

LEGAL FRAMEWORK FOR PROTECTION OF TRADE SECRET: IP's UNDERDOG

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ABSTRACT

The authors through this article elucidate the legal framework for protection of Trade Secret. The article provides an analysis of trade secret law in Indian jurisdiction as well as in other jurisdictions. The trade secret law falls within the broad ambit of contract, intellectual property rights, innovation and competition. The remedial part of the trade secret law is inimical to cause of action. The protection of the law is crucial to motivate innovative ideas, foreign investments and to encourage fair & healthy competition. Trade secret being a new facet of Intellectual Property Rights is very essential and has tremendous importance because in the era of globalization, success or failure of a company depends completely on its confidential information or secret policies. A Non-disclosure Agreement protects confidentiality of information which forms the very essence of a business. Disclosure of such confidential information or secrets can lead to potential damage to the company and an unfair advantage to its competitors. Through in this article, the authors have emphasized on the laws that are dealing with the protection of trade secrets in India.

Keywords: *Trade Secret, Confidential Information, Intellectual Property Rights, Non-Disclosure Agreement.*

CONCEPT OF TRADE SECRETS

A Trade Secret means any trade or business related information which is not usually in public domain and reasonable steps have been taken to secure the confidential information of a business. The North American Free Trade Agreement (NAFTA)¹ defined 'Trade Secret' as "information which holds a commercial value in the market but is not known to the public and diligent efforts has been made to secure its confidentiality". The unauthorized use of confidential information by a person other than the owner of such information shall amount to an unfair trade practice and would result in violation of trade secret.

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¹ North American Free Trade Agreement, 1994, art. 1711.

The Uniform Trade Secrets Act² defined ‘trade secret’ as any information or knowledge, including a formula, collection, template, tool, technique, system, method or process, that:

- (i) Holds independent commercial value, by not being usually known to and not being fairly recognized by another person, who can gain monetary value from the disclosure or use of such information thereof and;
- (ii) It is the subject of diligent efforts under the situations to secure its confidentiality. Trade secret is information, if revealed to a competitor, could cause actual and consequential loss or damages to the owner of confidential information. The information not only includes the strategies/policies, financial records of a business or the secret formula for manufacture of the products, but also the list of its consumer, their contact details and even the items purchased by them.³

Trade Secret being a crucial part of Intellectual Property laws of a company or business needs to be protected just like any other IP laws, so that it could not be disclosed to the public which might lead to being counter-productive. Further, the Apex Court in *State ex rel. Lucas County Board of Commissioner v. Ohio Environmental Protection Agency*⁴ ruled that a trade secret will lose its spirit if it is disclosed to the competitors. The trade secret or confidential information are protected through non-disclosure agreements, work for hire arrangements and non-competitive clause in a contract. The advantage of these types of agreements is that the employer can claim ownership over the work done by the employees and at the same time can prevent them from working for its competitors during the course of employment.

The notion behind a trade secret is that a sensitive information which could give one company or business a competitive advantage over the another in a commercial market, must be protected under the IP laws as it is an intellectual and hard-work of a person. A business is successful in the commercial market as it possesses some secret formula or information regarding running the business which others don't possess. Hence, based on this formula or information success of a business depends.

² The Uniform Trade Secrets Act, 1979, § 1(4).

³ *Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber*, 61(1995) D.L.T. 6 (India).

⁴ 88 Ohio St.3d 166, 174 (2000).

INTERNATIONAL FRAMEWORK FOR TRADE SECRET PROTECTION

TRIPS AGREEMENT

TRIPS Agreement is the first multilateral instrument to deal with the trade secrets, prior to this there was only a general obligation with respect to unfair competition provided under Article 10bis of Paris Convention, 1967. Article 39 of TRIPS agreement deals with the protection of 'undisclosed information'. The term 'undisclosed information' is defined as one of the category of intellectual property⁵. Article 39(1) of TRIPS Agreement mandates the member state to provide protection to the undisclosed information in accordance with paragraph 2 of Article 10bis of the Paris Convention, 1967. The main purpose of this clause is to protect the owner of trade secret or confidential information from being subjected to surrender their trade secret or confidential information to the government or other bodies. For this purpose, TRIPS have recommended the subject of regulation which includes disclosure, acquisition or use of others without the consent of the owner of the information, in a manner which is in contravention to honest commercial practices⁶. Provided that the information is secret in the sense that it is not readily accessible or generally known to the persons within the circles which normally deal with such information and have some commercial value and the owner of which is having a right to lawfully control the information by taking reasonable steps to maintain its secrecy⁷. Article 39(3) of TRIPS agreement, provides protection to the secret information which is provided to the government as a condition necessary for gaining approval for the marketing of agricultural, pharmaceutical or chemical products which utilizes new chemical entities. This provision make it mandatory for the WTO members to keep the data secret, disclosure of which could result into unfair competition. In addition, member shall provide for protection of such data against the disclosure except in cases where it is necessary to protect the public, or unless and until there are steps which are taken for ensuring that the data is protected against unfair competition.

