

Intellectual Property Rights and Agro-based Natural Product: Malaysian Legal Perspective

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Abstract

Malaysia is a country which has been blessed with plethora of natural resources and product such as plants and animals. It is an established fact that the agriculture sector part of our natural product contributed substantially to the growth and development of the Malaysian economy. At the same time, it falls as part of the property which must be protected to ensure its sustainability. This paper will look into the right and protection of agro-based natural product specifically to the plant varieties and geographical indications from Intellectual Property Rights perspective in Malaysia.

Keywords: Intellectual property, Agriculture, Agro-based natural product, New plant varieties, Geographical indications, Malaysia

1. Introduction

Agro-based natural product is part of our natural resources. Natural resources here can be defines as materials or substances such as minerals, forests, water, and fertile land that occur in nature and can be used for economic gain. (Note 1). It may also include the plant and animals. Natural resources occur naturally within environments that exist relatively undisturbed by mankind, in a natural form. A natural resource is often characterized by amounts of biodiversity existent in various ecosystems. Many of them are essential for our survival while others are used for satisfying our wants and needs.

In Malaysia, there are three main sources of law, namely written law (consist of federal and state constitutions), unwritten laws (consist of the English common law, the rules of equity, judicial decisions and customary law) and Islamic law. The most important measures for natural product and resources protection and conservation are embodied in the Malaysian Federal Constitution (Note 2). Conservation had been impliedly discussed under Article 92 of Malaysia Federal Constitution, which provides:

“92. National Development Plan

(1) If, after a recommendation from an expert committee and after consultation with the National Finance Council, Land Council and the Government of any State concerned, the Yang Di Pertuan Agong is satisfied that it is conducive to the national interest that a development plan be put into operation proclaim the area or areas as a development area and thereupon Parliament shall have the power to give effect to the development plan or any part thereof, notwithstanding that any of the matters to which the plan relates are matters with respect to which, apart from this Article, only States would have the power to make laws.

(3) In this Article, “development plans” means a plan for the development, improvement, or conservation of the natural resources of a development area, the exploitation of such resources, or the increase of means of employment in the area.”

Furthermore, the Third National Agricultural Policy (NAP3) set in placed two strategies to upgrade and develop the specialty natural products industry. The first strategic direction is strengthening institutional support through the followings mechanism:

(1) Introducing more conservation activities will be undertaken to preserve and manage biological diversity and legislation to regulate access to genetic resources.

(2) intensifying the production of quality specialty natural products through the use of high technology and the introduction of in-house quality assurance systems will be encouraged and the enforcement of quality and safety standards.

(3) Coordinating research and development in priority areas such as development of improved and cost-effective production technology of both the raw materials and end products

(4) Enhancing research and development capacity to venture into emerging product categories especially in the phytopharmaceutical, nutraceuticals and functional food category.

(5) Strengthening Joint ventures between public and private sectors to be encouraged and linkages between research institutions and industry

(6) Encouraging the formation of associations and alliances of producers, processors and practitioners

Whilst, the second strategic direction is increasing production and productivity by formulating and implementing programs to domesticate and cultivate valuable species on large-scale agricultural land as part of agro-forestry or plantation forests and community forests will be and promoting labor saving technologies such as automation and other mechanized systems. (Note 3)

Under the Ninth Schedule of the Malaysian Federal Constitution, both federal and states have legislative powers in the matters of protection and conservation of natural resources. The schedule divides legislative powers between Federal and State Governments, into 3 lists, Federal List, State List and Concurrent List (provision of powers to legislate concurrently, by either one Government subject to certain provisions in the Constitution). Parliament may legislate on matters in the Federal and Concurrent Lists, while State Legislative Assemblies may enact legislation on matters in the State and Concurrent Lists. However, the Federal Constitution permits flexibility by authorizing Parliament to legislate on matters in the State List for specific purposes. (Wan Arfah Hamzah & Ramy Bulan, 2005) For instance is to implement international agreements and to promote uniformity of law under Article 76. (Note 4) In case there are both federal and state laws on a matter in this list, Article 75 ensures that federal law shall prevail. The matters related to natural resources under Ninth Schedule Federal Constitution are as in Table 1.

