

# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



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# **LEGAL PROTECTION OF TRADE SECRETS AS INTELLECTUAL PROPERTY: COMPARATIVE STUDY AND ANALYSIS OF TRADE SECRET BILL, 2024**

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## ***Abstract***

Trade secret existence in the sphere of Intellectual Property seems to be like that of “Pluto.” With the rapid advancement of technology and the rise of AI-powered tools in the era of globalization, access to information has become easier; and the issue of Trade Secret protection has become significant, eventually leading to the rise of Trade Secrets as a new form of Intellectual Property which is governed by the national laws in the different jurisdiction. Recently, focusing on the need for separate legislation to protect trade secrets, the Law Commission of India proposed Trade Secret Bill. The paper aims to analyse the legal protection of Trade Secrets as a form of intellectual property in various jurisdictions through the doctrinal comparative legal research approach and analyse the adequacy of recent bill in aligning with the global landscape of IP law. The paper concludes by proposing reforms aimed at strengthening the legal protection of trade secrets to foster innovation.

**Keywords:** Trade secrets, intellectual property, trade secrets bill in India, comparative study

## **INTRODUCTION**

Trade secrets are considered the “currency” of the knowledge economy. It is a weapon that makes businesses unique and maintain a competitive edge in the market. In the contemporary world, transfer of technology and cooperation among industries across borders has become indispensable for the overall global economics.<sup>1</sup> Further, securing investments becomes easier with an effective Intellectual Property protection. Trade secret protection which was once the neglected subject of the legislature has now become one of the major concerns of the 21<sup>st</sup> century. The robust national innovation systems depend on having robust trade secret rules.<sup>2</sup>

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<sup>1</sup> Jon Chally, “The Law of Trade Secrets: Toward a More Efficient Approach” (2004) 57 Vanderbilt Law Review 1271

<sup>2</sup>Niharika Pilania and Rashmi Khorana Nagpal, Protection of Trade Secrets Under Common Law and World Wide, International Journal of Intellectual Property Rights (IJIPR), 13(2), 2023, 1-17

Over the past few decades, nations have apprehended the need of strong trade secret framework and accordingly made reforms and amendments. The paper aims to examine and compare recent development in the legal framework pertaining to trade secret in different jurisdiction and also the current position of India.

## LITERATURE REVIEW

### Historical Background of Protection of Trade Secret

The idea of safeguarding trade secrets is not a modern phenomenon. Since the evolution of trade and commerce, the concept of protecting trade secrets has been prevalent. In the 19th century England, modern trade secrets law evolved. Further, the law has an Anglo-American background, which originated from a series of doctrines, principles of justice and equity.<sup>3</sup> Amy Kapczynski, discusses historical background of the trade secret law emphasizing its evolution during the laissez-faire era when courts often gave importance to contract and property rights over labour regulations. Historically, trade secret law has been linked to industrial capitalism, where the allocation of knowledge favoured employers over employees.<sup>4</sup>

### Relationship with other forms of Intellectual Property

*Moohr*, disregards trade secrets as property considering that it does not satisfy the essential characteristics of intellectual property i.e., it does not facilitate dissemination of information rather discourages the same.<sup>5</sup> Further, unlike the other forms of IP, exclusion of public from getting access to information is not for a limited period but can be perpetual.<sup>6</sup> It lacks permanence i.e. a person shall not be entitled to protection if the information is reverse engineered by any other person or if it falls in the public domain directly or indirectly.<sup>7</sup>

On the other hand, *Lemley*, advocates that trade secrets shall be considered as IP due to the presence of essential characteristics of IP such as exclusive nature, transferability, economic nature etc. He acknowledges that the secrecy requirement in the trade secret law helps in the dissemination of information by reducing the negative effects of excessive secrecy for certain

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<sup>3</sup> Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 *Stanford Law Review* 311 (2008) (also *Stanford Law & Economics Olin Working Paper No. 358* (2008)).

