

Trade Secret Protection as Part of Intellectual Property System: a Comparative Study of Indonesian and United States of America Trade Secret Law

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Abstract

Legal protection of intellectual property is an important element in supporting creativity and trade. Indonesia has ratified the Agreement on Trade Related Aspects of Intellectual Property Rights and has enacted Law number 30 of 2000 concerning Trade Secrets as a law instrument to protect business actors in free trade practices although has not fully regulated the important aspects. The purpose of this research is to make a comparison between trade secret law in Indonesia and the United States of America and analyzed the legal aspects that can be adopted. The research method is normative research with comparative research type. The discussion in this paper examines the characteristics of the Trade Secret Act belonging to Indonesia and the United States and the forms of trade secret disputes that can arise along with the resolution of the problem. This study provides an overview of the differences between the trade laws belonging to Indonesia and the United States. This research also analyzes the decision of the Supreme Court so that it is found that there are still several aspects that have not been thoroughly regulated and have created a legal vacuum against the elements in the protection of trade secret law.

Keywords: Trade Secret Law, Trade Secret, Dispute, Dispute Settlement

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INTRODUCTION

The development of the business world at the international level is growing very rapidly. Moreover, there are no more boundaries or barriers in doing business in the midst of globalization. The number of opportunities in starting a business makes business actors grow rapidly. The development of technology and the internet has triggered the development of the business world.

Free trade is one of the triggers for the development of economic flows. The principle of free trade has become a breath of life for business actors. Free trade is of particular concern for developing and developed countries in order to sustain economic growth.

Not only economic aspects related to the business world, legal aspects are also equally important in maintaining a fair and equitable free trade for every country. Legal aspects are an inseparable part of the implementation of business in the national and international scope. The result of the development of ideas and human thinking will give birth to a product. This product will later develop into a complex legal issue in the national and international environment, and will also receive the spotlight from the international community. This product is called

intellectual property. Intellectual property is inherent in the system and order of life for modern business actors.

Intellectual property is very important for the development of today's industry. Intellectual property owned by business actors is a very valuable asset. Intellectual property is generated in various ways, such as by conducting experiment, research and development. This makes intellectual property not a cheap item but has economic value that supports the products produced by business actors. According to the Civil Law system in Indonesia, intellectual property rights can also be referred to as material rights or rights to an object originating from the work of reasoned minds or the results of human creativity. The result of this work is an intangible or immaterial object.¹ This rule is also contained in Article 499 of the Civil Code regarding objects that can be classified into various categories including tangible and intangible objects. The results of the human mind are intangible objects, so it can be concluded that the results of human thought are intellectual property rights that are exclusive or have economic value.²

The economic value contained in intellectual property triggers the making of regulations to protect the assets of these business actors. Protection of intellectual property becomes a new chapter to appreciate the discovery of intellectual property. Therefore, an agreement on world trade was formed or agreement establishing the World Trade Organization including the Agreement and Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) which was ratified by Indonesia with Law number 7 of 1994 (Law on Ratification of World Trade Organizational Formation).

The 8th Round of Uruguay or Uruguay Road succeeded in bringing the participating countries to an international trade agreement. This meeting resulted in an agreement set out in a multilateral agreement, it is the WTO Agreement. In 1994 a meeting took place in Marrakesh, Morocco which was followed by the participating countries and resulted in an agreement to sign the Final Act Embodying the Result of the Uruguay Round of Multilateral Trade Negotiations which was followed by the signing of the World Trade Organization Agreement along with its attachments. Provisions regarding intellectual property are attached to Annex 1C of the WTO Agreement with the title Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement). The TRIPs Agreement has been in effect since 1995. The

¹Saidin, *Aspek hukum hak kekayaan intelektual (Intellectual property right)* (Jakarta: Raja Grafindo Persada, 1995). 9.

²Suyud Margono, *Komersialisasi aset intelektual aspek hukum bisnis* (Gramedia Widiasarana Indonesia, 2002). 4.

transitional period is no later than 4 years from the year the agreement was entered into or in 2000 for developing countries and no later than the beginning of 2006 for underdeveloped countries.³

Trade secrets are not new things to the business environment in Indonesia. Trade secrets are information that is known only to the owner of the trade secret and should not be known by other parties. This means that this information is closed to other parties and only known by officials who have the authority to store and implement the information or secrets.⁴The law regarding trade secrets has been published since 2000, it is Law number 30 of 2000 concerning Trade Secret (Trade Secret Law). This rule is very important in order to encourage industries that are able to compete in the scope of national and international trade and encourage creativity and innovation in the business community. The establishment and promulgation of the Trade Secret Law in order to achieve protection of the rights of trade secret owners and to achieve legal certainty for the owners. Although the Trade Secret Law has been promulgated and is in effect, from a technology and business aspect there are still deficiencies in reducing the forms of trade secret theft crimes. In addition, the rules regarding trade secrets belonging to Indonesia are not as complex as the United States so that legal reforms are needed given the rapid development of technology. in today's digital era.

The promulgation of the Trade Secret Law indicates that Indonesia is serious about appreciating the form of creativity and the development of business innovation. The promulgation of the Trade Secret Law is motivated by the WTO/TRIPs agreement and Law number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Competition which shows that the thoughts contained in the TRIPs are part of the agreement in The WTO has adopted the Trade Secret Law as a premise.⁵The ideas contained in TRIPs regarding the protection of confidential information are essentially the same as the ideas contained in the protection of other intellectual property, for example patents, designs or brands, copyrights. The purpose of regulating this intellectual property is to ensure that parties who invest in developing ideas, creative concepts and information that have commercial and commercial value and benefit from the closed information by obtaining the exclusive right to be able to use the concept or confidential information. In addition, protection of intellectual property is carried out to

³Risa Amrikasari, 'Ulasan lengkap : Peran TRIPS Agreement dalam Perlindungan Hak Kekayaan Intelektual', [hukumonline.com/klinik](https://www.hukumonline.com/klinik/detail/ulasan/lt592407520f6f7/peran-trips-iagreement-i-dalam-perlindungan-hak-kekayaan-intelektual), 2017, <https://www.hukumonline.com/klinik/detail/ulasan/lt592407520f6f7/peran-trips-iagreement-i-dalam-perlindungan-hak-kekayaan-intelektual>.

