



C(Extr.)/22/2

ORIGINAL : anglais

DATE : 2 février 2005

**UNION INTERNATIONALE POUR LA PROTECTION DES OBTENTIONS VÉGÉTALES**  
GENÈVE

**CONSEIL**

**Vingt-deuxième session extraordinaire**  
**Genève, 8 avril 2005**

**EXAMEN DE LA CONFORMITE DE LA LOI DE 2004 SUR LA PROTECTION  
DES OBTENTIONS VEGETALES DE LA MALAISIE AVEC  
L'ACTE DE 1991 DE LA CONVENTION UPOV**

*Document établi par le Bureau de l'Union*

Introduction

1. Par une lettre datée du 10 novembre 2004, adressée au Secrétaire général adjoint de l'UPOV, Mme Dato' HJH Khamsiah BT. HJ. Muhammad, Vice-directeur général du Département de l'agriculture de la Malaisie, a demandé l'examen de la loi de 2004 sur la protection des obtentions végétales (ci-après dénommée "loi"), qui a reçu l'assentiment royal le 25 juin 2004, du point de vue de sa conformité avec l'Acte de 1991 de la Convention UPOV (ci-après dénommé "Acte de 1991"). Cette lettre est reproduite dans l'annexe I du présent document. L'annexe II contient le texte anglais de la loi communiquée par le Gouvernement malais.

2. La Malaisie n'a pas signé l'Acte de 1991. En vertu de l'article 34.2) de cet Acte, elle doit donc déposer un instrument d'adhésion pour devenir Partie contractante sur la base de l'Acte de 1991. Conformément à l'article 34.3) de l'Acte de 1991, un instrument d'adhésion ne peut être déposé que si l'État en question a demandé l'avis du Conseil sur la conformité de sa législation avec les dispositions de l'Acte de 1991 et si la décision du Conseil faisant office d'avis est positive.

### Fondement de la protection des obtentions végétales en Malaisie

3. La protection des obtentions végétales en Malaisie est régie par la loi à l'examen. On trouvera ci-après une analyse de cette loi dans l'ordre des dispositions de droit matériel de l'Acte de 1991.

#### Article premier de l'Acte de 1991 : Définitions

4. L'article 2 de la loi contient des définitions qui sont conformes à celles figurant à l'article premier de l'Acte de 1991. En particulier, la définition du terme "variété" est conforme à la définition de la variété contenue dans l'article 1.vi) de l'Acte de 1991. Il est recommandé d'ajouter "qu'il réponde ou non pleinement aux conditions pour l'octroi d'un droit d'obtenteur" après le mot "connu" afin de reprendre complètement cette définition.

5. Il est également proposé, afin de reprendre complètement la définition du terme "obtenteur" figurant à l'article 1.iv) de l'Acte de 1991, d'ajouter ce qui suit après le terme "variété" : "la personne qui est l'employeur de la personne précitée ou qui a commandé son travail, lorsque la législation de la Malaisie prévoit que le droit d'obtenteur lui appartient, ou l'ayant droit ou l'ayant cause de la première ou de la deuxième personne précitée, selon le cas;"

#### Article 2 de l'Acte de 1991 : Obligation fondamentale des Parties contractantes

6. La loi prévoit la protection des droits des obtenteurs, ce qui satisfait à l'obligation fondamentale des Parties contractantes énoncée à l'article 2 de l'Acte de 1991.

#### Article 3 de l'Acte de 1991 : Genres et espèces devant être protégés

7. La loi n'indique pas les genres et espèces devant être protégés. Il convient de noter que, en vertu de l'article 3.2)i) de l'Acte de 1991, lorsqu'elle déposera son instrument d'adhésion, la Malaisie sera tenue de communiquer une liste d'au moins 15 genres ou espèces auxquels elle devra appliquer l'Acte de 1991. Il est recommandé de préciser dans le règlement si la loi s'applique à tous les genres ou espèces ou à une liste particulière.

#### Article 4 de l'Acte de 1991 : Traitement national

8. La loi ne contient pas de restriction relative à la nationalité ou au pays de résidence; elle satisfait ainsi aux exigences de l'article 4 de l'Acte de 1991 relatives au traitement national.

