

Comparison of the Key Provisions in the Malaysian PNPV Act 2004 and the Draft Amendment (Act Revised 20XX)

Malaysia has presented to the UPOV Council draft amendments to its Protection of New Plant Varieties (PNPV) Act 2004 [Act 634] to examine conformity with the 1991 Act of the UPOV Convention. As briefly explained in the table below, the effect of the changes is the deletion of critical provisions that would safeguard national interests, prevent biopiracy of local biological resources, enable coherent implementation of national laws and protect the right of small farmers to freely save, exchange and use farm-saved seeds/propagating materials.

Section/Clause	PNPV Act 2004 (Original)	Draft Amendment (Act Revised 20XX)	Some key implications of the proposed amendments
Section 1 (Commencement)	Comes into operation on a date appointed by the Minister.	Minister may appoint different dates for the coming into operation of different provisions. Addition of Section 1(2A): This Act shall be read together with laws relating to plants, genetically modified plants, plant genetic resources, and sanitary/ phytosanitary measures.	While the intent is for this law to be read with other laws, but there is no provision to operationalize the coherence in implementation of national laws with the deletion of the application requirements as contained in Section 12 (b), (e), (f), (g), and (h) as well as the deletion of Section 15.
"Centre"	Defined as any place approved by the Board for the deposit of any sample of seeds or propagating material under section 27.	Definition deleted.	Deleted, corresponding to the deletion of mandatory deposit requirements (Section 27). Both these deletions are problematic as there is no requirement on the breeder to deposit any samples with a centre accessible to the government.
"Small farmer"	Defined based on the size of holding as prescribed by the Minister.	Definition deleted.	Freedom for small farmers to exchange and sell farm saved seeds/propagating materials has been deleted. Hence the definition of small farmer has been deleted.

NEW SECTION: 2A (Genera and Species)	The definition of "plant" referred to "any living organism in the plant kingdom but excludes any micro-organism" (e.g., fungi, bacteria, and algae)	New Section 2A added: Act applies to all plant genera and species, including mushrooms and autotrophic algae.	Implements the UPOV requirement extending protection to all plant species, meaning that Malaysia will no longer have the option of excluding certain genera and species from the scope of protection, such as those that are important for food security. The explicit extension to mushrooms and algae are a concern. (as they are scientifically not plant varieties and not explicitly required by UPOV 1991). Notably, the Canadian PVP regime explicitly excludes bacteria, fungi and algae from protection. ¹ The extension could lead to biopiracy of local biological resources as algae production is taking place in East Malaysia and jeopardise competitiveness of Malaysia's mushroom industry.
Section 4(1) (Board Functions)	(e) Set terms and conditions pertaining to deposited samples (under Sec 27). (f) Impose terms and conditions for research, experimental use, or export of varieties developed from local/indigenous genetic resources. (j) To revoke, surrender, assign or transmit any breeder's right.	(e) Deleted. (f) Deleted. (j amended) To process cancellation , surrender, assign or transmit any breeder's right.	Removes the authority of the Board to impose any conditions on the samples to be deposited (Section 27 on the need to deposit samples has also been deleted), or any other terms and conditions including the export of varieties developed from local/indigenous genetic resources. The Board also does not have the authority to revoke the grant of PVP. With these changes, the government has no authority to revoke the grant of PVP or restrict the exercise of breeder's rights, where there is non-compliance of other national laws or even in the national interest.

