack of inclusion of trade secrets in its negotiations for TRIPS-Plus FTAs may be attributed to the lack of EU harmonization, which is only now being addressed by the Directive on the Protection of Undisclosed Information.²⁷³ The next Section examines the key U.S. trade agreement representing a shift in the treatment of trade secrets.

C. The Trans-Pacific Partnership

TPP is the most recent FTA signed by the United States with a group of Pacific Rim countries including, Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.²⁷⁴

Language similar to article 39(3) of TRIPS, providing for protection of undisclosed test data (for pharmaceuticals), is provided in article 18.50, requiring a five-year exclusivity period before it can be relied upon or used for marketing approval of new chemical entities.²⁷⁵ Paragraph 3 provides for an exception for action aimed at protecting public health in line with:

and Cooperation Agreement Between the European Community and Its Member States, of the One Part, and the United Mexican States, of the Other Part, Oct. 28, 2000, 2000 O.J. (L 276) 45 (discussing nothing on trade secrets or undisclosed information); *Euro-Mediterranean Partnership*, EUR. COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership> (last updated Feb. 22, 2017) (discussing FTAs with Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Tunisia, Syria, and primarily limited to trade in goods).

272. This is true for the EU-Japan FTA and the EU-Mercosur FTA. No official information on the scope of IPR negotiations is available for the EU-Philippines FTA, the EU-Thailand FTA, the EU-Tunisia Deep and Comprehensive Free Trade Agreement, and the EU-Israel Deep and Comprehensive Free Trade Agreement.

273. 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. (L 157) 1.

274. Trans-Pacific Partnership, *supra* note 6. The Agreement was a significant point of contention in the 2016 election campaign, resulting in both candidates, Hillary Rodham Clinton and Donald J. Trump, promising that they would not seek its ratification. Daniel W. Drezner, *Does the 2016 Campaign Provide a Mandate Against the TPP?*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/posteverything/wp/2016/06/23/does-the-2016-campaign-provide-a-mandate-against-tpp/?utm_term=.0f498f9c278f. President Trump withdrew the U.S. signature on TPP on January 23, 2016. Peter Baker, *Trump Abandons Trans-Pacific Partnership, Obama's Signature Trade Deal*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/tpp-trump-trade-nafta.html>.

275. Trans-Pacific Partnership, *supra* note 6, art. 18.50(1)(a).

- (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.²⁷⁶

The Declaration does envision countries using exceptions and limitations under TRIPS,²⁷⁷ 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 TPP.

Article 18.78 of TPP addresses increased protection of trade secrets.²⁷⁸ The definition of trade secrets remains, at a minimum, 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 10.²⁷⁹ The provision explicitly includes state-owned enterprises within the ambit of article 39(2),²⁸⁰ something which has been considered a major accomplishment by the United States Trade Representative,²⁸¹ but which also suggests that State enterprises and the State were not necessarily seen by the TPP signatories as covered by article 39(2).

As argued above, that belief is likely mistaken. TPP expands criminal penalties for willful and unauthorized access to and acquisition of information contained in computer systems,²⁸² and importantly for the purposes of this Article, it criminalizes “the fraudulent disclosure, or alternatively, the unauthorised and wilful disclosure, of a trade secret, including by means of a computer

276. *Id.* art. 18.50(3).

277. World Trade Organization, Ministerial Declaration on the TRIPS Agreement and Public Health, WTO Doc. WT/MIN(01)/DEC/2 (2001).

278. Trans-Pacific Partnership, *supra* note 6, art. 18.78.

279. *Id.* art. 18.78(1); TRIPS Agreement, *supra* note 6, art. 39(2).

280. Trans-Pacific Partnership, *supra* note 6, art. 18.78(1).

281. See U.S. TRADE REPRESENTATIVE, TPP: MADE IN AMERICA: INTELLECTUAL PROPERTY 5, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Intellectual-Property.pdf> (last visited Apr. 16, 2017).

282. Trans-Pacific Partnership, *supra* note 6, art. 18.78(2)(a).

system.”²⁸³ This potentially includes such disclosure by a government employee, although it is not as specific as the U.S. Trade Secrets Act prohibition.²⁸⁴ 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 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 FOI laws. 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 United States 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 3.²⁸⁵ The sanctions are limited to unauthorized acts; a party remains free to exclude acts by government employees from criminal liability because they are not for commercial advantage or commercial gain.²⁸⁶ Thus, under paragraph 3, States under TPP remain free to exclude from criminal liability acts that would otherwise be covered 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 extends to acts that are not for commercial gain or advantage, thus ensuring that disclosure by government actors does not run afoul of TPP obligations. At most, it may be appropriate to limit criminal liability under TPP to those acts “directed by or for the benefit of or in association with a foreign economic entity,”²⁸⁷ which seems to be the primary concern driving the criminalization provisions.

TPP has the potential to be even more limiting than the TRIPS Agreement. However, to the extent that the opportunity to

283. *Id.* art. 18.78(2)(c).

284. *See supra* note 119 and accompanying text.

285. Trans-Pacific Partnership, *supra* note 6, art. 18.78(3) (“(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.”).

286. *See id.* art. 18.78(3).

