

# TRADE SECRETS AS A MEANS OF PROTECTING THE TRADITIONAL FOOD BUSINESS

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### TRADE SECRETS AS A MEANS OF PROTECTING THE TRADITIONAL FOOD BUSINESS

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#### ABSTRACT

The abundance of culture and wealth in Indonesia needs to be balanced with the patent protection to legitimize the ownership of these wealth and culture. Even so with traditional foods such as *Rujak Soto* from Banyuwangi which also requires to be patented, especially if it is within the scope of the trade industry, namely by conducting Trade Secret Protection. This study aims to analyze the scope of traditional food trade secret of *Rujak Soto* in Banyuwangi and the system of trade secret protection according to the Law Number 30 of 2000 and TRIPs: This research used a normative research type with a statute approach to study the research material namely the Law relating to the protection of trading business, as well as a conceptual approach to study the legal opinion and doctrines of experts. Without registering the trade secret that was owned, the owner of traditional food recipe has directly or automatically obtained protection against trade secret that he owned as long as the owner could protect his secret information from people who did not have the rights to the trade secret. The system of trade secrets protection which regulated in the Law of Trade Secrets of the Republic of Indonesia and TRIPs provided trade secret protection without a registration procedure as must be carried out by other intellectual property rights field. But unfortunately, the provision regarding the trade secrets protection has not specifically regulated about traditional knowledge, one of which was traditional food.

#### INTRODUCTION

Indonesia is known for its diversity of cultures and characteristics in every region that extends from Sabang to Merauke. Therefore, it has been imposed a protection against property owned, so that there is no claims which can be made by other country against Indonesia. While, there are many disputes at the international level that arise due to the problem for the claim of a culture. Therefore, there are many Indonesian cultures which have been asked for

protection of Intellectual Property Rights (IPR). But from the various cultures that obtain protection, only a few are trying to apply for protection against traditional Indonesian food. Traditional food is the embodiment of innovation and tastes from various regions which show the products of their respective regions because each region has different traditional foods. There is one of the fields that can be applied as the protection against traditional foods is Trade Secret Protection.

<sup>11</sup> Agreement Establishing the World Trade Organization was ratified by Indonesia through the Law Number 7 of 1994 (Mustikarini, 2016). According to Article 1 Number 1 of Law Number 30 of 2000 concerning Trade Secrets, states that:

"Trade Secrets is information that is not known by the public in the field of technology and/ or business, it has economic value because it's useful for business activities, and its confidentiality is kept by the trade secrets owner."

If relating to the traditional food that can be used as a symbol or characteristic of a country, it can be used as competitiveness among countries and even a country can submit claims of ownership for what is owned by another country. The increasingly rapid progress of globalization has obscured the culinary wealth of Indonesia. In present, often without knowing the origin or history of the foods that served and with comparing them makes traditional foods feel not familiar (Tanjung, 2015).

The protection within trade secret does not require a person to create something that contains the value of creativity or a new thought. The protection is only based on something that related to confidential it your in other words are not generally known but the information has a commercial value. This thing happens in Banyuwangi and is closely related to the traditional food. One of the quite famous is *Rujak Soto*. *Rujak Soto* is a food with a mix of vegetable salad and *soto*, both of them are included in the old culinary, which are then combined with a variety of filling inside and a very unique taste. In fact, there is a special culinary spot of *Rujak Soto* in Banyuwangi that has been established for more than 50 years with the name *Pondok Rujak Soto*. This place has been managed for three generations, and the recipe is only known by blood relatives. It is said that first, the recipe owned by the founder of *Pondok Rujak Soto* was written in a paper which was later owned by his daughter after he died and now the paper has been passed on to his present grandchild as the owner.

<sup>2</sup> If relating to the Article 3 paragraph (2) of the Law of Trade Secrets which states that, the information is considered as a secret if the information is only known by certain parties or unknown by the public. However, as we all know about the traditional food, many people have already known about the recipes in general, although there are some people who have special recipe and the confidentiality is kept. So, it is still unclear whether it can be used as a benchmark to get <sup>10</sup> trade secrets protection that can be protected by the legal protection system in the Law of Trade Secrets of the Republic of Indonesia and TRIPs. For this reason, first this study aims to study the scope of the

traditional trade secret of *Rujak Soto* in Banyuwangi, secondly to analyze the system of trade secret protection according to the Law Number 30 of 2000 and TRIPs.

## MATERIAL AND METHOD

The type of legal research used in this study was normative legal research through a statute approach which carried out by analyzing all the laws and regulations relating to the legal issues encountered (Marzuki, 2005). This approach was used to answer the legal issues regarding the system of trade secret protection according to the Law Number 30 of 2000 and TRIPs. This study also used a conceptual approach (conceptual approach) which carried out by moving from the views and doctrines that developed in the legal studies.