<sup>4</sup> Amy Kapczynski, *The Public History of Trade Secrets* (2022) 55 *UC Davis L Rev* 1367

<sup>5</sup> Geraldine Szott Moohr, 'The Problematic Role of Criminal Law in Regulating the Use of Information: The Case of the Economic Espionage Act' (2002) 80 *North Carolina Law Review* 853

<sup>6</sup> Robert G. Bone, *A New Look at Trade Secret Law: Doctrine in Search of Justification*, (1998) 86 *Cal. L. Rev.* 241

<sup>7</sup> Tanya Alpin, "Confidential information as Property?"(2013) 24 *King's Law Journal* 191

inventions.<sup>8</sup> Further, trade secrets play as dual role, sometimes it complements other forms of IP and whereas in some situation it is used as an alternative.<sup>9</sup> In the circumstances where copyright of ideas and patents of certain subject matter are not possible, protection is sought under the umbrella of trade secrets.<sup>10</sup>

### **Emerging need of the Protection of Trade Secret**

Especially after COVID-19, there is major shift towards digitalization and confidentiality can be breached with single snap of fingers and merely by clicking I agree button, there is an urgent need to have legislation protecting trade secrets.<sup>11</sup> A study conducted by the American Enterprise Institute, 2016 states that a strong trade secret protection laws and corporate R&D expenditures are positively correlated.<sup>12</sup>

### **RESEARCH GAP-**

There are several literatures emphasising on the need of trade secret protection. However, there is limited analysis of how different countries protect trade secrets in the contemporary situation. Further, there is no study of the recently proposed “*The Protection of Trade Secret Bill, 2024*” by the Law Commission of India. This paper aims to explore on this gap.

### **RESEARCH QUESTIONS**

- 1) How do different legal frameworks across jurisdictions compare in protecting trade secrets as intellectual property?
- 2) How India is responding to requirement of safeguarding Trade Secrets as Intellectual Property?

### **RESEARCH OBJECTIVE**

1. To analyse and compare the legal framework for trade secret protection across several jurisdictions.

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<sup>8</sup> Ibid at 3

<sup>9</sup> Karlf. Jorda, Trade Secrets and Trade-Secret Licensing. In Intellectual Property Management in Health and Agricultural Innovation: A Handbook of Best Practices (2007) (eds. A Krattiger, RT Mahoney, L Nelsen, et al.). MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A. Available online at [www.ipHandbook.org](http://www.ipHandbook.org).

<sup>10</sup> Michael Risch, Why Do We Have Trade Secrets?, (2007)11 Intellectual Property L. Rev. 1 (Available at: <http://scholarship.law.marquette.edu/iplr/vol11/iss1/1>)

<sup>11</sup> Bhaskar Mukherjee & Arushi Sharma, 'Future of Trade Secret in India: An Analysis of the Emerging Challenges in the Digital Era' (2021) 27 Supremo Amicus

<sup>12</sup> <https://www.everycrsreport.com/reports/R41391.html> (last accessed on 12th October, 2024)

2. To analyse Indian position in the arena of trade secret protection with special reference to recently proposed “The Protection of Trade Secret Bill, 2024”
3. To suggest reforms to strengthen the legal protection of trade secrets as Intellectual Property and to foster innovation across borders.

## INTERNATIONAL AGREEMENT

In the international sphere, the evolution of trade secrets protection may be located in the Trade-related aspects of intellectual property (TRIPS), the North American Free Trade Agreement (NAFTA), and the General Agreement on Tariffs and Trade. (GATT).<sup>13</sup>

Paris Convention (1883) is considered as first international treaty including Trade Secret within its purview of protection by incorporating the provision for “protection from unfair competition.” (Article 10bis)<sup>14</sup>

These agreements and conventions play a leading role in the way of setting and harmonizing trade secrets protection standards, encouraging other countries to adopt and enact laws in their respective jurisdictions, advancing enforcement mechanisms, accelerating the exchange of information, fostering innovation, enabling cross-border cooperation and expediting global trade. The first major step towards introducing legal remedy for the protection of Trade Secrets was the adoption of the Restatement (First) of Torts, 1939 by the US. <sup>15</sup> Subsequently, the Uniform Trade Secret Act (UTSA) was passed and adopted by several US States.