From the legislative powers conferred by the Federal Constitution, there are plethora of laws governing the protection and conservation of natural resources had been enacted and gazzetted in Malaysia. Some examples of legislation related to natural resources are as shown in Table 2.

2. Intellectual Property Rights & Agro-Based Natural Product: General Overview

Intellectual Property is a bundle of legally recognized rights when ideas or inventions are protected. According to prominent intellectual capitals practitioners, intellectual capital comprises three major components; human capital, intellectual assets and a subset of intellectual assets that are legally protected i.e. intellectual property rights. (Zaid Hamzah, 2006).

The establishment of the World Trade Organization (WTO) has extended trade rules into every field of economic endeavor, and has expanded the purview of trade agreements from the original trading of goods across international borders to investment measures, domestic regulatory initiatives, and services, and more importantly, Intellectual Property Rights. Intellectual Property Rights are rights over intellectual property conferred by national law, making it territorial, and form part of a nation's policy to encourage innovation and dissemination of knowledge, and are therefore intended to balance the interests of the inventor or originator with the broader needs of society. (Leocadio Sebastian & Jane G. Payumo, 2008). The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property. (Note 5) TRIPS cover the Intellectual Property Rights rules and provisions for WTO members and represent the state of intellectual property standards today. Since international treaties are also construed as statutes and reconciled with local laws, member-countries have to enact complementary and/or supplementary legislation, thus creating significant impact on their national policies. (Beronio, R.A. and J.G. Payumo, 2006) Under this international agreement, member-countries are obliged to provide most of the existing types of Intellectual Property Rights protection, namely:

- (1) copyright and related rights,
- (2) trademarks,
- (3) geographical indications (GI),
- (4) industrial designs,
- (5) patents, including plant variety protection,

- (6) layout designs (topographies) of integrated circuits,
- (7) protection of undisclosed information (or trade secrets), and
- (8) control of anti-competitive practices in contractual licenses.

TRIPS Agreement incorporate and holds valid all previous international provisions of some administered treaties and conventions by the World Intellectual Property Organization (WIPO). It also specifies detailed requirements for the substantive content of national intellectual property rights legislation such as the extent of coverage, terms of protection, and mechanisms of enforcement. It also brings national intellectual property rights legislation under the coverage of WTO dispute settlement procedures. National treatment, most-favored nation, and minimum standards are the important main principles enshrined in this agreement. As of on 23 July 2008, 153 members had ratified this treaty. (Note 6)

Articles 22-24 and 27-34 on Geographical indications and patents, respectively, are the provisions that affect agbiotech and agriculture since they regulate the protection of agriculture-related intellectual property rights, above all, protected plant varieties and patented inventions, including genetically modified organisms (GMOs). (Repetto, R.S. and M. Cavalcanti, 2002)

Geographical indications had been defined in section 3, Part II Agreement on Trade-Related Aspects of Intellectual Property Rights of 1995 (TRIPS Agreement) as an indications which identify a good as originating in the territory of a Member [of the World Trade Organization], or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.”(Note 7) Its aims to safeguard a specific description or presentation, in relation to products used, to indicate the geographical origin of the goods; by geographical origin is meant a country, region, locality, or linear feature to which a product may be attributed as being customarily harvested or manufactured there. This protection is proposed to protect farming community-based varieties, traditional knowledge, and plant varieties or animal breeds that already have or may gain favorable international or national reputation, or some distinctive foods and products (Repetto, R.S. and M. Cavalcanti, 2002) like Darjeeling Tea and Sabah Tea.

The life-patenting provisions of Article 27, on the other hand, are the most controversial of the TRIPS provisions. Specifically, Article 27.3(b) allows members to exclude from patentability plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. It, however, requires members to provide for the protection of plant varieties either by patents or by an effective sui generis system (Note 8) or by any combination thereof. The plant breeders’ rights (PBRs) provided in the International Union for the Protection of New Varieties of Plants (UPOV) Convention (Note 9) is one special system member-countries can adopt to protect its varieties. It is a kind of sui generis system of protection specifically tailored to the art of plant breeding, and the nature of modern cultivars.