⁴Etty Susilowaty, *Hak Kekayaan Intelektual Dan Lisensi Pada HKI* (Semarang: Badan Penerbit Un-dip Press, 2013). 136.

⁵Gunawan Widjaja, *Rahasia Dagang, Seri Hukum Bisnis* (Jakarta: Raja Grafindo Persada, 2001). 100.

prevent other parties from using it or disclosing confidential information without asking the permission of the trade secret owner.⁶ The development of protection of intellectual property, especially trade secrets, is needed as an impetus to gain recognition of intellectual property rights and achieve the right to exploit or enjoy the results of these trade secrets.⁷

The Trade Secret Law has an important role in providing protection from products or ideas that have commercial values and are effective and can provide benefits in business activities. The Trade Secret Law provides an impetus for every business actor to realize competition that is protected from unfair competition and builds good and competitive relationships or relations for business actors in conducting trade transactions. There are vital elements contained in the definition in the Trade Secret Law. The first element of information can be called a trade secret if the information contains thoughts or ideas in the field of technology or business, for example the composition of food, prescription drugs, customer lists and internal processes to produce a product or service. The second element is that confidential information contained in trade secrets must have economic or commercial value that is beneficial to business activities. The third element is confidential information that must be safeguarded by the owner of the trade secret fairly and properly.⁸ Not only that, the Trade Secret Law as a regulation that can create the flow of information for all parties in a trade transaction can provide added value to increasing productivity and efficiency in trading activities.⁹

Unfortunately, the Trade Secret Law has not further regulated the subject of trade secret law. The Trade Secrets Act does not define who is the owner of trade secrets. The definition and elements of the owner of a trade secret are very important because they form the basis of whether that person can be categorized as the owner of the trade secret. This is very different from United States regulations which clearly define who owns trade secrets. United States law defines the subjects of trade secrets ranging from natural persons to legal entities and non-legal entities. Trade secret law rules are very important, especially if there are cases where trade secrets are discovered which is designed by someone with the help of other colleagues or in the case of a leader and supervisor who conducts research experiments of a trade secret.

⁶Syahriyah Semaun, 'Perlindungan Hukum Terhadap Rahasia Dagang', *DIKTUM: Jurnal Syariah Dan Hukum* 9, no. 1 (2011): 30–42.

⁷Sulasno Sulasno, 'Lisensi Hak Kekayaan Intelektual (Hki) Dalam Perspektif Hukum Perjanjian Di Indonesia', *ADIL: Jurnal Hukum* 3, no. 2 (2012): 352.

⁸Sudarmanto, *KI & HKI, Serta Implementasinya Bagi Indonesia* (Jakarta: PT Elex media Komputindo, 2012). 89.

⁹Cita Citrawinda Priapantja, *Budaya Hukum Indonesia Menghadapi Globalisasi Perdagangan Atau Perlindungan Rahasia Dagang Di Bidang Farmasi* (Bandung: Chandra Pratama, 1999).36.

In addition, matters relating to trade secrets which include production methods, processing methods, sales methods and other methods in the field of technology and business are not further described so as to allow discoveries to be made by more than 1 (one) person in good faith raises debate, who is entitled to these trade secrets.

Based on the description above, the researcher wants to further investigate the legal position of trade secrets in Indonesia and in the United States and the settlement of disputes on trade secret violations using the Supreme Court decision number 332 K/PID.SUS/2013.

RESEARCH METHOD

This research used normative or dogmatic legal research methods with comparative research type. Normative legal research has a tendency to image law as a prescriptive discipline and see law from the point of view of legal norms. This legal research examined the legal position of trade secrets in Indonesia and trade secrets in the United States of America. Comparative research compared the trade secret laws that apply in Indonesia and the United States of America.

The type of data used was general data, consisting of primary law materials, secondary and tertiary law materials. Primary legal material consisted of statutory regulations, secondary legal material consisted of books and scientific journals related to this research and tertiary legal material consisted of a legal dictionary. After all the data and materials had been reviewed, the authors drew specific conclusions with the deductive method, which described legal theory, legal norms, court decisions and legal practice. After being described and reviewed in a normative juridical manner, the researcher then drew a conclusion.

TRADE SECRET LEGAL POSITION: INDONESIA AND THE UNITED STATES OF AMERICA

The Trade Secret Law in its regulations does not regulate the subject of trade secrets although it is a very crucial matter because it concerns the people who are entitled to the trade secret. In the previous draft of the Draft Trade Secret Law, there was a regulation stating that the inventor who is considered the owner of the trade secret is the inventor who technically controls the trade secret. In certain cases, if the owner is more than 1 (one) person, the person who is considered the owner is someone who is the leader or supervisor in the activities that produce the confidential information. If there is no such person, the person who compiled it, without prejudice to the rights of each part of the trade secret, is the owner of the trade secret. In certain cases, if a trade secret is carried out or discovered by a subordinate in leadership or supervision, the owner of the trade secret is the person who designed the trade secret.