## LITERATURE REVIEW

### *The scope of traditional food trade secrets (Rujak Soto in Banyuwangi)*

Production was a means, method or technique which used to create or increase the usability of goods/ service by using the existing factors of production. Traditional food was a food that was not difficult to produce on its own. In Banyuwangi, several food makers who were experts in making *Rujak Soto* with slightly different recipes had the aim of producing a more delicious taste. One of the restaurants that could be said as the longest and most legendary culinary spot of *Rujak Soto* was *Pondok Rujak Soto* (Pondok Rujak Soto Banyuwangi, 2016). The early business initiator of the *Pondok Rujak Soto* was Mrs. Fatimah, who later passed down the recipe from generation to generation until her third generation, namely her grandson, Mrs. Erni Linawati.

Based on the Law of Trade Secrets, it has been stated in Article 5 paragraph (1) that the rights of trade secret could change over or be changed over by inheritance, grant, will, written agreement, and other causes which was justified by the laws and regulations. Based on the means of distribution which carried out by generation to generation, it could be said that *Rujak Soto* that served at *Pondok Rujak Soto* was made based on a secret recipe that was included in the category of confidential information. It was very closely related to the protection which regulated in the Law of Trade Secrets.

### *The system of trade secret protection according to TRIPs*

The IPR legal framework adopted one of the WTO agendas, namely the Agreement on Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods (TRIPs) (Malbon, Lawson, & Davison, 2014). In the development of IPR regulation in Indonesia, TRIPs as an international norm rule had a very useful effect as a legal instrument that has succeeded in introducing several new legal instruments. In addition, it also provided new standards for IPR protection, such as the longer period of protection, as well as changing the old IPR views and theories which adopted by various countries, such as trade secrets (Sutedi, 2013). TRIPs had a general and fundamental goal which was to reduce distortion and things that make the progress difficult

for the international trade. The second goal of TRIPs was to protect personal rights (Jened, 2013).

Article 39 (2) TRIPs<sup>56</sup> regulated the protection for that information that kept a secret in a complete manner stipulated: An individual or legal entity would have the possibility to prevent so that the information that was legally in their possession was not revealed to, obtained by<sup>2</sup> or used by other parties without approval by means that was contradict to the honest commercial practice as long as the information was: (1) was confidentially in the sense that the information, as an object or in the form<sup>6</sup> of an appropriate configuration and assembly of its components, was generally known among, or was easily accessible to, people in the environment who usually deal with that type of information (2) had commercial value because of its confidentiality, and (3) arose a reason to keep it a secret for people who legally possess the information (Effron, 2003). Thus, *PondokRujak Soto* had the rights to get copyright protection in the future if there was a violation because the information about the secret recipe for generation to generation from their family contained economic value which in its implementation contained a goodwill because of the name *PondokRujak Soto* and also because of the use of the family's secret recipe which was made as a livelihood.

Based on the seven types of intellectual property rights protection which contained in TRIPs, traditional knowledge was not regulated therein. TRIPs protected information that was confidential or kept secret through general regulation. It was very unfortunate because Indonesia was a country that was rich in origin Indonesian culture and culinary. TRIPs regulated widely the things which included within the realm of a global nature, not specifically regulating the potential of a country. Comparing to other findings, culture and traditional food were the characteristic of the Indonesian nation. Maybe it was countless how much a number of innovations of the Indonesian people. So, it was unfortunate if it was not protected by the world about traditional knowledge which was the style of a nation and it was used as an icon in the embodiment of traditional culture and food (the original culinary of a country). Until now, there has been no agreement among countries throughout the world about whether it was necessary or not the results of traditional<sup>9</sup> innovation originating from the local people of a nation could be protected according to the international law.

#### ***The system of trade secrets protection according to the law no. 30 of 2000***

The beginning of the establishment of the Trade Secret Law besides as a continuation from the ratification of Law Number 7 of 1994, was also based on the Law Number 5 of 1999.<sup>62</sup> It was hoped that with the establishment of the Trade Secret Law could reduce the impact of fraudulent competition or unfair competition among business actors (Gunawan, 2001). Based on the definition of trade secrets which contained in Article 1 number 1 of the Trade Secret Law, several points could be analyzed, including: (1) There was<sup>7</sup> information, (2) Information was not publicly known, (3) Information was in the field of technology and/ or business, (4) Information had economic value, (5) There was an obligation to maintain the confidentiality of its owner

(Sembel, 2018). As applied in the Law of Trade Secrets, it could be seen that in its operation *PondokRujak Soto Banyuwangi* had a trade secrets in the form of *Rujak Soto* recipe which became a family's inheritance from generation to generation that was used to run business and its confidentiality should be kept by the owner.