#### Articles 5 à 9 de l'Acte de 1991 : Conditions de la protection; nouveauté; distinction; homogénéité; stabilité

9. L'article 14 de la loi prévoit les conditions d'enregistrement des obtentions végétales et d'octroi du droit d'obtenteur. L'article 14.1), qui renvoie à l'article 16 relatif à la dénomination des variétés, dispose qu'une "variété végétale est enregistrée en tant

qu'obtention végétale et fait l'objet d'un droit d'obtenteur si elle est nouvelle, distincte, homogène et stable", ce qui est conforme aux conditions prévues à l'article 5 de l'Acte de 1991.

10. L'article 14.2) de la loi dispose que "nonobstant l'alinéa 1), lorsqu'une variété végétale est produite, ou découverte et mise au point par un agriculteur, une communauté locale ou une population autochtone, cette variété végétale peut être enregistrée en tant qu'obtention végétale et faire l'objet d'un droit d'obtenteur si elle est nouvelle, distincte et identifiable". Cela signifie l'instauration d'un système de protection distinct, que l'on devrait pouvoir différencier clairement du droit d'obtenteur octroyé au titre de l'article 14.1) de la loi qui suit les conditions de protection prévues dans l'Acte de 1991. Étant donné que le droit octroyé au titre de l'article 14.2) de la loi ne s'applique qu'à un groupe particulier de déposants, se rapporte à un objet différent, est assorti de conditions de protection différentes et n'a pas la même durée (voir l'article 32.1)b) de la loi), il serait plus judicieux de lui donner un nom différent et de traiter séparément ce système de protection distinct, par exemple dans une nouvelle partie de la loi.

11. L'analyse de la loi n'est effectuée que du point de vue d'un droit d'obtenteur octroyé conformément aux dispositions de l'Acte de 1991. À cet égard, aucune observation ne sera formulée concernant l'autre droit octroyé sur la base des dispositions de l'article 14.2) et 3)e) et de l'article 32.1)b) de la loi puisque ces dispositions traitent d'un droit différent de celui prévu dans l'Acte de 1991.

12. L'article 14.3)a) de la loi prévoit la condition de nouveauté d'une manière conforme à l'article 6.1) de l'Acte de 1991.

13. L'article 14.3)b) de la loi prévoit la condition de distinction d'une manière conforme à l'article 7 de l'Acte de 1991. Il est recommandé d'ajouter l'explication figurant dans la seconde phrase de l'article 7 de l'Acte de 1991 : "En particulier, le dépôt, dans tout pays, d'une demande d'octroi d'un droit d'obtenteur pour une autre variété ou d'inscription d'une autre variété sur un registre officiel de variétés est réputé rendre cette autre variété notoirement connue à partir de la date de la demande, si celle-ci aboutit à l'octroi du droit d'obtenteur ou à l'inscription de cette autre variété sur le registre officiel de variétés, selon le cas."

14. L'article 14.3)c) de la loi prévoit la condition d'homogénéité d'une manière conforme à l'article 8 de l'Acte de 1991. L'article 14.3)d) prévoit la condition de stabilité d'une manière conforme à l'article 9 de l'Acte de 1991.

15. L'article 15 de la loi intitulé "Interdiction d'enregistrement et d'octroi d'un droit d'obtenteur" contient des dispositions relatives au rejet d'une demande qui ne sont pas compatibles avec l'Acte de 1991. Aux termes de l'article 5 de l'Acte de 1991, le droit d'obtenteur est octroyé lorsque la variété est nouvelle, distincte, homogène et stable, et l'octroi du droit d'obtenteur ne peut dépendre de conditions supplémentaires ou différentes de celles mentionnées ci-dessus, sous réserve que la variété soit désignée par une dénomination convenable, que l'obtenteur ait satisfait aux formalités et qu'il ait payé les taxes dues. Aux termes de l'article 17.1) de l'Acte de 1991, le droit d'obtenteur ne peut être limité que pour des raisons d'intérêt public et non pour des motifs liés à la demande. Il convient également de noter que, comme indiqué à l'article 18 de l'Acte de 1991, le droit d'obtenteur est indépendant de mesures de réglementation du commerce. Par conséquent, il est recommandé de supprimer l'article 15 de la loi ainsi que les renvois audit article figurant dans d'autres

dispositions de la loi, en particulier dans les articles 14.1), 19 et 23.1)c) et d). La matière de l'article 15 pourrait faire l'objet d'un mécanisme juridique distinct de la législation de protection des variétés végétales, qui pourrait être appliqué uniformément à toutes les activités relatives à la commercialisation de variétés, que ces variétés soient ou non protégées.

