14 Commentary on the Malaysian Protection of New Plant Varieties Act 2004

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Novel conditions of protection for new plant varieties bred by farmers, local communities or indigenous peoples

The Malaysian Protection of New Plant Varieties Act 2004 includes two alternative sets of conditions for granting plant breeders’ rights (PBR). First, the act sets out a more familiar set of conditions, found in many countries’ PBR laws, that mandate that, to be eligible for protection, varieties must be new, distinct, uniform and stable (Article 14(1)). A second, alternative set of conditions applies if the application for protection is for a variety that has been ‘bred, discovered and developed by a farmer, a local community or indigenous people.’ These varieties must be ‘new,’ ‘distinct’ and ‘identifiable’ to qualify for protection (Article 14(2)). The act did not come into force until 2007, and the regulations pursuant to the act came into force in 2008.

The definitions for new, distinct, uniform and stable are very similar to those definitions contained in other countries’ PBR laws and have been discussed elsewhere in this book, so for this reason they are not reproduced in this chapter. Identifiability, on the other hand, is a relatively novel concept, and, thus, it will be considered in more detail. The act states that a plant variety is identifiable when:

1. 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;
2. such characteristics can be identified by any person skilled in the relevant article (Article 14(e)).

These conditions were derived from the US Plant Patent Act in 1930. Under this system of protection, whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated spores, mutants, hybrids and newly found seedlings, other than a tuber-propagated plant or a plant found in an uncultivated state, may obtain a patent. According
to the US Patent and Trademark Office, asexual reproduction is used to establish the stability of the plant. Acceptable modes of asexual reproduction could include rooting, cutting, apomictic seeds, division, layering, runners, tissue culture, grafting and budding, bulbs, slips, rhizomes, corms and nucellar embryos. Confining it to asexually producing plants, it was not necessary to explicitly include the stability requirement in the American plant patent law – stability is biologically built-in to these particular varieties. In addition, the invention would have to be nonobvious – that is, not obvious to one who is skilled in the art at the time of invention by the applicant (US Patent and Trademark Office 2010).

The Malaysian Protection of New Plant Varieties Act 2004 is not explicitly limited in application to asexually reproducing plants, which reflects the fact that the drafters and law makers were interested in extending the conditions of protection inspired by the US Plant Patent Act to sexually propagated cereals and vegetables. However, it is noteworthy in this context that the act specifies that varieties satisfying the new, distinct and identifiable criteria ‘may’ be registered as a new plant variety, and granted a breeder’s right’ (Article 14(2); emphasis added). The act does not preserve the same discretion on the part of the Plant Varieties Board with respect to varieties that are new, distinct, uniform and stable, and it does state that such varieties ‘shall be registered as a new plant variety and granted a breeder’s right’ (Article 14(1); emphasis added). The drafters of the act fully appreciated that there was no precedent for the operation of these newly combined conditions of new, distinct and identifiable for sexually reproducing plants. They included the word ‘may,’ therefore, in order to provide flexibility to respond to unknowns that could arise when it came to the nuts and bolts of implementation. In the years since the act was passed into law, the Plant Variety Board has considered limiting applications from farmers, local communities or indigenous peoples for asexually reproducing plants.

These alternative criteria – new, distinct and identifiable – respond to the situation on the ground in Malaysia, at least as far as tropical fruit trees are concerned. There are many tropical plant varieties in Malaysia that have been discovered in farmers’ fields and that have been propagated by grafting, including, in particular, tropical fruit trees such as durian, mango, guava and rambutan. These fruit trees have long gestation periods, and it would have placed a heavy burden on the farmer (in terms of time and delayed benefits) to ask him to establish their intergenerational stability. Under these circumstances, it is more practical for examiners to determine the novelty of the claimed plant and to ascertain whether its characteristics are distinct and nonobvious to a person skilled in the relevant art. The advantage of this system – at least in theory – is that it cuts down on testing time (for stability and uniformity) and allows farmers the ability to gain protection and to go to the market with their new varieties almost immediately following the discovery in their fields.
Under the Malaysian law, the rights conferred on the registered owners of the new varieties are identical to those contained in the PBR laws of other countries with one exception. Taking effect from the filing date of the application for registration, the breeders' rights 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’ (Article 32(1)). The shorter period of protection for these latter varieties is justified due to the fact that there is no need for intergenerational testing of stability and therefore there is likely to be less investment and less delay in granting farmers their rights.

