



LEGAL ENFORCEMENT OF CUSTOMARY AGREEMENTS IN TRADE SECRET BREACH WITHOUT NON-DISCLOSURE AGREEMENTS IN INDONESIA

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Abstract -This study examines the significance of Non-Disclosure Agreements (NDAs) in safeguarding trade secrets, particularly within the context of Indonesia's legal framework. The background highlights the complexities of protecting intellectual property rights, including trade secrets, amid the absence of explicit provisions regarding NDAs within employment contracts. Employing a juridical-normative methodology, legal regulations, judicial decisions, and relevant literature are analyzed to assess the enforcement of customary agreements in cases of trade secret breaches without NDAs. Through the identification and interpretation of legal provisions, the study scrutinizes the recognition and protection of trade secrets, emphasizing the role of NDAs as a preventive measure. The findings underscore the challenges posed by regulatory gaps and ambiguities in trade secret protection, necessitating comprehensive legal frameworks. Despite Indonesia's alignment with international standards through participation in the World Trade Organization and adherence to TRIPS, the absence of explicit provisions on NDAs leaves trade secrets vulnerable and increases the likelihood of disputes. Recommendations include legislative reforms to clarify the legal status of NDAs, enhance enforcement mechanisms, and promote awareness of trade secret protection. Collaborative efforts involving government agencies, industry stakeholders, and legal practitioners are advocated to develop best practices and guidelines aligning with international standards, ensuring effective protection of trade secrets in Indonesia.

Keywords: Customary Agreements, Trade secrets, Non-Disclosure Agreements, Intellectual property protection, Legal framework

INTRODUCTION

In the business world, maintaining confidentiality is of utmost importance. Each business possesses unique values, characteristics, and components that differentiate it from competitors.[1] This distinctiveness holds significant economic implications, directly impacting the profitability attained by the business entity. Thus, safeguarding trade secrets becomes paramount. Trade secrets encompass confidential information crucial to a business's operations, safeguarded under commercial law.[2] This information is integral to a company's intellectual property and is protected to maintain product identity and prevent misuse. The term "trade secret" denotes a broad spectrum of confidential information, including formulas, processes, methods, or techniques, which confer competitive advantage to the business.[3]

The significance of trade secrets lies in their role as a cornerstone of competitive advantage within the business landscape.[4] Companies invest considerable resources in developing and safeguarding these secrets to retain their market position and sustain profitability. However, the protection of trade secrets extends beyond merely legal considerations; it encompasses the implementation of robust internal policies, employee training, and physical security measures to prevent unauthorized access or disclosure.[5] Moreover, the protection of trade secrets contributes to fostering innovation and creating a conducive environment for economic growth. By incentivizing businesses to invest in research and development without fear of exploitation, trade secret protection stimulates innovation and drives technological advancement across industries.

In today's interconnected global economy, safeguarding trade secrets presents complex challenges. The rise of digitalization and remote work arrangements has expanded the avenues for potential breaches, necessitating enhanced cybersecurity measures and vigilance.[6] Additionally, the emergence of international trade agreements and intellectual property frameworks underscores the



importance of harmonizing legal standards and enforcement mechanisms to ensure effective protection of trade secrets across borders.[7]

Trade secrets are generally defined as specific information that holds value, possesses economic potential, is not known to the public, and is adequately protected by its owner. For a trade secret to be recognized, it must have clear utility and be actively utilized. The economic potential inherent in trade secrets makes them susceptible to misuse or infringement.[8] In today's rapidly evolving and dynamic business environment, the significance of trade secrets cannot be overstated. To address this, countries worldwide have sought to enhance vigilance and regulation through the establishment of international institutions such as the General Agreement on Tariffs and Trade (GATT), which later evolved into the World Trade Organization (WTO).[9]


The Indonesian government has demonstrated its commitment to building protection for trade secrets in Indonesia through the enactment of Law Number 30 of 2000 concerning Trade Secrets (UURD). This legislation holds significant importance for several reasons. Firstly, Indonesia recognizes the necessity for specialized laws to safeguard trade secrets, aiming to advance industries to compete on both national and international scales. Such legislation encourages entrepreneurial creativity and innovation, providing legal certainty and protection for various types of businesses related to intellectual property rights. Secondly, Indonesia's interest in fulfilling the Agreement Establishing the World Trade Organization under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is pivotal. The ratification of this agreement through Law No. 7 of 1994 underscores Indonesia's commitment to international trade standards and intellectual property rights. The UURD's existence directly aligns Indonesia with the global trade community committed to safeguarding trade secrets and providing comprehensive protection.[10]