Some expert opinions state that the legal subject of trade secrets is someone who has legal authority which then creates rights and obligations. The authority of legal subjects is divided into 2 (two) types, they are the authority possessed by legal subjects for legal actions that can be performed and implemented, including factors that can influence. Other powers include the right to the said action or what is known as *rechtsbevoegdheid*. Therefore, legal subjects can also be called rights bearers, one of which is humans. Humans are rights bearers and are legal subjects from birth until they die. In fact, humans who are still in the womb already have rights and are considered to have been born. This is usually related to legal actions required, for example as an heir.¹⁰ Even so, there are restrictions on certain groups of legal subjects who are incompetent so that guardianship is needed for legal actions to be taken.

The perspective of the countries adhering to the Anglo-Saxon legal system defines trade secrets as information that is considered as property rights. Violation of trade secrets is categorized as an act against the law that is specific in nature or what is called the action for breach of confidence.¹¹ This is different from the perspective of countries that adhere to the legal system of continental Europe which considers that violations of trade secrets are categorized as actions against the common law as the concept of *onrechtmatigedaad*.

On August 2 - 9 1985 the Annual Conference Meeting was held in Minneapolis, Minnesota. This meeting resulted in the Uniform Trade Secret Act with 1985 Amendments (UTSA) which was proposed to be used uniformly by all states in the United States. UTSA consists of 12 sections, Section I regulates the basic understanding which in paragraph (3) states that the party (person) is defined broadly, including individuals to other legal entities, such as governments, estates, associations, associations, agents, companies and other business entities.¹²

The definition above can be stated that what is the legal subject of a trade secret does not only include individuals (*natuurlijkepersoon*), but also includes companies, business units, estate, and so on which are part of a legal entity (*rechtspersoon*).

CHARACTERISTICS OF TRADE SECRET LAW: INDONESIA AND THE UNITED STATES OF AMERICA

The Trade Secret Law does not cover and discuss the characteristics of trade secrets much. In essence, a trade secret is information that is not known to the public or the wider community

¹⁰Muhamad Sadi Is, *Pengantar Ilmu Hukum* (Jakarta: Kencana, 2017). 3.

¹¹ Suyud Margono, *Hak Kekayaan Intelektual: Komentar Atas Undang-Undang Desain Industri dan Desain Tata Letak Sirkuit Terpadu* (Jakarta: CV Novindo Pustaka Mandiri, 2001). 13.

¹²Gunawan Widjaja, *Rahasia Dagang* (Jakarta: PT. Raja Grafindo Persada, 2001). 25.

in the realm of technology and/or the economic sphere, where the main factor or supporting factor in its business activities is economic value and is strictly protected by the owner of the trade secret.¹³ Trade secret protection includes production methods, processing methods, sales methods, or other information in the technology or business field that has economic value and is not known to the public.¹⁴

Article 3 of the Trade Secret Law regulates the characteristics of trade secrets and is protected if the information is confidential, has economic value, and is kept confidential through proper efforts. Such information is considered confidential if the information is only known by certain parties or is not generally known by the public. Such information is considered to have economic value if the confidential nature of the information can be used to carry out commercial activities or businesses or to increase economic benefits. The confidentiality of the information is considered to be kept if the owner or the parties who control it have taken appropriate and proper steps.¹⁵

The Trade Secret Law does not specifically regulate the basic principles possessed by intellectual property in general. Basically, intellectual property adheres to 2 (two) basic principles, including first to file system and first to use system. First to file system is a legal protection that arises over intellectual property for intellectual property owners who register it first. This means that if there are 2 (two) people who register on the same day for the same object, then legal protection will be given to him who can register with the competent authority first compared to the others. Meanwhile, the first to use system is a legal protection that arises if it is based on the first user. This means that the legal protection of the owner of intellectual property is for him who uses the intellectual property for the first time.¹⁶

Trade secrets will only be protected as intellectual property as long as they are kept confidential. Trade secrets do not need to be registered because the law directly protects them if the related information covers the entire scope of the trade secret itself. Trade secret registration is only registered if there is a transfer of rights.¹⁷

The United States is the only country with a first-to-use registration system for intellectual property. The United States is quite knowledgeable about classifying trade secrets. Trade

¹³ Indonesia, Pasal 1 UU Rahasia Dagang.

¹⁴ Indonesia, Pasal 2 UU Rahasia Dagang.

¹⁵ Indonesia, Pasal 3 UU Rahasia Dagang.

¹⁶ Andry Setiawan, Dewi Sulistianingsih, and Rindia Fanny Kusumaningtyas, 'Eksistensi Pendaftaran Rahasia Dagang Dan Implementasi Perlindungannya (Studi Di Kanwil Kemenkumham Jawa Tengah)', *Law and Justice* 3, no. 2 (2019): 73–81.

¹⁷ Ghiand Carlo Legrand, 'Perlindungan Hukum Bagi Pemilik Rahasia Dagang', *Lex Privatum* 1, no. 4 (2013).

secrets are information regarding a certain product, including formulas (formulas), patterns, programs, tools, methods, techniques or processes, which include:¹⁸

- a. Having independent, actual or potential economic value, from which is not generally known, and it is difficult to find ways for other parties to derive economic value from its use or disclosure; and
- b. Relevant information is in a situation to maintain its confidentiality.

According to UTSA, there are basic characteristics of trade secrets:¹⁹

- a. The information is confidential;
- b. The information concerned provides a competitive advantage for the owner;
- c. The information should also give its owner an economic advantage over its competitors.

To determine this, there are a number of factors that must be considered, including: the value of information held by owners and competitors; what actions and efforts the owner has made in keeping the information confidential, the degree of difficulty for others to obtain or reproduce the information correctly; and; the extent to which other parties place this information in the public domain or make the information accessible by filing a patent or marketable application and the owner of the information to use reasonable efforts to keep it confidential.