Eventually, the growing need for harmonization influenced the introduction of **Article 39**, dealing with undisclosed information under the TRIPS Agreement 1995.<sup>16</sup> The TRIPs Agreement does not specifically define Trade Secret but defines it in the form of “*undisclosed information*”.<sup>17</sup> Accordingly, it directs its signatories to frame laws so that the natural and legal persons can prevent the unauthorised disclosure subject to the fulfilment of three criteria.

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<sup>13</sup> Abhijeet Kumar, Adrija Mishra, “Protecting Trade Secrets in India” (2015) Vol. 18, No.6, The Journal of World Intellectual Property, 335 doi: 10.1111/jwip.12050

<sup>14</sup> D.S. Sengar, Protection of Trade Secrets and Undisclosed Information: Law and Litigation (2011) Vol. 53, No. 2, Journal of the Indian Law Institute, 254

<sup>15</sup> Amy Kapczynski, 'The Public History of Trade Secrets' (2022) 55 UC Davis L Rev 1367

<sup>16</sup> UNCTAD-ICTSD, Resource Book on TRIPS and Development (2005) Cambridge University Press, 522

<sup>17</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) TRT/WTO01/001 <<http://docsonline.wto.org>

### **Essential elements for protection of information as Trade Secret:**

1. **SECRECY:** Information is secret which is not generally known or readily accessible to person who normally deal with the information in question.
2. **COMMERCIAL VALUE:** The information has actual or potential commercial value because it is secret.
3. **REASONABLE STEPS:** The person under whose control such information was, has taken reasonable steps to keep it secret

However, TRIP's agreement is flexible in nature. It doesn't mention how nation-states shall protect undisclosed information. Further, it does not necessitate enactment of separate legislation by the member states leading to variation of legal framework across several jurisdictions.

## **LEGAL FRAMEWORK OF TRADE SECRET PROTECTION**

### **GLOBALLY-**

Countries vary in their classification of trade secrets as intellectual property. Some countries recognise trade secrets as part of intellectual property framework, often including them under laws related to unfair competition, intellectual property rights or both. Complying with the standards set out in the TRIPs Agreement several nation-states have enacted laws recognizing Trade Secrets as Intellectual Property namely United States, European Union, China Japan, South Korea, etc. Further, countries like Australia, Canada, India does not have statutory framework for trade secret however, same is protected under the common laws, principles of equity, justice and good conscience.

However, the countries which do not explicitly categorise trade secret as intellectual property are Brazil, Argentina, Saudi Arabia, Thailand etc. Trade Secret Protection Index (TSPI), 2014 which aimed to measure the strength of trade secret systems in approximately 40 major economies, ascertaining their economic competitiveness shows that's OECD (Organization for Economic Cooperation and Development) countries to be on higher pedestal than BRICS.<sup>18</sup> United States, Canada, Japan holds higher ranking compared to India, China, Indonesia.

Trade secret legislation in countries with lower TSPI scores often exhibits several significant

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<sup>18</sup> Schultz, M. and D. Lippoldt (2014-01-30), "Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper", OECD Trade Policy Papers, No. 162, OECD Publishing, Paris. <http://dx.doi.org/10.1787/5jz9z43w0jnw-en>

gaps, including:

- Absence of criminal penalties for the misappropriation of trade secrets;
- No safeguards against third-party misappropriation, such as corporate espionage, as opposed to theft by employees or business associates;
- Insufficient protection of trade secrets' confidentiality throughout legal proceedings and
- Narrower definitions of trade secrecy often impose extra criteria like the need for documentation and labelling of trade secrets.

Following this, many countries in the recent years have undertaken reforms and strengthened their trade secret-protection policies and frameworks.<sup>19</sup>

### China

In China, Trade secrets are protected under Anti-Unfair Competition Law (AUCL) of 1993. The recent amendment of 2019 widened the definition of Trade Secrets. It mandated that trade secrets only need to possess commercial value which ultimately lowered the burden of proof on the right holder. However, in the *Mai Da Keer (Tianjin) Tech Co. Ltd v. Huayang Xinxing Technology (Tianjin) Group Co. Ltd (2019)*<sup>20</sup> court narrowed the scope of commercial secrets by excluding protection for mere customer list considering it to be complications from publicly available sources. In order to consider it as trade secrets, it was held that the same court contains precise purchasing habits, intentions and other nuanced information. The recent legislation and clarification by the Supreme People's Court on this crucial issue offered clarity and coherence.<sup>21</sup>

It specifies under Article 21 that the right holder would be entitled to damages caused and amount of damage shall not be less than one time but it shall not go beyond five times of the amount determined.

