



C(Extr.)/22/2

ORIGINAL: Inglés

FECHA: 2 de febrero de 2005

UNIÓN INTERNACIONAL PARA LA PROTECCIÓN DE LAS OBTENCIONES VEGETALES
GINEBRA

CONSEJO

Vigésima segunda sesión extraordinaria
Ginebra, 8 de abril de 2005

**EXAMEN DE LA CONFORMIDAD DE LA LEY DE
PROTECCIÓN DE LAS OBTENCIONES VEGETALES, 2004, DE MALASIA
CON EL ACTA DE 1991 DEL CONVENIO DE LA UPOV**

Documento preparado por la Oficina de la Unión

Introducción

1. Mediante una carta de fecha 10 de noviembre de 2004 dirigida al Secretario General Adjunto de la UPOV, la Sra. Dato' HJH Khamsiah BT. HJ. Muhammad, Director General Adjunto I del Departamento de Agricultura de Malasia, solicitó el examen de la conformidad de la Ley de Protección de las Obtenciones Vegetales de 2004 (denominada en adelante la "Ley"), que recibió aprobación real el 25 de junio de 2004, con el Acta de 1991 del Convenio de la UPOV (denominada en adelante el "Acta de 1991"). Dicha carta figura en el Anexo I del presente documento. El Anexo II contiene el texto en inglés de la Ley suministrado por el Gobierno malasio.

2. Malasia no ha firmado el Acta de 1991. Por lo tanto, en virtud del Artículo 34.2) de dicha Acta, para ser Parte Contratante debe depositar un instrumento de adhesión. Con arreglo al Artículo 34.3) del Acta de 1991, el instrumento de adhesión sólo podrá ser depositado si el Estado en cuestión ha solicitado la opinión del Consejo acerca de la conformidad de su legislación con las disposiciones del Acta de 1991 y si la decisión del Consejo haciendo oficio de opinión es positiva.

Fundamento de la protección de las obtenciones vegetales en Malasia

3. En Malasia, la protección de las obtenciones vegetales está regida por la Ley. A continuación figura un análisis de la Ley según el orden de las disposiciones de fondo del Acta de 1991.

Artículo 1 del Acta de 1991: Definiciones

4. Las definiciones del Artículo 2 de la Ley están en armonía con las del Artículo 1 del Acta de 1991. En particular, la definición de “variedad” se ajusta a la del Artículo 1.vi) del Acta de 1991. Se recomienda añadir “con independencia de si responde o no plenamente a las condiciones para la concesión de un derecho de obtentor” a continuación de la palabra “rango” para incorporar plenamente la definición de variedad.

5. Asimismo, para incorporar plenamente la definición de “obtentor” del Artículo 1.iv) del Acta de 1991, se sugiere añadir lo siguiente a continuación de la palabra “variedad”: “la persona que sea el empleador de la persona antes mencionada o que haya encargado su trabajo, cuando la legislación de Malasia así lo disponga, o el causahabiente de la primera o de la segunda persona mencionadas, según el caso;”.

Artículo 2 del Acta de 1991: Obligación fundamental de las Partes Contratantes

6. La Ley prevé la protección de los derechos de los obtentores de variedades vegetales que cumplan con la obligación fundamental de las Partes Contratantes exigida en el Artículo 2 del Acta de 1991.

Artículo 3 del Acta de 1991: Géneros y especies que deben protegerse

7. La Ley no prevé qué géneros y especies deben protegerse. Cabe observar que, de conformidad con el Artículo 3.2)i) del Acta de 1991, al depositar su instrumento de adhesión, Malasia debe notificar una lista de por lo menos 15 géneros o especies vegetales a los que se aplicará el Acta de 1991. Se recomienda aclarar en el Reglamento si la Ley se aplica a todos los géneros y especies o a una lista de ellos en particular.

Artículo 4 del Acta de 1991: Trato nacional

8. En la Ley no hay restricciones en lo relativo a la nacionalidad o el país de residencia, por lo tanto, la Ley cumple con el requisito de trato nacional que figura en las disposiciones del Artículo 4 del Acta de 1991.

Artículos 5 a 9 del Acta de 1991: Condiciones de la protección; Novedad; Distinción; Homogeneidad; Estabilidad

9. El Artículo 14 de la Ley incorpora las condiciones de registro de las obtenciones vegetales y de la concesión del derecho de obtentor. El Artículo 14.1) remite al Artículo 16 relativo a la denominación de la variedad y dispone que “se registrará una obtención vegetal y

se concederá el derecho de obtentor cuando la variedad sea nueva, distinta, homogénea y estable”, de conformidad con las condiciones previstas en el Artículo 5 del Acta de 1991.

10. El Artículo 14.2) de la Ley dispone que “[s]in perjuicio de lo dispuesto en el párrafo 1), cuando una variedad haya sido creada, descubierta y puesta a punto por un agricultor, una comunidad local o un pueblo indígena, esa variedad podrá ser registrada como obtención vegetal y será objeto de un derecho de obtentor, siempre y cuando sea nueva, distinta e identificable”. Este párrafo supone la introducción de otro sistema de protección que debería poder distinguirse claramente del derecho de obtentor conferido en virtud del Artículo 14.1) de la Ley, que se basa en las condiciones de protección previstas en el Acta de 1991. Puesto que el derecho conferido en virtud del Artículo 14.2) de la Ley está limitado a un grupo determinado de solicitantes y su objeto y sus condiciones de protección son distintos, al igual que la duración de la protección concedida (véase el Artículo 32.1)b) de la Ley), sería preferible asignar a este derecho un nombre distinto y tratar este sistema de protección, por ejemplo, en una nueva parte de la Ley.

11. El análisis de la Ley se efectúa únicamente en relación con un derecho de obtentor conferido con arreglo a las disposiciones del Acta de 1991, es decir que no se formularán comentarios acerca del otro derecho conferido en virtud de las disposiciones del Artículo 14.2), 3)e) y el Artículo 32.1)b) de la Ley, puesto que esas disposiciones atañen a un derecho distinto al previsto en virtud del Acta de 1991.

12. El Artículo 14.3)a) de la Ley incorpora la condición de novedad, en armonía con el Artículo 6.1) del Acta de 1991.

13. El Artículo 14.3)b) de la Ley incorpora la condición de distinción, en armonía con el Artículo 7 del Acta de 1991. Se recomienda además añadir la explicación que figura en la segunda frase del Artículo 7 del Acta de 1991: “En particular, el depósito, en cualquier país, de una solicitud de concesión de un derecho de obtentor para otra variedad o de inscripción de otra variedad en un registro oficial de variedades, se reputará que hace a esta otra variedad notoriamente conocida a partir de la fecha de la solicitud, si ésta conduce a la concesión del derecho de obtentor o a la inscripción de esa otra variedad en el registro oficial de variedades, según el caso.”

14. El Artículo 14.3)c) de la Ley incorpora la condición de homogeneidad, en armonía con el Artículo 8 del Acta de 1991. El Artículo 14.3)d) incorpora la condición de estabilidad, en armonía con el Artículo 9 del Acta de 1991.

15. El Artículo 15 de la Ley “Prohibición de registro y concesión del derecho de obtentor” contiene disposiciones sobre el rechazo de las solicitudes que no son compatibles con el Acta de 1991. El Artículo 5 de dicha Acta dispone que se concederá el derecho de obtentor cuando la variedad sea nueva, distinta, homogénea y estable, y que la concesión de ese derecho no podrá depender de condiciones suplementarias o diferentes, a reserva de que la variedad sea designada por una denominación adecuada y que el solicitante haya satisfecho las formalidades y pagado las tasas adeudadas. Tal como dispone el Artículo 17.1) del Acta de 1991, únicamente podrán imponerse limitaciones al ejercicio de un derecho de obtentor por razones de interés público y no en relación con la solicitud. Asimismo, cabe observar que, tal como exige el Artículo 18 del Acta de 1991, el derecho de obtentor es independiente de las medidas que reglamentan el comercio. En consecuencia, se recomienda eliminar el Artículo 15 de la Ley, así como la referencia a ese Artículo en otras disposiciones de la Ley, en particular, en los Artículos 14.1), 19 y 23.1)c) y d). La materia cubierta por el Artículo 15

podría ser objeto de otro mecanismo jurídico, disociado de la legislación sobre protección de variedades vegetales, que podría aplicarse de manera uniforme a todas las actividades relativas a la comercialización de variedades, con independencia de que esas variedades estén protegidas o no.

