

Implications of the TRIPS Agreement on Plant Variety Protection Regulations in Indonesia

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ABSTRACT

Pajrin R, Wiwoho J, Imanullah MN, Pujiyono. 2021. *Implications of the TRIPS Agreement on Plant Variety Protection Regulations in Indonesia*. The purpose of writing this article is to observe the implications of the TRIPS Agreement on the regulation of plant variety protection in Indonesia. This research is a normative legal research, using the Statute, Conceptual, Historical and Case Approach. The dynamics of the Plant Variety Protection regulation in Indonesia occurred after Indonesia ratified the international convention on the approval of the establishment of the world trade organization (WTO) in 1995. TRIPS Agreement is one of the aspects agreed in the international convention. This article describes the legal conditions for the plant variety protection in Indonesia. Plant Variety Protection in Indonesia has experienced various dynamics due to the influence of the TRIPS Agreement, UPOV and other international conventions. The Plant Variety Protection Act itself has undergone several revisions in substance. At first Plant Variety Protection was regulated in the Patent Law of 1997, then, Sui Generis, it regulated in Law Number 29 of 2000 concerning Plant Variety Protection. Although the regulation regarding the protection of plant varieties in Indonesia refers to UPOV, Indonesia has not ratified UPOV into national law in Indonesia until now.

KEYWORDS: *Indonesia, Implication, Plant Variety Protection, Regulation, TRIPS Agreement*

INTRODUCTION

Since the enactment of Law No. 29 Year 2000 concerning the Plant Variety Protection, there are legal cases that deceive the farmers. Since 2004 to 2010, there were fifteen cases that have been decided by District Court in East Java. This law is the impact of globalization as well as the obligations for Indonesia because Indonesia has joined and ratified the establishment of the WTO since 1995. Under the intellectual property regime, the Plant Variety Protection becomes the last package after other intellectual property regimes such as patents, trademark rights, copyrights etc. Globalization was formalized after the signing of the establishment of the World Trade Organization (WTO) by the countries in the world. In globalization era, every country must submit with regional economic regulations and world economic organizations and forbidden to determine the rules that are contrary to international rules agreement. Economic globalization

will give product market opportunities from domestic to international market competitively. In addition, it provides the opportunities for global product in domestic market. The inclusion of the TRIPS Agreement⁶ in WTO brings a new approach to intellectual property protection at the international level. For developing country, the existence of TRIPS Agreement actually enlarges the gap between developed and developing countries in the economic and technological fields.

In this article, the authors want to find out the Implications of the TRIPS Agreement on the Regulation of Plant Variety Protection in Indonesia. The study wants to reveal whether the existence of regulations in the field of plant variety protection has guaranteed the farmers' rights. This study is crucial because almost 38.07 million Indonesians work in the agricultural sector.

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MATERIALS AND METHODS

This research is a normative legal research. The legal materials used in this study were primary legal materials (statutory regulations), secondary legal materials and tertiary legal materials. The approach in this study uses the Statute Approach, Conceptual Approach, Historical Approach and Case Approach.

RESULTS AND DISCUSSION

History of PVP Law in Indonesia

In 18th century, Europeans had started to think about Intellectual Property. This was seen at the international exhibition of new inventions in Vienna in 1873. Some countries were then reluctant to participate in such exhibitions, for fear of the new ideas being stolen and exploited commercially in other countries. Since then, the need for intellectual work protection began to arise internationally. In 1863, Roquefort cheese received protection in the form of a simple Trademark Certificate. The inclusion of TRIPs Agreement in WTO carries new approach toward the protection of intellectual property in international level. For developing country, the existence of TRIPs Agreement actually enlarges the gap between developed and developing countries in the economic and technological fields. The development of intellectual property cannot be separated from brands, patents, and copyrights. The granting of exclusive rights in the form of Statute of Anne to the first author, where previously only for publisher occurred in 1710. Intellectual property as an effort to protect inventors through monopoly rights granted by law to obtain economic benefits from their inventions. The understanding of property rights known in civil law that is happening so far basically depends on the material conception. More than that, the concept is very dependent on physical assumptions, namely natural land and other objects contained on it, then develop on non-physical or intangible assumptions.