¹ <https://inspection.canada.ca/en/plant-varieties/plant-breeders-rights/overview/guide#a5>

Section 12(1) (Application Requirements)	Requires disclosure of (b) method of development, (e) source of genetic material/parental lines, (f) prior written consent of local community/indigenous people for traditional varieties, (g) compliance with access to resources law, and (h) compliance with law regulating GMOs.	All clauses (b), (e), (f), (g), and (h) are deleted. Clause (b) is replaced by: "provide information required for the examination of the conditions of protection established in section 14".	Removal of disclosure requirement sub-paras (e), (f) and (g) means that PVP will be granted without any due diligence as to whether there has been compliance with the ABS Act 2017 as well as the ABS laws of Sabah and Sarawak in terms of sourcing and use of local plant genetic resources for the development of the new plant variety. Once PVP is granted, the ABS Act does not apply (Section 5(2)(h)(ii) of the ABS Act) meaning there is no recourse against the biopirates once PVP is granted. Also undermines implementation of ABS laws of Sabah and Sarawak. Deletion of sub-para (h) also undermines implementation of the Biosafety Act.
Section 14 (Conditions for Protection)	(1) Requires New, Distinct, Uniform, Stable (NDUS). (2) Special provision for variety bred/developed by farmer/local community/indigenous people: requires New, Distinct, and Identifiable (NDI). (3)(e) Defines "identifiable".	(1) Requires New, Distinct, Uniform, Stable (NDUS). (2) New Clause: Granting protection shall not be subjected to any further or different conditions. (3) Definition of "New" refined to explicitly cover disposal "for the purpose of exploitation of the variety". The special NDI requirement (original Sec 14(2)) and the definition of "identifiable" (original Sec 14(3)(e)) are deleted.	Removes the separate, less stringent standard ("Identifiable") applicable to the grant of PVP for varieties bred/developed by farmer/local community/indigenous people. Under the proposed amendments, all varieties must meet the NDUS standard. Deletions will have discriminatory effects on farmers and IPLCs. The farmer-bred and community-evolved varieties, have been developed and maintained through generations of selection and adaptation to local environments, often cannot satisfy the rigid "uniform" and "stable" criteria required under commercial plant variety protection systems. Does not reflect diversity in Msia's agricultural system.
Section 15 (Prohibition)	Prohibits registration/grant if it affects public order/morality or may	Section 15 deleted.	With the deletion of section 15, the government cannot prohibit the grant of PVP to varieties that affect the public order/morality or that has a negative impact on the environment.

	produce a negative impact on the environment.		
NEW SECTION: 15A (Restrictions on Exercise)	Not present.	New Section 15A added: exercise of a breeder's right granted under this Act shall comply with all applicable written laws in particular those relating to: (a) the control of substances; (b) biosafety and the release of genetically modified organism; or (c) access to biological resources and benefit sharing. (2) protection granted does not constitute an authorization for commercial exploitation of the variety, for which the requirements of the corresponding legislation shall be satisfied. (3) exercise of breeder's right may be restricted, where appropriate, in order protect public order or morality, human, animal or plant life or health or to avoid serious harm to the environment.	This section has been added, to replace section 15. But it is ineffective since under the Act there is no way to restrict the exercise of breeder's rights once it has been granted. As mentioned above the authority of the Plant Varieties Board to impose terms and conditions has been removed as has its ability to revoke the grant of PVP. Further Section 15A is about the exercise of breeder's right after the grant of PVP and at the point of commercialisation. But other laws (Dangerous Drugs Act, Biosafety Act, ABS Act etc) regulate use of the varieties and genetic resources at the point of any use/access, even before a PVP application is made and commercialization of the variety. For e.g. the use of local biological resources for the development of new plant variety requires relevant permissions under the ABS Act 2017 as well as under the Sabah and Sarawak ABS laws. Once PVP is granted, according to Section 5(2)(h)(ii) of the ABS Act, the Act no longer applies. So Section 15A cannot effectively replace Section 15 as well as the deletions of disclosure requirements in Section 12. Similarly, Section 12 of the Biosafety Act regulating living modified organisms is clear that there can be no "release activity, or any importation of living modified organisms, or both without the prior approval of the Board". Even the contained use of living