Comparison Table of Indonesian trade secret law with the United States of America

	Indonesian Commercial Law	United States Commercial Law
Definition	Information that is not known to the public in the technology and/or business sector, has economic value because it is useful in business activities, and is kept confidential by the owner of the trade secret.	Information on a particular product, including formulas, patterns, programs, tools, methods, techniques or processes.
Registration System	Unregulated	<i>First to use</i>

¹⁸Aslan, 'Kurikulum Pendidikan Islam Di Amerika', *Al-Adzka: Jurnal Ilmiah Pendidikan Guru Madrasah Ibtidaiyah* 8, no. 2 (29 December 2018): 117–24, <https://doi.org/10.18592/aladzkapgmi.v8i2.2361>.

¹⁹Digital Media Law Project, 'Basics of a Trade Secret Claim | Digital Media Law Project', 2020, <http://www.dmlp.org/legal-guide/basics-trade-secret-claim>.

Characteristics	<p>a. Such information is confidential, has economic value and is kept confidential through appropriate efforts;</p> <p>b. Such information is considered confidential if the information is only known by certain parties or is not generally known by the public or the public;</p> <p>c. Such information is considered to have economic value if the confidential nature of the information can be used to carry out commercial activities or businesses or to increase economic benefits;</p> <p>d. This information is considered to be kept confidential if the owner or the parties who control it have taken appropriate and proper steps.</p>	<p>a. The information is confidential;</p> <p>b. The information concerned provides a competitive advantage for the owner;</p>
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TRADE SECRET DISPUTE: INDONESIA AND THE UNITED STATES

Theft of trade secrets can provide enormous economic benefits to right-holders and therefore attempts to steal trade secrets are frequent. In the United States, theft of trade secrets can also be categorized as a federal crime with the qualification of economic espionage as regulated by the United States Economic Espionage Regulation which was passed on October 11, 1996.²⁰

The owner of trade secrets is obliged to safeguard and maintain the confidential information in his possession. Safeguarding this confidential information can be done by making an agreement regarding the rights and obligations of the parties, especially requiring other parties not to divulge trade secrets in writing or orally. This kind of written agreement will be very useful to avoid misunderstanding of the scope which should be kept secret. The agreement will become a law for the parties to protect and protect trade secrets based on the legal principles of the agreement. In principle, the principles of contract law will protect confidential information including matters that have been agreed upon as well as regarding customs in general, although not expressly regulated in the agreement. This is in accordance

²⁰Ahmad M. Ramli, *Perlindungan Rahasia Dagang Dalam UU No. 30 Tahun 2000 Dan Perbandingannya Dengan Beberapa Negara* (Bandung: Mandar Maju, 2001), h. 15.

with what is listed in Article 1347 of the Civil Code which states that things which are always agreed upon by custom are considered to be tacitly included in the agreement, even though they are not stated explicitly.²¹

The settlement of disputes in trade secrets starts with parties who violate the rules set out in the trade secret. In Indonesia, a licensee or trade secret rights holder can sue anyone who knowingly and without right uses a trade secret owned by a licensee or trade secret right holder or grants a license to or prohibits other parties from using a trade secret or disclosing the trade secret. to third parties for commercial purposes.²²

The definition of a license is a license attached to the license holder to be able to enjoy the economic benefits of an intellectual property object for a certain period of time.²³ Licensing by trade secret owners is an alternative way to develop a business. Licensing means giving permission by the owner of a trade secret to the licensee to use his trade secret for commercial purposes with the consequence of providing compensation in the form of royalties to the owner of the trade secret.²⁴

Violation or misuse of trade secrets can occur if there are parties who knowingly disclose trade secrets with other parties, violate the contents of the agreement or do not carry out written or unwritten obligations as a form of safeguarding the trade secrets concerned.²⁵ The formulation given in Article 13 is stated by the phrase "on purpose". This relates to a criminal act concerning proving whether there is disclosure of trade secrets, violating the contents of the agreement or written or unwritten obligations to safeguard trade secrets.

Such actions are considered a violation of trade secrets if the purpose of disclosing trade secrets is to obtain confidential information which is used for further development of the confidential information or products by means of disclosing trade secrets in contravention of applicable laws and regulations.²⁶ The word "in a manner contrary to the prevailing laws and regulations" in practice requires a complex and specific evidentiary process.²⁷

²¹R. Subekti and R. Tjitrosudibio, *Kitab Undang-Undang Hukum Perdata* (Jakarta: Pradnya Paramitha, 1980). 343.

²²Ramli, *Perlindungan Rahasia Dagang Dalam UU No. 30 Tahun 2000 Dan Perbandingannya Dengan Beberapa Negara*.

²³Andi Fahmi Lubis, *Hukum persaingan usaha: antara teks & konteks* (Jerman: GTZ, 2009). 239.

²⁴Riandhani Septian Chandrika, 'Perlindungan Hukum Perjanjian Lisensi Rahasia Dagang Di Indonesia', *Jurnal Hukum Bisnis Bonum Commune*, volume 2 nomor 1 (2019): 14, <https://core.ac.uk/download/pdf/229337913.pdf>.

²⁵Ramli, *Perlindungan Rahasia Dagang Dalam UU No. 30 Tahun 2000 Dan Perbandingannya Dengan Beberapa Negara*.

²⁶Ramli.

²⁷Gerungan, 'Perlindungan Hukum Terhadap Rahasia Dagang Ditinjau Dari Aspek Hukum Perdata Dan Pidana Di Indonesia Oleh'.