287. *Id.* art. 18.78(3)(d).

limit criminal liability to one of the areas in the closed list exists, 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 Part illustrates the concern that TRIPS and TRIPS-Plus regimes may contain hidden landmines for the unwary government. Some countries fortunately implemented their access-to-information regimes in ways that have, largely accidentally, fallen within the TRIPS framework.²⁸⁸ 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 United States, provide overly narrow disclosure regimes, especially for access to environmental information.

An effective access-to-information regime can coexist 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 allow for disclosure in the public interest despite the existence of legislation that 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 is even more urgent in light of the fact that countries have signed on, or are planning to sign on, to international environmental treaties with submission and disclosure agreements. 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.

288. See *supra* Section II.B.

A key recent example of this is the Convention on Biological Diversity and its several protocols. The Convention on Biological Diversity (“CBD”) is in many ways an access-to-information treaty in that it aims to regulate the access to, terms of disclosure for, and use of information related to genetic resources and the distribution of benefits from such disclosure and use.²⁸⁹ 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.²⁹⁰

The CBD contains no guidance or rule on how the 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,”²⁹¹ 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 aims to more explicitly lay out the

289. See generally Convention on Biological Diversity, *supra* note 225.

290. E.g., *id.* art. 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.”); *id.* art. 15(7) (“Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.”); *id.* art. 19(2) (“Each Contracting Party shall take all practicable measures to promote and advance priority access on a fair and equitable basis by Contracting Parties, especially developing countries, to the results and benefits arising from biotechnologies based upon genetic resources provided by those Contracting Parties. Such access shall be on mutually agreed terms.”).

291. See *id.* arts. 15–16, 19.

content of the provisions of article 15, 16, and 19 of the CBD.²⁹² It has several provisions requiring the submission of information. Article 6(3)(e) states:

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.²⁹³

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 Access and Benefit sharing Clearing-House (“ABS”). The language may allow for certification of the existence of the contract and mutually agreed terms, rather than the actual documents themselves, but the treaty already creates a provision that requires submission of such information to a national body with an obligation to communicate it to an international clearinghouse mechanism.²⁹⁴ 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,²⁹⁵ but crucially, the submission of information to the ABS is “without prejudice to the protection of confidential information.”²⁹⁶ The content of this broad-brush exception remains to be elaborated, but it is noteworthy that the exception 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

292. Nagoya Protocol, *supra* note 225, pmb1.

293. *Id.* art. 6(3)(e).

294. *Id.*

295. *Id.* art. 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 . . .”).

296. *Id.*

interest in accessing the information. Nevertheless, by stating such a 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 Protocol²⁹⁷ is much clearer and elaborates on what exactly it means for information to be protected from disclosure. Article 21 specifically addresses confidentiality and states:

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 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.

297. Cartagena Protocol, *supra* note 3.

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.²⁹⁸

The Biosafety Clearing House (“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.²⁹⁹
- 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.³⁰⁰
- 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.³⁰¹
- There are no restrictions on standing or access. Access to the BCH information is open and available on the web once it has been submitted.³⁰²

Overall, the details of the Cartagena Protocol show greater consideration of problems related to reconciling access to submitted

298. *Id.* art. 21 (emphasis added).

299. *Id.* art. 20.

300. *Id.* art. 21(2).

301. *Id.*

302. See *Finding Information*, BIOSAFETY CLEARING-HOUSE, <http://bch.cbd.int/database> (last visited June 7, 2017).

information and claims of confidentiality, and it addresses them in a manner that balances the interests in confidentiality against 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 examples of the CBD, Nagoya Protocol, and the Cartagena Protocol support arguments for greater and more explicit consideration in the negotiations of environmental treaties of the interaction with trade secret protection beyond silence or declarations of “without prejudice to confidential information.”³⁰³ 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 proper implementation of the environmental treaties to which they are parties.

CONCLUSION

This Article argued that the TRIPS Agreement and subsequent regional and bilateral free trade agreements pose a threat to FOI laws and other general access-to-information regimes. This threat arose from the interaction of two issues. The first issue is that many countries with generalized access-to-information regimes usually provide exceptions to disclosure for trade secrets but allow courts to determine, on a case-by-case basis, whether or not to actually allow disclosure. The second issue is that TRIPS Agreement obligations actually prohibit disclosure where any expectation of secrecy is created by trade secret legislation.

The interaction of these two issues leaves only a narrow path to create TRIPS-compliant access-to-information regimes. A domestic access-to-information regime is compliant if it explicitly excludes the category of information it addresses from trade secret protection. This can be done for specific types of regulatory regimes, such as for toxic chemicals (e.g. the Toxic Release Inventory in the United States). A generalized access-to-information regime is also compliant if it does not provide for any exception for trade secrets,

303. Nagoya Protocol, *supra* note 225, art. 14(2).

provided it does not apply to information submitted for market approval of new chemical entities for pharmaceuticals and agriculture. Finally, an access-to-information regime is TRIPS-compliant if it provides only a narrow exception for non-disclosure of trade secrets, but otherwise requires disclosure (e.g. the Aarhus Convention).

I conclude that it is only by virtue of ignorance and accident that many States have not run afoul of the WTO dispute settlement process. However, the salience of this interaction is likely to increase as treaties like the Nagoya Protocol require more extensive submission and disclosure of commercially-relevant information. It may be time for legislators and treaty negotiators to make more deliberate choices regarding how to manage the tension between access to information and trade secret protection.