			organisms requires prior notification to be given to the Board using the prescribed forms (Part IV of the Biosafety Act). Non-compliance is an offence under the national law. For these reasons, the existing Sections 12 and 15 of the PNPV requires an applicant to support its application for PVP protection with documents showing compliance with any law regulating the development of plant variety involving genetic modification. In the absence of appropriate documentation, there can be no registration, for it will be a harm to public order and the environment. The proposed new Section 15A does not address these concerns.
Section 23 (Opposition Grounds)	Grounds include non-compliance, entitlement, being contrary to public order/morality, or potentially having a negative environmental impact.	Grounds limited to: (a) Entitlement, and (b) Non-compliance with the Act.	Removal of public order/morality and environmental impact as grounds for opposition.
NEW SECTION: 26B (Provisional Protection)	Not present.	New Section 26B added: Provides provisional protection from the date of publication until the grant of rights. The holder is entitled to equitable remuneration for unauthorized acts during this period.	Section 26B has been added to align the PNPV Act with Article 13 of UPOV 1991. Essentially it is giving the PVP holder the right to enjoy its rights even before the rights are granted.

Section 27 (Deposit of Samples)	Mandatory deposit of samples of propagating material at an approved center upon application approval.	Section 27 deleted.	Mandatory deposit requirement removed. With the deletion of Section 27, nothing in the amended act will require the breeder to deposit samples of seed/propagating materials at a centre accessible by the government. The removal can undermine government's ability to use compulsory license. And in the absence of deposit, once the protection expires, and the breeder withdraws the seeds from the market, they will not be accessible in the country, which amounts to enabling abuse of the PVP system.
Section 31 (Limitations)	Allows - (1)(d) Any act of propagation by small farmers using farm-saved seeds on their own holdings. (1)(e) Any exchange of reasonable amounts of propagating materials among small farmers . (1)(f) Sale of farm-saved seeds by small farmers due to natural disaster or emergency.	Amended (1)(d) Propagation by farmers (removing "small") using farm-saved harvest on their own holdings, <i>provided that this use is within reasonable limits and subject to the safeguarding of the legitimate interests of the rights holder as prescribed in the Regulation. Clauses (1)(e) and (1)(f) are deleted.</i>	The proposed changes allows farmers to save seeds and using them for propagation on the farmers own holding (not just "small farmers"). But this privilege is now restricted by the requirement that the use must be within reasonable limits and subject to safeguarding of breeder's rights (this means that seed saving will be subject to further restrictions). The right of small farmers to exchange and sell seeds (in limited circumstances) for propagating purposes has been removed. The proposed changes remove essential freedoms for small farmers to operate. In the absence of their right to freely use, save, exchange and sell farm-saved seeds, they will not have much defense against legal suits brought against them by commercial breeders, when using protected varieties.
Section 32 (Duration)	(1) Duration takes effect from the filing date . (1)(b) 15 years for NDI variety;	(1) Duration starts from the date of granting of a breeder's rights. Standard duration is twenty (20)	Duration starts from the date of <i>grant</i> (not filing) so the duration of PVP monopoly is much longer. Practically, because of the addition of provisional protection (new

	(1)(a) 20 years for NDUS variety; (2) 25 years for trees or vines.	years , and twenty-five (25) years for trees and vines. The 15-year term for NDI varieties is deleted. Addition of Section 32(2): Board shall publish expiration of rights.	Section 26B) the duration is much longer than stated as the protection begins from the date of publication.
Section 34 (Availability of Propagating Material)	Holder must ensure availability of material within three years from the date of application at a reasonable price.	Section 34 deleted.	Availability requirement removed. With this removal, nothing in the Act guarantees that the holder of PVP will make available the protected varieties at a reasonable price. Deletion also promotes anti-competitive behaviour of breeders, i.e. to protect the variety in Malaysia and obtain exclusive rights, mainly to prevent the development of local breeding in the variety, but with no intention to make available such varieties in sufficient quantities and at affordable prices for the farming community in Malaysia.
Section 35(1) (Duties of Holder)	(1)(a) Maintain at his expense samples deposited at a centre under Section 27.	(1)(a) Deleted.	Duty regarding sample maintenance removed, corresponding to the deletion of Section 27.
Section 36 (Compulsory Licence)	(1) Granted after three years from grant if: (a) Sec 34 (availability) not complied with; OR (b) Excessive importation. (4) Board determines a reasonable sum as royalty.	(1) Granted Only on grounds of public interest. (2) New Clause: Public interest includes food security, natural disaster, health security, pest and disease outbreak. (5) Board determines an equitable remuneration. Addition of Section 36(6): Board	Changes in Section 36 cannot replace the problems created by deleting Section 34. Section 36, is a limited intervention (i.e. not for each registered plant variety), which will only happen at the point of a crisis, and that as well only in the public interest. In contrast, the current Section 34, places an obligation on every breeder of the registered new plant variety to make the plant variety available. And if the breeder does not make it available,

