The Establishment of Plant Genes Bank for Plants Variety Protection

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In 2014, the first civil litigation on plant variety right was raised at Changhua District Civil Court, Taiwan. The plaintiff argued the defendants planted his registered Citrus Fruits (Citrus madurensis Lour), which he registered as new plant species under the requirement of Plant Variety and Plant Seed Act, Taiwan in 2012, which infringed without his prior permission and authorizations. The Court decided two months later and found judgement for the defendant because the Plaintiff can only raise the plant variety certificate but fail to prove the fruit trees planted by the defendant were the same species with plaintiff. The Court could not find the evident from plant variety characteristics examination report that Plaintiff never raised or applied to the Council of Agriculture. Furthermore, the plant variety characteristics examination is an official procedure described on the Article 3 of the Plant Variety and Plant Seed Act in 2005, it is the only method and procedure adopted by the reviewing committee to decide whether the plant certificate shall be granted. This case shows the difficulty of Plaintiff to take his burden of proof since the plant variety characteristics examination shall take almost one year (or four seasons) and make comparison with the argued plants.

Early in 2002, a similar case happened in the Civil Court of Hague, Netherland.[1] The Plaintiff was DANZIGER "DAN" FLOWER FARM, an Israeli Farm who asserted his ownership on "Dangypmini", a special species of gypsophila, and owned EU Plant certificate. The Defendant was the Netherland flower company named ASTTEE FLOWER B.V. who holds the "Summer Snow" and "Blancanieves" assortments of gypsophila granted plant certificates by EU. The Plaintiff complained the "Summer Snow" and "Blancanieves" are derived variety of "Dangypmini" and infringed their protected rights. However, the Plaintiff only provided the plant genes (plant DNA) of "Blancanieves" to the Court. The Court did not accept the DNA as evidence but adopted the principle of "observable phenotypic characteristic" for their determination. The Plaintiff brought the same case and filed complaints in Tel-Aviv, Israel again.[2] The Israeli Court accepted the plant DNA as evidence and confirmed " genetic conformity over comparisons of observable traits or characteristics" is essential on examining and identifying of essential characteristic.[3] The Israeli Court found the judgment for Plaintiff in 2009. These two cases show different attitudes of the Courts to adopt plant genes as evidence for decision of essential derivation on plants.

It brought us attention and realization that the genotypic derivation method is introduced and adopted during the plant varieties litigations. The use of genetic distance to determine essential derivation is not used as a substitute for observable characteristics, on the contrary, the genotypic variation could assist the Court to shorten the length of period on making decision and also reduce the appeal rate since both genotypic and phenotypic variation could be accepted as evidence and recognized by the Court. It is a perfect timing for countries that hold abundant biological diversity, such as the countries located in Equator with highly condensed biological species, to start to collect their plants genetic information. However,

[1] *Dan's Flower Far*m v. Astée Flower B.V. 105.003.932/01. Court of Appeal, The Hague (2009).
[2] Danziger v. Astée Flower 001228/03, District Court, Tel-Aviv-Jaffa (5 March 2009).
[3] Jay Sanderson, Plants, People and Practice: the Nature and History of the UPOV Convention 224 (2017).

establishing such genotypic derivation database is not easy and relies on various number of plant species and methods.

Taiwan is located in sub-tropical area with highly developed genetic technologies and research methods. It also leads the rapid growth of high value crops and ornamental plants. In order to protect its biological diversity and the plant variety rights, it is necessary for Taiwan to collect and establish its own plant genes banks for the future use or biodiversity conservation needs, especially the valuable orchard and fruits. The plant gene banks can not only enhance the research on biological diversity but also assist the efficiency improvement of the litigation procedures because the genetic evidence can provide more information to help the Court to make its final decision. It could also provide more evidence for the court to explain the contents on "essential characteristics" under the Article 3 and Article 25 of the Plant Variety and Plant Seed Act. It could enhance the awareness of plant variety protection and comparative advantage of high value plants of Taiwan.

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