Under Article 32, the burden of proof is upon the right holder to prove that he has taken reasonable steps to maintain the secrecy however it was infringed. Following which the burden

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<sup>19</sup> Eric Goldman, 'The New 'Defend Trade Secrets Act' Is the Biggest IP Development in Years' (Forbes, 28 April 2016) [The New 'Defend Trade Secrets Act' Is The Biggest IP Development In Years \(forbes.com\)](https://www.forbes.com)

<sup>20</sup> *Mai Da Keer (Tianjin) Tech Co. Ltd v. Huayang Xinxing Technology (Tianjin) Group Co. Ltd (2019)* Zui Fa Min Zai.268

<sup>21</sup> Paolo Beconcini, The State of Trade Secret Protection in China in Light of the U.S.-China Trade Wars: Trade Secret Protection in China Before and After the U.S.- China Trade Agreement of January 15, 2020, 20 UIC REV. INTELL. PROP. L. 108 (2021).

of proof shifts towards alleged infringer that the particular information was not trade secret.

### **Japan**

In Japan, Trade secrets are protected under Unfair Competition Prevention Act (UCPA), 1993<sup>22</sup> wherein several amendments have been made over years with recent being of 2024. The Act defines trade secrets, provides both civil and criminal remedies for its infringement. It lists down nine types of acts which constitute the crime of infringement of Trade Secrets.<sup>23</sup> Penalties can be both fine and imprisonment which may go up to five years. However, there is no provision for exemplary damages or attorney's fees which can be claimed.<sup>24</sup> Nevertheless, claimant herein need not prove the exact amount of loss or damage while seeking remedy instead damages are presumed to have occurred.<sup>25</sup> The Act prescribes provision to deal with the international misappropriation of Trade Secrets.<sup>26</sup>

### **European Union**

The EU Trade Secrets Directive 2016/9431, adopted recently in 2016 provides broad framework which EU member states are required to adopt.<sup>27</sup> The directive defines certain key terms in lines with the TRIPs Agreement.<sup>28</sup> Articles 6 to 15 constituting the majority of the directive, address measures, procedures, and remedies against unauthorized acquisition, use, or disclosure of trade secrets. Few key provisions are specifying limitation period of 6 years for taking action and safeguards of confidential proceedings. The directive obligates member states to make provisions ensuring availability of civil remedies while criminal liability or sanctions are not mandated. Article 1 seeks to harmonize the law; however, such endeavour is only partial as certain key issues like employee and ex-employee liability remain unregulated.

**United States of America:** USA is on the higher pedestal when it comes to having a legal framework for trade secret protection. The trade secrets are protected under dual legislation in the United States at the State and federal level under Uniform Trade Secrets Act (UTSA),

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<sup>22</sup> The Unfair Competition Prevention Act, 1993 (Act 47 of 1993)

<sup>23</sup> UCPA, Article 2(1)(iv) to(ix)

<sup>24</sup> Thomas Landman, 'Trade Secret Protection in Japan and the United States: Comparison and Recommendations' (2019) 44 Brook J Int'l L 714

<sup>25</sup> UCPA, Article 5-2

<sup>26</sup> UCPA, Article 19-2

<sup>27</sup> EU Trade Secrets Directive 2016/9431

<sup>28</sup> Katarzyna A. Czapracka, Antitrust and Trade Secrets: The U.S. and the EU Approach, (2008) 24 Santa Clara Computer & High Tech. L.J. 207

1985<sup>29</sup> and DTSA, 2016 respectively. Further, the Economic Espionage Act, 1996 (EEA) criminalizes the unlawful acquisition of trade secrets, whether for foreign espionage or commercial motives under the federal law. UTSA was introduced with an intention to provide standardized definitions of “trade secrets”, “trade secret misappropriation” and to lay down single statute of limitation.<sup>30</sup> DTSA, modelled in lines of UTSA, was enacted to provide federal civil remedy and amend EEA which mainly contained criminal remedy provision to include private cause of action such as injunction, damages etc. UTSA Section 1 provides certain exemplary list of efforts that US courts have found reasonable in maintaining secrecy such as “advising employees of the existence of a trade secret”, limiting access to a trade secret on need-to-know basis” and “controlling plant access”<sup>31</sup>