#### Article 10 de l'Acte de 1991 : Dépôt de demandes

16. La partie III de la loi, en particulier les articles 12, 13, 17 et 18, contient des dispositions qui ont trait au dépôt de demandes.

17. Outre la recommandation de supprimer l'article 15 et tout renvoi à ce même article dans d'autres dispositions de la loi, il est également recommandé que les renseignements requis au titre de l'article 12.1)e), f), g) et h) de la loi ne soient pas considérés comme des conditions supplémentaires pour l'octroi de la protection, ce qui serait contraire à l'article 5.2) de l'Acte de 1991. En effet, l'article 17 de la loi prévoit qu'une date de dépôt sera attribuée à la demande, sous réserve que celle-ci satisfasse aux obligations énoncées à l'article 12. Or, si les obligations énoncées dans l'article 12.1)e), f), g) et h) de la loi devaient être appliquées comme conditions supplémentaires d'octroi de la protection, en cas de non-respect de ces conditions la demande ne recevrait pas de date de dépôt et serait donc rejetée.

#### Article 11 de l'Acte de 1991 : Droit de priorité

18. La loi ne contient pas de disposition relative au droit de priorité comme l'exige l'article 11 de l'Acte de 1991. Le titre "Droit de priorité" de l'article 18 de la loi est trompeur puisque cet article ne traite pas des obligations énoncées à l'article 11 de l'Acte de 1991. Il est recommandé de supprimer le titre de l'article 18 "Droit de priorité" et de regrouper cet article et l'article 17 sous le titre "Date de dépôt". Il est également proposé d'incorporer à la loi un nouvel article "Droit de priorité" reprenant les dispositions de l'article 11 de l'Acte de 1991.

#### Article 12 de l'Acte de 1991 : Examen de la demande

19. Les articles 19, 20 et 21 de la loi contiennent des dispositions relatives à l'examen des variétés candidates qui sont conformes à l'article 12 de l'Acte de 1991, sous réserve de la suppression recommandée du renvoi à l'article 15 qui figure dans l'article 19 de la loi.

20. Concernant l'obligation de dépôt d'échantillons prévue à l'article 27 de la loi, il est recommandé de préciser dans la loi, ou dans les dispositions du règlement d'application relatives aux questions d'examen, que le dépôt d'échantillons est requis aux fins mentionnées dans les articles 12 et 22.1)b)i) de l'Acte de 1991, et non à titre de condition supplémentaire d'octroi de la protection.

#### Article 13 de l'Acte de 1991 : Protection provisoire

21. La loi ne prévoit pas de protection provisoire. Il est recommandé d'y inclure des dispositions conformes à l'article 13 de l'Acte de 1991.

### Article 14 de l'Acte de 1991 : Étendue du droit d'obtenteur

22. L'article 30 de la loi contient des dispositions essentielles concernant l'étendue du droit d'obtenteur qui sont conformes à l'article 14.1), 2) et 5) de l'Acte de 1991. Il est recommandé de reformuler la première phrase de l'article 30.1) comme suit : "Sous réserve de l'article 31, l'autorisation de l'obtenteur est requise pour les actes suivants accomplis à l'égard du matériel de reproduction ou de multiplication de la variété végétale enregistrée pour laquelle le droit est octroyé : ...". Cette proposition de libellé est conforme aux dispositions de l'article 14.1) de l'Acte de 1991 et correspond aux dispositions relatives à l'atteinte au droit d'obtenteur figurant dans l'article 47 de la loi. Il est également proposé de supprimer de l'article 30.2)a) de la loi la mention du "matériel de reproduction ou de multiplication de la variété végétale enregistrée" et d'ajouter à la fin de ce même article "à moins que l'obtenteur ait raisonnablement pu exercer son droit en relation avec ledit matériel de reproduction ou de multiplication", ce qui correspond à l'article 14.2) de l'Acte de 1991.

23. Pour ce qui est des variétés essentiellement dérivées, l'article 30.2)b) de la loi reprend les dispositions de l'article 14.5)i) de l'Acte de 1991 et l'article 2 de la loi contient une définition de la notion de variété essentiellement dérivée qui est conforme à l'article 14.5)b) de l'Acte de 1991. Afin de reprendre complètement l'explication relative aux variétés essentiellement dérivées, il est recommandé d'ajouter le texte de l'article 14.5)c) de l'Acte de 1991 "Les variétés essentiellement dérivées peuvent être obtenues, par exemple, par sélection d'un mutant naturel ou induit ou d'un variant somaclonal, sélection d'un individu variant parmi les plantes de la variété initiale, rétrocroisements ou transformation par génie génétique."

