EMERGING AND ENDURING ISSUES OF TRADE SECRECY – A SRI LANKAN PERSPECTIVE[**]

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Abstract: Trade secrets amount to capital, and they are rapidly eclipsing other sources of competitive advantage in the knowledge-based economy, which is largely reliant on knowledge assets rather than physical assets. The TRIPS Agreement that establishes the modern global standards of intellectual property (IP) protection does not provide for a globally unified protection of trade secrets. However, there is a recent movement in the European Union (EU) and the United States (US) for more harmonised legal regimes. The utility of a trade secrets' regime in Sri Lanka is emerging against the backdrop of the large-scale spread of small-and medium-sized enterprises, and the belief that the patent regime does not cater for domestic innovation needs. This paper argues that despite the fact that Sri Lanka has enacted a TRIPS-compliant trade secrets legal regime, the absence of provisions to preserve the confidentiality of trade secrets in the legal proceedings has negated the whole purpose of this law. In addition, this paper argues that over-reliance on trade secrecy challenges the established societal and political-economic beliefs and public interest considerations in the country. This paper concludes by recommending the introduction of legislative provisions to ensure the confidentiality of trade secrets during legal proceedings and to improve the lawful means of acquiring and using trade secrets, while balancing the interests of trade secrets holders and society.

Keywords: trade secrets, TRIPS Agreement, Intellectual Property Act of Sri Lanka, preservation of secrecy during the court proceedings, public interest in Sri Lanka.

1. INTRODUCTION

This paper examines the significant role played by trade secrecy in today's context, with special reference to Sri Lanka. It also analyses the effectiveness of the Sri Lankan legal framework in protecting trade secrets, especially in preserving confidentiality during court proceedings and whether, and to what extent, it serves the innovation, societal and economic needs of Sri Lanka. To this end, the first part of this paper outlines existing and emerging utilities of trade secrets in this century. The second part analyses the present international legal framework and emerging trends. Third, this paper appraises the emerging role played by the trade secrets regime in Sri Lanka. Then it evaluates Sri Lankan trade secrets law with special reference to two enduring issues: namely, the protection available during and after court proceedings, and how the law responses to public interest considerations and pragmatic societal needs and values. The paper concludes with recommending the introduction of a separate piece of legislation or legislative amendments with clear provisions on preserving confidentiality in trade secrets legal proceedings and lawful means of using, disclosing and acquiring trade secrets in line with the societal needs and socio-economic values of the country.

2. SIGNIFICANCE OF TRADE SECRETS IN TODAY'S CONTEXT

Today, the world has transformed into a knowledge-based economy[1] from a material-based one. Trade secrets in this economy amount to capital and they are rapidly eclipsing other sources of competitive advantage.[2] Robust protection and effective enforcement of trade secrets is critical to a company's ability to innovate, grow and invest locally and internationally.[3] Further, there is a positive correlation between the strength of the protection of intellectual property rights (IPRs) and its potential to attract investment and increase research and development (R&D) and technology transfer.[4] Highlighting the comparative and timely importance of trade secrets, Jorda considers trade secrets as the crown jewel of a company's intellectual capital.[5] Generally speaking, a trade secret can encompass any information which is secret with a commercial value, and subject to reasonable efforts to keep it secret.[6] It can arise in technical and commercial contexts, and can include formulas; know-how; contract terms; software; customer lists; engineering, marketing, finance or strategic information; and information about suppliers, competitors, and other industrial participants. Thus, the scope of trade secrets is virtually unlimited, compared to other forms of IP since they constitute a widely diverse category. It may be an incentive to develop incremental innovations that do not meet the non-obviousness

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[1] Oxford University, 'Oxford Dictionary' < https://en.oxforddictionaries.com/definition/knowledge_economy> accessed 18 April 2017. "Knowledge Economy: An economy in which growth is dependent on the quantity, quality, and accessibility of the information available, rather than the means of production."

[2] A Mitchell, 'The jurisdictional basis of trade secret actions: Economic and doctrinal considerations' (1997) 8 Australian Intellectual Property Journal 134, 136.

[3] US Chamber of Commerce, *The Case for Enhanced Protection of Trade Secrets in the Trans-Pacific Partnership Agreement* (2013) 10-12 <https://www.uschamber.com/sites/default/files/legacy/international/files/Final%20TPP%20Trade%20Secrets%208_0.pdf > accessed 17 April 2017; See also James Pooley, Trade Secrets: The Other IP Right, WIPO MAG.,no.3,June2013,at 2.

[4] Ibid.

[5] KF Jorda, 'Trade Secrets and Trade-Secret Licensing' in A Krattiger, R T Mahoney, L Nelsen (eds), *Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices* (MIHR, UK and PIPRA, USA, 2007) 1046.

[6] Article 39.2 of TRIPS Agreement; Section 160 (6) of Sri Lankan Intellectual Property Act, No. 36 of 2003.

requirement under the patent law.[7] This often occurs in the context of Small-and Medium-sized Enterprises (SMEs)[8] or start-ups, as this sector often lacks specialised human resources and financial strength to pursue, manage, enforce and defend their other IPRs.[9] It also covers a wide array of information, including commercialised experimental work, unreleased products or strategies, and even 'negative know-how' (that is, erroneous research approaches or results of failed experiments).[10]

As an illustration of the diversity of trade secrets, most traditional knowledge (TK)-based enterprises in Sri Lanka mainly rely on trade secret protection for their products.[11] As an example, *Samahan* which is known in Sri Lanka as a natural, safe and effective preparation for relief of cold and cold-related symptoms has been identified as a trade secret by the manufactures.[12] In contrast, Google's PageRank, which is an algorithm used to assign a numerical weighing to each element of a hyperlinked set of documents, the formula of Coca-Cola and the '11 herbs and spices' recipe of KFC, are protected as trade secrets. Therefore, it can be noted that trade secrets serve a wide range of sectors in this information age.[13]

Despite the significance of trade secrecy in this knowledge economy, what is more unique about trade secrets is that they can be easily and inexpensively shared and replicated compared to other IP assets. Bone states that ideas or information protected as trade secrets have tendency to escape like wild animals and, once gone, they return to the commons as public property.[14] As a result, they are more vulnerable to misappropriation and industrial espionage than any other IP. For instance, it has been revealed that the misappropriation of trade secrets costs the US economy billions of dollars per year.[15] Further, there are claims that one in five European companies has been a victim of trade secrets misappropriation, or at least attempts of misappropriation, in the last ten years.[16] Given that trade secret misappropriation has proven to be a significant issue in more developed economies, it is reasonable to expect that it is also likely to be an issue in developing countries such as Sri Lanka.[17]

With the rapid advances in information and communication technology, both the amount of trade secrets stored in electronic mode and the cyber intrusions into computer systems have greatly increased.[18] In fact, there is a race between entities that want to keep commercial secrets and those who want unauthorised access to them.[19] Moreover, the growth of using mobile devices, storing and processing confidential information in the cloud and the rise of social media pose threats for the protection of trade secrets.[20] However, it is doubtful whether the existing trade secrets regimes are effective due to low levels of legal protection, legal fragmentation and inadequate enforcement.'[21]

[7] N Biger and SE Plaut, 'Trade Secrets, firm–specific human capital, and optimal contracting' (2000) European Journal of Law and Economics 49, 52.