Artículo 10 del Acta de 1991: Presentación de solicitudes

16. En la Parte III de la Ley, en particular en los Artículos 12, 13, 17 y 18, figuran disposiciones relativas a la presentación de solicitudes.

17. Además de la recomendación de eliminar el Artículo 15 y la referencia al mismo en otras disposiciones de la Ley, se recomienda que las informaciones exigidas en virtud del Artículo 12.1)e), f), g) y h) de la Ley no sean consideradas como condiciones adicionales de protección, pues ello sería contrario al Artículo 5.2) del Acta de 1991. A este respecto, el Artículo 17 de la Ley dispone que se asignará a la solicitud una fecha de presentación siempre y cuando se cumplan los requisitos previstos en el Artículo 12 de la Ley. Si los requisitos previstos en el Artículo 12.1)e), f), g) y h) de la Ley se aplican como condiciones adicionales de protección, su incumplimiento supone que no se asignará una fecha de presentación a la solicitud, por lo que sería rechazada.

Artículo 11 del Acta de 1991: Derecho de prioridad

18. En la Ley no figuran disposiciones sobre el derecho de prioridad, como exige el Artículo 11 del Acta de 1991. El título “Derecho de prioridad” del Artículo 18 de la Ley induce a error, pues no se refiere a las obligaciones previstas en el Artículo 11 del Acta de 1991. Se recomienda eliminar el título del Artículo 18 “Derecho de prioridad”, e incluir ese Artículo, junto con el Artículo 17, bajo el título “Fecha de presentación”. También se propone incluir un nuevo Artículo, “Derecho de prioridad”, que incorpore las disposiciones del Artículo 11 del Acta de 1991.

Artículo 12 del Acta de 1991: Examen de la solicitud

19. En los Artículos 19, 20 y 21 de la Ley figuran disposiciones relativas al examen de las variedades candidatas y esas disposiciones se corresponden con el Artículo 12 del Acta de 1991, a reserva de la recomendación de eliminar la referencia del Artículo 15 en el Artículo 19 de la Ley.

20. En relación con el requisito previsto en el Artículo 27 de la Ley sobre el depósito de muestras, se recomienda aclarar en la Ley o en el reglamento de aplicación, en la parte relativa al examen, que el depósito de muestras se exige a los fines mencionados en los Artículos 12 y 22.1)b)i) del Acta de 1991, y no como condición adicional para obtener la protección.

Artículo 13 del Acta de 1991: Protección provisional

21. La Ley no contempla la protección provisional. Se recomienda incluir en la Ley disposiciones que estén en armonía con el Artículo 13 del Acta de 1991.

Artículo 14 del Acta de 1991: Alcance del derecho de obtentor

22. El Artículo 30 de la Ley incluye disposiciones fundamentales sobre el alcance del derecho de obtentor que están en armonía con el Artículo 14.1), 2) y 5) del Acta de 1991. Se recomienda redactar nuevamente la primera frase del Artículo 30.1) de la Ley, para que su texto sea el siguiente: “A reserva de lo dispuesto en el Artículo 31, se requerirá la autorización del obtentor para los actos siguientes realizados respecto de material de reproducción o de multiplicación de la variedad protegida: ...”. El texto propuesto cumple con las disposiciones del Artículo 14.1) del Acta de 1991 y se corresponde con las disposiciones sobre infracción contempladas en el Artículo 47 de la Ley. Además, se sugiere eliminar del Artículo 30.2)a) de la Ley la referencia al “material de reproducción o de multiplicación de la variedad protegida” y añadir al final del Artículo 30.2)a) “a menos que el obtentor haya podido ejercer razonablemente su derecho en relación con dicho material de reproducción o de multiplicación”, en armonía con el Artículo 14.2) del Acta de 1991.

23. En relación con las variedades esencialmente derivadas, en el Artículo 30.2)b) de la Ley figuran las disposiciones del Artículo 14.5)i) del Acta de 1991, y en el Artículo 2 de la Ley figura la definición de variedad esencialmente derivada, en armonía con el Artículo 14.5)b) del Acta de 1991. Con el fin de dar una explicación cabal sobre las variedades esencialmente derivadas, se recomienda añadir el contenido del Artículo 14.5)c) del Acta de 1991: “Las variedades esencialmente derivadas podrán obtenerse, por ejemplo, por selección de un mutante natural o inducido o de un variante somaclonal, selección de un individuo variante entre las plantas de la variedad inicial, retrocruzamientos o transformaciones por ingeniería genética”.

Artículo 15 del Acta de 1991: Excepciones al derecho de obtentor

24. El Artículo 31 de la Ley incorpora, con discrepancias menores, los elementos esenciales de las disposiciones del Artículo 15 del Acta de 1991. En el Artículo 31.1)c), se recomienda sustituir la expresión “los párrafos 30.1)a) a g)” por “los párrafos 30.1) y 2)a)”, y sustituir la última parte, “esas otras variedades vegetales sean esencialmente derivadas de la variedad protegida;”, por “se aplicarán las disposiciones del Artículo 30.2)b), c) y d);”.

25. En cuanto al Artículo 31.1)d) de la Ley, se recomienda aplicar la excepción prevista en el Artículo 15.2) del Acta de 1991, “dentro de límites razonables y a reserva de la salvaguardia de los intereses legítimos del obtentor”. Esta excepción está prevista parcialmente en el Artículo 60.2)d) de la Ley, relativo a la especificación que puede incluirse en el reglamento a los efectos de la definición de “pequeño agricultor”.

26. Se recomienda eliminar el Artículo 31.1)e) de la Ley, puesto que el intercambio de material protegido con fines de reproducción o de multiplicación no queda cubierto por las excepciones previstas en el Artículo 15 del Acta de 1991.

27. Se recomienda desplazar el Artículo 31.1)f) de la Ley a los Artículos 36 y 37 relativos a las licencias obligatorias, puesto que la situación descrita parece responder a los casos de limitación del derecho de obtentor por razones de interés público.

Artículo 16 del Acta de 1991: Agotamiento del derecho de obtentor

28. Tal como exige el Artículo 16 del Acta de 1991, en el Artículo 31.2) de la Ley figuran las disposiciones relativas al agotamiento del derecho de obtentor.

Artículo 17 del Acta de 1991: Limitación del ejercicio del derecho de obtentor

29. Los Artículos 36 y 37 de la Ley contienen disposiciones sobre licencias obligatorias. Se recomienda modificar el Artículo 36.1) de manera que sólo se refiera a casos de interés público. En particular, en relación con el Artículo 36.1)b), cabe observar que el Acta de 1991 no obliga al obtentor a producir en el ámbito local la variedad protegida, sino que le deja la libertad de importarla.

30. El Artículo 18 del Acta de 1991 exige que el derecho de obtentor sea independiente de las medidas destinadas a reglamentar la producción, el control, la comercialización, la importación o la exportación del material de las variedades. Por lo tanto, se recomienda eliminar el Artículo 34 y los apartados a) y b) del Artículo 36.1) de la Ley.

31. El Artículo 36.4) de la Ley dispone que “el licenciario pagará al titular una suma razonable en concepto de regalía”. Ello está en armonía con el requisito de remuneración equitativa del Artículo 17.2) del Acta de 1991.

Artículo 18 del Acta de 1991: Reglamentación económica

32. A reserva de las recomendaciones formuladas en lo relativo a los Artículos 12, 15, 34 y 36.1)a) y b) de la Ley, ésta no parece contener disposiciones que entren en conflicto con el Artículo 18 del Acta de 1991.

Artículo 19 del Acta de 1991: Duración del derecho de obtentor

33. Los Artículos 32 y 33 de la Ley se refieren a la duración del derecho de obtentor. Se recomienda introducir las modificaciones siguientes: eliminar del Artículo 32.1) las palabras “de presentación de una solicitud”. El Artículo 19 del Acta de 1991 exige que la duración del derecho de obtentor se cuente a partir de la fecha de concesión o, en este caso, a partir de la fecha de registro.