### Article 15 de l'Acte de 1991 : Exceptions au droit d'obtenteur

24. L'article 31 de la loi contient, avec quelques divergences mineures, les dispositions essentielles de l'article 15 de l'Acte de 1991. Dans l'article 31.1)c), il est recommandé de remplacer "aux sous-alinéas a) à g) de l'article 30.1)" par "à l'article 30.1) et 2)a)", et également de remplacer la dernière partie "ces autres variétés végétales sont essentiellement dérivées de la variété végétale enregistrée" par "les dispositions de l'article 30.2)b), c) et d) s'appliquent."

25. En ce qui concerne l'article 31.1)d) de la loi, il est recommandé d'appliquer l'exception prévue à l'article 15.2) de l'Acte de 1991 : "dans des limites raisonnables et sous réserve de la sauvegarde des intérêts légitimes de l'obtenteur". Cela est en partie assuré par l'article 60.2)d) de la loi, qui prévoit une définition de la notion de "petit agriculteur" dans le règlement d'application.

26. Il est recommandé de supprimer l'article 31.1)e) de la loi car l'échange de matériel protégé à des fins de reproduction ou de multiplication ne serait pas couvert par les exceptions au titre de l'article 15 de l'Acte de 1991.

27. Il est recommandé de transférer le contenu de l'article 31.1)f) de la loi dans les articles 36 et 37 relatifs aux licences obligatoires, car la situation décrite semble relever de la restriction du droit d'obtenteur pour des raisons d'intérêt public.

### Article 16 de l'Acte de 1991 : Épuisement du droit d'obtenteur

28. Les dispositions relatives à l'épuisement du droit d'obtenteur prévues à l'article 16 de l'Acte de 1991 figurent dans l'article 31.2) de la loi.

### Article 17 de l'Acte de 1991 : Limitation de l'exercice du droit d'obtenteur

29. Les articles 36 et 37 de la loi contiennent des dispositions relatives aux licences obligatoires. Il est recommandé de modifier l'article 36.1) pour n'y inclure que les cas d'intérêt public. En particulier, à propos de l'article 36.1)b), on notera que l'Acte de 1991 n'oblige pas l'obtenteur à produire dans le pays la variété protégée : il peut, au lieu de cela, choisir d'importer la variété protégée.

30. L'article 18 de l'Acte de 1991 exige que le droit d'obtenteur soit indépendant des mesures adoptées en vue de réglementer la production, le contrôle, la commercialisation, l'importation ou l'exportation du matériel des variétés. Il est donc recommandé de supprimer l'article 34 et les sous-alinéas a) et b) de l'article 36.1) de la loi.

31. L'article 36.4) de la loi prévoit qu'"une somme raisonnable" doit être versée par le détenteur de la licence au titulaire du droit d'obtenteur à titre de redevance. Ce point est conforme à l'obligation de rémunération équitable prévue à l'article 17.2) de l'Acte de 1991.

### Article 18 de l'Acte de 1991 : Réglementation économique

32. Sous réserve des recommandations relatives aux articles 12, 15, 34 et 36.1)a) et b) de la loi, celle-ci ne semble pas contenir de dispositions contraires à l'article 18 de l'Acte de 1991.

### Article 19 de l'Acte de 1991 : Durée du droit d'obtenteur

33. Les articles 32 et 33 de la loi portent sur la durée du droit d'obtenteur. Les modifications suivantes sont recommandées : supprimer dans l'article 32.1) la référence au "dépôt d'une demande". L'article 19 de l'Acte de 1991 exige que la durée du droit d'obtenteur soit calculée à partir de la date d'octroi ou, en l'occurrence, de la date d'enregistrement.

34. L'article 32.1)b) de la loi traite de la durée du droit d'obtenteur pour une variété végétale qui est nouvelle, distincte et identifiable. Comme recommandé au paragraphe 10 ci-dessus, il est suggéré qu'un nom distinct soit donné au titre octroyé selon ces conditions qui diffèrent des conditions et de la durée du droit d'obtenteur régi par l'Acte de 1991.