The act defines a local community as ‘as a group of individuals having settled together who are continuously inheriting production processes and culture, or a group settled in a village or area in a eco-cultural system.’ A farmer is a person who:

- cultivates crops by cultivating the land himself;
- cultivates crops by directly supervising the cultivation of land through any other person; or
- 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.

The act does not include a definition of indigenous peoples other than to note that they are aborigines and/or natives as defined in the federal constitution. A breeder is defined as ‘a person who has bred or has discovered and developed any plant variety.’ To ‘discover and develop,’ in turn, is defined as ‘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’ (Article 2).

**Application for plant breeders’ rights: proof of prior informed consent to use ‘traditional varieties’**

In addition to adapting intellectual property rights protection for varieties bred by a farmer, local community or indigenous peoples, the Malaysian law also creates a form of access and benefit-sharing protection for local communities and indigenous peoples vis-à-vis plant varieties. Applications for breeders’ rights under the act must be ‘accompanied with the prior written consent of the authority representing the local community or the indigenous peoples in cases where the plant variety is develop from traditional varieties’ (Article 12(1) (f)). Here again, the law engages the issue of how to define varieties developed by farming communities and indigenous peoples. Traditional varieties are not defined in the act per se. However, the intention behind the use of the term in Article 12(1)(f) is meant to refer to a definite subgroup of material and not to
extend to all materials grown by farmers or on farmers’ lands (which is another possible way of approaching the issue with an access and benefit-style protection of this nature).

Ultimately, the Plant Varieties Board will have to provide guidance on what is meant by a traditional variety, as it was intended in the act’s overall scheme, including the conditions that presumably need to be satisfied before a variety can be recognized as such. In addition to providing such a definition, the Plant Varieties Board will also need to provide guidance on how to identify those individuals who have the authority to represent local communities or indigenous peoples for the purposes of seeking their prior informed consent. The Plant Varieties Board should also provide a standard format for a legally binding document expressing prior informed consent. Ultimately, it may be helpful if the board also considers creating a national list of all such traditional varieties in order to reduce the transactions between developers using those varieties and the communities and peoples whose rights need to be protected. Such a list would be created pursuant to the prior informed consent requirement of Article 12(3)(f).

If the Plant Varieties Board did create such a list, the definition of traditional varieties could include elements that have been proposed under the revised draft provisions for the protection of traditional knowledge published by the World Intellectual Property Organization (WIPO) in 2006 (WIPO 2006). These elements define traditional varieties as those varieties that have been

- developed, conserved and used in a traditional and intergenerational context;
- distinctively associated with a local or indigenous community that conserves and uses the varieties between generations;
- integral to the cultural identity of an indigenous or local community that is recognized as holding the varieties through a form of custodianship, guardianship, stewardship, collective ownership or cultural responsibility;
- identified as having distinctive functional traits such as taste, aroma, cooking quality, colour and medicinal values that are associated with the culture of the local communities.

The act’s definition of local community and indigenous peoples, coupled with WIPO’s criteria for traditional varieties, could provide the legal certainty that is necessary to make Article 12(3)(f) operational. An example of how this could be applied can be found in the Bario rice varieties of the Kelabit highlands of Sarawak. A formal breeder using the Bario rice varieties of the Kelabit community for the development of a new plant variety would require the prior informed consent of the authority representing the
Kelabit community if the breeder wanted to apply for the new plant variety registration.

