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MISSION PERMANENTE DE LA MALAISIE

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INTERNATIONALES À GENÈVE

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20 May 2024

Mr. Michael Fakhri
Special Rapporteur on the Right to Food,

Dear Mr. Fakhri,

I refer to your letter of 25 March 2024 Ref: AL/MYS/2/2024 concerning the communication sent by the Special Rapporteur on the right to food, on the provisions related to farmers' privileges in the current Malaysian Protection of New Plant Varieties Act 2004 (hereafter referred to as Act 634) and the implementation of the UPOV Convention 1991.

I hereby transmit in the **ANNEX** the response of the Government of Malaysia, to the aforementioned matter.

I wish to extend my appreciation for your understanding and cooperation, and I sincerely hope that the attached response from the Government of Malaysia will be given full consideration.

Please accept the assurances of my highest consideration.

Thank you.

A handwritten signature in black ink, appearing to read 'Nadzirah'.

DATO' NADZIRAH OSMAN
Permanent Representative

**RESPONSE FROM THE GOVERNMENT OF MALAYSIA TO THE COMMUNICATION
SUBMITTED BY SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD ON THE PROVISIONS
RELATED TO FARMERS' PRIVILEGES IN THE CURRENT MALAYSIAN PROTECTION OF
NEW PLANT VARIETIES ACT 2004 (HEREAFTER REFERRED TO AS ACT 634) AND THE
IMPLEMENTATION OF THE UPOV CONVENTION 1991**

1. Additional information and comments on the information received from the Special Rapporteur on the Right to Food, Mr. Michael Fakhri

Some information shared by Mr. Michael Fakhri, Special Rapporteur on the Right to Food, presents different interpretations regarding the provisions related to farmer's privileges in the current Malaysian Protection of New Plant Varieties Act 2004 (hereafter referred to as Act 634) and the implementation of the UPOV Convention 1991. This information is extracted, discussed, and further clarified as follows:

View relating to functions of Act 634 in preserving the farmers' seed system based on farm-saved seeds and the exchange and sale of seeds is crucial to providing smallholder farmers access to seeds (including improved and protected varieties)

(a) Under the current Act, as stipulated in Section 31.(1) on the Limitation of Breeder's Right, the sale of farm-saved seeds of a protected variety is conditional, applying only in situations where the seeds cannot be utilized by small farmers for the next planting on their own land due to natural disasters, emergencies, or other uncontrollable factors. Essentially, under normal conditions, farm-saved seeds should be fully utilized by small farmers on their own land. It is important to note that allowing the sale of farm-saved seeds to others, mostly bought by other small farmers, carries the risk of lower yields due to inadequate attention to ensuring seed quality, such as germination rate, absence of pests and diseases, or genetic degradation. This informal seed trading does not provide a warranty to the user but leaves them bearing in silence the cost resulting from lower yields.

View relating to UPOV Optional Exception

(b) The optional privilege under the UPOV Convention 1991 provides governments with flexibility in deciding on the introduction of limitations to breeder's rights concerning farm-saved seeds in legislation. Governments are free to choose measures that suit their national interests for developing the agricultural industry through breeding. This flexibility allows governments to decide which crops and the amount of seeds of each protected variety are exempted from breeders' rights. Clarification from UPOV has been received with examples relating to this flexibility. For instance, Poland, as a UPOV member country, provides breeder's limitations for potatoes by declaring small farmers to be those with holdings up to 10 hectares. Meanwhile, Japan, also a UPOV member, provided breeders with limitations on farm-saved seeds to all categories of farmers for a few decades in their legislation. With the flexibility provided for in UPOV 1991, Japan recently decided to remove the provision after finding that small farmers, due to smaller land areas, prefer to use breeder's seeds to ensure higher yields and secure better livelihoods. On the other hand, the Japanese impact study on the provision of farm-saved seeds also found that commercial farmers are the group that enjoys the provision of farm-saved seeds because they can invest in facilities to maintain seed quality. It is important to note that UPOV does not interfere with member countries' decisions on defining small farmers in each country.

Thus, each country should tailor its needs according to their own interests.