35. Concernant l'article 32.2) de la loi, il est recommandé de remplacer l'expression "peut enregistrer" par "enregistre", pour traduire l'obligation faite par l'article 19.2) de l'Acte de 1991, et d'ajouter à la fin de l'alinéa le membre de phrase "à compter de la date d'enregistrement".

#### Article 20 de l'Acte de 1991 : Dénomination de la variété

36. L'article 16 de la loi reprend les dispositions essentielles de l'article 20 de l'Acte de 1991 relatives à la dénomination des variétés. Il est recommandé d'ajouter certaines dispositions manquantes correspondant à l'article 20.1)b), 4), 5) et 6) de l'Acte de 1991 afin de reprendre complètement les dispositions relatives à la dénomination des variétés.

37. Il est proposé d'insérer au début de l'article 16.1)d) le texte de l'article 16.2)d) de la loi après l'avoir modifié comme suit : "ne doit pas être susceptible d'induire en erreur ou de prêter à confusion sur les caractéristiques, la valeur ou l'identité de la variété ou sur l'identité de l'obteneur de la variété végétale. Elle doit notamment ...".

38. Il est proposé d'ajouter dans l'article 16.5) de la loi les mots soulignés ci-après : "la dénomination d'une variété végétale enregistrée est utilisée lorsque le matériel de reproduction ou de multiplication de la variété végétale est offert à la vente à titre commercial ou commercialisé...". Concernant l'article 16.6) de la loi, il est également recommandé de supprimer "à titre commercial" et d'ajouter juste après les mots supprimés "ou commercialise". Le membre de phrase ci-après devrait être inséré à la fin de l'article 16.6) : "pour autant que des droits antérieurs ne s'opposent pas à cette utilisation."

#### Article 21 de l'Acte de 1991 : Nullité du droit d'obteneur

39. L'article 39 de la loi énonce les motifs de nullité du droit d'obteneur. L'article 39.2)c) et 3) couvre le motif de nullité du droit d'obteneur exigé par l'article 21.1)iii) de l'Acte de 1991. Les motifs de nullité prévus par l'article 21.1)i) et ii) de l'Acte de 1991 n'apparaissent pas dans la loi. L'article 39.4) de la loi ne semble pas pertinent pour la protection des variétés végétales.

40. Il est recommandé de modifier les motifs de nullité prévus par la loi afin qu'elle ne contienne pas d'autres motifs que ceux visés à l'article 21.1) de l'Acte de 1991. L'article 21.2) de l'Acte de 1991 exclut tout autre motif de nullité.

41. Afin d'énoncer les effets d'une décision de nullité, il conviendrait d'ajouter, à l'article 40.2) de la loi, après le terme "nul", le membre de phrase suivant : "et réputé n'avoir jamais été octroyé". Le membre de phrase "à compter de la date d'octroi du droit d'obteneur" devrait donc être supprimé.

#### Article 22 de l'Acte de 1991 : Déchéance de l'obteneur

42. L'article 41 de la loi énonce les motifs de déchéance d'un obteneur. L'article 41.1)a) correspond aux motifs de déchéance prévus à l'article 22.1)b)i) de l'Acte de 1991.

43. L'article 41.1)b) de la loi correspond aux motifs de déchéance prévus à l'article 22.1)b)ii) de l'Acte de 1991.

44. L'expression "d'uniformité et de stabilité" devrait être ajoutée après le mot "condition" à l'article 41.1)c) de la loi afin que celui-ci reprenne complètement les motifs de déchéance prévus à l'article 22.1)a) de l'Acte de 1991.

45. Les motifs de déchéance prévus à l'article 22.1)b)iii) de l'Acte de 1991 ne figurent pas dans la loi.

46. L'article 41.1)d) et e) de la loi contient de nouveaux motifs de déchéance qui sont contraires à l'impératif de l'article 22.2) de l'Acte de 1991, lequel exclut tous autres motifs que ceux prévus à l'article 22.1) dudit Acte. L'article 41.6)b) de la loi concerne l'autorisation de produire une variété végétale pour des raisons d'intérêt public une fois l'enregistrement annulé. Cette disposition nécessite un éclaircissement car, en cas d'annulation de la protection, la variété tombe dans le domaine public et il n'est plus nécessaire d'obtenir une autorisation pour produire cette variété.

