

A Review on the Proposed Act for the Protection of New Plant Varieties (Breeder's Rights) - A critical Analysis

*H.A.Menaka Harankaha,
Department of Commercial Law*

Abstract

Background

Agreement on Trade Related Aspects of Intellectual Property (TRIPS) to which Sri Lanka also is a signatory, requires member countries to protect plant varieties either by patents or by an effective *sui generis* system. Sri Lanka, in line with the TRIPS Agreement, passed its intellectual property rights Act in the parliament in 2003. However, this law does not have a direct bearing on agro-bio diversity or the right of farmers. In recent past, however, the National Intellectual Property Office has drafted a bill dealing with these rights and presented it for the observation of Ministry of Agriculture on 26.07.2010. In this research, an analysis is made on this draft Act highlighting various impacts of some selected provisions of this proposed law.

A protection for plant varieties is important as the plant breeding requires a long-term efforts and investments hence investors are disappointed to commit in the absence of protection. On the other hand, once a plant breeder releases propagating material of his variety, he loses the ability to profit from his achievement, since others may reproduce and use his variety without recognizing his work. Therefore, it is obvious that a creating a system of exclusive rights of exploitation for plant breeders in a country encourages them to start new plant breeding programs.

On the other hand, Sri Lanka has been recognized as a biodiversity hot spot in view of its uniquely high levels of bio diversity. Sri Lanka is rich in both wild and agro bio diversity. Therefore laws in protecting agro bio diversity of the country and the rights of the farmers are also equally important.

The proposed Bill on protection of new plant varieties (breeder's rights) prepared by the National Intellectual Property Office of Sri Lanka is reviewed in the above backdrop analyzing and balancing the competing interests of both parties.

Methods

For the purpose of this paper, salient sections of the draft Bill are analyzed in different perspectives. Relevant articles of TRIPS, CBD and the UPOV will also be compared and

contrasted for a comparative analysis. Some features of the Plant Varieties and Farmers' Rights Act of India (PPVFR) which are relevant to Sri Lanka will also be analyzed. This research is based on library and on-line research.

Results

In the draft Bill, there are some provisions which need further clarifications. For examples, section 02 deals with criteria for Protection. According to the proposed bill, a new variety shall be accepted if it satisfies requirements such as newness, distinctness, uniformity, stableness, denomination etc. The draft bill provides that *a variety is distinct if it is clearly distinguishable by at least one essential characteristic from any other variety* (emphasis added). It can be argued that this one essential characteristic, which is a requirement in satisfying the distinct nature of the new variety from an existing one, is an easy test to get through by a breeder who is well equipped with modern high technology. Therefore, there is a possibility to produce many "new varieties" which could be almost similar in every respect to an existing plant/variety.

Other significant factor is that the novelty provisions allow for substantial *grace periods*. Here, applicant is entitled for the commercialization of the plant prior to grant without prejudicing the application. For instance, a person can sell a tree or a vine outside Sri Lanka for up to six years before he needs to apply for a plant variety rights. In analyzing section 09, it is obvious that it explains who is eligible to be an applicant. Most probably the applicant is the breeder or his successor or an employer of the person who has bred, developed or discovered the variety. Hence, the only disposals or sales to be taken into account when considering the novelty of a particular variety are those by the applicant himself or with his consent. Sales of materials by a third party who has independently developed the same variety will not render the variety lacking in novelty.

Sub section 9(3) of the proposed Act provides that where there are several independent developers, priorities are accorded to the first to apply. Except farmer's right provisions, no protection is given to an independent developer via **prior user's rights** under the Bill. In such circumstances a monopoly may be granted to a person over an activity or trade of a plant variety which someone else was doing already.

Section 17 provides exhaustion of breeder's rights. This allows second selling of the protected variety without the consent from the right holder subject to two exceptions. A

breeder's right shall not extend to acts concerning any material of the protected variety (a) unless such acts involve further propagation of the variety in question. For example, a person can buy an ornamental plant from a plant seller which is a protected variety and uses it any manner without *commercializing* it. Then a problem would arise whether a person is able to produce hundred of plants from that by way of producing and using propagated material and use them by himself and distribute them *in free* among his friends and others at his disposal. A question would arise whether this is an allowed act under this section.

Section 43 deals with Compulsory licenses. Issuance of compulsory licenses is important as breeder's protected rights are exclusive rights and as this protection extend over 25 years, at many cases. It is desirable if a compulsory license can be issued after 02 years from the date of grant of plant breeder's right rather than 03 years as provided by this subsection as many of these breeder's rights are associated with essential food of human being such as rice, wheat, grain and other food items and food producing plants. For example, UK, being a party to UPOV, allows issuing compulsory licenses after two years despite the fact that the Convention demands for three years.

Conclusion/Recommendations

While identifying positive impacts of many provisions of the Bill, it is expected to recommend some reforms/modifications to some provisions in the perspective of striking a balance between breeders and farmers rights. An emphasis will be made to recognize prior user's rights of an independent developer of a variety by the Act. For compulsory licenses (CL), some grounds are expected to be identified. Relevant section provides public interest as the only ground. It is recommended that *urgency* or *an emergency situation* as a separate ground for issuing CL as the subject matter is dealt with food and food related items. *Abuse of exclusive power* by the right holder can also be considered as a separate ground as some powerful companies can purposely block supplying seeds and other important propagating material for farmers. Unnecessary prize hike can also be considered under this ground.

In addition to the farmer's rights provided by the draft Act, it is desirable to consider inclusion of some other rights recognized by the Indian plant variety protection laws. For

example, this draft Bill does not recognize farmer's right to sell his seed though this right is pivotal in the context of farmer's contribution to the production in Sri Lanka.

Application of the Principle of Proportionality as a Tool for Investment Dispute Settlement

Shamila Dawood
Department of Commercial Law,

Abstract

Generally, foreign investment contracts are concluded mainly as long-term cross-border investments. As a result, unexpected non commercial risks, politically or legally, may arise during the period of its duration. To evade this fear, many bilateral and multilateral treaties are concluded with provisions on “no” expropriation without compensation and settlement through arbitration. This is because, nationalization or expropriation (directly or indirectly) of foreign property is the foremost governmental interference and it is considered as one of the most serious encroachments on property rights of foreign investor. Numerous tribunals and scholars have accepted that the host states could enjoy their sovereign rights in order to enhance socio-economic conditions, protect the environment and protect essential interest of the State during a state of emergency/economic crisis through adopting various regulatory measures. At the same time, host states are under compulsion to fulfil their contractual commitments which were given at the entry of investment. This situation makes it difficult for arbitrators to come to a conclusion whether regulatory measures tantamount to expropriation which prevent the use and enjoyment of the investors' property rights. In this regard, in order to come to a preferable solution, arbitrators try to apply the principle of proportionality as a method of investment dispute settlement particularly in expropriation cases. Thus, this principle has emerged as a tool in balancing different conflicts of interest in many legal orders and systems. Recently, ICSID arbitrators who seem to be attracted by the application of principle of proportionality have cited European Courts of Human Right (ECHR) and its case laws, and World Trade Organization (WTO) Jurisprudence. This principle has been