In this case if there was a violation act or a criminal act against trade secrets, the legal enforcement could be carried out if there has been a complaint offense, in other words, the violation of the criminal act against trade secrets was classified into a criminal complaint offense complaint. From a series of problems that have arisen, the disputes that often occurred related to trade secrets was about traditional culinary. There were still many Indonesian people who uphold their customs. This was certainly very influential on a new finding which in general the Indonesian people assumed that the finding was a shared property which was then used as a national heritage or culture. Because the findings were already known by the public and many of the innovated findings have been made the icons of their respective regions by the local community, so it was difficult to determine who the creator or owner was.

There were things which often claimed by other countries, it was about the traditional foods and the origin cultures of Indonesia. The action that could be taken by the government was by protecting trade secrets if it related to the traditional foods. Thus, it could be said that IPR protection especially trade secrets was an appreciation for the owner of the innovation or the work he has created. Traditional knowledge had characteristics which included: a. the fields of industrial, scientific, literature and art; b. hereditary; c. derived from certain regional society (Saleh, 2010). In the Law of Trade Secrets did not specifically regulate the protection of national culinary which in this case could be referred to as traditional food.

As an example that happened to the next generation of *PondokRujak Soto* owner. Even though it has been established for more than 50 (fifty) years, the owner of *PondokRujak Soto* has never registered its trade secrets because the law automatically protected the confidential information and it had economic value as well as the confidentiality was kept by the owner of the trade secrets. But it was different from the Article 5 of the Law of Trade Secrets which stated that it must be registered to the Directorate General of Intellectual Property Rights accompanied by documents on the transition of rights with the aim of obtaining legal protection (Pohan, 2009; Suwu, 2010).

## RESULTS AND DISCUSSION

### *Proof in the protection of trade secrets*

A protection of trade secrets which have been created did not require registration such as other fields of intellectual property rights, except in the case of transition (Mukhtar, Zainol, & Jusoh, 2018; Nolff, 2001; Weckström, 2012). The obligation to maintain confidentiality depended on the relationship between the owner of the trade secrets and the recipient of the trade secrets and the circumstances as well as the context and information that revealed

between two of them (Hoeren, 2020).<sup>3</sup> To prove the existence of trade secrets which owned by the owner, then the owner of the trade secret must be able to show an effort that he has treated the secret as the trade secrets that had the economic value and must had commercial value because of the confidentiality. In addition, the owner of trade secrets has also made an effort in such a way as an owner of the right to possess his confidentiality (Nurani, 2001).

In the condition that the trade secrets has been given to the recipient in the form of a document that was marked "confidential" or the recipient was notified orally that the information was confidential, therefore, it could be used as the proof of an obligation to maintain confidentiality. If there was no written or oral proof that the information provided was under conditions to maintain confidentiality, the proof must show that the condition in which the information was provided resulted in an obligation to maintain confidentiality. However, even though there has been written or oral proof which showed that the owner of the information considered it confidential, it was possible that confidential information could have been independently developed by other parties that were not entitled to and not authentic or confidential at all. The proof was usually needed to prove the right way how the information has been misused. After being proven that the information was confidential and the trade secret was given or obtained by the recipient of trade secrets, then the use of trade secrets which was difficult to prove directly could be seen from the action of the trade secrets recipient. Thus, it required a doctrine as the proof the experts to help in the process of proving that the information or concept was considered confidential by the original owner and proof in the use of trade secrets for recipients of trade secrets (Lindsey, Damian, Butt, & Utomo, 2006).

### CONCLUSION

Without registering the trade secrets which were owned, the owner of *pendok Rujak Soto* has directly or automatically obtained the protection for his trade secrets as long as the owner could protect his confidential information from people who did not have the rights to the trade secrets. The system of trade secrets protection regulated in the Law of Trade Secrets of the Republic of Indonesia and TRIPS provided trade secrets protection without a registration procedure as must be carried out by other intellectual property rights fields. Protection of trade secrets would continue as long as the information made could be kept confidential. Thus, the information owned was automatically protected by the Law and remains considered as trade secrets as long as the information was kept confidential and it had economic value and also was within the scope of supervision or kept confidential by the owner or the holder of trade secrets. But unfortunately, the provision regarding the protection of trade secrets have not specifically regulated traditional knowledge, one of which was traditional food.

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