[8] Hereinafter referred to as SMEs.

[9] European Commission, *Explanatory Memorandum- Proposal for a Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure* (2013) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013PC0813&from=EN> accessed 17 April 2017.

[10] Jenniffer Brant and Sebastian Lohse, *Trade Secrets: Tools for Innovation and Collaboration - Research Paper 3, International Chamber of Commerce* (2014) 5. < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2501262 > accessed 17 April 2017; KF Jorda (n 5) 1052.

[11] NS Punchi Hewage, *Promoting a Second-Tier Protection Regime for Innovation of Small and Medium-Sized Enterprises in South Asia: The Case of Sri Lanka* (Nomos Verlagsges, Germany, 2015) 156.

[12] However, in *Link Natural Products (Pvt) Ltd v Tropical Herbs (Pvt) Ltd* (Case No. CHC 25/2001/03, 01.02.2013), it was held by the Commercial High Court of Sri Lanka that as the plaintiff did not produce sufficient details so as to recognise *Samahan* as a trade secret, court could not proceed with the case. It is observed, however, plaintiff intentionally did not provide necessary details as there was a fear that it will further make the '*Samahan* trade secret' public. In Sri Lanka there are no recognised precautionary-methods such as proceeding in camera in the trade secret court proceedings. This issue is further discussed section 4.3 of this paper.

[13] Oxford University, 'Oxford Dictionary' <https://en.oxforddictionaries.com/definition/information_age > accessed 17 April 2017. 'Information Age: Information age is the era in which the retrieval, management, and transmission of information, especially by using computer technology, is a principal (commercial) activity.'

[14] Robert G Bone, 'A New Look at Trade Secret Law: Doctrine in Search of Justification' (1998) 86 (2) California Law Review 241, 255.

[15] Randall C Coleman, *Combating Economic Espionage and Trade Secrets Theft: Statement before Subcommittee on Crime and Terrorism of the Senate Judiciary Committee* (113th Cong. 1 2014) <https://www.fbi.gov/news/testimony/combating-economic-espionage-and-trade-secret-theft> accessed 18 April 2017.

[16] Baker and McKenzie, *Study on trade secrets and confidential business information in the internal market* (April 2013) <http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_final-study_en.pdf> accessed 17 April 2017.

[17] In fact, empirical research on trade secrets has been difficult to conduct since trade secrets are 'secret' in nature: See Katherine Linton, 'The Importance of Trade Secrets: New Directions in International Trade Policy Making and Empirical Research' (2016) Journal of International Commerce and Economics 1,2.

[18] Elizabeth A Rowe, 'RATS, TRAPS, and Trade Secrets' 2016 (56)2 Boston College Law Review 381,382.

[19] David S. Levine, 'School Boy's Tricks: Reasonable Cybersecurity and the Panic of Law Creation (2015) 72 Washington and Lee Law Review 323,323.

[20] Jenniffer Brant and Sebastian Lohse (n 10) 15.

[21] Ibid.

3. INTERNATIONAL LEGAL FRAMEWORK AND EMERGING TRENDS

The TRIPS Agreement[22] of the World Trade Organization (WTO), represents the current level of protection of trade secrets at the international level. Article 39.1 of the TRIPS Agreement by cross-referencing Article 10 *bis* of the Paris convention, suggests protecting trade secrets as undisclosed information[23] under the unfair competition regime.[24]

According to Article 39.2 of the TRIPS Agreement, 'protection must apply to information that is secret, which has commercial value because it is secret and that has been subjected to reasonable steps which were taken to keep it a secret.' It provides natural and legal persons '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'. These dishonest commercial practices include breach of contract; breach of confidence; inducement of breach; as well as the acquisition of such information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition.[25]

It is the author's view that the TRIPS Agreement does not recognise the proprietary rights in trade secrets or undisclosed information. However, Article 1.2 of the TRIPS agreement states that the term 'intellectual property' refers to all categories of IP that are the subject of sections 1 through 7 of Part II. Thus, arguably, TRIPS considers undisclosed information as IP, since the title of Section 7 of Part II is 'Protection of Undisclosed Information'. Correa states that it is generally accepted that unfair competition is one of the disciplines of industrial property, and TRIPS Article 1.2 should be interpreted in this sense.[26] Nonetheless, he further states that in Article 39, which provides that '…persons shall have the possibility of preventing information lawfully within their control…', the use of the word 'persons' instead of 'owners' denotes the non-proprietary nature of the rights recognised by the Article 39.[27] The historical reason is the twists and turns that occurred in the drafting stage of Article 39.[28] Most of the developing country negotiators, led by India, were vehemently opposed to recognising the property nature of undisclosed information proposed by the US.[29] Therefore, Article 39 explicitly states that the protection of undisclosed information arises under pre-existing industrial property principles of unfair competition but does not label such information as proprietary.[30]

Moreover, the TRIPS agreement requires all Members of the WTO to make their IP regimes compatible with the standards set by it.[31] Even though most of the WTO Members have by and large harmonised their IP regimes when implementing the TRIPS obligations, trade secrets have been conspicuously left out.[32] One possible reason for this position is the leeway that the TRIPS Agreement has given to its Members regarding the protection of trade secrets. In particular, Article 39.2 of the TRIPS Agreement states 'trade secrets, undisclosed information or know-how cannot be revealed in a manner contrary to honest commercial practices'. As provided in footnote 10 of the Agreement, '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.' Thus, this

[22] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing The World Trade Organization, Annex 1c, The Legal Texts: The Results of The Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 UNTS 299, 33 I.L.M. 1197 (1994). Hereinafter referred to as TRIPS Agreement. Having negotiated in the 1986-94 Uruguay Round of WTO, this has introduced intellectual property rules into the multilateral trading system for the first time.