The seed protection was started in 1930 marked by patent issuance for asexual plants and the Plant Variety Protection Act of 1970 (PVPA) in America. From this regulation, a giant seed industry was born in the world. In European countries, Plant Variety Protection Act was issued in 1942 in Netherland, while in Germany was issued in 1953. In general, the law reviews plants' uniqueness, homogeneity and

stability. It is almost similar with the legislation condition in the field of Plant Variety Protection, i.e., New, Distinct, Uniform and Stable or often abbreviated as NDUS. In Indonesia, there have been several changes to the legislation regarding intellectual property. In 1961, several countries in the world had agreed an international convention on plant variety protection; this international agreement is recorded in International Convention for the Protection of New Varieties of Plants, which is more known as UPOV. UPOV is an acronym for Union International pour la protection des obtentions vegetable. In Indonesia, Plant Variety Protection is an intellectual property regime that is still relatively new compared to other intellectual property regimes such as brands, copyrights and patents. The history of intellectual property in Indonesia can be broken down into 4 phases or stages. The 4 stages are as follows:

Dutch Colonial Period. At this time the Dutch Colonial Government introduced a law at the first time in 1844. Then, in 1885, the Trademark Act was issued and followed by the Patent Act in 1910 and the Copyright Act in 1912. **Japanese Colonial Period** During the Japanese colonial period, various laws and regulations in the field of intellectual property were still enforced. This intellectual property regulation was enacted until the independence of the Republic of Indonesia in 1945. The early period of independence until the era of New Order after Indonesia proclaiming independence on August 17, 1945. In this era, laws and regulations inherited from the Dutch Colonial were still applied as long as they do not conflict with the 1945 Constitution of the Republic of Indonesia. In the Intellectual Property Regulations, the Copyright Act and Trademark Act was still used, however, the Patent Act was not applied because it was requiring the registration process to the Dutch.²⁸ It is certainly contrary to the sovereignty of the Unitary State of the Republic of Indonesia. The beginning of the Reformation to the present. The first law of Intellectual Property in the field of plant variety protection in Indonesia was Law Number 29 Year 2000 concerning Plant Variety Protection. This law adequately accommodated various aspect compare to other Plant Variety Protection laws and regulations.

Table 1 Legal History Legislation regulating the Plant Variety Protection are as follows

No	Laws and Regulations	Regulated Aspects
1.	Laws Number 6 Year 1989 concerning Patent	Article 7 letter c the discovery of new types or varieties of plants or animals, or about any process that can be used breeding for plants or animals and their products; new types varieties of plants or animals Are referred here food plants or farm animals. This variety cannot be patented.
2.	Law Number 5 Year 1990 concerning Biological Resources and their Ecosystems	This law not only stipulated the protection of plant varieties explicitly, but also generally regulates the use of wild plant and wild animal species. Article 36 Paragraph (1) stipulates the procedure for utilization. The utilization of wild plants and animal species can be carried out as follows: Assessment, research, and development; Captivity Hunting Trade Demonstration Exchange Medical plant cultivation Breeding for pleasure
3.	Law Number Year 1997 concerning Patent	The revision of La number 6 Year 1989 to become Law Number 13 Year 1997 concerning Patent in the form of revocation or abolition of Article letter C where there are varieties of both plants and animals that cannot patented. That revocation or abolition of Article 7 letter C is occurred because Indonesia participated in TRIPs Agreement. Which in Article 27 Paragraph (3) letter b stipulates that: “However member shall provide for the protection of plants varieties either by patent or by an effective sui generis system or by any combination thereof”. According to that article, then in 2000, sui generis, Indonesia creates Law concerning Plant Variety Protection.
4.	Law Number 12 Year 1992 concerning Plant Cultivation System	This law is one of the media in managing and utilizing various kinds of vegetable natural resources in a sustainable, harmonious and balanced in order to provide the greatest prosperity to the people. Article 8 explains that the acquisition of the quality seeds for plant development is carried out through the discovery of superior varieties and/ or introduction from abroad. In detail, it is written in Article 9: The discovery of superior varieties is carried out through plant breeding activities. The search and collection of germplasm in the context of plant breeding is performed by the government. The search and collection of germplasm as referred to paragraph (2) can be accomplished by individuals or legal entities based on permits. The government conserves the germplasm with the community.
5.	Government Regulation Number 44 Year 1995 concerning Seeding	This Government Regulation aims to provide the guarantee of adequate and sustainable quality seeds; as a means of preserving germplasm which is a national asset that needs to be increased to support the development of plant cultivation as well as the effort to regulate Law Number 12 Year 1992 concerning Plant Cultivation Systems.
6.	Law Number 29 Year 2000 concerning Plant Variety Protection (PVP)	This law has been applied since 2000. PVP Law is expected to be able to provide a strong legal basis in encouraging the creation of superior and new varieties in the context of developing seed industry. In accordance with international conventions in the field of intellectual property, it is necessary to regulate sui generis regarding the plant variety protection

The Regulation of PVP in Indonesia

Intellectual Property Rights are granted to breeders, or anyone who claims to have discovered or developed new varieties of plants. The law guarantees ownership and assures everybody to control and enjoy the objects or creations they produce with the help from country exclusively. Therefore, that description shows that legal protection is for the benefit of the owner (breeder), either personally or legal subject groups.