		shall publish compulsory licensing.	Section 41 of the existing Act allows the government to cancel the PVP granted to the breeder. This is an important “stick” to prevent the abuse of the extensive rights accorded to the plant breeder, and yet it also has been deleted. Further why delete the existing grounds for issuing CL? In addition to public interest, the existing ground to address excessive importation should be maintained. Otherwise, the breeder may challenge the issuance of CL, arguing that issuing a CL to address excessive importation is not in the public interest.
Section 39 (Invalidation)	(1) Interested person institutes court proceedings . (2) Grounds for invalidation include lack of compliance, false info, or entitlement belonging to another.	Renamed: Nullity of a Breeder’s Right. (1) Application for nullity may be made to the Board (grounds 39(2)(a) and (b)) or to the Court (ground 39(2)(c)). (2) Grounds strictly limited to failure of NDUS conditions at the time of grant (UPOV requirements). Addition of 39(6): No breeder's right shall be declared null and void for reasons other than those referred to in subsection 39(2).	Under the existing PVP Act, any interested person can apply to invalidate the grant if there is non-compliance with the Act (e.g. failure to comply with Section 12 (disclosure), section 27(deposit of sample); section 34 (availability of propagating material). But now, nullity can be sought only for failing to meet the NDUS conditions, and no other grounds are allowed.
Section 41 (Revocation)	(1) Grounds include failure to maintain samples, failure to pay fees, failure to continuously demonstrate conditions, contravention of terms, or unauthorized use of	Renamed: Cancellation of a Breeder’s Right. (1) Grounds include: (a) Uniformity/Stability no longer fulfilled; (b) failure to provide material/info for verifying maintenance of the variety; (c) failure to pay annual fee; (d)	The proposed amendments limits the right of the government to revoke PVP once it is granted.

	samples. (2) Holder given 14 days to show cause.	failure to submit suitable denomination if cancelled. (2) Holder given 30 days to show cause. Addition of 41(7): No breeder's rights shall be declared cancelled for reasons other than those referred to in subsection 41(1).	
Section 51 (Offence)	Offence for contravention of terms/conditions OR use of samples without permission.	Offence only covers contravention of terms/conditions (as holder or compulsory licensee). Offence regarding sample use deleted.	Removal of offence related to use of deposited samples.
Section 60 (Regulations)	(2)(d) Prescribing the size of holding for the purposes of the definition of "small farmer".	(2)(d) Replaced with: To prescribe conditions for the implementation of paragraph 31(1)(d) (farmer's privilege). New Clause (2)(da): To prescribe conditions for the implementation of subsection 32(2) (duration for trees/vines).	Reflects the deletion of the "small farmer" definition and adds regulatory power to define the limits on farmers' ability to save seeds under the new Section 31(1)(d).
NEW SECTION: 60A (Transitional Provisions)	Not present.	New Section 60A added: Addresses how the amended Act handles existing applications, rights granted under the old Act, the continued maintenance of the Register, and the disposal of	The new section requires the disposal of samples deposited under the existing Act. This requirement is entirely illogical and lacks justification. Why should existing seed samples be destroyed when we should be promoting conservation and sustainable use of plant genetic resources.

		samples deposited under the principal Act.	
--	--	---	--