34. El Artículo 32.1)b) de la Ley se refiere a la duración del derecho para una variedad vegetal que sea nueva, distinta e identificable. Tal como se recomienda en el párrafo 10 del presente documento, se sugiere asignar un nombre distinto al título cuyas condiciones de concesión y cuya duración sean distintas de las previstas en el Acta de 1991 para la concesión de un derecho de obtentor.

35. En relación con el Artículo 32.2) de la Ley, se recomienda sustituir la palabra “podrá” por la palabra “deberá”, como exige el Artículo 19.2) del Acta de 1991; además, al final del párrafo deberán añadirse las palabras “a partir de la fecha de registro”.

Artículo 20 del Acta de 1991: Denominación de la variedad

36. El Artículo 16 de la Ley incorpora los elementos esenciales de las disposiciones del Artículo 20 del Acta de 1991 en lo relativo a la denominación de la variedad. Se recomienda añadir algunas disposiciones omitidas, correspondientes al Artículo 20.1)b), 4), 5) y 6) para incorporar plenamente las disposiciones sobre denominación de la variedad.

37. Se sugiere modificar el Artículo 16.2)d) de la Ley, según se indica a continuación: “no deberá inducir a error o confusión acerca de las características, el valor o la identidad de la variedad o la identidad del obtentor de la variedad vegetal. En particular, ...”. Una vez modificado, este Artículo deberá incorporarse al comienzo del Artículo 16.1)d).

38. En el Artículo 16.5) de la Ley se sugiere añadir las palabras subrayadas: “La denominación de una variedad vegetal registrada deberá utilizarse cuando el material de reproducción o multiplicación de la variedad vegetal sea ofrecida en venta ~~con fines comerciales~~ o comercializado...”. En el Artículo 16.6) de la Ley, se recomienda asimismo eliminar la expresión “con fines comerciales” y añadir justo después de las palabras eliminadas “o comercializa”. Al final del Artículo 16.6) deberían incluirse las palabras siguientes: “excepto cuando un derecho anterior impida dicha utilización”.

Artículo 21 del Acta de 1991: Nulidad del derecho de obtentor

39. El Artículo 39 de la Ley prevé los fundamentos de la nulidad del derecho de obtentor. En el Artículo 39.2)c) y 3) se contemplan las causas de nulidad del derecho de obtentor dispuestas por el Artículo 21.1)iii) del Acta de 1991. La Ley no prevé las causas de nulidad contempladas en el Artículo 21.1)i) y ii) del Acta de 1991. El Artículo 39.4) de la Ley no parece pertinente a la protección de las obtenciones vegetales.

40. Se recomienda modificar las causas de nulidad previstas en la Ley, de manera de no incluir causas adicionales que no se mencionan en el Artículo 21.1) del Acta de 1991. El Artículo 21.2) del Acta de 1991 excluye cualquier otra causa de nulidad.

41. Para indicar los efectos de una declaración de nulidad, en el Artículo 40.2) de la Ley, después de las palabras “y sin efecto”, deberán añadirse las palabras “y se considerará que nunca ha sido concedido”; en consecuencia, deberán eliminarse las palabras “a partir de la fecha de concesión del derecho de obtentor”.

Artículo 22 del Acta de 1991: Caducidad del derecho de obtentor

42. El Artículo 41 de la Ley prevé las causas de caducidad del derecho de obtentor. Las que figuran en el Artículo 41.1)a) corresponden a las que prevé el Artículo 22.1)b)i) del Acta de 1991.

43. Las causas de caducidad previstas en el Artículo 41.1)b) de la Ley corresponden a las que prevé el Artículo 22.1)b)ii) del Acta de 1991.

44. En el Artículo 41.1)c) de la Ley, a continuación de la palabra “condiciones” deberán añadirse las palabras “de homogeneidad y estabilidad”, para que las causas de caducidad correspondan plenamente con las que prevé el Artículo 22.1)a) del Acta de 1991.

45. La causa de caducidad prevista en el Artículo 22.1)b)iii) del Acta de 1991 no está incorporada en la Ley.

46. En el Artículo 41.1)d) y e) de la Ley se prevén causas adicionales de caducidad que son contrarias al requisito previsto en el Artículo 22.2) del Acta de 1991, que excluye cualquier causa que esté al margen de las mencionadas en el Artículo 22.1) de dicha Acta. El Artículo 41.6)b) de la Ley se refiere a la autorización para producir una variedad vegetal por razones de interés público, una vez que el registro haya caducado. Habrá que aclarar esta disposición, puesto que si el registro caduca la variedad pasa a ser parte del dominio público y ya no será necesaria una autorización para producirla.

Artículo 30 del Acta de 1991: Aplicación del Convenio

47. El Artículo 30.1)i) del Acta de 1991 dispone que cada Parte Contratante “preverá los recursos legales apropiados que permitan defender eficazmente los derechos de obtentor”. Los Artículos 47 a 49 de la Ley contienen disposiciones sobre infracción y prevén los procedimientos, las órdenes judiciales e indemnizaciones pertinentes. Los Artículos 53 a 56 de la Ley describen las facultades que se conceden a las autoridades en materia de observancia. Es decir que la Ley está en armonía con el Artículo 30.1)i) del Acta de 1991.

48. El Artículo 30.1)ii) del Acta de 1991 dispone que cada Parte Contratante “establecerá una autoridad encargada de conceder derechos de obtentor...”. El Artículo 4.1)c) de la Ley dispone que esta función incumbe a la Comisión de Obtenciones Vegetales. Así pues, la Ley está en armonía con el Artículo 30.1)ii) del Acta de 1991.

49. El Artículo 30.1)iii) del Acta de 1991 dispone que cada Parte Contratante publicará información sobre las solicitudes y la concesión de derechos de obtentor y sobre las denominaciones propuestas y aprobadas. El Artículo 22 de la Ley incorpora el requisito de publicación de la solicitud de registro de una obtención vegetal y de la concesión de un derecho de obtentor. El Artículo 28.1)c) de la Ley dispone que el registro de una obtención vegetal y la concesión del derecho de obtentor se publicarán en el Boletín Oficial. Sin embargo, las disposiciones relativas a la publicación no se refieren expresamente a la publicación de las denominaciones propuestas y registradas. Se recomienda que se aclare esa cuestión en el reglamento de aplicación. A reserva de esa aclaración, la Ley satisface los requisitos del Artículo 30.1)iii) del Acta de 1991.

Conclusiones generales

50. En opinión de la Oficina de la Unión, la Ley incorpora en sus disposiciones principales la mayoría de los elementos esenciales del Acta de 1991. Se recomienda introducir en la Ley complementos y modificaciones, según se indica en el presente documento, para subsanar las discrepancias que pueda haber respecto de la conformidad estricta. Tal como se menciona en los párrafos 10 y 11 del presente documento, los derechos conferidos en virtud del Artículo 14.2) de la Ley quedan al margen del alcance del Acta de 1991, puesto que se refieren a un grupo específico de solicitantes, una materia diferente, distintas condiciones de protección y otra duración del derecho. Por lo tanto, es necesario examinar atentamente la incidencia que la protección de variedades en virtud del Artículo 14.2) de la Ley podría tener respecto de la protección conferida en virtud del Artículo 14.1) de la Ley, para evitar que la aplicación de las disposiciones del Acta de 1991 se vea entorpecida. Con el fin de prever

mecanismos de protección equilibrados y transparentes, se recomienda separar claramente las disposiciones relativas a ese derecho específico de las disposiciones plasmadas siguiendo el modelo del Acta de 1991. La necesidad de efectuar esa separación y los ajustes necesarios en consecuencia se pondrá claramente de manifiesto durante la redacción de las modificaciones que se recomienda introducir en la Ley, por ejemplo, respecto del alcance del derecho y las causas de nulidad y caducidad.