⁵Agreement on Trade Related Aspect of Intellectual Property Rights, 1995, art 1(2).

⁶ WTO explained the term "honest commercial practices" as: '*the collective practices of breach of contract, inducement to breach and breach of confidence along with the acquisition of undisclosed information by the third party who either deliberately or inadvertently involves in such acquisition* '.

⁷Agreement on Trade Related Aspect of Intellectual Property Rights (TRIPS), 1995, art 39(2).

USA: U.S.A protects its trade secret under ‘Uniform Trade Secrets Act’ (UTSA) commonly known as US Trade Secret Law. Following this there is North American Free Trade Agreement (NAFTA) which was entered on 17th of December, 1992 between United States, Canada and Mexico. According to NAFTA, ‘Trade Secret’ is defined as “*information which holds a commercial value in the market but is not known to the public and diligent efforts has been made to secure its confidentiality*”. It is mandatory for the member countries to protect the trade secrets from acquisition, disclosure or use by an unauthorized user. The remedies were also available in the form of injunctive relief and damages. USA has also enacted ‘The Economic Espionage Act’ (EEA) in the year 1996 to protect the trade secret at federal level. It is a criminal statute and does not provide for private civil right of action.

UNITED KINGDOM: The trade secret protection in UK is more broad and effective in nature. It includes the search and seizure orders which may be issued for the protection of trade secrets. The remedies including injunctive relief, damages and the third party liability are available in case of “*breach of confidence*”. The Consultation Report on ‘Misuse of Trade Secrets’ by the Law Commission of UK, wherein it was provisionally proposed that the use/disclosure of the trade secret without the authority would amount to a criminal offence.

JAPAN: In the year 1991, Japan enacted its national trade secret legislation which includes any technical or business information having a commercial value which is administered as trade secret and not available in the public domain. Infringement happens when a person procures a trade secret either by theft, extortion or fraud or by unauthorized use or disclosure of a lawfully acquired trade secret for an unfair competition. Aggrieved person can avail remedy in the form of injunctive relief, damages and third party liability.

FRANCE: France is having The French Criminal Code dealing with theft of trade secrets since 1844. Three types of trade secrets are recognized by French: (a) manufacturing trade secret; (b) know-how; and (c) confidential business information. Also the remedies like injunctive relief, damages and third party liability are available to the private litigants.

BRAZIL: Brazil made changes in its intellectual property laws in the year 1996. And the trade secrets were given protection under the rubric of “unfair competition”. Like U.S, Brazil also used a variant of the Section 757⁸ which is commonly known as 6 factor test to determine a

⁸ Undisclosed Information (Restatement of Torts), Treatise, 1939, § 757 comment (b).

particular piece of information qualifies to be a trade secret. Things like common knowledge, knowledge in the public domain or knowledge which is apparent to an expert in the field do not qualify for a protection under trade secrets. The owner of the trade secret has to take positive steps to protect the secrecy of the information. An extensive range of relief is available such as compensatory damages, punitive damages and injunctions. Any release or exploitation or use without authorization of a trade secret, access to which is by virtue of contractual or employment relationship is penalized under the criminal law.

CHINA: The first trade secret law promulgated in China was 'The Law of the People's Republic of China against the Unfair Competition' in short Unfair Competition Law in the year 1993. This act defined trade secret as technical and management information that is unknown to the public, which can bring economic profits, is in practical value and for which the rightful party has adopted adequate measures to maintain the confidentiality.