[23] Article 39 provides for the protection of undisclosed information and test data.

[24] Paris Convention for the Protection of Industrial Property (March 20, 1883; effective July 7, 1884, and amended June 2, 1934 and July 14, 1967) (the Paris Convention): Article 10 *bis* - "any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition". It does not contain any specific mention specifically relevant to trade secrets. Instead, it states following three examples of unfair competition: (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor; (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

[25] See the Footnote 10 of the TRIPS Agreement.

[26] Carlos M Correa, *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement* (Oxford University Press, US, 2007) 368.

[27] Ibid.

[28] Elizabeth A. Rowe and Sharon K. Sandeen, *Trade Secrecy and International Transactions: Law and Practice* (Edward Elgar, UK USA, 2015) 26.

[29] Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights- Communication from India-MTN.GNG/NG11/W/37 (10 July 1989), para 46. <https://www.wto.org/gatt_docs/English/SULPDF/92070115.pdf > This view was supported by a group of developing countries including India, Brazil, Argentina, Chile, China, Colombia, Cuba, Egypt, Nigeria, Peru, Tanzania and Uruguay.

[30] Elizabeth A Rowe and Sharon K Sandeen (n 28).

[31] Article 1.1 of the TRIPS Agreement.

[32] See Charles Tait Graves, 'Trade secrecy and common law confidentiality: the problem of multiple regimes' in Rochelle c. Dreyfuss and Katherine J. Strandburg (eds), *The Law and Theory of Trade Secrecy- A Handbook of Contemporary Research* (Edward Elgar, UK, USA, 2011) 79. As per the author 'there is no other area of IP law where the main body of law is supplemented by such a confusing, inconsistent host or alternative possibilities.'

provision gives leeway for countries to rely on their pre-existing domestic mechanisms.[33] Apart from this, the wording of Article 39.2 can be construed as giving the Members broad scope to determine the means to be applied to prevent the listed practices such as civil or commercial sanctions, or criminal sanctions.[34] Also, in general, Member countries have the discretion of adopting a legal framework of their choice to afford protection for trade secrets as stated in Article 1.1.[35] This appears to be the reason why trade secrets regimes are highly fragmented compared to other IP regimes.

However, in recent years, there has been a new wave of regional and domestic attempts to introduce more harmonised laws. For instance, having identified that legal fragmentation adversely affects the appropriation and dissemination of information, know-how and technology,[36] the EU enacted a Directive in 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.[37] Accordingly, the EU Directive intends to adopt a common definition on trade secrets across EU member States. It states the circumstances under which the acquisition, use and disclosure of a trade secret is unlawful or lawful. Also, the Directive provides for the measures, procedures and remedies that should be made available to the rightful holder of trade secrets in case of alleged misappropriation. Furthermore, it establishes mechanisms for the preservation of confidentiality of trade secrets during legal proceedings. It provides for sanctions in cases of non-compliance with the measures provided; and provisions on monitoring and reporting.[38] Thus, common standards for trade secrecy have become a legal acquis of the EU since 2016. Members are given two years to incorporate these standards in their domestic legal systems. Additionally, the highly controversial US-led Trans-Pacific Partnership Agreement (TPPA) requires signatories to provide a strong and cost-efficient protection for trade secrets, including both criminal and civil remedies.[39] Although the TPPA may well be abandoned with the US withdrawing from it,[40] trade secrecy provisions of the TPPA can be considered as a moment for reflection on the laws of the TPP members and their readiness to adopt a harmonised trade secrets legal regime which includes civil and criminal sanctions.[41] In the US, the recently enacted Defend Trade Secrets Act introduces a federal civil cause of action for trade secrets misappropriations, providing a more robust and harmonised framework for the protection of trade secrets.[42] This is a clear reflection that the US continues to have a strong trajectory with regard to the promotion of robust and harmonised trade secrets laws, despite its withdrawal from the TPPA.

It is clear that there is significant movement in the international arena in promoting a more harmonised and robust trade secrets law.[43] However, two decades since adopting the TRIPS agreement, the trend appears to be more towards adopting regional mechanisms rather than international measures. In general, these trends highlight the need for an internationally or regionally consistent response to protecting trade secrets. However, there appears to be no trend of introducing robust or harmonised trade secrets laws in developing countries. Nevertheless, it would be inevitable for such countries to prepare to adopt these policies and regulatory standards as prerequisites of bilateral or multilateral treaties, foreign direct investments or technology transfer agreements. That is mainly because these countries are considered as policy/technology takers instead of policy/technology makers.[44] For example, it is hard to argue that countries such as Vietnam wanted a robust trade secrets regime or criminalisation of trade secrets theft to be a part of the TPPA. That was a mere reflection of the lower bargaining power of developing nations and the strong voice of developed TPP nations, mainly the US.

[33] Peter-Tobias Stoll, Jan Busche and Katrin Arend (eds), *WTO – Trade-Related Aspects of Intellectual Property Rights* (Martinus Nijhoff Publishers, Leiden - Boston, 2009) 643.

[34] ibid. As observed by the authors : 'the wording [of Article 39.2] has been interpreted as giving the members broad scope to determine the means to be applied to prevent the listed practices such as civil or commercial sanctions, or criminal sanctions.'

[35] See Article 1.1 of the TRIPS agreement: "…Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

[36] Baker and McKenzie (n 16).

[37] Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

[38] Ibid.

[39] Article 18.78 of the Trans-Pacific Partnership Agreement; US Chamber of Commerce (n 3); Also, intellectual property rights in general and trade secrets in particular are parts of recently negotiated Transatlantic Trade and Investment Partnership Agreement (TTIP).

[40] President Trump has signed to withdraw the USA from the TPP in January 2017 as one of the first moves being sworn as the president.

[41] Darshana Sumandasa, 'TPP on Trade Secrecy- A Momentum of Reflection' (IP Academic Conference Australia, Perth, February 2016)

[42] However, there are criticisms for this Act as it leaves all state trade secrets laws in place and simply layers a new federal law on top of them adding more laws instead of creating uniform national law.

[43] Joshua Sibble, 'International Trend Toward Strengthening Trade Secret Law' (2014) 26 Intellectual Property and Technology Law Journal 18.