51. Se invita al Consejo a:

a) tomar nota de la información que figura en el presente documento;

b) adoptar una decisión positiva sobre la conformidad de la Ley de Protección de Obtenciones Vegetales, 2004, de Malasia con las disposiciones del Acta de 1991 del Convenio Internacional para la Protección de las Obtenciones Vegetales. Sin embargo, para lograr la plena conformidad de la Ley con el Acta de 1991, todavía es necesario introducir en la Ley algunas disposiciones adicionales y modificaciones, como se indica en el presente documento; una vez incorporadas en la Ley esas disposiciones adicionales y modificaciones, a satisfacción de la Oficina de la Unión en consulta con el Presidente del Consejo, Malasia podría depositar su instrumento de adhesión al Acta de 1991;

c) solicitar a la Oficina de la Unión que ofrezca su asistencia al Gobierno de Malasia para la redacción de las disposiciones adicionales y modificaciones que es necesario introducir en la Ley;

d) autorizar al Secretario General a informar al Gobierno de Malasia acerca de esa decisión.

[Siguen los Anexos]

ANEXO I

[Traducción de la Oficina de la Unión de una carta con fecha 10 de noviembre de 2004]

Enviada por: Dato' HJH. Khamsiah BT. HJ. Muhammad,
Director General Adjunto I del Departamento de Agricultura de
Malasia

Al: Sr. Rolf Jördens,
Secretario General Adjunto de la UPOV

Asunto: Solicitud de examen preliminar de la Ley de Protección de las Obtenciones
Vegetales, 2004, de Malasia

Con referencia a la breve conversación mantenida entre los delegados malasios y el Sr. Makoto Tabata, Consejero Principal de la UPOV, durante el reciente trigésimo octavo período de sesiones del Consejo de la UPOV, celebrado el 21 de octubre en Ginebra (Suiza), tengo el agrado de comunicar al Consejo que Malasia prevé adherirse a la familia de la UPOV, en su debido momento.

Hasta tanto se presente una solicitud oficial, agradeceré que el Consejo de la UPOV realice un examen preliminar de la Ley Malasia de Protección de las Obtenciones Vegetales de 2004 y brinde su asesoramiento acerca de la conformidad de nuestra Ley con las disposiciones del Acta de 1991 del Convenio de la UPOV.

Agradecemos profundamente su asistencia y cooperación.

(Firmado)

[Sigue el Anexo II]

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LAWS OF MALAYSIA Act 634
PROTECTION OF NEW PLANT VARIETIES ACT 2004

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LAWS OF MALAYSIA

Act 634

PROTECTION OF NEW PLANT VARIETIES ACT 2004

An Act to provide for the protection of the rights of breeders of new plant varieties, and the recognition and protection of contribution made by farmers, local communities and indigenous people towards the creation of new plant varieties; to encourage investment in and development of the breeding of new plant varieties in both public and private sectors; and to provide for related matters.

ENACTED by the Parliament of Malaysia as follows:

PART I

PRELIMINARY

Short title and commencement

- 1.(1) This Act may be cited as the Protection of New Plant Varieties Act 2004.
- (2) This Act comes into operation on a date to be appointed by the Minister by notification in the *Gazette*.

Interpretation

2. In this Act, unless the context otherwise requires-

“propagating material” means any material or plant, or any part of the plant, used for multiplication or reproduction;

“breed” means to carry out activities conducive to the development of any plant variety;

“prescribed” means prescribed by regulations made under this Act;

“breeder’s right” means the right given on the registration of a new plant variety under this Act;

“Ministry” means the Ministry for the time being responsible for agriculture;

“Fund” means the Plant Varieties Fund established under section 10;

“Board” means the Plant Varieties Board established under section 3;

“compulsory licence” means the authorization by the Board under section 36 to perform in Malaysia any act referred to in subsection 30(1) without the consent or agreement of the holder;

“local community” means a group of individuals who have settled together and continuously inherit production processes and culture or a group of individuals settled together in a village or area and under an eco-cultural system;

“discover and develop” means activities which lead to the desired phenotypic expression and affect the crop genotype and which may or may not entail deliberate or artificial creation of genetic variability;

“Minister” means the Minister charged with the responsibility for plant varieties;

“denomination” means the name or identification for a plant variety expressed in letters or a combination of letters and figures written in any language;

“person” includes a body of persons, corporate or unincorporate;

“authorized officer” means an officer authorized under subsection 53(1);

“breeder” means a person who has bred or has discovered and developed any plant variety;

“holder” means the holder of a breeder’s right;

“licensee” means any person, agency or company to whom a compulsory licence is granted by the Board under section 36;

“Examiner” means any person, government department or organization appointed by the Board for the purpose of conducting a substantive examination under section 21;

“farmer” means any person who-

- (a) cultivates crops by cultivating the land himself;
- (b) cultivates crops by directly supervising the cultivation of land through any other person; or
- (c) conserves and preserves, severally or jointly, with any person any traditional variety of crops or adds value to the traditional variety through the selection and identification of their useful properties;

“small farmer” means a farmer whose farming operations do not exceed the size of holding as prescribed by the Minister;

“indigenous people” means persons who fall within the definition of the “aborigine” or “native” as defined respectively in Clause (2) of Article 160 and Clause (6) of Article 161A of the Federal Constitution;

“centre” means any place approved by the Board for the deposit of any sample of seeds or propagating material under section 27;

“samples” include seeds and any other propagating material which are capable of regeneration;

“plant” means any living organism in the plant kingdom but excludes any micro-organism;

“variety” means a plant grouping within a single botanical taxonomy of the lowest known rank-

- (a) which can be defined by the expression of the characteristics resulting from a given genotype or a combination of genotypes;
- (b) which can be distinguished from any other plant grouping by the expression of at least one of such characteristics; and
- (c) which can be considered as a unit with regard to its suitability for being propagated unchanged,

and includes propagating material and harvested material of the plant variety;

“essentially derived plant variety” means a plant variety which-

- (a) is predominantly derived from the initial plant variety, or from a plant variety that is itself predominantly derived from the initial plant variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial plant variety;
- (b) is clearly distinguishable from the initial plant variety; and
- (c) except for the differences which result from the act of derivation, conforms to the initial plant variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial plant variety;

“registered plant variety” means a plant variety which has been registered as a new plant variety and for which a breeder’s right has been granted under this Act;

“legal personal representative”, in relation to a deceased person, means a person to whom probate of the will of the deceased person or letters of administration of the estate of the deceased person have been granted whether in Malaysia or outside Malaysia.

PART II

PLANT VARIETIES BOARD

Establishment of the Board

3. A board by the name of “Plant Varieties Board” is established.

Functions and powers of the Board

4.(1) The functions of the Board shall be-

- (a) to perform the duties and functions and exercise the powers as may be provided for in this Act;

- (b) to set appropriate systems for the examination of new plant varieties;
- (c) to consider and approve or reject applications for registration of new plant varieties and grant of breeder's rights;
- (d) to impose fees or administrative charges to be paid under this Act;
- (e) to set terms and conditions pertaining to the samples of registered plant varieties deposited at centres approved by the Board under section 27;
- (f) to impose any terms and conditions for the research and experimental use or export of any registered plant variety developed from local genetic resources or by indigenous people;
- (g) to keep and maintain a record of other plant varieties which are not registered in the Register of New Plant Varieties;
- (h) to administer and control the Plant Varieties Fund;
- (i) to appoint any person, government department or organization to be an Examiner for the purposes of conducting a substantive examination under section 21;
- (j) to revoke, surrender, assign or transmit any breeder's right granted under this Act;
- (k) to advise the Minister on all matters pertaining to this Act; and
- (1) to do such other things as it considers fit to enable it to perform its functions effectively or that are incidental to the performance of its functions.
- (2) The Board shall have all such powers as may be necessary for or in connection with the performance of its functions under subsection (1) or which are reasonably incidental to such performance.

