# Trade secrets versus Cost Benefit Analysis[☆]

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## Abstract

We argue that administrative agencies should base their decisions on Cost Benefit Analysis (CBA) for two reasons: first the well known ex ante effect that CBA make public decisions more rational and second the little discussed ex post effect that the agency's CBA provides valuable information to judicial or political bodies controlling the agency. The ex post purpose of CBA implies (judicial review of administrative decisions) or requires (political review) the public availability of the CBA. A conflict between this public availability and the protection of trade secrets arises, if the costs or benefits of a decision depend on information which are trade secrets. As a solution to this conflict, we propose a nonpublic *in camera* court procedure which leaves little discretion to the agency.
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## 1. Introduction

Cost Benefit Analysis (CBA) serves two different, though closely related functions. The first function is to make public decisions more rational by properly evaluating and comparing all predictable effects of alternative decisions. We refer to this function as the ex ante function of CBA. Most of the literature[1] on CBA investigates questions related to their ex ante function. Debates about the specifics and alternatives of CBA and about their merits with respect to their ex ante function have shown that none of the types is perfect and all

[1] Some examples are Zerbe and Dively (1994); Boadway and Bruce (1984, pp. 292–328); Pearce (1998); Dasgupta and Pearce (1972); Mishan (1988); McGarity (1998); Revesz (1999); Costanza, Farber, and Maxwell (1989). For a critical discussion of different approaches see Adler and Posner (1999).

have their drawbacks. In addition, all such techniques require some kind of aggregation of individual preferences to social preferences and thus suffer from the problems developed in Arrows impossibility theorem.

The second function of CBA is to facilitate the control of public decisions by the judiciary or some political institutions: a CBA on which a public decision is based and which is available to the controlling body conveys a large amount of information to the controlling body—information which the controlling body would otherwise have to produce on its own, or even might never be able to gather. We label this function the ex post function of CBA. The ex post function of CBA used to be neglected in the literature. Only recently did Cass Sunstein (2001) and Eric Posner (2001) address the CBA's function to facilitate judicial or political control of public decisions. Of course, the ex post function also serves the ex ante function: the easier it is to control public decisions, the stronger are the incentives of the decision-makers to weigh the pros and cons of a specific decision against each other in a proper way. However, the two purposes of a CBA are clearly distinct and only ex ante function is a widely discussed topic in the literature.

Since we mainly deal with the ex post function of CBA, we follow Lesser and Zerbe (1998, p. 221) in using a rather broad definition of CBA.[2] We call any decision procedure a CBA if it satisfies the following conditions: it must (1) enumerate the alternative outcomes of the decision, (2) describe the predicted consequences of these alternative outcomes and how these predictions are derived, (3) assign evaluations to these consequences which are numerical and based on the same dimension,[3] and (4) choose the outcome for which the sum of the evaluated benefits exceeds the sum of the evaluated costs by the largest difference. We stress that we do not discuss where the evaluations come from—they may be based on the willingness to pay or the willingness to accept but also on personal value judgments of the decision-maker.

In this paper, we first (Section 2) briefly review to what extent CBA are used in administrative decision-making in different countries. In Section 3, we discuss why judicial control of administrative decisions, in particular on large scale projects, currently, i.e. without a proper CBA by the administration, cannot comply with the self-imposed standards of courts to control whether "the objective weight of each and every single concern has been properly taken into account by the authority" (German Federal Administrative Court).[4] We will argue that political control of administrative decision must suffer from similar pitfalls and that requiring the administrations to perform a CBA in the wide sense described in the previous paragraph solves the problem. We acknowledge that conducting a CBA is costly (Section 4) but we stress that the clear statement of numerical and comparable measures of costs and benefits is the last point to economize on. We also acknowledge and discuss in detail that in addition to these direct costs of a CBA, there may be indirect costs of published reasons of public decisions in the form of an inefficient revelation of trade secrets. In Section 5, we discuss how the courts should deal with trade secrets which are at the base of a public decision. Section 6 concludes.

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[2] "CBA is simply an accounting framework in which benefits and costs associated with decisions are set out for purposes of information and discussion" (Lesser & Zerbe, 1998, p. 221).

[3] Typically dollars or another currency unit, but quality adjusted live years or even saved exemplars of an endangered species would do the job equally well.

[4] For details regarding the applicable standard, see Section 3.3.