In addition to the aforementioned objectives, there are various related rights associated with trade secrets, including the right to register trade secrets, the right to file lawsuits, and the right to transfer trade secrets. However, there is a crucial issue concerning the obligation to register when transferring trade secrets. Trade secrets themselves are not mandatory to register. However, leaking trade secrets is punishable by law. The leakage of trade secrets is regulated in Article 17 in conjunction with Articles 13 and 14 of Law Number 30 of 2000 concerning Trade Secrets.[11] According to these provisions, individuals who disclose, take, or acquire another person's trade secrets unlawfully may be subject to a maximum imprisonment of 2 (two) years and/or a fine of up to Rp. 300,000,000 (three hundred million Indonesian Rupiah). However, it is worth noting that legal action can only be pursued if the victim, who owns the trade secret, files a complaint (*ad hoc* offense).[12]

In practice, individuals who disclose or utilize trade secrets often evade legal repercussions because they were not previously bound by a non-disclosure agreement (NDA). An NDA, also referred to as a confidentiality agreement (CA), confidential disclosure agreement (CDA), proprietary information agreement (PIA), or secrecy agreement, is a legal contract between two or more parties that outlines confidential material, knowledge, or information shared for specific purposes while restricting access to it.[13]

In Indonesia, the utilization of NDAs is relatively rare, particularly among smaller businesses or in less formal business arrangements.[14] Typically, NDAs are more commonly employed within larger-scale businesses where the stakes for confidentiality are higher and the potential consequences of information leakage are significant. Therefore, there is a pressing need for precise legal formulations to ensure enforcement against perpetrators of trade secret leakage, even in the absence of an NDA. While NDAs can provide a robust legal framework for protecting confidential information, their absence should not undermine the ability to enforce legal action against those who breach trade secret laws.

The urgency of this research on the legal enforcement of customary agreements in cases of trade secret breaches without NDAs in Indonesia stems from the critical need to address gaps in the existing legal framework concerning intellectual property protection. With the increasing importance of confidentiality in business transactions, exploring alternative legal mechanisms for safeguarding trade secrets is imperative. This research not only fills a crucial gap in understanding the legal status and enforceability of customary agreements in trade secret protection but also has significant implications for policy development and legal reform. By shedding light on the effectiveness of



customary agreements in trade secret protection, this research contributes to the enhancement of the legal framework for intellectual property rights enforcement and promotes fair and equitable business practices in Indonesia's dynamic business environment.

The methodological approach for this research will employ a juridical-normative method. This method entails an in-depth analysis of legal provisions, regulations, and judicial decisions relevant to customary agreements, trade secrets, and Non-Disclosure Agreements (NDAs) in Indonesia.[15] Firstly, the identification of pertinent legal regulations concerning customary agreements, trade secrets, and NDAs will be conducted. This involves scrutinizing relevant laws, governmental regulations, ministerial regulations, and judicial precedents. Secondly, a thorough analysis of the legal provisions will be carried out, focusing on the recognition and enforcement of customary agreements in cases of trade secret breaches, as well as the protection of intellectual property rights. Subsequently, data collection will involve gathering legal texts, official documents related to trade secret violation cases, court judgments, and pertinent legal literature.[16] Interpretation of the law will follow, seeking a deep understanding of the substantive legal provisions concerning customary agreements and trade secrets. Comparative analysis will also be employed to compare various legal regulations applicable in Indonesia and to benchmark against legal practices in other relevant jurisdictions concerning trade secret protection. Finally, conclusions will be drawn based on the findings from the legal analysis, assessing the effectiveness of enforcing customary agreements in cases of trade secret breaches without NDAs in Indonesia. These conclusions will be grounded in the legal interpretations and comparative analysis conducted throughout the research process.