View relating to UPOV exclusion of farmer breeding techniques like selection

(c) Assuming the term 'selection' mentioned in the information provided entails subsequent activities to ensure the resulting population of plants will express the desired characteristics of being sufficiently uniform and stable, the variety can be protected under legislation parallel to the UPOV Convention 1991. The term 'selection' is reflected in the UPOV Convention 1991 as the actions of being 'discovered and developed'. The selection process is the preliminary stage of breeding, identifying a group of plants with the same distinct characteristics. It needs to be followed through by efforts to propagate the variety, usually through vegetative approaches such as grafting, meristem culture, and growing them through several cycles to maintain the expression of those unique characteristics. The latter part of the activities after selection is particularly vital as the seeds accessed by users must ensure a minimum level of uniformity in certain desired characteristics, which can be higher yields, disease resistance, or climate tolerance.

View relating to exclusion of protected seed use for customary practices under UPOV System

(d) The view regarding the use of seeds of protected varieties for customary practices, such as local seed exchange and familial sharing of harvests, in the provided information provides a blanket conclusion of rejection under the UPOV Convention 1991 without considering the management or use of exchanged or shared seeds after the customary practices. This judging criterion is important as it may lead to different conclusions. For instance, sharing the harvest of a protected variety among neighbours in the form of food or planting material for backyard planting for subsequent self-consumption would not be an offence. It would only require permission from the rights holder if the use of such seeds is carried out on a commercial scale, for which breeders will have no control over the seed quality of their created varieties sold in the market; this could eventually affect their reputation as breeders and in the commercial seed industry.

View relating to the inclusion of other International Treaties

(e) It would not be a contradictory situation to align the Convention on Biological Diversity, Nagoya Protocol, and the International Treaty for Plant Genetic Resources for Food and Agriculture with UPOV as there are UPOV member countries that also fulfill their obligations with the mentioned conventions and treaties.

Conclusion

The Malaysian government's notion to accede to the UPOV Convention 1991 arose earlier than any of the free trade agreements in force today. In 2005, Malaysia sought UPOV's view in examining the current Act and conducted subsequent studies to understand the UPOV system, including taking note of the implementation of plant breeder's rights in neighbouring UPOV member countries such as Vietnam, China, and Japan. Additionally, Malaysia looked into the Indian seed system and made comparisons to gauge its suitability to our country's agricultural conditions.

An important item that has been omitted from the provided information is the situation of our local breeders. Malaysia has a very small breeding industry, with most of the breeding work relying on public research in the early years. Plant breeding is a very costly and time-

consuming task with limited budget allocations. For years, crop prioritization has focused on a very limited number of staple crops and commodity crops. We excel in rice, oil palm, durian, rubber, and cocoa, with very good varieties bred by our own local breeders. These varieties were utilized by farmers without remuneration to our breeders in the early years. One example is our superior black pepper varieties. Our breeders may seek protection of their rights in other countries, but the scope of protection will be subject to the legislation of those countries. Some different protection mechanisms may not be favourable to our variety of creators. For example, protecting a vegetable variety in Malaysia provides 20 years of protection, while protecting our variety in Thailand would only grant 7 years of protection. After the protection period, our variety will be released for free use by the public. However, under the UPOV Convention 1991, a minimum protection period applies to all member countries, and also provisional protection is provided before granting full protection. This mechanism benefits our local breeders in enjoying earlier protection. Through this provision, breeders intending to enter foreign markets will be more comfortable with the familiar and similar protection mechanism. Additionally, sharing varietal information among member countries will enable the detection of the breaking of breeders' rights.

The subject of protection under the PVP Act is a plant variety, which is the output of breeding work. In Malaysia, breeders are unable to access remuneration from their process of developing new varieties as we do not provide a Plant Patent system to protect plant varieties in the country. The source of income for their innovation will be from the sale of new seeds. As a government that acknowledges both farmers' and breeders' efforts in developing the national agricultural industry, we must seek a balance between both to ensure a healthy and sustainable production mechanism.

2. Information on the current PVP system that is being implemented in Malaysia and how it promotes farmers' rights, as articulated in the International Treaty on Plant Genetic Resources for Food and Agriculture.

Farmer's privileges are provided as follows under the current PVP Act:

- Farmers benefit from access to a wide range of genetic resources for their agricultural practices, facilitated by the introduction of various plant varieties developed by breeders worldwide.
- Through Section 14(2) of the PVP Act, farmers are eligible to register their own developed plant varieties, receiving protection for a period of 15 years.
- Farmers are allowed to exchange seeds of protected varieties within reasonable limits among communities.
- In cases of natural disasters, emergencies, or other unforeseen circumstances beyond the control of small farmers, they are permitted to sell farm-saved seeds of protected varieties, thus providing them with necessary flexibility during challenging times.
- Farmers are granted exemptions from breeder's rights, enabling them to freely utilize protected varieties for non-commercial activities, such as cultural and ritual purposes, thus honouring their cultural rights.