In the United States, filing a trade dispute can be made with the elements that the subjects involved must meet the requirements and scope as provided for in trade secret law, the right holder of trade secret has established reasonable precautions to prevent disclosure of trade secrets or the holder. trade secrets must prove that the information was misused or taken in an illegal manner.

Such misuse can be defined, among other things, by obtaining trade secrets from trade secret owners obtained in a prohibited or improper manner or disclosing to other parties about trade secrets without obtaining the consent of the trade secret owners. Disclosure of trade secrets was also carried out in an improper manner.²⁸In addition, the use of trade secrets obtained from people who knowingly disclose trade secrets is also included in the definition of abuse or if the trade secrets obtained are from people who actually have an obligation to maintain confidentiality or limit their use. Parties who do not disclose trade secrets but receive information and use them in the above manner are also subject to trade secret violations because people who use them know that knowledge of trade secrets was obtained by mistake.

This definition of abuse can be broken down into three types of prohibited behavior, including obtaining information in the wrong way, using the wrong way or disclosing the wrong way about trade secrets belonging to other parties.²⁹

This misuse of information is tied to a common concept, it is improper or inappropriate means. UTSA clearly defines improper as theft, bribery, misrepresentation, breach of confidentiality obligations, or espionage via electronic or other means. "The explanation of Section 1 UTSA provides a broader example of improper means which could include lawful behavior. but not according to the circumstances, for example a transport aircraft used as aerial reconnaissance used to determine the layout of a competitor's factory during plant construction or using authorized access to computer networks or systems to gain unauthorized access to information on the network or in a competitor's system would also be examples of inappropriate means.

Comparison Table of Forms of Violation in Indonesian Law and the United States of America

	Indonesian Commercial Law	United States Commercial Law
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²⁸Ramli, *Perlindungan Rahasia Dagang Dalam UU No. 30 Tahun 2000 Dan Perbandingannya Dengan Beberapa Negara*.

²⁹ Fenwick & West LLP, *Trade Secrets Protection A Primer and Desk Reference for Managers and In House Counsel* (San Francisco: Fenwick & West LLP). 9.

Form of violation	<ul style="list-style-type: none"> a. Deliberately disclosing trade secrets; b. To renege on an agreement or deny written or unwritten obligations to safeguard the Trade Secret concerned c. Disclosure of trade secrets for information development purposes is against the prevailing laws and regulations 	<ul style="list-style-type: none"> a. Obtaining trade secrets from trade secret owners in a prohibited or inappropriate manner; b. Disclosing to other parties about trade secrets without getting the consent of the owner of the trade secret and done in an improper manner; <p>Obtaining from people who knowingly disclose secrets</p>
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TRADE SECRET DISPUTE RESOLUTION: INDONESIA AND THE UNITED STATES

Indonesia based on the Trade Secret Law, licensees or holders of rights to trade secrets can file a lawsuit against anyone who intentionally and/or without the right to commit an act as regulated in Article 4, it is using their own trade secrets and granting licenses to or prohibiting other parties from use trade secrets or disclose trade secrets to third parties for commercial purpo

ses in the form of claims for compensation; and/or, termination of all acts as referred to in Article 4, the claim is submitted to the District Court.

In the United States, losses to trade secret owners may include actual losses caused by unfair acts caused by misuse that do not account for actual damage or losses. Section 4 of the UTSA

regulates that if a claim of abuse is made in bad faith, the motion to terminate the decision is made or contested in bad faith; or there was deliberate or dangerous abuse. Section 4 of the UTSA enables courts to provide applicable parties a reasonable attorney fee in certain circumstances as a deterrent against claims of misappropriation and attempts to end willful misuse. In the latter situation, the court must consider the extent to which the complainant will recover damages in determining whether additional attorneys' fees should be awarded. There are three categories of damage that a court can provide for damages including actual losses, unfair acts and fair royalties.³⁰

³⁰Steven D. Gordon, 'The Impact of the New Federal Trade Secrets Act on Trade Secret Litigation | Insights | Holland & Knight', 2018, <https://www.hklaw.com/en/insights/publications/2018/07/the-impact-of-the-new-federal-trade-secrets-act-on>.

As an alternative to damages based on actual damages or unfair acts, plaintiffs may be awarded a reasonable royalty for the disclosure of the illegal act or the use of trade secrets. Although in practice this is not the preferred solution. The Committee prefers another solution, namely by stopping the abuse and spread of abused trade secrets and providing appropriate compensation.

On May 11, 2016, President Obama approved and signed the Defend Trade Secrets Act of 2016 or the 2016 Trade Secrets Defense Act (DTSA), which brings law to become one of the most common and prevalent forms of intellectual property protection to the national stage. By providing rules for companies to take legal action in federal court for trade secret misappropriation, DTSA puts trade secrets on par with other well-known intellectual property assets, such as patents, copyrights and trademarks.³¹

The DTSA amended the Economic Espionage Act of 1996 or the Economic Espionage Act 1996 (EEA) to provide civilian means for trade secret fraud. In particular, the EEA allows trade secret owners to carry out civil action in federal court if the trade secret is used or intended to be used in interstate commerce. As a result, lawyers can now more easily file trade secret fraud claims in federal court. Previously, civil claims were only available under state law and therefore many lawsuits were filed in state courts (unless federal jurisdiction was fulfilled in another way, for example by additional jurisdiction).³²

ANALYSIS OF DISPUTE RESOLUTION ON VIOLATIONS OF TRADE SECRETS USING THE APPROACH OF THE SUPREME COURT DECISION DATED JUNE 16, 2015 NUMBER 332 K/PID.SUS/2013