*Extra-territorial protection of Trade Secret in USA-* The major difference between UTSA and DTSA is with regard to their extent of extraterritorial jurisdiction which was attempted to be broadened by the Protect American Trade Secrets Act of 2021, enabling the DTSA to be applicable to actions outside the U.S. that impact U.S. commerce.<sup>32</sup> Further, section 337 of the Tariff Act of 1930, permits owners of trade secrets to bring misappropriation claims before the U.S. International Trade Commission (ITC), which has the authority to halt the importation of products made using illegally acquired trade secrets, regardless of whether the theft took place outside the U.S. Proposed measures like the Secrets Act, 2021 aim to enhance this power, especially for reasons related to national security.<sup>33</sup>

*Legislative Considerations in the 117th Congress:* Numerous bills were proposed to tackle foreign threats, particularly from China, by increasing penalties for trade secret theft, implementing immigration restrictions, and intensifying scrutiny of foreign interference. Initiatives such as the Combating Chinese Purloining (CCP) of Trade Secrets Act, the Stop Theft of Intellectual Property Act, and the Protecting American Intellectual Property Act aimed to deter foreign espionage and the theft of trade secrets through stricter penalties and visa limitations.<sup>34</sup>

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<sup>29</sup> Uniform Trade Secrets Act, 1985

<sup>30</sup> National Conference of Commissioners on Uniform State Laws, Uniform Trade Secrets Act with 1985 Amendments, Section 1(4)

<sup>31</sup> Ibid

<sup>32</sup> Motorola Sols., Inc. v. Hytera Commc'ns Corp. Ltd., --- F.4th ---, No. 22-2370, 2024 WL 3268954 (7th Cir. July 2, 2024)

<sup>33</sup> Christopher T. Zirpoli, An Introduction to Trade Secrets Law in the United States (2023) Congressional Research Service IF12315 (Available at <https://crsreports.congress.gov/>)

<sup>34</sup> Ibid

Development and amendments in the recent years showcase the willingness of nation states to strengthen the enforcement mechanism to better protect their trade secrets.

## INDIA'S APPROACH

Trade Secret protection in India is currently in the embryonic stage. Although, India is a signatory of TRIPs Agreement, it does not have a specific legislation dealing with trade secret protection yet today. Instead, the confidential information is protected through several legislation like Indian Contract Act, Specific Relief Act, Bharatiya Nyaya Sanhita, Copyright Act, SEBI, IT Act, Civil Procedure Code, tort law, principles of equity, justice and good conscience or by the effect of an Official Secrets Act, 1923.<sup>35</sup> Indian courts use the term “trade secrets”, “confidential information”, “know-how” interchangeably.<sup>36</sup>

### *Judicial interpretation/decision:*

Due to lack of specific definition of trade secrets, courts have come up with their own interpretation in *Bombay Dyeing and Manufacturing Co.Ltd. v. Mehar Karan Singh*<sup>37</sup> and *Tata Motors and Anr. v. State of West Bengal*.<sup>38</sup>

In *American Express Bank v. Priya Puri*,<sup>39</sup> the court held that trade secret is information which in case of disclosure cause harm to the holder.

This demonstrates the inconsistent and uncertain nature of protection.

### *Intervention of United States*

In the year 2016, India and US released a joint statement.<sup>40</sup> However, apart from Government level cooperative engagements and dialogue, the lack of adequate legal measures for protection of trade secrets is often cited in the annual Special 301 Reports released by the Office of the United States Trade Representative and India is consistently mentioned in the priority watch list which identifies trading partners that do not adequately or effectively protect and enforce IP rights.<sup>41</sup>

<sup>35</sup> Tarun Wadhwa v. Saregama India Ltd. (2021) 88 PTC 423

<sup>36</sup> S.K. Verma, Legal Protection of Trade Secrets and Confidential Information, (2002) Vol. 44, No. 3 Journal of the Indian Law Institute, 336