Membership of the Board

5.(1) The Board shall, consist of the following members:

- (a) the Director General of the Department of Agriculture, Peninsular Malaysia who shall be the Chairman;
- (b) the Director General of the Malaysian Agricultural Research and Development Institute;
- (c) the Director General of the Malaysian Rubber Board; (d) the Director General of the Malaysian Palm Oil Board; (e) the Director-General of the Malaysian Cocoa Board;
- (f) the Director-General of the Forest Research Institute of Malaysia;
- (g) the Director of Agriculture, Sabah; (h) the Director of Agriculture, Sarawak;

- (i) a representative from the Ministry of Agriculture and Agro-based Industry;
 - (j) a representative from the Ministry of Plantation Industries and Commodities;
 - (k) a representative from the Ministry of Domestic Trade and Consumer Affairs; and
 - (1) a representative from the Ministry of Science, Technology and Innovations.
- (2) The Minister shall appoint a senior officer of the Department of Agriculture, Peninsular Malaysia, to be the Secretary to the Board.

Alternate member

- 6.(1) The Minister may appoint a person to be an alternate member in respect of each person who is a member of the Board under paragraphs 5(1)(a) to (h) to attend meetings of the Board in place of the member when that member is for any reason unable to attend.
- (2) When attending meetings of the Board in place of a member, an alternate member shall for all purposes be deemed to be a member of the Board.

Meetings of the Board

- 7.(1) The Chairman shall preside over every meeting of the Board.
- (2) Notwithstanding subsection (1), if for any reason the Chairman is unable to attend a meeting of the Board, the members present shall elect from among themselves a member to preside over the meeting, and the member elected shall exercise the powers of the Chairman for the duration of that meeting and shall be deemed to be the Chairman for the purposes of that meeting.
- (3) The quorum of the Board shall be six.
- (4) If on any question to be determined by the Board there is an equality of votes, the Chairman shall have the casting vote.
- (5) The Board shall meet at such place and time as may be determined by the Chairman.

Board may invite others to meetings

8. The Board may invite any other person to attend any meeting of the Board for the purpose of advising the Board on any matter under discussion, but that person shall have no right to vote at the meeting.

Provision of facilities by Ministry

9. The Ministry shall provide the Board with the staff, funds and other facilities as are necessary to enable it to carry out its functions.

Plant Varieties Fund

10.(1) A fund to be known as the “Plant Varieties Fund” which shall be administered and controlled by the Board is established.

(2) The Fund shall consist of-

- (a) such sums as may be provided from time to time by the Government or any State Government for the purposes of this Act; and
- (b) moneys, fees and other charges received by the Board under this Act.

Expenditure to be charged on the Fund

11. The Fund shall be expended for the purpose of paying any expenditure incurred by the Board for carrying into effect the provisions of this Act.

PART III

PROCEDURE AND CONDITIONS FOR APPLICATION OF
REGISTRATION OF NEW PLANT VARIETY AND GRANT OF
BREEDER’S RIGHT

Application for registration of new plant variety and grant of breeder’s right

12.(1) An application for the registration of a new plant variety and a grant of a breeder’s right shall be made to the Board in the prescribed manner and shall-

- (a) specify the name, address, nationality and other particulars of the applicant;
- (b) specify the method by which the plant variety is developed;
- (c) be supported by documents and information relating to the characteristics of the plant variety which distinguish the plant variety from other plant varieties;
- (d) specify a plant variety denomination in accordance with section 16;
- (e) contain information relating to the source of the genetic material or the immediate parental lines of the plant variety;

- (f) be accompanied with the prior written consent of the authority representing the local community or the indigenous people in cases where the plant variety is developed from traditional varieties;
- (g) be supported by documents relating to the compliance of any law regulating access to genetic or biological resources; and
- (h) be supported by documents relating to the compliance of any law regulating activities involving genetically modified organisms in cases where the development of the plant variety involves genetic modification.

(2) An application under subsection (1) shall be accompanied by the prescribed filing fee. Persons who may apply for registration of new plant variety and grant of breeder's right

13.(1) An application for the registration of a new plant variety and grant of a breeder's right under section 12 shall only be made by-

- (a) a breeder;
- (b) the employer of the breeder;
- (c) the successor in title of the breeder;
- (d) a farmer or group of farmers, local community or indigenous people who have carried out the functions of a breeder;
- (e) any government or statutory body which has carried out the functions of a breeder.

(2) If the applicant's ordinary residence or principal place of business is outside Malaysia or if the applicant is a group of farmers, the applicant shall appoint an agent who is a resident or who has a registered office in Malaysia upon whom notice or process relating to the application for registration and grant of a breeder's right and other matters relating to such registration or breeder's right may be served, and if the applicant fails to appoint such an agent, the Board may refuse to proceed with the application until the agent has been appointed.

(3) If the applicant is a local community or an indigenous people, the authority representing the local community or indigenous people shall be the agent for such applicant and notice or process relating to the application and other matters relating to the registration of a new plant variety or breeder's right may be served on it.

Conditions for registration of new plant variety and grant of breeder's right

14.(1) Subject to sections 15 and 16, a plant variety shall be registered as a new plant variety and granted a breeder's right if the plant variety is new, distinct, uniform and stable.

(2) Notwithstanding subsection (1), where a plant variety is bred, or discovered and developed by a farmer, local community or indigenous people, the plant variety may be

registered as a new plant variety and granted a breeder's right if the plant variety is new, distinct and identifiable.

- (3) For the purposes of subsections (1) and (2)-
- (a) a plant variety is new if on the filing date of the application for registration and grant of a breeder's right, the propagating or harvested material of the plant variety has not been sold or otherwise disposed of on a commercial basis by or with the consent of the breeder-
- (i) within Malaysia, earlier than one year before the filing date of the application for registration of a new plant variety and grant of a breeder's right; and
- (ii) in other countries-
- (A) earlier than six years before the filing date of the application for registration of a new plant variety and grant of a breeder's right in respect of trees and vines; and
- (B) earlier than four years before the filing date of the application for registration of a new plant variety and grant of a breeder's right in respect of other plant varieties;
- (b) a plant variety is distinct if on the filing date of the application for registration of a new plant variety and grant of a breeder's right it is clearly distinguishable from any other plant variety, the existence of which is a matter of common knowledge;
- (c) a plant variety is uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics;
- (d) a plant variety is stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each particular cycle;
- (e) a plant variety is identifiable if-
- (i) it can be distinguished from any other plant grouping by the expression of one characteristic and that characteristic is identifiable within individual plants or within and across a group of plants; and
- (ii) such characteristics can be identified by any person skilled in the relevant art.

Prohibition of registration and grant of breeder's right

15. The Board shall not approve the registration of a new plant variety and grant of a breeder's right to any person in respect of any plant variety-

- (a) which may affect public order or morality; or

- (b) where there is reasonable ground to believe that the cultivation, reproduction or any other use of that plant variety may produce a negative impact on the environment.

Denomination of a new plant variety

16.(1) The denomination of a plant variety the registration of which by the Board is applied for-

- (a) shall be the generic designation of the plant variety;
 - (b) must enable the plant variety to be identified;
 - (c) shall not exclusively consist of numerals; and
 - (d) shall be different from other plant variety denominations which identify an existing plant variety of the same plant species or a closely related species.
- (2) The Board may reject any denomination of a plant variety which –
- (a) does not satisfy the requirements of subsection (1);
 - (b) is contrary to public order or morality;
 - (c) is not suitable for the identification of the plant variety; or
 - (d) may cause confusion concerning the characteristics or the identity of the breeder of the plant variety.
- (3) Where a denomination of a plant variety is rejected by the Board under subsection (2), the Board may require the applicant to furnish a new denomination within a specified time.
- (4) If a new denomination as required under subsection (3) is not furnished by the applicant within the time specified by the Board, the application shall be deemed to be withdrawn and shall not be further proceeded with, but without prejudice to a fresh application being made by the applicant.
- (5) The denomination of a registered plant variety shall be used when the plant variety is offered for sale on a commercial basis and if a trade mark, trade name or other similar indication is used together with the denomination, the denomination of that registered plant variety must remain easily recognizable.
- (6) Notwithstanding the expiration of the duration of the breeder's right in respect of a plant variety, any person who offers for sale on a commercial basis any propagating material of a registered plant variety shall continue to use the denomination of that registered plant variety.

Filing date

17. The filing date of an application for the registration of a new plant variety and grant of a breeder's right shall be the date of receipt of the application by the Board on condition that the application has complied with the requirements of section 12.