[44] For example Sri Lanka-USA Bilateral Investment Treaty 1993 identified that the protection of intellectual property which includes trade secrets as a term of the agreement. Sri Lanka has such bilateral investment protection agreements with 28 countries. Article 157 of the Sri Lankan Constitution guarantees the safety of investment protection treaties which are approved by the parliament by a two-thirds majority. Therefore, arguably, these treaties get the same applicability as the domestic legislations. See 'Investment Protection and Double Taxation' , BOI Sri Lanka <http://www.investsrilanka.com/why_sri_lanka/investment_protection > accessed 17 April 2017.

When it comes to Sri Lanka, there is a different domestic compulsion and utility for a trade secrets regime, which is analysed in the next section.

4. TRADE SECRETS LAW IN SRI LANKA

4.1 Trade secrecy uses in Sri Lanka

One of the salient features in the Sri Lankan innovation landscape is the existence of Small and Medium-Sized Enterprises (SMEs), which mainly engage with minor and incremental innovation.[45] As revealed by the Sri Lankan Ministry of Finance, SMEs currently play a pivotal role in the Sri Lankan economy, amounting to 75 per cent of the total number of enterprises and contributing 52 per cent of the Gross Domestic Product (GDP).[46] Scholars have identified that there is a negative correlation between a firm's size and the intensity of their reliance on trade secrets.[47] Thus, the smaller firms prefer trade secrets as an appropriate mechanism over patent because they are not in a position to afford the cost, time and the bureaucratic process of other registered IP rights.[48] For instance, currently more than 60 per cent of Sri Lankan SMEs use at least informal means of secrecy to protect their products and processes.[49] Overall, this can be regarded as a significant statistic, considering that 75 per cent of Sri Lankan enterprises are SMEs.

Further, it is doubtful whether the existing patent regime caters for the knowledge and incremental innovation of domestic firms, since most of the domestic innovators are not in a position to reach the patent threshold[50] comprising novelty (newness)[51], inventive step[52] and industrial applicability.[53] This is intensified in a context where Sri Lanka follows a 'universal novelty standard', which requires that an invention should be new throughout the world. This standard provides that all materials made available to the public before the filing date of the patent anywhere in the world form part of the prior art against which a patent's novelty is assessed.[54] This may be one of the reasons for the plunging numbers of resident patents granted in Sri Lanka as depicted by the following chart.

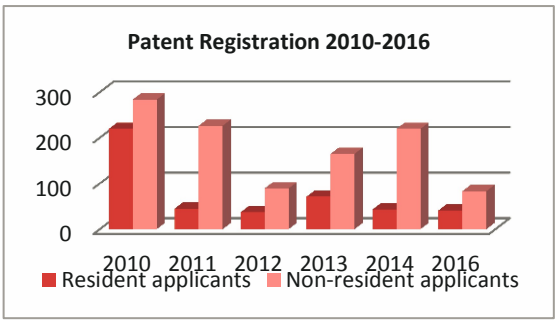

Chart 1: Patent Registration in Sri Lanka 2010-2016
Source: National Intellectual Property Office, Sri Lanka, 2017[55]

The above chart shows the fact that there are fewer patents granted every year in Sri Lanka. The majority of patents are granted to non-residents or foreign applicants. Therefore, in the absence of a regime that caters to domestic innovation needs, trade secrets become a gap filling regime.[56]

TK-based innovations and grassroots innovations have also occupied a significant place in the innovation landscape of the country.[57] Since there is no explicit protection for TK or TK-inspired products in Sri Lanka, the TK-based industry currently largely relies on trade secrets protection.[58] However, it should be noted that these products can be protected as far as they satisfy the tripartite test of trade secrets: secrecy; having reasonable measures to protect secrecy; and real or potential commercial value.

Therefore, it is clear that the trade secrets regime has become a crucial IP protection method in Sri Lanka and its contribution in SMEs, minor and incremental innovation and TK-inspired invention is significant. The next section

[45] N S Punchi Hewage, (n 11) 40.
[46] Ministry of Finance, Sri Lanka, 'Annual Report 2015', 220. <http://www.treasury.gov.lk/documents/10181/12870/2015/68f51df3-5465-4805-ab6f-4a024ec672f6?version=1.0 > accessed 17 April 2017.
[47] Baker and McKenzie (n 16); Nicola Searle and Gavin C. Reid 'Firm size and trade secret intensity: evidence from the Economic Espionage Act' (2012) CRIEFF discussion paper, School of Economics & Finance, University of St Andrews, No. 1203, 23. <https://crieff.files.wordpress.com/2012/09/dp1203.pdf > accessed 17 April 2017.
[48] Ibid.
[49] N S Punchi Hewage (n 11) 149.
[50] Ibid 150.
[51] Intellectual Property Act, No. 36 of 2003, Section 64
[52] Ibid, Section 65.
[53] Ibid, Section 66.
[54] According to Section 64 (1) of the Sri Lankan IP Act, 'an invention is new if it is not anticipated prior art' and Section 64 (2) provides that 'everything made available to the public, anywhere in the world, by means if written publication, oral disclosure, use or in any other way shall be considered as prior art'. Therefore, arguably, this can be regarded as absolute or universal novelty requirement.
[55] National Intellectual Property Office of Sri Lanka, *Intellectual Property Statistics* (2017) <http://www.nipo.gov.lk/satistic.htm>
[56] N S Punchi Hewage (n 11) 156: 'Today, the protection of trade secrets or undisclosed information has a profound impact on the innovation climate of a country'; See also L M De Silva, 'Second-Tier Patent Protection or Trade Secrets? East Asian Experience and Sri Lanka in Boosting Innovations of Small and Medium-Sized Enterprises' (29th LAWASIA Conference ,Colombo, August 2016) <https://www.google.com.au/search?q=Second-Tier+Patent+Protection+or+Trade+Secrets%3F+East+Asian+Experience+and+Sri+Lanka+in+Boosting+Innovations+of+Small+and+Medium-Sized+Enterprises&ie=utf-8&oe=utf-8&client=firefox-b&gfe_rd=cr&ei=V6S8WKrwBKju8weA1KmAAQ> accessed 17 April 2017.
[57] N S Punchi Hewage (n 11) 50; See also WADJ Sumanadasa, 'Protection of Traditional Knowledge- A Polycentric Issue: A Sri Lankan Perspective' (Annual Research Symposium ,University of Colombo, 2012) < http://www.cmb.ac.lk/wp-content/uploads/PROTECTION-OF-TRADITIONAL-KNOWLEDGE.pdf > accessed 17 April 2017.
[58] N S Punchi Hewage (n 11) 156.

of this paper evaluates the Sri Lankan legal framework in order to identify the effectiveness in protecting trade secrets as well as the major loopholes of the law.