<sup>37</sup> (2010) 112 BomLR 375 (India)

<sup>38</sup> (2010) 6 SCC 243 (India)

<sup>39</sup> (2006) III LLJ540 DEL

<sup>40</sup> India and United States Joint Statement on the Trade Policy Forum (October 20, 2016), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/October/9/oE2olo80%8BIndia-US-Joint-Statement-TPF>

<sup>41</sup> Office of the United States Trade Representative, '2013 Special 301 Report' (United States Trade Representative, May 2013) 39 [05012013 2013 Special 301 Report.pdf \(ustr.gov\)](https://ustr.gov/sites/default/files/2013%20Special%20301%20Report.pdf)

### *Previous Attempts*

The Indian Government had made attempts to address the issue of inadequacy of protection of trade secrets by virtue of “the National Innovation Bill, 2008”<sup>42</sup>, National Intellectual Property Rights Policy, 2016.<sup>43</sup> The Department Related Parliamentary Standing Committee on Commerce in its 161st Report undertook a review of the intellectual property rights regime in India wherein committee made recommendation on issue regarding whether there is a need for a separate law on trade secret or not the government or parliament did not take specific measures.

### **The Protection of Trade Secret Bill, 2024**

On 5<sup>th</sup> March, 2024, the 22nd Law Commission of India, chaired by Hon'ble Justice Ritu Raj Awasthi made certain recommendations pertaining to Trade Secret and Economic Espionage. Further, by virtue of Report No. 289, commission proposed a draft bill titled "The Protection of Trade Secret Bill, 2024" upon the direction of the Department of Legal Affairs and Legislative Department.<sup>44</sup>

### **Analysis of proposed Bill:**

The Commission mainly relied on the TRIPs Agreement and legal framework pertaining to trade secrets protection of various jurisdictions. The primary motive for sui generis legislation was to consolidate the fragmented laws pertaining to trade secrets in multitude of statutes. Certain key features of the bill are:

- Definition of key terms like “holder of trade secret”, “misappropriation”, “trade secrets” etc.<sup>45</sup>
- Exception provisions like whistle blower,<sup>46</sup> compulsory licensing in which protection of trade secrets cannot be claimed.<sup>47</sup>
- Civil remedy in case of misappropriation<sup>48</sup>
- Confidentiality of proceedings<sup>49</sup>

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<sup>42</sup> National Innovation Bill, 2008

<sup>43</sup> Department of Industrial Policy and Promotion, ‘National Intellectual Property Rights Policy’ (DIPP, 12 May 2016)

<sup>44</sup> The Protection of Trade Secrets Bill, 2024, 22<sup>nd</sup> Law Commission of India Report

<sup>45</sup> The Protection of Trade Secrets Bill, 2024, Section 2

<sup>46</sup> The Protection of Trade Secrets Bill, 2024, Section 5

<sup>47</sup> The Protection of Trade Secrets Bill, 2024, Section 6

<sup>48</sup> The Protection of Trade Secrets Bill, 2024, Section 7

<sup>49</sup> The Protection of Trade Secrets Bill, 2024, Section 9

- Remedy for defendants in case of false allegation of theft of trade secret is made.<sup>50</sup>

The bill is a positive step towards the formulation of specific legislation yet it cannot be said to be a comprehensive legislation. It is ambiguous and warrants judicial interpretation of provisions to a greater extent.

### **Suggestions for the draft bill**

**Reasonable steps:** One of the essential elements which the holder of trade secret need to prove is he has taken reasonable steps to keep it secret.<sup>51</sup> However, the provision is ambiguous as does not illustrate what steps would be considered reasonable. This may cause the holder of a trade secret to become preoccupied with protecting the trade secret rather than concentrating on other vital aspects, thus slowing down innovation.

**Remedies:** The primary purpose of any legislation is to provide remedy. Stronger remedies in a corresponding to that stated under UTSA and DTSA will ultimately enhance the protection under the draft bill. For instance, the spectre of exemplary damages (up to double the actual award) will deter wilful and malicious misappropriation, and offers a potent legal deterrent. Further, when establishing of actual damages is not possible, law may provide for a “reasonable royalty” guaranteeing that the applicant is fairly compensated. By facilitating these, the owners of trade secrets can have greater confidence and focus on research and innovation without fear of losing their competitive advantage unjustly.