1. Protection of Trade Secrets in Indonesia

The regulation of trade secret protection in Indonesia has undergone significant development, with a foundation laid through active participation in the World Trade Organization and adherence to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) in 1994. This international commitment solidified the recognition of trade secrets as valuable assets deserving legal protection.[17] Subsequently, the Indonesian government ratified the TRIPs agreement through Law No. 7 of 1994, affirming the importance of safeguarding trade secrets. Building upon this, the government introduced its own domestic legislation with the enactment of Law No. 30 of 2000 concerning Trade Secrets, also known as *Undang-Undang Rahasia Dagang* (UURD).[18] This law serves as the primary legal framework for trade secret protection in Indonesia, offering comprehensive guidelines and mechanisms for enforcing trade secret rights.[19]

The placement of trade secrets within the realm of intellectual property rights marks a significant milestone, granting them enduring and specific legal protection. Prior to this categorization, violations of trade secrets were addressed through general criminal and civil provisions, lacking the specificity required to effectively address trade secret breaches.[20] However, with the implementation of the trade secret law, sanctions for trade secret violations have become more specific and tailored. Trade secret breaches are now recognized as infringements of intellectual property rights, providing trade secret owners with clearer legal recourse and avenues for seeking redress in cases of unauthorized disclosure or misuse.

Trade secrets are invaluable assets for businesses, often representing critical components that contribute to their competitive edge and economic success. However, safeguarding these trade secrets from unauthorized disclosure is essential to maintain their economic value and prevent potential harm to the business. Under the UURD in Indonesia, there exists a clear obligation for owners to protect the confidentiality of their trade secrets, particularly in relationships with employees who may have access to sensitive information during the course of their employment. This obligation is underscored by Article 3 of the UURD, which emphasizes the pragmatic necessity of confidentiality in business relationships, especially concerning the potential disclosure of trade secrets. Employees, having acquired knowledge of trade secrets during their tenure, pose a significant risk if they choose to divulge this information, especially if they transition to competing firms or establish similar ventures themselves.[21]

The consequences of trade secret disclosure can be severe, jeopardizing not only the confidentiality of the information but also the business's competitive position and market advantage. To mitigate these risks, the UURD provides protective measures, ensuring that trade secret owners are afforded legal recourse in the event of unauthorized disclosure or misuse. One such measure is the option for



trade secret owners to register their confidential information with the Directorate General of Intellectual Property (DGIP), enhancing their ability to enforce their rights and seek legal remedies against infringing parties.[22] By registering their trade secrets, owners gain additional legal protection and leverage, deterring potential wrongdoers from engaging in unlawful activities and preserving the integrity and value of their confidential information.[23]

In the realm of intellectual property protection, countries typically employ two main mechanisms, as outlined by the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights, the first to file system and the first to use system. The first to file system grants legal protection to products and legal subjects that are the first to register with the Directorate General of Intellectual Property (DGIP). Under this system, the first registrant is deemed the rightful owner and is afforded legal protection by the state. This system is widely adopted by various nations, including Indonesia, as it provides a straightforward and commonly utilized approach to intellectual property protection. On the other hand, the first to use system operates based on the principle of demonstrating prior usage, where intellectual property rights are granted to the individual or entity that can prove they were the first to use the intellectual property. This system allows for the sale and purchase of intellectual property rights after creation and before utilization. Notably, the United States is the only member of the WTO that employs the first to use system, highlighting the diversity in approaches to intellectual property protection among member states.

In the context of trade secret law in Indonesia, there is no explicit provision that mentions which system is adopted, whether it be the first to file or first to use system.[24] Even the Trade Secrets Law does not mandate the registration of trade secrets. Article 3 of the UURD clearly states that for a trade secret to be eligible for protection, it must meet three criteria: it must be kept confidential and not publicly known, possess economic value, and be safeguarded appropriately. Therefore, a trade secret that is not registered with the Directorate General of Intellectual Property but meets these criteria is generally afforded protection by the state.[25] Moreover, considering the confidential nature of the information, many parties may choose not to register it with the government. Although the UURD does not explicitly regulate the registration system or its mechanisms, it can be understood that Indonesia generally adheres to the First to File System for trade secret protection. This means that the party who first registers the trade secret is considered the rightful owner. However, to prevent unauthorized registration by non-owners, the government is obligated to verify registrations and records when they are submitted.


2. The Importance of Non-Disclosure Agreements in Protecting Trade Secrets

In today's fast-paced and highly competitive business environment, safeguarding sensitive information and proprietary knowledge has become paramount for organizations across industries. NDAs serve as indispensable legal tools, providing a robust framework for protecting confidential information and mitigating the risks of unauthorized disclosure.[26] More than mere contractual agreements, NDAs hold significant weight as admissible evidence in court proceedings, ensuring accountability and upholding the integrity of business relationships.