3. Intellectual Property Rights & Agro-Based Natural Product: Malaysian Legal Position

3.1 General Legal Framework

Malaysia extremely biologically diverse and is rich in natural resources. Many of the plants have been used by the indigenous population for centuries to provide cures for various illnesses. To respond to the development of intellectual property at domestic and global levels, Intellectual Property Corporation of Malaysia (MyIPO) (Note 10) had been established, with the enforcement of the Intellectual Property Corporation of Malaysia Act 2002. It was placed under the Ministry of Domestic Trade and Consumer Affairs (as it then was) (Note 11). Therefore, through the adoption of World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1995, Malaysian government have make significant changes to the legislations to be in compliance in providing for minimum levels of protection of intellectual property rights. Malaysian government parliament passed a number of legislations for Intellectual Property Rights protection and they are as follows;

- (a) Copyright Act 1987
- (b) Patent Act 1983
- (c) Geographical Indications Act 2000
- (d) Industrial Design Act 1996
- (e) Trademarks Act 1976
- (f) Layout - Designs Of Integrated Circuits Act 2000

Unfortunately not all intellectual property branches provide for the protection to natural resources. The most relevant legislation would be patent and geographical indications. However, it is likely conceivable that the patent law could give some protection to natural resources. As although patent law is there to protect registered patented invention, unfortunately plant varieties have been excluded from this protection. (Nazura Abdul Manap et al, 2007) It is so as

in compliance with Article 27.3(b) of TRIPS Agreement, Malaysian Patent Act 1983 had provided that plant and animal falls into the matter which cannot be patentable. The provision *inter alia* stated that:

“ ... the following shall not be patentable: (b) plant or animal varieties or essentially biological processes for the production of plants or animals, other than man-made living micro-organisms, micro-biological processes and the products of such micro-organism processes;...” (Note 12)

Hence, there is an urgent need to act in accordance with Trade Related Aspects of Intellectual Property (TRIPS) Agreement as it is an obligation for a signatory country to provide intellectual property rights protection for new varieties of plants. (Nazura Abdul Manap et al, 2007)

3.2. New Plant Varieties

In order to overcome the hurdle created by section 13(2)(b) Malaysian Patent Act 1983, the legislature passed a new law known as Protection of New Plant Varieties Act 2004 (Act 634). This Act came into operation on 1 July 2004. Prior to this Act, there was no formal protection on the rights of breeders. However an informal registration of new fruits varieties has been available for certification purposes. (Ida Madiha, 2004) The introduction of the Act is a shift from the informal breeding system which Malaysia has established decades ago. The main disadvantage of the previous informal system is it lacks of legislative protections for breeders of plant varieties. (David Len, 2005). As plant variety is excluded from patentability, the introduction of the *sui generis* plant variety system would complement well with the whole intellectual property eco-system in Malaysia. (Note 13) The responsibility in implementing the Protection of New Plant Varieties Act 2004 has been entrusted by Agriculture and Agro-Based Ministry to the Department of Agriculture (DOA) Malaysia (Note 14) as it has been registering fruit clones since the early 1930's. (Note 15)

In addition, the Act provides 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.. Moreover, new plant varieties are also known as plant breeders' right. Therefore, with the enactment of this Act breeders of new varieties of plants and seeds are able to receive intellectual property protection. As a form of intellectual property right, it gives patent-like rights to plant breeders to exclusively exploit his registered plant variety. (David Len, 2005) In other words, it grants the exclusive right to breeders of new varieties to exploit their varieties and has features that are in common with patents for industrial inventions. Both forms of protection grant to their holders a form of exclusive right to pursue innovative activity. Furthermore, it tends to encourage investment in and development of the breeding of new plant varieties in both public and private sectors