Policy rationale

The policy rationale for the Protection of New Plant Varieties Act 2004 is to provide not only for the protection of breeders’ rights for new plant varieties but also for the recognition and protection of the contributions made by farmers, local communities and indigenous peoples in creating new plant varieties as well as in encouraging investment in breeding new plant varieties in both the public and private sectors. Given that the Department of Agriculture in Malaysia has been registering fruit clones since the early 1930s and that most of these clones have been discovered and selected in farmers’ fields, the act will continue to support such efforts by farmers and to provide them with an easy legal and administrative mechanism under which to register their new plant varieties and acquire breeders’ rights. The act also takes note of the fact that there are still about 600,000 smallhold farmers engaged in agriculture in Malaysia. It is therefore necessary to provide an opportunity under the act for these smallhold farmers to also be able to apply for breeders’ rights. Thus, the act must not limit propagation by smallhold farmers who have used harvested material of the registered plant variety planted on their own holding, exchanged reasonable amounts of propagating materials among smallhold farmers and sold farm-saved seeds in situations where nonusage is beyond the control of the farmer.

State of implementation

The Protection of New Plant Varieties Act 2004 came into force in January 2007. The Protection of New Plant Varieties Regulations 2008 entered into force in October 2008. Some crop-specific guidelines for testing for distinctness, uniformity and stability have been developed. So far, no such guidelines have been developed for identifiability under the act. The application form that has been developed for registering new plant varieties includes the requirement of a letter of consent from the authority representing the local community or indigenous peoples that is making the application in cases where the plant variety is developed from traditional varieties (Malaysian Department of Agriculture 2010).

As of April 2010, 43 applications for the registration of new plant varieties and request for breeders’ rights have been accepted by the Crop Quality Control Division in the Plant Variety Protection Registration Office at the Department of Agriculture in Malaysia. The office is currently conducting substantive examinations with respect to these applications. To date, there have yet to be
any applications for protection from farmers, local communities, and indigenous peoples.

Conclusion

The Malaysian Protection of New Plant Varieties Act 2004 represents an attempt – in the context of a plant variety protection law – to provide support for farmers, local communities and indigenous peoples as the conservers and innovators of plant genetic resources. The administrative guidelines to implement the novel aspects of this law are slowly being worked out. Ongoing experiences in the early days of implementation will provide lessons and insights for further improvement and refinement.

Notes

3 To be patentable, the following are also required:
   • that the plant was invented or discovered and, if discovered, that the discovery was made in a cultivated area;
   • that the plant is not a plant which is excluded by statute, where the part of the plant used for asexual reproduction is not a tuber food part, as with potato or Jerusalem artichoke;
   • that the person or persons filing the application are those who actually invented the claimed plant – that is, discovered or developed and identified or isolated the plant and asexually reproduced the plant;
   • that the plant has not been sold or released in the United States of America more than one year prior to the date of the application;
   • that the plant has not been enabled to the public – that is, by description in a printed publication in this country more than one year before the application for patent with an offer to sale or by release or sale of the plant more than one year prior to application for patent;
   • that the plant be shown to differ from known, related plants by at least one distinguishing characteristic, which is more than a difference caused by growing conditions or fertility levels, and so on;
   • the invention would not have been obvious to one skilled in the art at the time of invention by the applicant (US Patent and Trademark Office 2010).
4 The rights conferred are very similar to those in the plant variety protection laws of other countries, so are not described in this chapter. It is interesting to note, however, that the law creates exemptions for ‘small farmers’ to plant back – in other words, exchange ‘reasonable amounts’ of propagating materials of protected varieties (Article 31(d) and (e)). It also allows small farmers to sell farm-saved seeds in situations where they cannot make use of those seeds as a result of a natural disaster or other circumstances beyond their control, as long as the amount sold is not more than what the farmers would need for his own holdings (Article 31(1)(f)). The act defines a small farmer as one ‘whose farming operations do not exceed the size as prescribed by the Minister of Agriculture of Malaysia’ (Article 2).
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References