At its core, an NDA is a legally binding contract between parties, typically an employer and an employee, a company and a contractor, or two businesses engaged in a collaborative venture. The essence of an NDA lies in its provisions, which delineate the scope of confidential information, establish obligations regarding its protection and non-disclosure, and outline the repercussions of breach or unauthorized disclosure. By defining clear parameters and expectations, NDAs create a framework of trust and accountability, fostering a conducive environment for collaboration and innovation.[27]

In the realm of litigation, NDAs play a pivotal role as evidentiary instruments, providing tangible proof of the parties' intent and commitment to maintaining confidentiality. In legal proceedings involving allegations of trade secret misappropriation, breach of contract, or infringement of intellectual property rights, NDAs serve as crucial documentary evidence, demonstrating the existence of a binding agreement to protect confidential information. Courts routinely recognize and uphold NDAs as valid contracts, thus underscoring their significance in establishing the legal basis for claims and defenses.[28]

Moreover, NDAs serve as invaluable tools for preserving the integrity of confidential information throughout the litigation process. By imposing strict confidentiality obligations on the parties



involved, NDAs prevent the unauthorized dissemination of sensitive information during pre-trial discovery, depositions, and court hearings. This ensures the preservation of trade secrets and proprietary data, safeguarding the competitive advantage and commercial interests of businesses embroiled in legal disputes.

Furthermore, NDAs offer a practical mechanism for seeking legal recourse and remedies in cases of breach or violation. In the event of a suspected breach, the aggrieved party can initiate legal action and seek damages, injunctive relief, or specific performance remedies as provided for in the NDA. Courts, guided by principles of contract law and equity, enforce NDAs rigorously, holding parties accountable for breaches and ensuring that contractual obligations are upheld.

In the landscape of civil litigation in Indonesia, the evidentiary framework delineated by the *Herziened Inlandsch Reglement* (HIR) dictates the admissibility of evidence, featuring five fundamental categories. Central among these is written evidence, encompassing a diverse array of documents such as official records, authenticated deeds, and contractual agreements, which constitute the cornerstone of evidential support in civil proceedings. Additionally, witness testimony assumes significance akin to its role in criminal trials, with witnesses providing firsthand accounts of pertinent events to bolster or refute claims before the court.[29]

Moreover, the notion of presumption plays a pivotal role in evidentiary considerations, wherein a series of interconnected facts or circumstances may lead the judiciary to infer the occurrence of certain events, albeit contingent upon corroboration from supplementary evidence. Complementing this, admissions—whether oral or written—serve as crucial indicators of party admissions, potentially strengthening or undermining their respective positions in litigation. Meanwhile, oaths, imbued with religious solemnity, may serve as a supplementary form of evidence, albeit requiring careful judicial scrutiny due to their profound implications.

Nevertheless, amidst the procedural intricacies of civil litigation, the absence of NDAs within employment contracts presents a notable challenge in trade secret protection. In scenarios where NDAs are omitted, employees may lack clear contractual obligations regarding the safeguarding of proprietary information, potentially leading to disputes over trade secret breaches. This regulatory lacuna underscores the imperative for robust legal mechanisms to safeguard trade secrets effectively, ensuring clarity and enforceability in contractual agreements to mitigate risks and uphold the integrity of commercial relationships in Indonesia's legal landscape.

3. Legal Enforcement of The Customary Agreement on Trade Secret

Customary agreements for safeguarding trade secrets, even in the absence of formal NDAs, are common in various cultures and communities worldwide. These agreements rely on longstanding traditions, unwritten rules, and shared values within a particular social or professional group to establish confidentiality and trust. While they may not be as formal or legally binding as NDAs, customary agreements play a crucial role in preserving the confidentiality of trade secrets and maintaining harmonious relationships among individuals or entities.[13]

In many traditional societies, customs and norms govern interpersonal relationships and business dealings. Within these communities, informal agreements or understandings are often reached through verbal communication, gestures, or implicit actions. These customary agreements may involve explicit promises to keep certain information confidential or implicit expectations of discretion based on shared cultural values of trust and respect.[30]

One example of a customary agreement for trade secret protection is the practice of "*amanat*" in Indonesian culture.[31] *Amanat* entails entrusting someone with confidential information or resources, with the implicit understanding that they will safeguard and protect these assets as if they were their own. While not legally binding in a formal sense, the concept of *amanat* carries significant moral and social weight, compelling individuals to uphold their end of the agreement out of a sense of honor and obligation to their community.