Right of priority

18. Subject to section 17, where two or more applications for the registration of a new plant variety and grant of a breeder's right are received by the Board in respect of the same plant variety, priority shall be given to the application that is accorded an earlier filing date by the Board.

Preliminary examination

19.(1) Where an application for the registration of a new plant variety and grant of a breeder's right has a filing date and the application is not withdrawn, the Board shall examine the application and determine whether it complies with the requirements of sections 15 and 16.

(2) If the Board, as a result of the examination under subsection (1), finds that the requirements of sections 15 and 16 are not complied with, the Board shall give an opportunity to the applicant to make any observation on such finding and to amend the application within the specified period so as to comply with those requirements, and if the applicant fails to do so, the Board may refuse the application.

(3) If the Board, as a result of the examination under subsection (1), finds that the requirements of sections 15 and 16 have been complied with, the Board shall notify the applicant in writing as soon as practicable.

Request for substantive examination

20.(1) If an application for the registration of a new plant variety and grant of a breeder's right has been examined under section 19 and the applicant has been notified under subsection 19(3), the applicant shall file within the specified period a request for a substantive examination of the application.

(2) A request for a substantive examination under subsection (1)-

(a) shall be made in the prescribed form;

(b) shall be accompanied with the prescribed fee; and

(c) if requested by the Board, shall provide the specified quantities of propagating materials required for the purposes of the substantive examination.

Substantive examination

21.(1) Where a request for substantive examination has been made under section 20, the Board shall refer the application to an Examiner who-

(a) shall determine whether the application complies with the requirements of section 14; and

(b) shall report his determination to the Board.

(2) If the Examiner reports in accordance with subsection (1) that the requirements of section 14 are not complied with, the Board shall give the applicant an opportunity to make observations on the report and to amend the application so as to comply with the requirement within the specified period.

(3) If the applicant fails to satisfy the Board within the specified period that the requirements of section 14 are complied or to amend the application so as to comply with the requirements, the Board shall reject the application for the registration of a plant variety and grant of a breeder's right.

(4) If the Examiner reports in accordance with subsection (1) that the application as originally filed or as amended complies with the requirements of section 14, the Examiner shall inform the Board in writing of the findings of his examination.

*Application for registration of new plant variety
and grant of breeder's right to be published*

22. If the Board is satisfied that an application for the registration of a new plant variety and grant of a breeder's right has complied with the requirements of this Act, the Board shall cause the application to be published in the *Gazette*.

*Opposition to application for registration of a
new plant variety and grant of breeder's right*

23.(1) Any interested person may, within three months from the date of publication of an application for the registration of a new plant variety and grant of a breeder's right, give notice to the Board and the applicant of his intention to oppose the application on any or any combination of the following grounds:

(a) that the person opposing the application is entitled to the breeder's right as against the applicant;

(b) that the application for the registration of the new plant variety and grant of a breeder's right does not comply with the requirements of this Act;

(c) that the application for the registration of the new plant variety and grant of a breeder's right is contrary to public order or morality;

- (d) that the application for the registration of the new plant variety and grant of a breeder's right may produce a negative impact on the environment.
- (2) The notice shall be in writing in the manner to be specified by the Board in writing and shall include a statement of the grounds of opposition.

Reply by applicant

- 24.(1) The applicant shall within thirty days after the receipt of the notice of opposition send a reply to the Board and the opponent, in the manner to be specified by the Board in writing, stating the grounds for his application for registration and grant of a breeder's right.
- (2) If the applicant fails to reply to the opposition within the period specified in subsection (1) or, if the period has been extended by the Board, within the additional period, the applicant shall be deemed to have abandoned his application for the registration of the new plant variety and grant of a breeder's right.

Filing of documentary evidence in support

- 25.(1) Where the applicant submits a reply under subsection 24(1), the opponent and the applicant shall file documentary evidence in support of the opposition or the application for the registration of the new plant variety and grant of a breeder's right, as the case may be, with the Board.
- (2) Any documentary evidence to be filed by the opponent or the applicant under subsection 1) shall be filed within the time and in the manner to be specified by the Board in writing.
- (3) Where the applicant files the documentary evidence in support of his application, the opponent may be given an opportunity, within the time to be specified by the Board in writing, to submit to the Board and applicant evidence in reply to be adduced in the manner to be specified by the Board in writing.
- (4) After considering the documentary evidence filed by the opponent and applicant, and after giving both parties an opportunity to make submissions, the Board shall decide whether-
- (a) to reject the application for the registration of the new plant variety and grant of breeder's right; or
 - (b) to approve the application.
- (5) The Board shall, within two months after making a decision under subsection (4), give its grounds of decision in writing.

Failure to file documentary evidence

26.(1) If the applicant fails to file the documentary evidence as required under subsection 25(1), the Board may treat the application for the registration of the new plant variety and grant of a breeder's right as abandoned.

(2) Where the opponent fails to file the documentary evidence as required under subsection 25(1), the Board may treat the opposition as abandoned and shall approve the application for the registration of the new plant variety and grant of a breeder's right.

Deposit of samples

27. If an application for the registration of the new plant variety and grant of a breeder's right has been approved by the Board and the applicant has been notified in writing, the applicant shall, within the time specified by the Board, deposit samples of the seed or any other propagating material of the plant variety in the quantity to be specified by the Board at a centre approved by the Board.

Registration of new plant variety and grant of breeder's right

28.(1) If the Board is satisfied that the applicant has complied with requirements of section 27, the Board shall register the new plant variety and grant the breeder's right to the applicant and shall –

- (a) issue a certificate of registration of the new plant variety and grant of a breeder's right to the applicant in the prescribed form;
- (b) record the denomination of the new plant variety and the registration of the new plant variety and grant of a breeder's right in the Register of New Plant Varieties; and
- (c) publish in the *Gazette* a reference to the registration of the new plant variety and grant of a breeder's right.

(2) The contents of the certificate of a breeder's right shall be *prima facie* evidence of the facts stated therein and the duration of the protection granted.

Register

29.(1) The Board shall keep and maintain a register called the Register of New Plant Varieties.

(2) The Register shall be kept in such form and shall contain such particulars as may be specified by the Board.

(3) The Register shall be available to the public for inspection subject to such conditions as the Board deems fit.

(4) A copy or extract of any entry in the Register duly certified by the Secretary to the Board shall be given to any person requiring the copy or extract upon payment of the prescribed fee.

PART IV

RIGHTS, LIMITATIONS AND DUTIES OF A HOLDER

Scope of breeder's right

30.(1) Subject to section 31, a holder of a breeder's right shall, in respect of the registered plant variety for which the right is granted, have the right to carry out all or any of the following acts on a commercial basis:

- (a) producing or reproducing;
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) marketing, inclusive of selling;
- (e) exporting;
- (f) importing;
- (g) stocking the material for the purposes mentioned in paragraphs (a) to (f).

(2) The breeder's right shall also extend to-

- (a) any propagating material of the registered plant variety, harvested material of the registered plant variety and the entire or any part of a plant variety where the propagating material of that plant variety is obtained through unauthorized means from the registered plant variety;
- (b) plant varieties which are essentially derived from the registered plant variety, if the registered plant variety is not essentially derived from another plant variety;
- (c) plant varieties which are not clearly distinguishable from the registered plant variety; or
- (d) the production of other plant varieties which require the repeated use of the registered plant variety.

(3) For the purposes of paragraph 30(2)(a), "unauthorized" in relation to the propagating material means it is obtained without the consent or permission of the holder.