The world faces the condition where the seed internalization is happened. One of the disseminations means of the world's seed business is international conventions. Each international convention has their own characteristics and aspects. UPOV is one of the international conventions which affects the regulation of plant variety. At first, UPOV was only ratified by six countries. Then, after WTO agreed the TRIPS Agreement, there were 75 countries ratified UPOV. Although the legislation in the field of plant variety protection in Indonesia refers to UPOV, Indonesia has not ratified UPOV yet. Based on Erizal Jalam, in his presentation in Bogor, 19 January 2018, the condition in Vietnam is not much different with Indonesia before and after becoming the member of UPOV. Nevertheless, in contrast to China, there has been a significant change. China's Seed Industry is advanced and has a wide market. In its record, Indonesia requires to strengthen the domestic seed industry if Indonesia desiderate to join UPOV. The world's seed company should notice the seed condition in Indonesia and its market share. The data can be seen in the table below.

Table 2 The seed condition in Indonesia

No	Before merger		After merger	
	Company	% Market Share	Company	% Market Share
1.	Mosanto	26,5	Mosanto Bayer Crop Science	30,1
2.	DuPont (Pioneer)	18,7	Dow-DuPont	22,7
3.	Sygenta	7,8	Sygenta	7,8
4.	Vilmorin & Cle	4,4	Vilmorin & Cle	4,4
5.	Dow	4,0	Dow	4,0
6.	KWS Saat	3,7	KWS Saat	3,7
7.	Bayer Crop Science	3,6	DLF	1,3
8.	DLF	1,3	Sakata	1,2
9.	Sakata	1,2	Rijk Zwaan	1,0
10.	Rijk Zwaan	1,0	Takil and Co	1,0
11.	Other	27,8	Florimond Desprez	0,7
12.	-	-	Other	22,1

Source: Official Website of the Ministry of Agriculture of the Republic of Indonesia

The data illustrates that the world's seed industry is dominated by giant seed companies. However, in comparative superiority, Indonesia is actually very rich in natural resources or often called as mega biodiversity. Roscoe Pound in his theory of Law as Tool of Social Engineering can create the big scheme in mobilizing all the potential in realizing seed sovereignty to be able to compete with other seed industries in the world. The selection of legal source and the decision to make law is one of the keys in achieving the goal. Plant Variety Protection (PVP) is the right granted to the breeders and/or PVP rights holders to use their own breeding varieties or give approval to other people or legal entities. Plant variety protection by Sui Generis is regulated in Law Number 29 Year 2000, which was previously regulated in Patent Law. The PVP Law is validated to encourage the agriculture field to be advanced, efficient, resilient, and to have an important role to achieve national development goal. Moreover, the validation of PVP law creates superior varieties, preserves germplasm as the main ingredient in plant breeding without damaging any parties and encourages the growth of seed industry. PVP Law also increases the interest and participation of individual and legal entities to perform plant breeding activities to produce new superior varieties. The right granted for the breeders or PVP right holders is a form of consequence of international conventions in the field of Plant Variety Protection that need to be regulated by law. Those cases are the reason for the enactment of PVP Law in 2000. Since the PVP Law was validated, Indonesia has promulgated all branches of intellectual property as required by the TRIPS Agreement. PVP Law has 76 articles. If it was seen from the law history in Indonesia, PVP Law is the first law by Sui Generis regulates the plant variety protection which previously regulated in Patent Law where the regulation is not as detail as PVP Law. From all the existing articles, it can be concluded that the main principle behind the law is the balance between the public interest and the interests of the PVP holder. There are several important principles contained in the PVP Law as following: PVP Law focuses on plant varieties and the right of plant