Hi Pin, the defendant, at one time visited the Coffee Factory, CV Bintang Harapan, which was owned by the victim witness John Satria Salim. The arrival of Hi Pin (the Defendant) intended to look for coffee employees at the Bintang Harapan Coffee Factory, but he could not find the person. A few days later, the Defendant planned to return to look for employees of the CV Bintang Harapan Coffee Factory, which was carried out not at the coffee factory but at the employees' mess. The defendant's efforts paid off because he managed to meet NoldhyLagindawa (who becomes the witness at the court), to help him to recruit his friends to work as employees in the defendant's company, it is CV Tiga Putra Berlian. The Defendant's invitation was successful so that witness NoldhyLagindawa and his friends Parian, Arsand,

³¹Victoria A. Cundiff, 'Reasonable Measures to Protect Trade Secrets in a Digital Environment', *Idea* 49 (2008): 359.

³²Cundiff.

MarkumYambese and Jumadi stopped working at CV Bintang Harapan Coffee Factory and decided to work at CV Tiga Putra Berlian with a doubled salary than in CV Bintang Harapan.

The employees of the former CV Bintang Harapan Coffee Factory then worked at CV Tiga Putra Berlian and received a direct mandate from the Defendant. The defendant divided the tasks for his employees, among others, ordered witness NoldhyLagindawa to make a coffee frying and grinding place according to the form owned by CV Bintang Harapan, ordered witness NoldhyLagindawa to take samples of raw coffee, carry out documentation from frying machines and production machines from CV Bintang Harapan and ordering witness Parian to take the coffee powder filter from the mill together with witness Markum to take plastic packaging at CV Bintang Harapan coffee factory with the intention that the ground coffee produced by CV Bintang Harapan and CV TigaBerlian is the same.

The defendant obtained trade secrets by recruiting employees of CV. Bintang Harapan and asked them to work for the Defendant's company. The defendant also asked these employees to take some coffee production tools to be used as an example in making coffee belonging to the Defendant, including taking a frying place, grinding and ground coffee filtering, frying, grinding and ground coffee filtering is something that is specific and confidential because it is closely related to the taste of Bintang Harapan ground coffee. Not only that, the former employees of CV. Bintang Harapan also knows how they are milled and produced to produce coffee belonging to CV Bintang Harapan. With the tools used and their ability to process the Defendant obtained this information. The information obtained clearly violated the law because without the permission of the coffee owner CV. Bintang Harapan.

The defendant clearly complied with the elements of Article 14 of the Trade Secret Law because he obtained trade secrets in a way that violated the prevailing laws and regulations. In this case there were 2 (two) actions of the Defendant that violated the law, consisting of using trade secrets in bad faith and obtaining trade secrets in a way that was not justified.

Apart from obtaining the wrong method, the Defendant also used and processed this information in a way that was against the law. The information regarding the trade secret was used by the Defendant to sell coffee on behalf of Tiga Putra Berlian. The defendant wanted his coffee to taste the same as Bintang Harapan's coffee, so that customers would switch to buying the coffee ofTiga Putra Berlian. Besides, the Defendant also marketed his coffee to Bintang Berlian subscribers. Information regarding Bintang Harapan customers was known by the Defendant through a former employee of CV. Bintang Harapan who is currently working for the Defendant's company. This goal is clearly a bad faith in the business world or the world of business competition. Due to this action, the customers switched to Tiga Putra Berlian coffee

and resulted in Bintang Harapan coffee not selling, so that it was detrimental to the coffee owner of CV. Bintang Harapan, it is Jhon Satria Salim.

It did not stop there, the defendant together with witness NoldhyLagindawa looked for customer and distributor data from CV Bintang Harapan with the aim of offering TigaBerlian ground coffee. The defendant's actions had been carried out without the permission and knowledge of the victim witness John Satria Salim, the owner of CV Bintang Harapan Coffee Factory. The Defendant's actions caused losses in the form of obstruction of the production and distribution process of Bintang Harapan ground coffee because 5 (five) of his employees had been recruited by the Defendant and the transfer of several customers and distributors from Bintang Harapan ground coffee to Tiga Putra Berlian ground coffee.

For this loss, the case was submitted to the Palu District Court. The Palu District Court gave the decision of the Palu District Court Number 55/Pid.B/2011/PN.PL. August 24, 2011 which is as follows:

1. To declare that the defendant HI PIN was not legally and convincingly proven guilty of committing a criminal act as charged by the public prosecutor;
2. To release the Defendant from the indictment;
3. To restore the rights, dignity, and position of the Defendant to their original state.

The verdict of the Palu District Court was pronounced on August 24, 2011 and on September 6, 2011, the Public Prosecutor submitted an appeal for cassation. Regarding the petition for this case, the Supreme Court is of the opinion that as the highest judicial body that has the task of fostering and maintaining that all laws and laws in all regions of the country are applied appropriately and fairly, the Supreme Court has the authority to examine cassation requests against decisions. After studying this case and the previous ruling, the Supreme Court was of the opinion:³³

- a. Whereas *Judex Facti* had wrongly applied the applicable law because it did not properly consider the juridically relevant matters that the Defendant's action to order witness NoldhyLagindawa to make a coffee frying and milling place in a suitable form that belonged to the CV Bintang Harapan coffee factory is based on their experiences while working at CV Bintang Harapan coffee factory;
- b. That the Defendant also ordered his employees to take samples of raw coffee, ground coffee filters and frying machines. The defendant also ordered the documentation of the coffee production process, taking the ground coffee filter and plastic packing at CV Bintang

³³ Republik Indonesia, Putusan Mahkamah Agung nomor 332 K/Pid.Sus/2013.