The new PVP bill aims to strengthen the human rights aspect of farming with the following proposed amendments:

- Improvement of Section 31 Limitation of Breeder's Right, which will uphold limitations on breeder's rights, allowing farmers to reserve seeds for future planting on their own land and to employ protected varieties for non-commercial purposes, including cultural and rituals, and even used as initial material to breed a new variety and to own it as

their breeder's right.

- Removal of the clause regarding the exchange of seeds for next planting among small farmers under Section 31(1)(e).

Firstly, this provision only applies to protected varieties, not to varieties that have been grown for years and are no longer entitled to protection. Seed exchange practices are uncommon among Peninsular Malaysia farmers but still occur among small farmers in East Malaysia who use traditional varieties. Farmers in Peninsular Malaysia, in interviews, expressed that they prefer to buy a new batch of seeds for each new crop as the storage and maintenance of seeds require skill and suitable weather conditions to ensure germination quality and freedom from pests and diseases.

Under the current Act and ACT 634 Bill in line with UPOV, each small farmer is allowed to produce seeds of protected varieties for their own use within their own holdings, with a reasonable limit decided by the Malaysian government, and not by UPOV. Each farmer should utilize this limitation to access seed sources from the authentic creator and reproduce them for the next planting without permission from breeders, instead of obtaining them from unauthorized seed producers who may not be familiar with the variety and cannot guarantee its performance.

With the Breeder's Rights Limitation, farmers are provided with the opportunity to try out new varieties and make comparisons and evaluations on the superior performance of protected varieties. Most of the time, a protected variety comes with sophisticated ways to maintain its genetic purity to prevent genetic contamination and regression. Reproducing seeds without good quality control in genetics may lead to losses in productivity for oneself, and for others when they are exchanged.

- Removal of Section 14(2) of Act 634 in conjunction with the introduction of a mechanism for registering common crop varieties.

Section 14(2) of ACT 634 was specifically drafted foreseeing that farmers, local communities, and indigenous people may not have the same professional breeding techniques and knowledge to breed a new plant variety that would meet the criteria of a protected variety under Section 14(1). These varieties may have been developed over years and generations to reach the stability of the desired characteristics, either intentionally or unintentionally. Protection under Section 14(2) provides a protection period of 15 years for non-tree and vine categories of varieties, which is 5 years shorter as compared to Section 14(1) of ACT 634.

However, through years of ACT 634 implementation, it was found that varieties developed by farmer breeders are able to meet the requirements under Section 14(1) of ACT 634 and should enjoy the same protection period. The ACT 634 Bill, in line with UPOV 1991, prohibits discrimination based on breeders' ethnicity or occupation but focuses solely on the quality (new, distinct, uniform, and stable) of a new variety.

While Section 14(2) of ACT 634 only requires a new plant variety to be new, distinct, and identifiable, it does not require the variety to be sufficiently uniform and stable. Seed production of protected varieties becomes challenging in ensuring that the end-users receive seeds of good genetic quality for farm production when there is no minimal standard set for variation. Enforcing infringement cases for breeder's rights under Section 14(2) could be challenging when protected varieties exhibit a great number of variations.

In addition to safeguarding farmers' rights in legislation, Malaysia has established a separate plant variety registration system known as the Common Crop Variety

Registration. This system has been extended to cover all crop types since 2012, and records varieties that have been developed, sold, or disposed of within the country. Varieties recorded in this system are classified as varieties of common knowledge, including traditional varieties. As a result, these varieties are no longer eligible for claims of breeder's rights by others under the current Plant Variety Protection Act (ACT 634) or the ACT 634 Bill aligned with UPOV. Such varieties are freely accessible to the public.

A new variety developed by indigenous/traditional farmers is encouraged to be registered under Section 14(1), entitling them to a longer protection period. For a potential new variety that has not achieved sufficient uniformity and stability, further breeding improvement can be done in collaboration with public research agencies for the community's needs. Currently, we record varieties developed by farmer breeders as eligible for protection under Section 14(1) of Act 634, to be as excellent as professional breeders' varieties.