KOREA: In 1991, the Korean laws were amended in order to come up with the statutory protection of the trade secret regime. This law came forth at the time when, US litigation was initiated between GE and a Korean firm that had acquired the GE trade secrets from a former employee⁹, this law came into effect on 15th December, 1992.

ISRAEL: Under Section 496 of the Penal Law, 1977 the disclosure of confidential information or trade secret by an employee was prohibited in Israel. The employee contracts enjoin the employee from using the trade secret along with the industrial know-how. And there is a presence of implied obligation between employers and employee regarding the confidentiality.

LEGAL POSITION IN INDIA

In India, there is no proper law for the protection of trade secret which eventually results in exploitation of sensitive data or confidential information of a business. Despite the fact that there is no legal regime for trade secret law, the Indian Courts have time and again upheld the protection of trade secrets under various legislations including the Indian Contract Act, 1872; the Copyright Act, 1957; SEBI (Prohibition of Insider Trading) Regulation, 1992 and Information Technology Act, 2000.

⁹ General Electric Co. v. Sung, 843 F. Supp.776 (D. Mass, 1994).

- 1. Indian Contract Act, 1872-** In India, a person can be obliged under a contract not to disclose any confidential information which is disclosed to him in confidence. The concept of '*breach of confidence*' was outlined under the Section 27 of the Act. Under Common Law, the term '*breach of confidence*' was used for the first time in the case of *Saltman Engineering Co v. Campbell Engineering Co*¹⁰. The Court in *Peter Pan Manufacturing Corp v. Corsets Silhouette Ltd.*¹¹ observed that the obligation not to use confidential information can be extended to a situation where information is disclosed by one party to another and the latter unfairly used the information to compete with the former.

Section 27 of the Act states that a non-compete agreement would be void if it restrains any person from carrying on a lawful profession, business or trade. However, an Indian court may enforce such restrictive provision only if it satisfies the "reasonableness" test. The essence of Section 27 was perfectly outlined by the Court in *Percept D Mark (India) Pvt. Ltd. v. Zaheer Khan*¹² where it was held that a restrictive provision would be void and unenforceable if it goes beyond the terms and conditions of a contract. An employer is legitimate in preventing his employee from exploiting the trade secret of the business during the course of employment. Further, the employer also has authority to prevent his employee from joining his competitor's company or business, which is likely to harm the employer's trade or business.

- 2. The Copyright Act, 1957-** The Indian Courts have time and again held in various cases that client's information stored in the form of databases is protected under copyright law. The databases are protected as an inherent data under copyright law rather than mere form of expression. The Court *observed that even though trade secret law and copyright protects different components of business data or information, where copyright protects expression of these compilations of information and trade secret secures confidentiality of the information. The Court held that confidential data or information come under the purview of protection of copyright protection.*¹³

¹⁰ (1948) 65 R.P.C. 203.

¹¹ (1963) 3 All E.R. 402.

¹² A.I.R. 2006 S.C. 3426.

¹³ *BURLINGTON*, *supra* note 4.

3. **Section 72 of the Information Technology Act, 2000** lays down criminal remedies against the disclosure of sensitive information, but these remedies are confined to electronic records only.
4. **SEBI (Prohibition of Insider Trading) Regulations, 1992** prohibits an insider of a company from fraudulently trading the confidential data of a company. Further, SEBI has provision which provides punishment for insider trading.

In India, apart from the above-mentioned protection provided to the trade secrets, they are also covered under the purview of the following frameworks.

I. BREACH OF CONFIDENCE

Breach of confidence, being a civil remedy imposes an obligation on an individual to respect the confidentiality of information by providing protection against the misuse of such confidential information entrusted to the individual.¹⁴ Tracing its history in the right to privacy, confidentiality has always been perceived by the Indian Courts as a common law tort. A landmark judgment, *ZeeTelefilms Ltd & anr. v. Sundial Communications Pvt Ltd*.¹⁵ was based on the above-mentioned ruling wherein the Bombay High Court ruled that the scope of breach of confidence is much different from that of the copyrights law because scope of the former is wide enough to include an unpublished/original idea that was disclosed to a person in a matter of trust, even when the obligation to maintain its confidentiality is merely implied.