Harapan coffee factory with the intention that the ground coffee produced by the CV Bintang Harapan coffee factory was the same as the ground coffee produced by CV Tiga Putra Berlian owned by the Defendant;

- c. Whereas *Judex Facti* did not consider the statements of witnesses correctly and accurately and only considered statements which were favorable to the Defendant;
- d. Whereas *Judex Facti* in its decision to release the Defendant had erroneously or misinterpreted the element of the criminal act of “using the trade secret of another party or obtaining or controlling trade secrets in a manner that was against the rules”. The elements of the criminal acts that were charged by the Public Prosecutor were based on the information provided by the witness from the side of John Satria Salim, who was an employee of the Defendant in connection with the actions committed in the context of disclosing trade secrets. This is because the information includes production methods, processing methods or recipes, marketing or sales methods as well as other production information which is a trade secret of witness John Satria Salim;
- e. Whereas the Defendant's actions were carried out without the permission and knowledge of the victim witness John Satria Salim, fulfilling the elements of Article 17 paragraph (1) of the Trade Secret Law.

The decision of the Supreme Court stated that the Defendant fulfilled the elements in Article 17 paragraph (1) of the Trade Secret Law, it is:

Anyone who deliberately and without rights uses the Trade Secret of another party or commits an act as referred to in Article 13 or Article 14 shall be sentenced to imprisonment for a maximum of 2 (two) years and/or a maximum fine of Rp.300,000,000.00 (three hundred million rupiah).

Based on this consideration, the Supreme Court is of the opinion that the Defendant's actions have been proven legally and convincingly guilty of committing a criminal act as charged by the Public Prosecutor, it is violating Article 17 paragraph (1) of the Trade Secret Law. Upon the Defendant's actions and also after considering the applicable law, the Supreme Court decided:

- a. The Defendant's actions had harmed the victim witness Jhon Satria Salim;
- b. Granting the appeal submitted by the Public Prosecutor and canceled the Palu District Court decision dated August 24, 2011 number 55/Pid.B/2011/PN.Pl so that it could no longer be maintained;
- c. Stating that the Defendant Hi Pin's actions have met the elements of a criminal act “without the right to use the trade secret of another party” so that the Defendant was legally and convincingly found guilty of committing a crime;

- d. Sentencing Hi Pin to a criminal sentence in the form of imprisonment for 1 (one) year and 6 (six) months and a fine of Rp.5,000,000.00 (five million Rupiah). If the fine is not paid, it will be replaced by a 2 (two) month imprisonment.

If a comparison is made with the law of the United States through UTSA, some of these elements must be fulfilled before a lawsuit is filed for violations of law, including:

- a. Subjects that become parties are subjects that have been stipulated in the applicable legal regulations.

This element has been fulfilled. One of the legal subjects according to UTSA is an individual. Defendant Hi Pin is a legal entity it is an individual.

- b. Trade secret rights holders have adopted reasonable precautions to prevent disclosure of trade secrets.

This element must be seen first by conducting further investigations. The UTSA does not further regulate what forms can be grouped into prevention of disclosure.

- c. The holder of trade secrets must prove that the information was misused or taken in an illegal manner.

This element is also fulfilled. This can be further found out about the methods the defendant took to order his co-workers to take some of the coffee milling and frying products without the knowledge and permission of the coffee owner. This action can be categorized as an act of taking information against the law.

Furthermore, misuse of this information can also be defined as:

- a. Obtaining trade secrets from owners of trade secrets obtained by improper means; or
- b. Disclosing or using trade secrets owned by trade secret owners without express and/or implied consent.

From this description, it can be seen that the fulfillment of the elements of the violation of United States law through UTSA is broader with more complicated evidence than the Trade Secret Law.

CONCLUSION

The Trade Secret Law in Indonesian and the United States law is very different. This can be seen from the basic principles of intellectual property, legal subjects, scope and form of dispute resolution. Indonesia should have reviewed the existing trade secret law because when compared to the United States there are several important provisions that are not regulated. The basic principle of intellectual property is divided into 2 (two), they are first to use and first to file, unfortunately Indonesia has not regulated this at all in the Trade Secret Law. In addition,

when compared to United States law, there are regulations regarding trade secret law subjects that have not been regulated in Indonesian law.

Through this research, the researcher suggests that Indonesia immediately regulate the basic principles of intellectual property for trade secrets. In addition, Indonesia needs to adopt a definition of the legal subject of trade secrets belonging to the United States because the rules regarding legal subjects are very important as the basis for one's ownership. The legal elements of trade secret disputes belonging to the law of the United States of America, especially regarding subjects in violation of the law, are also regulated more complex and this is very different from the subject of violation law belonging to Indonesia, whose rules are very limited. Therefore, the law in Indonesia can also adopt a legal vacuum against the subject of violation of trade secrets. Based on this, it is necessary to renew the Trade Secret Law given the increasingly high business competition and increased innovation and creativity in the investment environment for the sustainability of the trade industry.