breeders as an effort to create legal protection for plant breeders; PVP Law regulates farmers' interest in Article 10 as a form of public interest protection. Through this article, farmers can use the seeds protected by PVP Law and plant them without a permit on condition that the seeds are used only for farmers' interest and not distributed to others; PVP Law controls plant varieties that cannot be protected even though the plants meet the requirement to be protected. Law, Public Order, morality and religion are the important factors to exclude in plant variety protection; PVP Law only protects new plant varieties and does not protect the process of acquiring the new plant varieties; The protection period given to plant varieties is divided into two categories: annual plants and perennial plants. The division is made because there are fundamental differences between two types of plants. PVP Law provides the opportunity to plant breeders to register their commercialized plant varieties as long as it does not exceed a certain time limit. This policy is taken since commercialization is one of the important factors to reap the economic benefits of plant variety protection system; Plant breeders must apply to PVP office appointed by government so that they can be protected by PVP Law. In other words, registration in PVP Law is the vital requirement for legal protection of new plant varieties produced by plant breeders. Unlike other intellectual property branches whose administration is under the Ministry of Law and Human Rights of the Republic of Indonesia, PVP Law is under the Ministry of Agriculture. The main reason for this separation is that the process of examining plant varieties is highly technical and requires expertise. According to those considerations, the examination of plant varieties application will hit the target if it is handled by the Ministry of Agriculture. Unlike other intellectual property branches, PVP settlements are handled by the District Court not Commercial Court; PVP Law also provides opportunities for PVP application to resolve their legal problems through institutions arbitration and alternative dispute resolution. For further implementation, the legislators order to make implementing regulations in government regulations and ministerial regulations.

Table 3 The results of the study of PVP Law are as follow

No	Explanation	Type of Regulations	Article
1	The government utilizes protected varieties for food and medicine procurement policies	Government Regulation	Article 1 Paragraph (2) PVP Law
2	License Agreement	Government Regulation	Article 43 Paragraph (3) PVP Law
3	Compulsory License	Government Regulation	Article 55 PVP Law
4	Substantive Examination Fee	Ministerial Decree	Article 29 Paragraph (2) PVP Law
5	PVP Right Transfer Fee	Ministerial Decree	Article 40 Paragraph (3) PVP Law
6	License agreement registration fee	Ministerial Decree	Article 43 Paragraph (1)
7	The provisions regarding the amount of mentioned fee	Ministerial Decree	Article 63 Paragraph (1) and (2)

There are several articles that imprecise about the derivative arrangements in PVP Law. PVP Law only mentions that the articles will be regulated by the government. Those articles are as follows: 36 The provision for naming, registering, and using varieties as original varieties for essential derivative varieties as the Agency assigned to implement (Article 6 Paragraph (7)); The provision for naming, registering, and using local varieties as well as the agencies assigned to implement (Article 7 Paragraph (4)); The provision regarding the registration requirements as PVP consultant (Article 13 Paragraph (2)); The provision regarding PVP rights application using priority rights (Article 14 Paragraph (2)); The provision regarding the withdrawal of PVP application (Article 21 Paragraph (2)); The provision

concerning inspection procedures, qualification of PVP examiners and officials (Article 30 Paragraph (4)); The provision concerning granting or refusing an application for PVP rights, form, and content (Article 35 Paragraph (4)); The organizational structure and working procedure of PVP appeal commission (article 39); Terms and procedures for the transfer of PVP rights (Article 40 Paragraph (4)). PVP Law has been implemented in Indonesia for 21 years. On 25 and 26 August 2020, The Centre for Crop Variety Protection and Agricultural Licensing held a Focus Group Discussion (FGD) to inventory the various problems from PVP Law. Some notes for that activity were as follows: The effort in providing services to the community is needed, especially in the use of information and technology through simplifying and

acceleration process of the application; there are 792 PVP right applications recorded by Centre for Crop Variety Protection and Agricultural Licensing until 2020. There are 50 varieties applied every year. From the data, there are 30 applicants of PVP rights both individual and institution. It shows the lack of breeders who register to get PVP rights; In law enforcement context, PVP Office should technically take part in overseeing the legal process if there is a violation. However, practically, ninety percent of the legal process is carried out by law enforcement parties; PVP Law needs to be amended because 30% of the social substance needs to be changed.

In conclusion, Plant Variety protection in Indonesia has experienced various dynamics due to the effect of TRIPS Agreement, UPOV and other international conventions. The Plant Variety Protection Act has undergone several revisions in substance. Previously, PVP is regulated in Patent Law Year 1997 before sui generis regulated in Law Number 29 Year 2000. Although the regulation of plant variety protection in Indonesia refers to UPOV, Indonesia has not ratified UPOV into national law in Indonesia.

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