4.2 Legal framework

Sri Lanka has enacted a TRIPS-compliant IP regime in the Intellectual Property Act, No. 36 of 2003 ('IP Act')[59] and trade secrets are also protected under that regime. Trade secrets are protected as a subset of unfair competition law.[60] As stated in section 160(6) of the IP Act, 'any act or practice, in the course of industrial or commercial activities, the results in the disclosure, acquisition or use by others, of undisclosed information without the consent of the person lawfully in control of that information (or rightful holder) and in a manner contrary to honest commercial practices shall constitute an act of unfair competition.' This is a clear reiteration of the language in the TRIPS Agreement and the Article 10 *bis* of the Paris Convention.[61]

Also, following footnote 10 to the TRIPS agreement, the IP Act provides a detailed provision explaining ways in which trade secrets misappropriation may occur. This includes i) industrial or commercial espionage, ii) breach of contract, iii) breach of confidence, iv) inducement to commit any of the above, and v) acquisition of undisclosed information by a third party who knew, or was grossly negligent in failing to know, that an act referred to in i) to iv) above was involved in such acquisition.[62]

Further, the IP Act provides a clear and precise definition as follows:
'For the purpose of this Act, information shall be considered 'undisclosed information' if,

> i. it is not, as a body or in the precise configuration and assembly of its components, generally known among, or readily accessible to, persons within the circles that normally deal with the kind of information in question;
> ii. it has actual or potential commercial value because it is secret; and
> iii.it has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret.'[63]

Although this is, in general, an adoption of the TRIPS definition, the IP Act goes beyond the definition by stating more details and examples. For instance, further stating the scope of the information that is covered by this provision, the IP Act provides that 'undisclosed information shall include technical information relating to the manufacture of goods or the provision of services; and business information which includes the internal information which an enterprise has developed so as to be used within the enterprise.'[64] Since this is an inclusive provision, any other information which satisfies the requirements of the definition and which is technical or commercial in nature may qualify for protection.

Moreover, Sri Lankan law provides for both civil[65] and criminal remedies, whereas the TRIPS agreement merely addresses the civil aspects of regulation. For instance, as provided by section 160(8), criminal penalties may apply only for wilful and unauthorised disclosures of trade secrets. This was included in the legislation as a result of an industry request led by the Ceylon Chamber of Commerce, considering the emergence of employee-involved trade secrets misappropriations.[66] Ceylon Chamber of Commerce was of the view that there should be criminal sanctions in addition to civil liability since civil litigation in Sri Lanka is costly and time-consuming.[67]

Further, there is still room for the application of common law as the IP Act states that rights conferred by the IP Act shall be in addition to, and not in derogation of, any common law rights.[68] The consequence of this provision is that unwritten common law and equitable actions such as breach of confidence are still applicable even after the enactment of the legislation.

It can be observed that the IP Act largely followed Article 6 of the 'WIPO model provisions on protection against unfair competition.'[69] Arguably, Sri Lankan law has provided for relatively sound legal provisions and mechanisms for the protection of trade secrets by following a TRIPS-plus approach.[70] For instance, it

[59] Intellectual Property Act, No. 36 of 2003 : An Act to provide for the law relating to intellectual property and for an efficient procedure for the registration, control and administration there of ; to amend the Customs Ordinance (chapter 235) and the High Court of the Provinces (special) Provisions Act, No. 10 of 1996 ; and to provide for Matters connected therewith or incidental thereto.
[60] IP Act, 2003, s 160(6).
[61] Paris Convention (n 25)
[62] IP Act, 2003, s 160 (6).
[63] IP Act, 2003, s 160(6)c.
[64] IP Act, 2003, s 160 (6)e.
[65] IP Act, 2003, s 160(7).
[66] Email from Dr. DM Karunaratna (former Director General of the National Intellectual Property Office of Sri Lanka) to author (26 May 2017).
[67] Ibid.
[68] IP Act, 2003, s 160 (9).
[69] WIPO Publication No. 832, Geneva (1996).
[70] In 2016 APEC Ministers endorse 'Best Practices in Trade Secret Protection and Enforcement Against Misappropriation'. These practices include assertion of claims; scope; certainty and predictability; liability; defences against legal claims; remedies; procedural measures; government obligations to keep secrecy when trades secrets are submitted for investigative, regulatory or other exercises of governmental authority. APEC, 'Best Practices in Trade Secret Protection and Enforcement Against Misappropriation' (2016) <https://ustr.gov/sites/default/files/11202016-US-Best-Practices-Trade-Secrets.pdf> accessed 17 April 2017 ; According to recently developed OECD – Trade Secrets Protection Index, the followings are the yardstick of measuring a trade secrets law of a country: definition and coverage; specific duties and misappropriation; remedies and restrictions of liability; enforcement, investigation, discovery and data exclusivity; and system functioning and related regulation: See Mark F. Schultz and Douglas C. Lippoldt , *Approaches to Protection of*

provides a harmonised and precise definition which leads to a clear identification of trade secrets. The law is presumably certain and predictable, since it states the scope of application and the circumstances on which misappropriation of trade secrets can happen. The IP Act also covers both civil and criminal aspects of regulation. All of these components can be construed as best practices of trade secrets law which are recognised by the APEC and OECD.[71]

However, the meaning of s 160(9) is unclear regarding the extent to which the common law can be applied. Judicial practice reflects that judges prefer to apply common law principles rather than relying on the provisions of the IP Act as they were trained and are more familiar with common law provisions. This practice was reflected by recent cases such as *Link Natural Products Ltd v Tropical Herbs Ltd*[72] and *John Keells Holdings PLC v Shanitha Fernando.*[73] For instance, in the *Link Natural Case*, the Commercial High Court of Sri Lanka has moved in to the establishment of requirements of breach of confidence action without proper reference to the provisions of the IP Act. Thus, it is unclear whether a substantive change or international harmonisation occurred through the IP legislation in 2003.

Furthermore, this legislation is silent on the defences or lawful means of using, disclosing and acquiring trade secrets. Thus, it is hard to figure out how it balances the public interest and societal values and needs. Moreover, its inability to legislate provisions for the preservation of trade secrets during court proceedings is a major loophole. Therefore, the next section of this paper explores these two issues in greater detail.