REFERENCES

- Amrikasari, Risa. 'Ulasan lengkap : Peran TRIPS Agreement dalam Perlindungan Hak Kekayaan Intelektual'. [hukumonline.com/klinik](https://www.hukumonline.com/klinik/detail/ulasan/lt592407520f6f7/peran-trips-iagreement-i-dalam-perlindungan-hak-kekayaan-intelektual), 2017. <https://www.hukumonline.com/klinik/detail/ulasan/lt592407520f6f7/peran-trips-iagreement-i-dalam-perlindungan-hak-kekayaan-intelektual>.
- Aslan. 'Kurikulum Pendidikan Islam Di Amerika'. *Al-Adzka: Jurnal Ilmiah Pendidikan Guru Madrasah Ibtidaiyah* 8, no. 2 (29 December 2018): 117–24. <https://doi.org/10.18592/aladzkapgmi.v8i2.2361>.
- Chazawi, Adami. *Tindak pidana hak atas kekayaan intelektual (HaKI): penyerangan terhadap kepentingan hukum kepemilikan dan penggunaan hak atas kekayaan intelektual*. Malang: Bayumedia, 2007.
- Cundiff, Victoria A. 'Reasonable Measures to Protect Trade Secrets in a Digital Environment'. *Idea* 49 (2008): 359.
- Digital Media Law Project. 'Basics of a Trade Secret Claim | Digital Media Law Project', 2020. <http://www.dmlp.org/legal-guide/basics-trade-secret-claim>.
- Dona, Prima, Zainul Daulay, and Ulfanora Ulfanora. 'Juridical Analysis of Partner Liabilities in Bankruptcy Process at CV Agro Sawita Mandiri Perkasa'. *International Journal of Multicultural and Multireligious Understanding* 6, no. 3 (2019): 96–104.
- Effendy, Taufik. 'Rahasia Dagang Sebagai Bagian Dari Hak Kekayaan Intelektual'. *Al-Adl: Jurnal Hukum* 6, no. 12 (2014).

- Gerungan, Anastasia E. 'Perlindungan Hukum Terhadap Rahasia Dagang Ditinjau Dari Aspek Hukum Perdata Dan Pidana Di Indonesia Oleh: Anastasia E. Gerungan'. *Jurnal Hukum Unsrat* 22, no. 5 (2016).
- Gordon, Steven D. 'The Impact of the New Federal Trade Secrets Act on Trade Secret Litigation | Insights | Holland & Knight', 2018. <https://www.hklaw.com/en/insights/publications/2018/07/the-impact-of-the-new-federal-trade-secrets-act-on>.
- Is, Muhamad Sadi. *Pengantar Ilmu Hukum*. Jakarta: Kencana, 2017.
- Legrand, Ghand Carlo. 'Perlindungan Hukum Bagi Pemilik Rahasia Dagang'. *Lex Privatum* 1, no. 4 (2013).
- Lubis, Andi Fahmi. *Hukum persaingan usaha: antara teks & konteks*. Jerman: GTZ, 2009.
- Margono, Suyud. *Komersialisasi aset intelektual aspek hukum bisnis*. Gramedia Widiasarana Indonesia, 2002.
- Margono, Suyud. *Hak Kekayaan Intelektual: Komentar Atas Undang-Undang Desain Industri dan Desain Tata Letak Sirkuit Terpadu*, 2001.
- Priapantja, Cita Citrawinda. *Budaya Hukum Indonesia Menghadapi Globalisasi Perdagangan Atau Perlindungan Rahasia Dagang Di Bidang Farmasi*. Bandung: Chandra Pratama, 1999.
- Ramli, Ahmad M. *Perlindungan Rahasia Dagang Dalam UU No. 30 Tahun 2000 Dan Perbandingannya Dengan Beberapa Negara*. Bandung: Mandar Maju, 2001.
- Saidin. *Aspek hukum hak kekayaan intelektual (Intellectual property right)*. Jakarta: Raja Grafindo Persada, 1995.
- Semaun, Syahriyah. 'Perlindungan Hukum Terhadap Rahasia Dagang'. *DIKTUM: Jurnal Syariah Dan Hukum* 9, no. 1 (2011): 30–42.
- Septian Chandrika, Riandhani. 'Perlindungan Hukum Perjanjian Lisensi Rahasia Dagang Di Indonesia'. *Jurnal Hukum Bisnis Bonum Commune*, volume 2 nomor 1 (2019): h. 14. <https://core.ac.uk/download/pdf/229337913.pdf>.
- Setiawan, Andry, Dewi Sulistianingsih, and Rindia Fanny Kusumaningtyas. 'Eksistensi Pendaftaran Rahasia Dagang Dan Implementasi Perlindungannya (Studi Di Kanwil Kemenkumham Jawa Tengah)'. *Law and Justice* 3, no. 2 (2019): 73–81.
- Sonata, Depri Liber. 'Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum'. *Fiat Justisia Jurnal Ilmu Hukum* 8, no. 1 (2014): 15–35.

- Subekti, R., and R. Tjitrosudibio. *Kitab Undang-Undang Hukum Perdata*. Jakarta: Pradnya Paramitha, 1980.
- Sudarmanto. *KI & HKI, Serta Implementasinya Bagi Indonesia*. Jakarta: PT Elex media Kompu-tindo, 2012.
- Sulasno, Sulasno. 'Lisensi Hak Kekayaan Intelektual (Hki) Dalam Perspektif Hukum Perjanjian Di Indonesia'. *ADIL: Jurnal Hukum* 3, no. 2 (2012): 352.
- Susanty, Ade Pratiwi, and Andrew Shandy Utama. 'Perlindungan Hukum Terhadap Produk Makanan Khas Daerah Di Kota Pekanbaru Berdasarkan Undang-Undang Nomor 30 Tahun 2000 Tentang Rahasia Dagang'. *Jurnal Ilmu Hukum* 8, no. 1 (2019): 101–117.
- Susilowaty, Etty. *Hak Kekayaan Intelektual Dan Lisensi Pada HKI*. Semarang: Badan Penerbit Un-dip Press, 2013.
- Widjaja, Gunawan. *Rahasia Dagang*. Jakarta: PT. Raja Grafindo Persada, 2001.
- . *Rahasia Dagang, Seri Hukum Bisnis*. Jakarta: Raja Grafindo Persada, 2001.