II. SPRING BOARD DOCTRINE

The Spring Board doctrine has been described by the Indian Courts as “*A person who has acquired the confidential information from the owner of a trade secret, is prohibited from using it as a springboard for any act which is prejudicial to the owner of trade secret.*”

The Spring Board doctrine although propounded by the foreign courts has been successfully implemented and followed by the Indian Courts. The doctrine provides an additional

¹⁴ R.G. Hammod, *The origins of the equitable duty of confidence*, (1979) Anglo-Am L.R. 7.

¹⁵ 2003(5) Bom C.R. 404.

protection to the owner of trade secret to protect his information even under apprehension of disclosure of the information or before actual infringement.

The principle laid down by the doctrine is that when an ex-employee of a company having knowledge of former employer's trade secrets, joins rival or competitor of former employer, and there are chances of him to disclose the trade secrets of the former employer because of reasons such as the temperament of the new job. So, in order to be on a safer side, and to prevent such disclosure, the employer would seek following legal remedies:-

- (i) the ex-employee from joining the new employer's company/business.
- (ii) the new employer from recruiting the ex-employee.

The Bombay High Court opined that "*the doctrine is even applicable in the case where the information has been brought in public domain. Such information could not be utilized to prejudice the owner of trade secret without his consent.*"¹⁶ Further, the Karnataka High Court ruled that "*an ex-employee may legitimately be prevented from misusing the confidential information of the employer & also enjoined from acting in a way which is prejudicial to the interest of his employer.*"¹⁷

III. PRINCIPLE OF EQUITY

The Principle of Equity has been developed with an aim to enlarge the existing rigid framework of law. In a situation where the stringent application of the common law causes grave injustice, the principle of equity is applied in order to alleviate the stringency of the existing laws. According to the principle, an individual in possession of any trade secret or any information which is confidential in nature is prevented from taking unfair advantage of such a situation. The Delhi High Court opined that the prohibition imposed on the respondent against using the specifications, drawings, know-how & any other confidential information relating to the production of fodder, which was provided to the respondent under an express condition of confidentiality.¹⁸

IV. NON-DISCLOSURE AGREEMENT (NDA)

¹⁶ Bombay Dyeing and Manufacturing Co. Ltd. v. Mehar Karan Singh, MANU/MH/0955/2010 (India).

¹⁷ Inphase Power Technologies v. Abb India Limited, M.F.A No. 3009/2016 (India).

¹⁸ John Richard Brady v. Chemical Process Equipments Pvt Ltd., A.I.R. 1987 Del 372 (India).

Non-disclosure agreement is one of the mechanism through which we can avoid the risk of trade secret misuse. Trade secret is referred as the master's property and any agreement having an effect of transferring this property against the will of the master will be considered as invalid. However, section 27 of Indian Contract Act, 1872 specifically mentions that no such agreement having an effect of putting restrictions from carrying out trade, business or profession is valid. The Court laid down the test for determining the validity of agreement in terms of section 27 wherein the court held the validity of an agreement concerning the maintenance of secrecy which included the restraint on employee from serving elsewhere for fixed period of time. The court observed that the restriction imposed were of limited as to time, nature of employment and as to the area. And stated that the conditions imposed are neither too wide nor unreasonable and hence the agreement is valid.¹⁹

V. NON-COMPETE AGREEMENT

Non-Compete Agreement is a restrictive contract between the employee & employer wherein an employee is under an obligation not to be in competition with his employer for a specified duration post his employment period. The employee is prohibited from disclosing any confidential information or trade secret that he had learnt during the course of employment. Such agreement is always referred to as a "restrictive covenant" or a "covenant not to compete".²⁰ These types of covenants terminate automatically on expiration of such contracts and its duration is only valid until the lifetime of such contracts. The prohibition provided in the covenant, under no circumstances, is extended beyond the terms and conditions of such contracts. The underlying idea behind such type of agreement is that there are high chances of the employee exploiting the confidential information or trade secret of a company, and eventually gaining an unfair competitive edge over the former employer.

RECENT JUDGMENTS RELATED TO TRADE SECRET

1. *Steer Engineering Pvt Ltd. v. Glaxosmithkline Consumers and Ors.*²¹

¹⁹ Niranjan Shankar Golikari v. Century Spinning & Mfg. Co. Ltd, A.I.R. 1967 S.C. 1098 (India).