#### Article 30 de l'Acte de 1991 : Application de la Convention

47. L'article 30.1)i) de l'Acte de 1991 exige que les Parties contractantes "[prévoient] les recours légaux appropriés permettant de défendre efficacement les droits d'obtenteur". Les articles 47 à 49 de la loi contiennent des dispositions relatives aux atteintes au droit d'obtenteur et prévoient qu'elles peuvent donner lieu à poursuites, injonctions et dommages-intérêts. Les articles 53 à 56 de la loi décrivent les pouvoirs dont sont investis les services chargés de faire respecter la loi. La loi est donc conforme à l'article 30.1)i) de l'Acte de 1991.

48. L'article 30.1)ii) de l'Acte de 1991 exige que les Parties contractantes "[établissent] un service chargé d'octroyer des droits d'obtenteur [...]". L'article 4.1)c) de la loi prévoit que cette fonction sera remplie par le Bureau des variétés végétales (*Plant Varieties Board*). La loi est donc conforme à l'article 30.1)ii) de l'Acte de 1991.

49. L'article 30.1)iii) de l'Acte de 1991 exige que les Parties contractantes publient les informations relatives aux demandes et à l'octroi des droits d'obtenteur ainsi qu'aux dénominations proposées et approuvées. L'article 22 de la loi impose la publication de la demande d'enregistrement d'une obtention végétale et d'octroi d'un droit d'obtenteur. L'article 28.1)c) de la loi dispose que l'enregistrement de l'obtention végétale et l'octroi d'un droit d'obtenteur doivent être publiés dans le bulletin officiel. Les dispositions relatives à la publication ne mentionnent pas expressément la publication des dénominations proposées et enregistrées. Il est recommandé de préciser ce point dans le règlement d'application. Sous réserve de cette précision, la loi répond aux exigences de l'article 30.1)iii) de l'Acte de 1991.

#### Conclusion générale

50. Pour le Bureau de l'Union, la loi, dans ses principales dispositions, reprend la plupart des dispositions de l'Acte de 1991. Il est recommandé que la loi soit complétée et modifiée, comme exposé dans le présent document, afin de remédier aux divergences par rapport à une stricte conformité. Comme expliqué aux paragraphes 10 et 11 ci-dessus, les droits octroyés au titre de l'article 14.2) de la loi ne relèvent pas de l'Acte de 1991, puisqu'ils concernent un groupe particulier de déposants, un objet différent, des conditions de protection différentes et une durée du droit différente. Pour éviter d'entraver l'application des dispositions de l'Acte de 1991, il est donc nécessaire d'étudier attentivement l'incidence que pourrait avoir la protection de variétés au titre de l'article 14.2) de la loi sur la protection octroyée au titre de l'article 14.1) de celle-ci. Afin d'instaurer des mécanismes de protection impartiaux et transparents, il est recommandé de séparer de façon claire les dispositions traitant de ce droit



particulier des dispositions élaborées sur la base de l'Acte de 1991. La nécessité d'effectuer cette séparation et les ajustements qui en découlent apparaîtra de manière encore plus évidente lors de la rédaction des modifications qu'il est recommandé d'apporter à la loi, par exemple en ce qui concerne l'étendue du droit d'obtenteur et les motifs de nullité et de déchéance.

*51. Le Conseil est invité à :*

*a) prendre note des renseignements ci-dessus;*

*b) rendre une décision positive concernant la conformité de la loi de 2004 sur la protection des obtentions végétales de la Malaisie avec les dispositions de l'Acte de 1991 de la Convention internationale pour la protection des obtentions végétales. Toutefois, cette loi requiert encore quelques dispositions complémentaires et modifications, exposées dans le présent document, afin d'être pleinement conforme à l'Acte de 1991; une fois ces dispositions complémentaires et modifications incorporées à la loi à la satisfaction du Bureau de l'Union, en concertation avec le président du Conseil, la Malaisie pourra déposer son instrument d'adhésion à l'Acte de 1991;*

*c) demander au Bureau de l'Union de proposer son aide au Gouvernement de la Malaisie pour rédiger les dispositions complémentaires et les modifications requises;*

*d) autoriser le Secrétaire général à informer le Gouvernement de la Malaisie de cette décision.*

[Les annexes suivent]