Limitations of breeder's right

31.(1) The breeder's right shall not extend to-

- (a) any act done privately on a non-commercial basis; (b) any act done for an experimental purpose;
 - (c) any act done for the purpose of breeding other plant varieties and any act referred to in paragraphs 30(1)(a) to (g) in respect of such other plant varieties, except where such other plant varieties have been essentially derived from the registered plant variety;
 - (d) any act of propagation by small farmers using the harvested material of the registered plant variety planted on their own holdings;
 - (e) any exchange of reasonable amounts of propagating materials among small farmers; and
 - (f) the sale of farm-saved seeds in situations where a small farmer cannot make use of the farm-saved seeds on his own holding due to natural disaster or emergency or any other factor beyond the control of the small farmer, if the amount sold is not more than what is required in his own holding.
- (2) The breeder's right granted under section 30 shall not apply to any material of the registered plant variety or any material derived from that material which has been sold within Malaysia on a commercial basis by the breeder or by any other person with his consent, unless such material is used for purposes involving-
- (a) the further propagation of the registered plant variety; or
 - (b) the export of the material to a country which does not protect varieties of the plant genus or species to which the variety belongs and where the exported material is not for final consumption.

Duration of breeder's right

- 32.(1) The breeder's right to a registered plant variety shall take effect from the filing date of an application for the registration of the plant variety and grant of breeder's right and shall subsist for a period of-
- (a) twenty years for a registered plant variety that is new, distinct, uniform and stable; or
 - (b) fifteen years for a registered plant variety that is new, distinct and identifiable.
- (2) Notwithstanding the provisions of subsection (1), where an application for the registration of a new plant variety and grant of breeder's right is made in respect of trees or vines, and the application has complied with the provisions of this Act, the Board may register the plant variety and grant breeder's right for a duration of twenty-five years.

Extension of duration of breeder's right

33.(1) Notwithstanding the provisions of section 32, the Board may extend the duration of a breeder's right granted if the Board is satisfied that such extension is desirable on the ground of national needs and interests.

(2) An application for the extension of the duration of a breeder's right under subsection (1) shall be made in writing to the Board by the holder before the expiry of the duration of that breeder's right.

Availability of propagating material

34. The holder shall ensure that the propagating material, which is of reasonable quality, of the registered plant variety is available in reasonable quantities within three years from the date of application for registration of the new plant variety and grant of a breeder's right and at such reasonable price as may be determined by the Board.

Duties of a holder

35.(1) The holder shall throughout the duration of the breeder's right-

- (a) maintain at his expense samples which have been deposited at a centre approved by the Board under section 27;
- (b) furnish the Board with the propagating material of the registered plant variety which is capable of reproduction whenever requested by the Board;
- (c) provide the Board with facilities and information regarding the registered plant variety, without any charge, whenever requested by the Board.

(2) For the purposes of paragraph 35(1)(c), "facilities" includes the facilities for carrying out an inspection.

PART V

COMPULSORY LICENCE

Compulsory licence

36.(1) If at any time after the expiration of three years from the grant of a breeder's right the Board is satisfied that-

- (a) any of the requirements of section 34 is not complied with and the needs of the farming community for the propagating material of the registered plant variety have not been met; or
- (b) an excessive proportion of the registered plant variety offered for sale is being imported,

the Board may grant a compulsory licence to any person, agency or company to undertake any of the acts mentioned in subsection 30(1) with regards to any material of the registered plant variety, whether with or without the authorization of the holder, notwithstanding that the holder may have granted his authorization to any other person.

(2) Before granting a compulsory licence the Board shall give the holder a notice in writing of its intention to do so and giving him the right to make representations within a specified period.

(3) The Board shall, upon considering the representations of the holder, or if no representation is received within the specified period, make a decision in respect of its intention and shall inform the holder of its decision within a reasonable period of time.

(4) Where the Board grants a compulsory licence under subsection (1), the Board shall determine a reasonable sum to be paid by the licensee to the holder as royalty.

Scope and conditions of compulsory licence

37. Upon the granting of a compulsory licence to any person, agency or company, the Board shall determine-

(a) the scope of the compulsory licence and the right to carry out any of the acts referred to in section 30 except that such right shall not extend to the act of importation;

(b) the duration of the compulsory licence; and

(c) the terms and conditions of the compulsory licence.

Termination of compulsory licence

38.(1) The Board shall have the power to terminate or revoke any compulsory licence granted under section 36 if the Board is satisfied that the licensee has breached any of the terms and conditions of the compulsory licence.

(2) Before terminating a compulsory licence, the Board shall give the licensee a notice in writing requiring him to show cause within fourteen days from the date of receipt of the notice as to why the licence should not be terminated.

(3) After the expiry of the period of fourteen days and after considering any representations made by the licensee, the Board shall decide whether to terminate the licence or to take no further action.

(4) The Board shall give the licensee a written notice of its decision under subsection (3) as soon as practicable.

PART VI

INVALIDATION, REVOCATION, SURRENDER AND
ASSIGNMENT OR TRANSMISSION

Invalidation of breeder's right

39.(1) Any interested person may institute court proceedings against the holder to invalidate the registration of a new plant variety and grant of a breeder's right.

(2) The court shall invalidate a breeder's right if the person requesting the invalidation proves that-

- (a) the holder has furnished to the Board false or misleading information or statement in respect of the application for registration of the new plant variety and grant of a breeder's right;
- (b) the holder has not complied with the requirements of this Act; or
- (c) the breeder's right does not belong to the person to whom the breeder's right was granted.

(3) Notwithstanding subsection (2), the court shall not invalidate the registration of a new plant variety and grant of a breeder's right on the ground mentioned in paragraph 39(2)(c) if the breeder's right has been assigned to the person to whom the breeder's right belongs.

(4) If the provisions of subsection (1) apply to only some of the claims or some parts of a claim, such claims or parts of a claim may be declared invalid by the court and the invalidity of part of a claim shall be declared in the form of a corresponding limitation of the claim in question.

Date and effect of invalidation

40.(1) When the decision of the court becomes final, the Registrar of the court shall notify the Board and the Board shall record the invalidation on the certificate of registration of the new plant variety and grant of a breeder's right and in the Register of New Plant Varieties and publish the fact of such invalidation in the *Gazette*.

(2) Any invalidated certificate of registration and grant of a breeder's right or claim or part of a claim shall be regarded as null and void from the date of the grant of the breeder's right.
Revocation of breeder's right

41.(1) The Board may revoke a breeder's right granted to a holder if-

- (a) the holder fails to provide the Board within the period specified by the Board in writing with the information, facilities or propagating materials deemed necessary by the Board for the maintenance of the samples deposited at a centre approved by the Board when requested by the Board;

- (b) the holder fails to pay any fees payable to the Board to keep his breeder's right in force;
 - (c) the registered plant variety fails to demonstrate continuously the conditions for which the registration was made and breeder's right was granted;
 - (d) the holder contravenes any of the terms and conditions imposed on him as a holder; or
 - (e) the holder uses or causes to be used any sample of a registered plant variety deposited at a center under section 27 without the prior written permission of the Board.
- (2) Before revoking a breeder's right, the Board shall give the holder a notice in writing requiring the holder to show cause within fourteen days as to why his breeder's right should not be revoked.
- (3) After the expiry of the period of fourteen days and after considering any representations made by the holder, the Board shall decide whether to revoke the protection or to take no further action.
- (4) The Board shall give the holder a written notice of its decision under subsection (3).
- (5) The revocation of a breeder's right shall take effect-
- (a) if there is no appeal against the revocation, on the expiration of fourteen days from the date on which the notice of revocation is served on the holder; or
 - (b) if there is an appeal against such revocation, when the revocation is confirmed by the Minister under section 46.
- (6) If a breeder's right is revoked under subsection (1), the Board shall-
- (a) direct the holder to return the certificate of registration of the new plant variety and grant of a breeder's right to the Board; and
 - (b) have the power to authorize any person to undertake the production of the plant variety for reasons of public interest.
- (7) The Board shall record the revocation on the certificate of registration of the new plant variety and grant of a breeder's right and in the Register of New Plant Varieties and publish the fact of such revocation in the *Gazette*.

Surrender of breeder's right

- 42.(1) A holder may surrender his breeder's right by submitting a written request to the Board together with the certificate of registration of the new plant variety and grant of a breeder's right.
- (2) The surrender shall take effect on the date the Board receives the certificate of registration and grant of a breeder's right pursuant to the written request under subsection (1).

(3) The Board may impose any terms and conditions as it deems fit in respect of the surrender.

(4) The Board shall record the surrender in the Register of New Plant Varieties and publish the fact of such surrender in the *Gazette*.