²⁰ Will Kenton, *Non-Compete Agreement*, LAW & REGULATIONS (Nov. 24, 2020), [Non-Compete Agreement Definition \(investopedia.com\)](https://www.investopedia.com/terms/n/non-compete-agreement-definition/).

²¹ Mathews P. George, *Trade Secret Case Law : Steer Engineering Pvt Ltd. v. Glaxosmithkline Consumer & Ors.*, SPICYIP (Nov. 25, 2020), [Trade Secret Case Law: Steer Engineering Pvt. Ltd. v. Glaxosmithkline Consumer & Ors. \(SpicyIP\)](https://www.spicyip.com/trade-secret-case-law-steer-engineering-pvt-ltd-v-glaxosmithkline-consumer-or-ors/).

In this case the appellant was engaged in the work of developing different technologies one such technology was the extrusion process. The appellant transferred this technology of extrusion process to the defendant company for the manufacture of Horlicks by entering into a Masters Service Agreement (MSA). Along with the transfer of this technology, the appellant also shared the test results and all the information related to that process. Later on, the defendant filed for patent protection based on the information received from the appellant company and by producing the test results data. To this, the appellant company raised objection as to the copyright infringement along with the breach of confidence. The defendant on the other hand argued that they got all the right and control over the intellectual property of the appellant as well as over the information that they have received by virtue of the Master Service Agreement.

The court decided in favour of defendant as the appellant failed to produce the original test reports. Further, the court observed that the MSA agreement that they entered into failed to indicate the nature of confidentiality of the data which was shared. Hence, the court decided in favour of the defendant.

2. *TCS Epic Systems case*²²

In this case, a Wisconsin based company; Epic Systems Corporation hired TATA Consultancy Services (TCS) along with its subsidiary TATA America International Corporation (TAIC) with an aim for setting up their system to provide medical facility in Portland. Soon after that, the Epic systems corporation raised serious allegations on the TCS along with its subsidiary that they are stealing their trade secrets and intellectual properties. Not only that they also alleged that the TCS workers were also indulge in making a similar software which was the exact copy of their original software.

The defendant argued that the Epic systems corporation is unable to produce any material proof to prove the stealing of data.

The court decided in favour of Epic Systems Corporation and imposed compensatory damages of 140 million dollar and 280 million dollar as punitive damages.

3. *Zoho Corporation Pvt Ltd. v. Freshworks, Inc.*²³

²² Radhika Kajarekar, *Epic Systems Case*, (Nov. 28, 2020), [TCS Employees Steal Trade Secrets From Client; Slapped With Rs. 1000 Crore Punishment \(trak.in\)](#).

In this case, the two start-up companies namely, the Zoho and Freshworks were battling against each other in U.S jurisdiction on the issue of misappropriation of trade secrets. An allegation of unauthorised access to customer relationship management (CRM) was made by the Zoho on Freshworks. Further, it was also alleged that Freshworks had also frame their business model based entirely upon their software. In this case, Mr. Girish Mathrubootham, who was the owner of Freshworks was one of the product manager at Zoho. There was a serious allegation on him to have used the data's of Zoho Company in his own start-up. Many ex-employees have also confessed upon such misappropriation of trade secrets by the Freshworks. The matter is pending before the US court.

REMEDIES AVAILABLE FOR BREACH OF CONFIDENCE

The civil remedies available against violation of trade secret or breach of confidence in India includes:-

- a) Award for an interlocutory (interim relief) or permanent injunction preventing the 3rd party from disclosing the confidential information or trade secrets to the competitors.
- b) Returning all the confidential information to the owner of trade secret.
- c) Damages or Compensation for any loss caused to the owner of trade secret against the disclosure of confidential information.
- d) The party at fault may also be asked by the Court to deliver-up such confidential information to the owner of trade secret.²⁴

EXCEPTIONS TO BREACH OF CONFIDENCE

1. PUBLIC INTEREST:

Where the disclosure of information is necessary in the interest of public in that case, the court will not restrain such disclosure. And such disclosure will not amount to breach of confidence. Also, the information such as relating to the anti-national activities, breaches of Statutory laws or duties will also fall under this category.

²³Bismah Malik, *Zoho v. Freshworks: Why is India's top Saas companies locked in a legal battle in US?*, INDIAN EXPRESS (Dec. 1, 2020), [Zoho vs Freshworks: Why are India's top Saas companies locked in a legal battle in US?- The New Indian Express](#).