3.2.1. What are plant varieties?

Section 2 of the Protection of New Plant Varieties Act 2004 define “plant” as any living organism in the plant kingdom but expressly excluding any micro-organism. The similar section further define the word “variety” as 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;

3.2.2 Plant Breeder's Rights

According to section 2 of the Protection of New Plant Varieties Act 2004, breeder's right means the right given on the registration of a new plant variety under the Act. Government had granted legislative right and protection to the proprietor of plants breeders with regards to breeding, discovering and developing of new plant varieties. The holder possesses an exclusive right to produce for sale and to sell propagating material of the variety. They also may license others to do the activities and usually collect royalties from commercialization of their protected varieties. Furthermore, a protected variety with its grant of rights may be sold or assigned to another person. Like other intellectual property, the holders may take civil action in the case of infringement. (Note 16)

3.2.3 Plant Varieties Board

By virtue of section 3 of the Act, Plant Varieties Board had been expressly established where they were vested with broad supervisory and administrative functions. The new Plant Variety Board's function is to review and approve or reject applications for registration of new plant varieties and grant of breeder's rights and to protect the rights of the breeders. The Board consists of the top officials of government departments, which deal with the agricultural industry

in Malaysia. It includes notably the Director-Generals of Malaysian Agricultural Research and Development Institute and Forest Research Institute Malaysia, and representatives of the Ministry of Agriculture and Agro-based Industry, the Ministry of Domestic Trade and Consumer Affairs. (Note 17) It is a clear indication that Parliament is indeed serious in protecting the rights of plant breeders. (Patrick Mirindah, 2008)

3.2.4 Who may apply?

An application for the registration to warrant the protection of plant varieties may be made by a breeder; the employer of the breeder; the successor in title of the breeder; a farmer or group of farmers, local community or indigenous people who have carried out the functions of a breeder; or any government or statutory body which has carried out the functions of a breeder. (Note 18)

3.2.5 Criteria for registration

A plant variety can be registered under the Act if the applicant manages to prove that the plant variety is new, distinct, uniform and stable. However, where a plant variety is bred, or discovered and developed by a farmer, local community or indigenous people, the plant variety may only be registered as a new plant variety and granted a breeder's right if the plant variety is new, distinct and identifiable. (Note 19)

3.2.6 Scope of protection

The holder of a breeder's right on a commercial basis, shall have the right to carry out the act of producing or reproducing; conditioning for the purpose of propagation; offering for sale; marketing (inclusive of selling); exporting; importing; and stocking the material for any of the stated purposes. (Note 20)

3.2.7 Exceptions to infringement

There are limitations to the breeders' right. Section 31(1) of The Protection of New Plant Varieties Act 2004 provided that the right shall not extend to any act done privately on a non-commercial basis, or for an experimental purpose, or for the purpose of breeding other plant varieties. The rights also will not comprise of any act of propagation by small farmers using the harvested material of the registered plant variety planted on their own holdings; any exchange of reasonable amounts of propagating materials among small farmers; and 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.

3.2.8 Term of protection

The law provides a grant of breeder's right for a period of:-

- (a) twenty years for a registered plant variety that is new, distinct, uniform and stable,
- (b) fifteen years for a registered plant varieties which are bred, or discovered and developed by a farmer, local community or indigenous people, and
- (c) twenty-five years for tree and vines. (Note 21)

3.3. *Geographical indications*

Besides new plant varieties, Malaysia also provides legal protection through intellectual property rights to products consist of natural resources based on their geographical origin. The protection is governed by Geographical Indication Act 2000 (Act 602) and Geographical Indication Regulation 2001. The former came into operation on 15 June 2000 and provides for the protection of geographical indications and for matters connected therewith. Generally, geographical indication is a sign used on goods which have a specific geographical origin and possess particular qualities or a reputation due to that place of origin. Most commonly, it includes the name of the place of origin of the goods.