4.3 Enduring issues

a. Preservation of confidentiality during the litigation

Protection of the *status quo* of a trade secret during litigation is a pivotal aspect of any trade secrets law, as there is a high risk of revealing it during the litigation. There is an ever-present risk in trade secrets cases that the exuberance of counsel, or the predicament of witnesses, may let the cat out of the bag.[74] Exposure of a trade secret can occur in two stages of court proceedings: firstly, when the plaintiff is proving the existence of the trade secrets, and secondly, when the plaintiff is proving that the defendant possesses the plaintiff's trade secret.[75] Moreover, it can be further exposed when the court is discussing aspects of the trade secret in its orders and opinions.[76] This is a real problem in the Sri Lankan trade secrets law, as there is no explicit provision on the issue.

According to Article 106(1) of the Second Republic Constitution of Sri Lanka, 1978, all sittings of every court shall be held in public. In fact, this has been recognised as an immutable aspect of judicial character as it serves the purpose of pure, impartial and efficient system of administration of justice.[77] However, there are exceptions available for this general rule such as proceedings relating to family relations, sexual offences and issues relating to national security.[78] Yet, this constitutional provision does not cover the proceedings regarding trade secrets or confidential information. Moreover, there is no explicit provision addressing this issue in the IP Act, except section 85 (2). In addressing issue of reversed burden of proof in patent litigation, section 85(2) mentions that the legitimate interests of the alleged infringers in protecting their undisclosed information shall be taken into account. Nevertheless, it is submitted that this provision is only applicable in cases related to patent infringements, but not trade secrets misappropriations. Even this provision fails to indicate how courts could ensure or protect the infringer's legitimate interests relating to undisclosed information. It is merely a carbon-copy of Article (34)3 of the TRIPS Agreement. Undoubtedly, this scenario prejudicially affects trade secrets protection in Sri Lanka, despite the fact that Sri Lanka possesses drafted legislative provisions on the definition, misappropriation and remedies of trade secrets.

Case law examples on the area are evidence that the vulnerability of trade secrets during court proceedings is regarded as a serious impediment in proving the plaintiffs' claim and in particular establishing that the plaintiff has possessed trade secrets. For instance, in *Link Natural Products Ltd v Tropical Herbs Ltd,* two former employees of the plaintiff were alleged to have misappropriated a secret process for making a medicinal product called *Samahan.* The respondent company which hired these two ex-employees of *Link Natural* had developed a new product called *Suveni* which was similar to *Samahan* and which served the same purposes. Despite establishing the trade secrecy of *Samahan,* the plaintiff attempted to utilise chemical tests such as chromatographs to establish that the rival company had made a similar product. However, Amarasekara J held that the court was unable to hold the case in favour of the plaintiff, as the court was not given the required information to make the decision. In effect, this would have meant that the plaintiff would have had to disclose the information that it was trying to protect, and plaintiff

Undisclosed Information (Trade Secrets)- Background Paper, OECD Trade Policy Paper No. 162 (22 January 2014) 21. <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2013)21/FINAL&docLanguage=En> accessed 17 April 2017.

[71] Ibid.

[72] Case No. CHC 25/2001/03, 01.02.2013.

[73] Case No. 16/2013/IP and 17/2013/IP, 15.08.2013.

[74] This issue has been emphasised by Street CJ in *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294

[75] Mark F Schultz and Douglas C. Lippoldt (n 70) 19.

[76] Ibid.

[77] Lord Atkinson per *Scott v Scott* [1913] AC 417, 463; see also Enid Campbell and H P Lee, *The Australian Judiciary* (2nd ed, Cambridge University Press, 2013) 251.

[78] The Second Republic Constitution of Sri Lanka, 1978, Article 106 (1).

chose not to reveal it to the court. The same issue has been highlighted in the case of *John Kells Honldings PLC v Shanitha Fernando.*[79] Therefore, this issue is a barrier to implementing the law. As a result, the general perception among the trade secrets holders is that it is not worth the effort to litigate before the courts.[80]

However, it is possible that Section 839 of the Civil Procedure Code, No.12 of 1895 (as amended)[81] can be utilised in resolving the problem. According to this section, the courts can make an order in terms of the inherent powers as may be necessary to meet the needs of justice. Section 839 provides that 'nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.' Therefore, a closed hearing can be ordered as a mean of justice in trade secrets cases since a public hearing would defeat the purpose of the case. However, this is considered as a discretionary power of courts which can be utilised in exercising the revisionary jurisdiction. This power is vested only with the superior courts and it may not be issued routinely. As a result, the plaintiffs have to bear an additional burden after selecting the path of litigation to prove that a closed-hearing is required in their cases.

Furthermore, it is doubtful whether the Sri Lankan court system is free from the corruption and the manipulation of political elites.[82] At the outset, this may reduce the trust in the judiciary and trade secrets holders' willingness to come before the courts when there is a misappropriation. That is because trade secrets holders are reluctant to take any risk of losing the secrecy of their information which is the threshold requirement to acquire trade secrets legal protection.[83] In addition, court proceedings are time consuming and may dissuade companies from taking commercial disputes to courts.[84] Therefore, this raises a serious doubt whether an aggrieved trade secret holder would seek legal redress at all. Instead, they may rely on the costly internal mechanisms to protect trade secrets through strategies such as secrets access restriction procedures and trade secret handling procedures. Thus, it may be argued that procedural aspects of law, i.e. the non-availability of provisions to preserve the confidentiality in the legal proceedings may negate the purpose of substantive law which follows many good practices of trade secrets protection.

Therefore, it is highly recommended to include clear legislative provisions on the issue by increasing trust and reliability of law. This can be done by introducing in-camera hearings in trade secrets litigation, and by perhaps limiting access only to the parties, counsels, witnesses and other professionals involved with the case. Restricting the access to any document containing trade secrets submitted by parties and to the final judgment should also be considered as an important aspect of such proceedings. Redacted versions of judgments may be made available for public records.[85]

b. Public interest; socio-economic values

As pointed out in section 4.1 of this paper, the trade secret regime occupies and plays a major role in preserving information, knowledge and innovation in Sri

[79] CHC Colombo 16/2013/IP and 17/2013/IP Decided on 15.08.2013.