²⁴P. NARAYANAN, INTELLECTUAL PROPERTY LAW 382 (Eastern Law House, Calcutta, 3rd ed. 2017).

2. KNOW-HOW:

There is no such definition of know-how. Know is an intangible asset which consists of all those technical and commercial information which is documented in the form of detailed manufacturing data including specifications and drawings²⁵. Know-how basically indicates the skill and experience of the man who does his job and no employer can impose any kind of restriction upon his employees from making use of the skill, aptitude and general technical knowledge in competition with his former employer which he had acquired in his employment²⁶.

Any action of breach of confidence cannot proceed against the know-how which is learnt during the course of employment. And even if the employer seeks to restrain his ex-employee from the use of the know-how that that is acquired by him during the course of his employment, then the employee have to furnish his evidence which would be sufficient to identify the secret which he claims to be his property. Also, the employer has to give explanation as to how the information got transferred into the possession of that employee in such circumstances that the conscience of employee was affected so that it would be unconscionable of the employee to make use of the information for his own purpose²⁷. Under the general law only those confidential information could get protection which is the property of an ex-employer and the restraining of trade to forbid the use of acquired know-how by an ex-employee which is not the property of his employer would prima facie be unreasonable.

A 'SUI GENERIS' TRADE SECRET LAW

In order to protect a large amount of Undisclosed Information and knowledge which is stored in a large repository as a trade secret by the practitioner, India had to come up with a legislation under a '*Sui Generis*' system as given under Article 10bis of the Paris Convention along with Article 39(2) and Article 39(3) of TRIPS Agreement. In order to develop respect for trade secrets and undisclosed information it is necessary that this step of creating a proactive legislation under the respective article of TRIPS along with the provisions relating to breach of contract or non-disclosure agreement has to be observed in consonance with each other.

²⁵ FELIX LIEBESNY (ed.), MAINLY ON PATENTS 94, (Butterworths, London 1972).

²⁶ *Supra* note 25.

²⁷ *Ibid.*

The Department of Science and Technology released a draft legislation named ‘**The National Innovation Act of 2008**’. This draft legislation aims at codifying and consolidating the law of confidentiality in order to protect confidential information, trade secret and innovation. The problem lies on the fact that this act is still at the proposed stage and only after the due consideration of recommendations, the draft legislation will be put to test on the floors of the Parliament²⁸ the consequence of which could lead to the enactment of this draft legislation. Due to this delay in enactment we are unable to get a robust mechanism on trade secret protection.

CONCLUSION & SUGGESTIONS

Due to lack of protection mechanism for the trade secrets, India is lagging behind in terms of enjoyment of rights and privileged which India could otherwise get. Despite TRIPS mandate on India for codifying the law on trade secret. India has not codified its law regarding trade secrets. Many Asian countries have beat India in the race of codifying their law relating to trade secret such as Korea and Japan. India has only codified the equitable principle of fiduciary relationship in the Securities Exchange Board of India (Prohibition of Insider Trading) Regulations, 1992 which makes the insider liable for the use and disclosure of confidential information under the Securities Exchange Board of India (in short “SEBI”) Act, a makes third party not liable for the use of this information²⁹.

The following recommendation is put forth for the better governance of trade secrets in India:

Firstly, trade secret protection in India should be dealt by a separate legislation instead of taking recourse to different set of laws. Therefore, a sui generis trade secret law is the need of the hour.

Secondly, the third party liability provision must be added (like other countries such as UK, Japan and France) in the legislation to make the third party also liable for using and disclosing the confidential information.

Thirdly, trade secret protection should be given even in the absence of non-disclosure agreement.

²⁸ India: A Probe on The Proposed National Innovation Act, 2008, LEXORBITIS (Oct. 29, 2020), <https://www.mondaq.com/india/patent/67750/a-probe-on-the-proposed-national-innovation-act-2008>.

²⁹ Vandana Pai & Ramya Seetharaman, *Legal Protection of Trade Secret*, (2004) 1 S.C.C. (Jour) 22.



INDIAN JOURNAL OF LAW, POLITY AND ADMINISTRATION

Therefore, a specific legislation on trade secrets protection is highly recommended keeping in view the abovementioned suggestions so that unfair competition could be reduced effectively and business could get new avenues to flourish.