3.3.1 Definition

Legal definition of geographical indication as provided in the legislation means an indication which identifies any goods as originating in a country or territory, or a region or locality in that country or territory, where a given quality, reputation or other characteristic of the goods is essentially attributable to their geographical origin. (Note 22) It can be used on natural or agricultural product or any product of handicraft or industry. (Note 23) Moreover, the goods for the purpose of registration under geographical indication had been classified in the prescribed Third Schedule of Geographical Indication Regulation 2001 (Note 24) as shown in Table 3.

3.3.2 Scope of protection

The protection shall be given regardless whether or not the geographical indication is registered; and as against another geographical indication which, although literally true as to the country, territory, region or locality in which

the goods originate, falsely represents to the public that the goods originate in another country, territory, region or locality. (Note 25) However, no protection to be provided for;

- (a) geographical indications that do not correspond to the meaning of “geographical indication” as defined in section 2;
- (b) geographical indications which are contrary to public order or morality;
- (c) geographical indications which are not or have ceased to be protected in their country or territory of origin; or
- (d) Geographical indications which have fallen into disuse in their country or territory of origin. (Note 26)

3.3.3 Who may apply?

Application for registration of a geographical indication can be made personally or through an agent by a person who is carrying on an activity as a producer in the geographical area specified in the application with respect to the goods specified in the application, and includes a group or groups of such person or a competent authority or a trade organization or association. (Note 27)

3.3.4 Registration

Registration of geographical indication can be made in pursuant to section 19 of the Act. The registrar will allowed the registration after he satisfied that the entire requirements had been complied with and that the geographical indication sought to be registered is not contrary to public order or morality. By the end of 2010, there are 12 natural resources products (including two from foreign product) had been registered under Geographical Indications Act 2001. The products are as stated in Table 4. Despite of the insignificant number of registered product, Intellectual Property Corporation of Malaysia anticipated that Malaysia has a lot of goods and natural resources which have potential to be registered as geographical indication in future. For example mangoes from state of Perlis or rice from state of Kedah. It is hoped that more products based on the natural resources from other states will also be registered under the geographical indications status.

4. Conclusion

As a conclusion intellectual property law provides for legal provision to natural resources particularly to the plants and agriculture products. It is a commendable effort by the Government to provide for the legislative protection to the natural product particularly through plant varieties and geographical indications. It is hoped that the protection will give some contribution to the conservation and protection of the natural resources in Malaysia.

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Notes

Note 1. "natural resources." The Oxford Pocket Dictionary of Current English. 2009. *Encyclopedia.com*. 1 May. 2010 <<http://www.encyclopedia.com>>.

Note 2. Kakimbek Salykov. The Enforcement of environmental protection legislation. *Environmental Affair Law Review*. 581 1991-1992

Note 3. Refer <http://www.fishdept.sabah.gov.my>

Note 4. The supreme law of the Federation as expressly declared by Article 4. "4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Note 5. Power of Parliament to legislate for States in certain cases – Article 76. (1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say: (a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or (b) for the purpose of promoting uniformity of the laws of two or more States; or (c) if so requested by the Legislative Assembly of any State.

Note 5. http://www.wto.org/ecogni/tratop_e/trips_e/intel2_e.htm

Note 6. Refer <http://www.wto.org>

Note 7. Article 22.1 of the TRIPS Agreement

Note 8. Literally meaning 'of its own kind', this refers to the system of protection for new plant varieties where member-countries can make their own rules to protect new plant varieties with some form of intellectual property rights, provided that such protection is effective.

Note 9. The UPOV Convention, first adopted in Paris in 1961, came into force in 1968 and has been revised in 1972, 1978, and 1991. As of October 22, 2009, UPOV has 68 member countries/contracting parties.

Note 10. Previously known as PHIM but went through rebranding program where the acronym PHIM became MyIPO on 3 March 2005 at the inaugural National Intellectual Property Day.

Note 11. The ministry is currently known as Ministry of Domestic Trade, Co-operatives and Consumerism).