[80] NS Punchihewa, 'Preservation of confidentiality of trade secrets in the course of legal proceedings: a Sri Lankan perspective' (Annual Research Symposium, University of Colombo, 2015) p. 51 <http://www.cmb.ac.lk/wp-content/uploads/Annual-Research-Symposium-2015.pdf > accessed 17 April 2017.

[81] Civil Procedure Code, No.12 of 1895 (as amended) :An Ordinance to consolidate and amend the law relating to the procedure of the civil courts. As a norm, this legislation establishes the open court requirement during court proceedings. For example, see Sections 91, 151 and 184.

[82] Transformations index BTI 2016 'Sri Lanka Country Report' (BTI- Project, 2016) <https://www.bti-project.org/fileadmin/files/BTI/Downloads/Reports/2016/pdf/BTI_2016_Sri_Lanka.pdf > Accessed 17 April 2017; See also Marga Social Monitor Project, *A System Under Siege: An Inquiry Into the Judicial System of Sri Lanka* (Colombo: Marga Institute, 2002).

[83] For instance see KS Fernando 'Police records missing in murder trial: Judge orders investigations into missing records-case postponed', *Daily Mirror* (Colombo, 7 Apr 2017) < https://www.pressreader.com/sri-lanka/daily-mirror-sri-lanka/20170407/282608852667534> accessed 23 May 2017. In a such a system and where there is no specific provision to preserve confidentiality in trade secrets trials and case records, it is doubtful whether trade secrets holders would seek litigation path when their trade secrets at stake.

[84] Bureau of Economic and Business Affairs, 'Investment Climate Statements: Sri Lanka' (U.S. Department of State,2016) <https://www.state.gov/e/eb/rls/othr/ics/2016/sca/254491.htm > accessed 17 April 2017. Although the Commercial High Court (which possesses the exclusive jurisdiction into matters related to intellectual property) is regarded as comparatively better off in terms of case disposal rate and efficiency, it can take one to four years to dispose of an IP case. See World Bank. *Sri Lanka : Justice Sector Review*. Washignton: World bank, 2013. <https://openknowledge.worldbank.org/bitstream/handle/10986/16051/776620LK0ESW0P00Box377382B00PUBLIC0.pdf?sequence=1&isAllowed=y > accessed 28 April 2017. For instance, see the above mentioned *Link Natural Products Ltd v Tropical Herbs Ltd* which was filed in 2001 and decided in 2012. The appeal against this case is still pending with the Supreme Court of Sri Lanka.

[85] See Article 9 of the EU Directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (n 47) : 'Member States shall ensure that the parties, their lawyers or other representatives, court officials, witnesses, experts and any other person participating in legal proceedings relating to the unlawful acquisition, use or disclosure of a trade secret, or who has access to documents which form part of those legal proceedings, are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential and of which they have become aware as a result of such participation or access. In that regard, Member States may also allow competent judicial authorities to act on their own initiative.'

Lanka. Nonetheless, this application and utility may create problems to the Sri Lankan society, as it may hinder knowledge dissemination which is needed for follow-up innovation and development of the country.

Although one of the public policy goals of IP law, in general, is to promote the disclosure of technical information resulting in promoting innovation, it is clear that in trade secrets law that the public will never come to know how to make the inventions, as the law promotes secrecy.[86] Thus, overreliance on trade secret protection may hinder technological growth, as some research and development would repeat previous but undisclosed work.[87] Moreover, some argue that creating a potential monopoly on the invention or information protected as a trade secret would result in creating an incentive for concentration of economic power in the hands of a few companies which possess trade secrets.[88] Additionally, non-disclosure of proprietary information, such as the quantity and processing of ingredients of a product,[89] could pose a threat to the public interest and perhaps public health. Therefore, it is unclear whether trade secrets policy serves social benefit or societal needs.

On the contrary, it may be argued that trade secrets not only serve to promote innovation, but also the dissemination of knowledge on account of its wide exceptions. For instance, the acquisition of trade secrets shall be considered lawful when obtained by independent discovery or reverse engineering. Therefore, more than one individual may 'develop the same or substantially similar body of information in a phenomenon known as multiple independent (or simultaneous) inventions'[90] or dependent inventions (based on reversed engineering). Thus, it can be argued that trade secrets law encourages competition, albeit with duplicate investment in R&D by permitting these two defences.[91] Nevertheless, it is doubtful whether there are means or financial resources for a researcher to invest in such duplicate innovation in a country like Sri Lanka, where the technological advancements, monetary capacity and home-grown creativity is comparatively low.

Further, overreliance on trade secrets may prejudicially affect the economic growth and innovative performance of the country as it restricts knowledge spill-over. It is an empirically proven fact that knowledge spill-over is a driving force behind the increased innovative and economic performance of a firm and a country at large.[92] As trade secrets may promote monopoly over information for an indefinite time, it is doubtful whether trade secrets law serves further innovation or economic development of a country. As seen, Sri Lankan firms largely rely on trade secrecy, for instance, in protecting most of their minor or incremental innovation and other valuable commercial or technical information. However, it cannot be argued that a legally enforceable law exists to protect trade secrets. .[93] The consequence of this is that firms holding trade secrets adopt less-efficient and more restrictive approaches of protection, such as hiring only family members or paying wage premiums to prevent employee movement.[94]

Therefore, it is desirable to strengthen trade secrets law by addressing the implementation of law issues and by increasing the means of lawful use, disclosure and acquisition for a social benefit. It is submitted that the existence of a robust and effective law would promote sharing of trade secrets with broader circles of contacts which may lead to follow-on innovations.[95] This, in turn, would result in increasing knowledgespill-overs which is essential for economic development and follow-on innovations.