**Establishment of bodies:** Regulatory bodies, such as Trade Secret Boards to oversee trade secrets, should be established to ensure effective governance in this area. Expert panels would be formed to assess and determine the presence of key characteristics necessary for trade secret protection, providing a specialized and informed approach to safeguarding trade secrets.

**Feasibility of invoking Compulsory Licensing provision:** The draft bill under Section 6 lays down provision for compulsory licensing by virtue of which the Central Government can issue compulsory license for trade secret in cases of national emergency, public health crises or national security in lieu of certain amount of license fee to trade secret holder.<sup>52</sup> While theoretically its implementation may seem viable, enforcing it for trade secrets in real sense is

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<sup>50</sup> The Protection of Trade Secrets Bill, 2024, Section 10

<sup>51</sup> The Protection of Trade Secrets Bill, 2024, Section 2(f)(iii)

<sup>52</sup> The Protection of Trade Secrets Bill, 2024, Section 6

questionable and presents significant challenges, enforcement and monitoring issues, risk and legal complexities. Unlike patents trade secrets rely on confidentiality. Forcing disclosure, even under a license, risks leakage and loss of exclusivity. Further, since trade secrets don't have publicly disclosed information, it is complicate to assess a fair license fee. A balanced approach, such as voluntary licensing or government intervention with confidentiality safeguards may be more practical.

**Limitation Period:** Unlike Europe,<sup>53</sup> the proposed bill is silent on the limitation period for filing of suit and deadline for the courts for resolving the suit presented before it. This could lead to an unending litigation and burden the courts with false cases.

**Extra-territorial applicability of laws:** The legislature should consider expanding the horizon of applicability of proposed bill. Considering the current business environment where India is participating in transaction globally, misappropriation of trade secrets by the nationals of other country becomes obvious. Therefore, to protect the same, strong framework extending the applicability of laws internationally shall be included.

## CONCLUSION AND SUGGESTION

The comparative analysis of the legal framework of different countries demonstrates that the countries are upgrading and strengthening laws realizing the need for the protection of trade secrets as intellectual property. Further, attempts are made to make a uniform law by adopting essential traits pertaining to protection of trade secrets mentioned in TRIPs Agreement. It is seen that countries with sturdy regulation of Trade Secrets as IP stand in higher pedestal than the countries who govern it under the common law system. At the juncture, when India seems to be lacking behind, introduction of Trade Secret statute grounded in the proposed bill will serve as a guiding light to fill the vacuum. Further, the current legislation of different countries is also riddled with gaps and are yet to be addressed collectively. The gaps primarily concern the challenges related to enforcement and the adaptation of the legislation to the evolving dynamics of the digital world.<sup>54</sup>

To address gaps in global trade secret law, several solutions can be proposed. These include establishing uniform international standards through a global trade secret treaty or WIPO

<sup>53</sup> Article 8 of EU Directive 2016/943

<sup>54</sup> James Pooley, 'The Top Ten Issues in Trade Secret Law' (1997) 70 Temp L Rev 1181

guidelines, expanding TRIPS for better digital protection, and encouraging and mandating countries without dedicated trade secret laws to develop comprehensive frameworks. Cross-border enforcement can be improved via international arbitration, judicial cooperation, cybersecurity integration, using blockchain for trade secret protection. Safeguards for cloud and remote environments should be specified. AI systems and machine-learning algorithms utilized in trade or manufacturing should be explicitly included under trade secret laws, covering proprietary datasets, neural network models, and related analytics. Legislation should mandate companies and organizations with valuable trade secrets to follow specific cybersecurity protocols extending the illustrations of "reasonable efforts". These may encompass encryption protocols, access limitations, and routine security evaluations to reduce the risk of cyber theft. Specialized trade secret courts, better evidentiary rules, and stringent remedies for misappropriation are also vital. Lastly, governments should support SMEs with resources for trade secret management and promote global IP harmonization, enhancing overall protection and enforcement.

These provisions will help tackle the changing environment of trade secret protection, especially given rapid technological growth and the increasing digitization of sensitive data across various sectors.