3. Information on the extent to which the PVP system in its current form is compatible or at odds with UPOV 1991.

Malaysia requested a UPOV examination of the current Act back in 2005. The evaluation revealed that most of the Articles outlined in the UPOV Convention 1991 are covered in the Act in recognizing breeders' innovations and upholding a fundamental aspect of human rights by granting a limited period for breeder's rights. However, there are inconsistencies due to additional elements regarding activities on biodiversity, genetically modified organisms, and narcotic items, which were not in place during the enactment of the Act.

In parallel with the UPOV Convention 1991, Act 634 provides:

- The same eligibility for individuals applying for protection.
- Equal protection periods for professional breeders subject to fulfilling the conditions of being new, distinct, uniform, and stable under Section 14(1).
- Similar requirements for a proposed denomination.
- Consistent scope of breeder's rights.
- Matching protection coverage in terms of the form of plant materials and categories.
- Breeder's rights limitations for privately conducted non-commercial activities, experiments, and breeding new varieties that are carried out without continuously relying on protected varieties, recorded under compulsory exemption under UPOV Article.
- Breeder's rights limitations for farm-saved seeds under an optional exemption under the UPOV Article.

However, the provisions of Act 634 which are inconsistent with the UPOV Convention 1991 are as follows:

- Section 14(1) is consistent with UPOV, but Section 14(2) does not comply, as it does not require the conditions of being new, distinct, and identifiable (NDI) for varieties bred, discovered, and developed by farmers, local communities, or indigenous people. This reliance on NDI, based on personal experience rather than scientific proof, may hinder the rights of farmers and indigenous communities by not adequately protecting their varieties, which lack uniformity and stability.
- Section 31(1)(e) permits the exchange of protected varieties' seeds among farming communities within reasonable limits, contrary to UPOV's recommendation. This could lead to a loss of control over seed source tracking and quality by breeders,

affecting their opportunity to sell seeds for remuneration of their breeding investment.

- Section 12(1)(f) mandates obtaining prior written consent from the authority representing the local community or indigenous people when applying for plant breeder's rights for varieties developed from traditional varieties. This is not consistent with UPOV, as a plant variety protection system does not have the purpose of regulating activities involving traditional varieties. Furthermore, activities beyond breeding are governed by the Malaysian Access to Biological Resources and Benefit Sharing Act 2017, which is enacted to oversee activities related to traditional varieties in a more inclusive and comprehensive manner, covering all varieties, including both protected and unprotected ones.
- Section 32(2) offers different protection periods for varieties of non-tree and vine species based on applicant identity, contrary to UPOV's principle of equal protection duration regardless of applicant background in remunerating contributions to agricultural biodiversity.

4. Malaysia's position regarding UPOV Recognition on the connections between formal and informal seed systems in developing nations where agriculture, particularly small scale farming, plays a substantial role in the economy, serving as a significant source of livelihood and employment.

Through our communication with UPOV in meetings, workshops, and bilateral discussions, it is evident that UPOV does not regulate activities under any seed systems. Its primary objective is to provide guidance to member countries regarding the recognition of variety ownership, essentially determining who is responsible for a given variety. It is important to note that UPOV does not grant breeder's rights; this authority lies with the government. UPOV does, however, provide limitations on farm-saved seeds and allows governments to decide whether to include or exclude these limitations based on their country's needs. Additionally, governments determine who qualifies as small farmers within their jurisdiction.

To facilitate the development of varieties bred by indigenous communities and farmers, the Department of Agriculture collaborates with universities, organizations, and associations to conduct continuous programmes. These initiatives aim to educate indigenous communities and farmers about the process of registering plant varieties and to provide assistance in acquiring the knowledge and skills necessary to stabilize desired traits in developed varieties.

5. Action taken by Malaysia in implementing or contemplating to safeguard and promote the rights of farmers, specifically smallholder farmers, during EFTA negotiations.

Malaysia's Act, aligned with UPOV 1991, ensures no breeder rights will be granted for existing common knowledge varieties, thereby allowing free access to these varieties to any farmer. Additionally, the breeder's limitations on farm-saved seeds are applicable to agricultural crops listed with exemptions. Furthermore, varieties bred by farmers will benefit from an equal protection period and scope as those developed by professional breeders.

Note: Negotiations are specifically under the Intellectual Property Rights (IPR) chapter