Moreover, it is uncertain whether the corpus of trade secrets law embraces the societal, economic and political values of Sri Lanka which contributed towards designing the public policy of the country. For instance, historically, altruism, based on Buddhist philosophy, is one of the values that is rooted in the Sri Lankan society. *Sabbe saththa bawanthu sukhithathwa* or 'wishing the welfare and happiness of all beings' is one of the inseparable values in Sri Lankan Buddhist culture. As stated in the *Karaneeya Metta Sutta,* as a mother will guard her only child with her life, let the child extend unboundedly his/her heart to every living being. Therefore, societal values such as 'giving or desire to do so', 'empathy' and 'non-expectation of anything as reward' are incorporated into Sri Lankan Buddhist culture. This scenario suggests that the trade secrets regime in a Sri Lankan setting needs to be more attuned to the public interest considerations in light of the societal values which

[86] Lionel Bentley, 'Patents and Trade Secrets' in Neil Wilkof and Shamand Basheer (eds) *Overlapping Intellectual Property Rights* (Oxford University Press, 2012) 82.
[87] Belay Seyoum, 'Property rights versus public welfare in the protection of trade secrets in developing countries' (1993) 7.3 The International Trade Journal 349.
[88] Ibid.
[89] There can be exceptions such as revealing the ingredients keeping the process as a secret and vice versa.
[90] Elizabeth A. Rowe and Sharon K Sandeen (n 28) 52.
[91] Robert G Bone, 'The (still) Shaky Foundation of Trade Secret Law '(2014) 92.7 Texas Law Review 1803.
[92] Effie Kesidou and Adam Szirmai, 'Local Knowledge Spillovers, Innovation and Economic Performance in Developing Countries: A discussion of alternative specifications' (2008) Working Paper Series 2008-033 of United Nations University - Maastricht Economic and Social Research and Training Centre on Innovation and Technology, 7. <http://www.merit.unu.edu/publications/working-papers/abstract/?id=3425 > accessed 17 April 2017.
[93] As has been mention in the previous section, there is no proper mechanism in preserving secrecy during the trade secrets litigation which discourages the aggrieved parties to seek a legal redress.
[94] Douglas C. Lippoldt and Mark F. Schultz, 'Trade Secrets, Innovation and the WTO- Strengthening the Global Trade System' (The E15 Initiative ,2014) < http://e15initiative.org/wp-content/uploads/2015/09/E15-Innovation-LippoldtSchultz-FINAL.pdf > accessed 17 April 2017.
[95] Ibid.

promotes 'wellbeing of all', rather than the capitalistic idea of 'individual wellbeing based on profit maximisation'.

Moreover, in terms of political and economic ideologies, Sri Lanka is recognised as a *Democratic Socialistic Republic*.[96] Therefore, ideologically, it is supposed to have a socially or collectively owned economy, along with the politically democratic system of governance.[97] Egalitarianism or equitable social order is an important component of such an economy which enunciates that the true democracy can hardly thrive in a society with great extremes of wealth and poverty.[98] Arguably, therefore, a trade secrets system which encourages the dominance and profit maximisation of trade secrets-owned companies does not fit into to this economy. Whereas survival of the fittest and giving scant attention to those left behind is the reality in capitalistic economies, socialistic countries believe that collective survival and society take precedence over the economic rights of one person. However, the trade secrets regime which promotes the non-disclosure for an infinite time at a glance does not serve this purpose. Thus, it can be pointed out that the existence of trade secrets regime as one of the most significant IP rights in the country reflects a discrepancy in terms of Sri Lanka's political-economic ideology.

Therefore, it is doubtful whether trade secrets law policy which is based on the western or industrial world's societal values and political-economic ideologies serves the purpose of public policy or the public interest of Sri Lanka. Hence, there is a need to reformulate trade secrets legal policies so as to address home-grown public interests and societal considerations. Since there is no restriction or specification by the TRIPS agreement on the legal measures of trade secrecy, such a reformulation can be done through domestic law. In fact, TRIPS proposes a minimalist approach allowing countries to have their own standards, while ensuring the basic standard suggested by the TRIPS.

Thus, it is desirable for Sri Lanka specifically to include lawful means of disclosing, using and acquiring trade secrets into its laws. For instance, whistle-blowers' and media's good faith revelation of trade secrets for public benefit should be allowed. If they are revealing an illegal activity conducted under the blanket protection of trade secrets; or environmental or public health harms of particular trade secrets, such disclosures should be considered legal. It may also be desirable to have a system like 'compulsory licensing' in the trade secrets regime in Sri Lanka enabling the government to allow reproducing the protected product or process without the consent of the trade secrets holder, if the societal needs force the government to do so. In a context where the trade secrets regime has spread in a wide range of spectrum of the intellectual property protection, it is perhaps imperative for Sri Lanka to include such an exception. Nonetheless, this should be enforced carefully in exceptional circumstances. For instance, this may be significant if any essential medicinal product or process is protected as a trade secret. It is further noted that these circumstances should be defined and stated clearly as lawful ways of using, disclosing and acquiring trade secrets without allowing an exploitation of the system.

5. CONCLUSION

The trade secrets regime plays a significant role in today's context in general and particularly in Sir Lanka. A significant nature of the Sri Lankan economy and innovation culture is that the existence of SMEs which rely on the trade secrets regime to protect their minor innovation and other technical or commercial information. Sri Lanka has TRIPS-compliant-legislation in protecting trade secrets. However, it is argued that it follows a TRIPS-plus approach as it provides for a detailed-provision, including a precise definition with examples; ways of misappropriation of trade secrets; and more importantly criminal aspects of the issue. This paper identifies two main enduring problems in Sri Lankan trade secrets law; namely, non-availability of provisions for the preservation of the confidentiality of trade secrets during the trade secrets litigation; and its silence on addressing the public interests issues and the socio-economic values. This paper recommends including clear legislative provisions on the protection of trade secrets during court proceedings and introducing lawful ways of use, disclosure and acquisition of trade secrets in good faith. Nevertheless, it is submitted that further extensive research is required prior to implementing such a proposal. It may be desirable to address these issues in separate legislation as including these in general IP legislation may bring about further complexities. This is perhaps a pertinent suggestion considering the diverse nature of trade secrets compared to other IP rights and the existence of multiple legal regimes in trade secrets law. Further, it is perhaps a worthwhile movement considering the heavy reliance on trade secrets law in Sri

[96] Preamble of the 1978 Constitution of the Democratic Socialistic Republic of Sri Lanka.

[97] See Chapter VI- Article 27 of the Constitution: Directive Principles of State Policy and Fundamental Duties. Article 27 states that 'the State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include - (2) b 'the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life.' According to Article 27 (7) and (8) 'the State shall eliminate economic and social privilege and disparity, and the exploitation of man by man or by the State' ; 'the State shall ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment.' Article 27 (1) mentions that 'the Directive Principles of State Policy shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.'

[98] E. Anugwom, 'Socialism' in G. L. Anderson and K. G. Herr (eds), *Encyclopaedia of activism and social justice* Vol. 3 (SAGE Publications Ltd, 2007) 1301-1303.

Lanka and the global movements that have occurred towards robust trade secrets laws.

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