Similarly, in other cultures, such as in certain indigenous communities or close-knit professional networks, verbal agreements sealed with a handshake or other symbolic gestures may serve as customary agreements for maintaining confidentiality. These agreements are rooted in mutual trust, shared values, and the understanding that betraying a confidence would not only violate the agreement but also damage one's reputation and standing within the community.[32]



While customary agreements lack the legal enforceability of NDAs, they can still act as effective deterrents against unauthorized disclosure of trade secrets. The fear of social ostracism, loss of reputation, or other social consequences often serves as a powerful incentive for individuals to honor their commitments under customary agreements. Additionally, within tightly knit communities or industries, the informal mechanisms of social control and peer pressure can reinforce compliance with customary norms of confidentiality. Customary agreements, deeply ingrained within traditional societies, often serve as effective means of regulating social and economic interactions, even in the absence of formal written contracts. In the context of Indonesia's legal framework as outlined in Article 1320 of the Civil Code (KUHPerdata), customary agreements can fulfill the essential conditions for validity.[33]

First, customary agreements reflect the consensus of the parties involved, as decisions are typically reached through communal discussions, oral agreements, or traditional rituals. While not documented in writing, the voluntary consent of the parties is implied, and coercion or duress is typically absent, aligning with the requirement of mutual agreement. Second, customary agreements involve individuals considered legally competent within their cultural context. Although legal capacity may differ from statutory law, customary norms typically dictate that participants possess mental soundness and maturity. In cases where individuals lack legal capacity, such as minors, customary practices often dictate representation by competent guardians or elders. Third, customary agreements revolve around specific objects or subjects integral to the community's traditions, such as land, resources, or communal responsibilities. While not always tangible or quantifiable in a commercial sense, these objects hold significant cultural and social relevance, meeting the requirement of specificity as outlined in Article 1320.

Lastly, customary agreements adhere to principles of legitimacy and conformity with customary law. While not necessarily aligning with statutory law, these agreements respect community values and traditions, ensuring they do not contravene ethical standards or societal norms. Even without NDAs, individuals involved in the unauthorized disclosure of trade secrets can still face legal consequences based on customary agreements. In many cultures and societies, customs and social norms play a crucial role in regulating human interactions and safeguarding the confidentiality of proprietary information. While these agreements may lack the formal documentation of an NDA, they are often considered binding and legally enforceable within their respective social and cultural contexts.

In traditional societies, breaches of customary agreements regarding trade secrets can result in severe social sanctions, such as ostracism or reputational damage. These consequences can significantly impact personal relationships, professional opportunities, and standing within the community, serving as powerful deterrents against unauthorized disclosures. Even in the absence of specific legal statutes governing trade secrets, breaches of customary agreements can still be subject to legal action under general legal principles. For example, the breach of trust or violation of confidentiality obligations inherent in customary agreements may constitute grounds for legal claims based on principles of equity or tort law. In Indonesia, where customary practices hold significant importance, breaches of customary agreements regarding trade secrets can be regarded as violations of prevailing social norms. Despite the lack of a written NDA, customary agreements effectively establish expectations of confidentiality and trust among parties involved in business transactions or professional relationships.

CONCLUSION

The legal landscape surrounding customary agreements in addressing trade secret breaches without Non-Disclosure Agreements (NDAs) in Indonesia highlights the intricate challenges faced in safeguarding intellectual property rights within the nation's legal system. Despite Indonesia's efforts to harmonize its legal framework with global standards, including its participation in the World Trade Organization and adherence to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), significant gaps persist in enforcement mechanisms. The absence of clear provisions concerning the registration and enforcement of NDAs in employment contracts exacerbates the susceptibility of trade secrets to breaches and escalates the likelihood of disputes between employers and former employees. This regulatory gap underscores the urgent necessity for comprehensive legal frameworks that provide clarity and robust enforceability in protecting proprietary information.

To bolster the protection of trade secrets, it is imperative to undertake legislative reforms aimed at elucidating the legal standing of NDAs and bolstering mechanisms for their enforcement.

Furthermore, fostering a culture of awareness and adherence to trade secret protection among businesses and employees is critical. Additionally, promoting alternative dispute resolution avenues, such as mediation and arbitration, can offer expedited and cost-efficient methods for resolving trade secret conflicts outside traditional court settings. Collaborative efforts involving governmental bodies, industry stakeholders, and legal experts are pivotal in devising best practices and guidelines for safeguarding trade secrets in alignment with international norms and standards.

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