Note 12. Patent Act 1983, section 13(2) (b)

Note 13. Ibid

Note 14. DOA was officially as to be the National Registrar of Varieties in 1994 by the Ministry of Agriculture (as it then was). Retrieved from <http://pvpbkkt.doa.gov.my/> on 1 May 2010

Note 15. Agriculture and Agro-based Industry Minister Tan Sri Muhyiddin Yassin (as he then was) at the opening of the 7th Asian Regional Technical Meeting for Plant Variety Protection on 6 November 2006 had stated that the approach is in consonance with the National Agriculture Policy (1998 – 2010) as good quality planting materials are recognized as pre-requisites for the sustenance of productivity and competitiveness of the agriculture sector."

Note 16. Protection of New Plant Varieties Act 2004, Section 47 & section 49

Note 17. Refer Part II of the Protection of New Plant Varieties Act 2004 consist of section 3 until section 11

Note 18: Protection of New Plant Varieties Act 2004, section 13(1)

Note 19. Protection of New Plant Varieties Act 2004, section 14(1) and (2)

Note 20: Protection of New Plant Varieties Act 2004, section 15

Note 21. Protection of New Plant Varieties Act 2004, section 32

Note 22. Geographical Indications Act 2000, section 2

Note 23. Geographical Indications Act 2000, section 2

Note 24. Geographical Indications Regulation 2001, Regulation 5

Note 25. Geographical Indications Act 2000, section 3

Note 26. Geographical Indications Act 2000, section 4

Note 27 Geographical Indications Act 2000, section 11(1)

Table 1. Matters related to natural resources under Ninth Schedule of Malaysian Federal Constitution

Federal List	Concurrent List	State List
Trade, commerce & industry; fisheries; Education; Welfare of aborigines; Control of agricultural pests, protection against such pests & prevention of plant disease; Media; Tourism;	Protection of wild animals and wild birds; Animal husbandry; Town and country planning; <u>Supplementary list for Sabah and Sarawak</u> Agricultural & Forest research, control of & protection from agricultural pests, prevention of plant diseases	Land; Agriculture & forests; Local government; State works and water; Turtle and riverine fishing; <u>Supplementary list for Sabah and Sarawak</u> Native laws and customs;

Table 2. Examples of legislation related to natural resources

NO	ACT NO	ACT TITLE
1	Act 127	Environmental Quality Act 1974
2	Act 172	Town And Country Planning Act 1976
3	Act 210	Fisheries Act 1963 (Revised – 1978)
4	Act 226	National Parks Act 1980
5	Act 291	Patents Act 1983
6	Act 317	Fisheries Act 1985
7	Act 385	Land Conservation Act 1960 (Revised 1989)
8	Act 474	Land Development Act 1956 (Revised 1991)
9	Act 602	Geographical Indications Act 2000
10	Act 634	Protection Of New Plant Varieties Act 2004
11	Act 647	Animals Act 1953 (Revised 2006)
12	Act 76	Protection Of Wild Life Act 1972

Table 3. Goods for the purpose of registration under geographical indication had been classified in the prescribed Third Schedule of Geographical Indication Regulation 2001

(a) Class 1	Wines and Spirit (wine, spirit)
(b) Class 2	manufactured goods (handicraft, food)
(c) Class 3	Natural product (mineral; agriculture)
(d) Class 4	miscellaneous (others not included in class 1 to 3)

Table 4. Registered product under Geographical Indications Act 2001

No.	Products	State	Year of Registration
1.	Sarawak Pepper	Sarawak	November 2003
2.	Sabah Tea	Sabah	October 2006
3.	Borneo Virgin Coconut Oil	Sabah	October 2006
4.	Tenom Coffee	Sabah	November 2006
5.	Sabah Seaweed	Sabah	April 2007
6.	Bario Rice	Sarawak	April 2008
7	Limau Bali Sungai Gedung	Perak	May 2009
8	Pisco	Foreign Product	2010
9	Scotch Whisky	Foreign Product	2010
10	Sarawak Beras Biris	Sarawak	2010
11	Sarawak Beras Bajong	Sarawak	2010
12	Kuih Lidah Kampung Berundong Papar	Sabah	2010

(Source: Intellectual Property Corporation of Malaysia January 2011)

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