Assignment or transmission of breeder's right

43.(1) A breeder's right or an application for the registration of a plant variety and grant of a breeder's right may be assigned or transmitted with the approval of the Board to-

(a) the legal personal representative of the holder or the applicant for such registration and grant; or

(b) any person entitled by operation of law to such assignment or transmission.

(2) The application for the assignment or transmission of a breeder's right shall be-

(a) made in the manner to be specified by the Board in writing; and

(b) accompanied with the prescribed fee.

(3) The Board may approve the assignment or transmission of the breeder's right if-

(a) it is in writing signed by or on behalf of the contracting parties; or

(b) the holder or the applicant for the registration of a new plant variety and grant of a breeder's right dies or becomes incapacitated.

(4) Before granting its approval for the assignment or transmission of a breeder's right, the Board shall publish in the *Gazette* the details of the application and provide a reasonable period of time for any objection to the application for the assignment or transmission.

(5) The assignment or transmission of a breeder's rights shall be recorded in the Register of New Plant Varieties and the fact of such assignment or transmission shall be published in the *Gazette*.

PART VII

APPEALS

Appeals

44. Any person who is aggrieved by the decision of the Board with regard to –

(a) the rejection of an application for the registration of a new plant variety and grant of a breeder's right;

- (b) the grant of a compulsory licence under subsection 36(1); (c) the royalty to be paid under subsection 36(4);
- (d) the termination of a compulsory licence under section 38;
- (e) the revocation of a breeder's right;
- (f) the terms and conditions in respect of the surrender of a breeder's right; or
- (g) the assignment or transmission of a breeder's right, may, within thirty days after being informed in writing of the decision of the Board appeal in writing against such decision to the Minister.

Appeal Board

45.(1) Upon receipt of an appeal under section 44, the Minister shall refer the matter to an Appeal Board.

(2) The Appeal Board shall consist of the following members:

- (a) the Secretary-General of the Ministry of Agriculture and Agro-based Industry, who shall be the Chairman;
- (b) the Secretary-General of the Ministry of Science, Technology and Innovations;
- (c) the Secretary-General of the Ministry of Plantation Industries and Commodities;
- (d) the Permanent Secretary of the Ministry of Agriculture and Food Industry of Sarawak; and
- (e) the Permanent Secretary of the Ministry of Agriculture, Sabah.

(3) At the meetings of the Appeal Board, three members shall constitute a quorum.

(4) If for any reason the Chairman is unable to attend the meeting of the Appeal Board, the members present shall elect from among themselves a member to preside over the meeting and the member elected shall exercise the powers of the Chairman for the duration of that meeting and shall be deemed to be the Chairman for the purposes of that meeting.

(5) The Appeal Board may regulate its own procedure at the hearing of any such appeal and shall not be bound by any law or rule of practice relating to the admissibility of evidence.

(6) The Appeal Board shall consider the appeal and make recommendations to the Minister.
Decision of the Minister

46. The decision of the Minister shall be final and the person making the appeal shall be informed in writing of the decision.

PART VIII

INFRINGEMENT

Acts deemed to be infringement

47. Subject to the provisions of this Act, an infringement of a breeder's right shall consist of the performance of any of the acts referred to in section 30 in Malaysia by a person other than the holder without the authorization of the holder in relation to the registered plant variety for which a breeder's right has been granted to the holder.

Infringement proceedings

48.(1) The holder shall have the right to institute court proceedings against any person who has infringed or is infringing his rights.

(2) The holder shall have the same right against any person who has performed acts which make it likely that an infringement will occur, which in this Part is referred to as an "imminent infringement".

(3) The proceedings in subsections (1) and (2) may not be instituted after five years from the date the act of infringement is discovered or could have been reasonably discovered by the holder.

Injunction and award of damages

49.(1) If the holder proves that an infringement has been committed or is being committed, the court may award damages and may grant an injunction to prevent further infringement and award any other legal remedy.

(2) If the holder proves that an imminent infringement has occurred, the court may grant an injunction to prevent the infringement and award any other legal remedy.

PART IX

OFFENCES

Offence with respect to furnishing any false or misleading particular, etc.

50. Any person who furnishes or causes to be furnished to the Board any false or misleading particular, information or statement in respect of an application for the registration of a new plant variety and grant of a breeder's right commits an offence and shall on conviction be liable to a fine not exceeding twenty thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Offence with respect to contravention of terms and conditions and use of samples without permission

51. Any person who-

- (a) contravenes any of the terms and conditions imposed on him as a holder or as a licensee; or
- (b) uses or causes to be used without the prior written permission of the Board any sample of a registered plant variety deposited at any centre under section 27,

commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding six months or to both.

Offence by body corporate

52. Where a body corporate commits an offence under this Act or any regulations made under this Act, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer of such body corporate or was purporting to act in any such capacity, or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate, or was assisting in its management-

- (a) may be charged and tried jointly in the same proceedings with the body corporate; and
- (b) where the body corporate is found guilty of the offence, shall be deemed to be guilty of that offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves-
 - (i) that the offence was committed without his knowledge, consent or connivance; and
 - (ii) that he took all reasonable precautions and had exercised all due diligence to prevent the commission of the offence.

PART X

ENFORCEMENT

Authorization of officers

53.(1) The Minister may authorize in writing any officer in the Ministry to exercise the powers under this Part.

(2) An officer authorized under subsection (1) shall be deemed to be a public servant within the meaning of the Penal Code [Act 574].

Power of enforcement

54.(1) Any authorized officer or a police officer not below the rank of Inspector may exercise all the powers of enforcement under this Act.

(2) Every authorized officer or police officer, when acting against any person under this Act, shall declare his office and shall on demand produce to the person against whom he is acting such authority card as the Minister may direct to be carried by such authorized officer or as the Inspector General of Police may direct to be carried by such police officer.

Power of investigation

55. An authorized officer shall have all the powers necessary to carry out an inspection and to investigate the commission of any offence under this Act.

Additional powers

56. Any authorized officer or police officer not below the rank of Inspector may, for the purpose of enforcing this Act, do all or any of the following:

- (a) enter, inspect and examine with or without notice any premises or farm at any reasonable hour in relation to any offence reasonably suspected to have been committed under this Act;
- (b) require the production of any record, book, accounts, computerized data or documents kept by the holder and inspect, examine and copy any of them;
- (c) require the production of any identification document from any person in relation to any case or offence under this Act;
- (d) make such inquiry as may be necessary to ascertain whether the provisions of this Act have been complied with.

PART XI

MISCELLANEOUS

Institution of prosecution

57. No prosecution for or in relation to any offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor.

Jurisdiction to try offences

58. Notwithstanding any written law to the contrary, a Court of a Magistrate of the First Class shall have jurisdiction to try any offence under this Act and to impose the full punishment for any such offence.

Protection of officers

59. No action shall be brought, instituted or maintained in any court against-

- (a) any member of the Appeal Board;
- (b) any member of the Board;
- (c) any authorized officer; and
- (d) any Examiner,

for any act or omission done in good faith in the performance of their functions and the exercise of their powers under this Act.

Regulations

60.(1) The Minister may make regulations for the purpose of carrying into effect the provisions of this Act.

- (2) Without prejudice to the generality of subsection (1), regulations may be made-
 - (a) to regulate the procedure for an application for the registration of a new plant variety and grant of a breeder's right and the determination of questions in connection with such application, registration and grant, and in connection with the extension of the duration of such registration and grant, and the revocation, surrender, assignment or transmission of a breeder's right;
 - (b) prescribing the fees and charges payable under this Act and the manner for collecting and dealing with such fees and charges;
 - (c) prescribing forms, book, registers, documents and other matters to be used under this Act and the information to be furnished for any of the purposes of this Act;
 - (d) prescribing the size of a holding for the purposes of the definition of "small farmer"; and
 - (e) providing generally for any other matter for the proper and effective implementation of this Act.

PNMB

DICETAK OLEH
PERCETAKAN NASIONAL MALAYSIA BERHAD,
CANVANGAN KUALA LUMPUR
BAGI PIHAK DAN DENGAN PERINTAH KERAJAAN MALAYSIA

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