ANNEXE I

**Traduction d'une lettre datée du 10 novembre 2004**

**adressée par :** DATO HJH. KHAMSI AH BT. HJ. MUHAMMAD  
Vice-directeur général  
Département de l'agriculture de la Malaisie  
Kuala Lumpur  
Malaisie

**à :** M. Rolf Jördens,  
Secrétaire général adjoint de l'UPOV  
34, chemin des Colombettes  
CH-1211 Genève 20 (Suisse)

**Objet :** Demande d'examen préliminaire de la loi de 2004 sur la protection des obtentions végétales de la Malaisie

Monsieur le Secrétaire général adjoint,

Suite au bref entretien que les délégués de la Malaisie ont eu avec M. Makoto Tabata, conseiller principal de l'UPOV, à la récente trente-huitième session ordinaire du Conseil de l'UPOV tenue le 21 octobre 2004 à Genève (Suisse), j'ai l'honneur d'informer le Conseil de l'UPOV que la Malaisie a l'intention de rejoindre au plus tôt la grande famille de l'Union.

En attendant le dépôt d'une candidature officielle, je saurais gré au Conseil de l'UPOV de bien vouloir mener un examen préliminaire de la loi de 2004 sur la protection des obtentions végétales de la Malaisie et nous donner son avis quant à la conformité de notre loi vis-à-vis des dispositions de l'Acte de 1991 de la Convention UPOV.

Nous vous remercions de votre généreuse assistance et coopération.

(Signé :)  
DATO HJH KHAMSI AH BT. HJ. MUHAMMAD

[L'annexe II suit]

ANNEXE II / ANNEX II / ANLAGE II / ANEXO II

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

ARRANGEMENT OF SECTIONS

PART I

PRELIMINARY

Section

1. Short title and commencement
2. Interpretation

PART II

PLANT VARIETIES BOARD

3. Establishment of the Board
4. Functions and powers of the Board
5. Membership of the Board
6. Alternate member
7. Meetings of the Board
8. Board may invite others to meetings
9. Provision of facilities by Ministry
10. Plant Varieties Fund
11. Expenditure to be charged on the Fund

PART III

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

12. Application for registration of new plant variety and grant of breeder's right
13. Persons who may apply for registration of new plant variety and grant of breeder's right
14. Conditions for registration of new plant variety and grant of breeder's right
15. Prohibition of registration and grant of breeder's right
16. Denomination of a new plant variety
17. Filing date
18. Right of priority
19. Preliminary examination
20. Request for substantive examination
21. Substantive examination
22. Application for registration of new plant variety and grant of breeder's right to be published
23. Opposition to application for registration of a new plant variety and grant of breeder's right

24. Reply by applicant
25. Filing of documentary evidence in support
26. Failure to file documentary evidence
27. Deposit of samples
28. Registration of new plant variety and grant of breeder's right
29. Register

#### PART IV

##### RIGHTS, LIMITATIONS AND DUTIES OF A HOLDER

30. Scope of breeder's right
31. Limitations of breeder's right
32. Duration of breeder's right
33. Extension of duration of breeder's right
34. Availability of propagating material
35. Duties of a holder

#### PART V

##### COMPULSORY LICENCE

36. Compulsory licence
37. Scope and conditions of compulsory licence
38. Termination of compulsory licence

#### PART VI

##### INVALIDATION, REVOCATION, SURRENDER AND ASSIGNMENT OR TRANSMISSION

39. Invalidation of breeder's right
40. Date and effect of invalidation
41. Revocation of breeder's right
42. Surrender of breeder's right
43. Assignment or transmission of breeder's right

#### PART VII

##### APPEALS

44. Appeals
45. Appeal-Board
46. Decision of the Minister

#### PART VIII

##### INFRINGEMENT

47. Acts deemed to be infringement

48. Infringement proceedings
49. Injunction and award of damages

## PART IX

### OFFENCES

50. Offence with respect to furnishing any false or misleading particular, *etc.*
51. Offence with respect to contravention of terms and conditions and use of samples without permission
52. Offence by body corporate

## PART X

### ENFORCEMENT

53. Authorization of officers
54. Power of enforcement
55. Power of investigation
56. Additional powers

## PART XI

### MISCELLANEOUS

57. Institution of prosecution
58. Jurisdiction to try offences
59. Protection of officers
60. Regulations

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

[Fin de l'annexe II et du document/  
End of Annex II and of document/  
Ende der Anlage II und des Dokuments/  
Fin del Anexo II y del documento]