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SUI GENERIS PROTECTION OF PLANT VARIETIES – IMPLICATION ON INDIGENOUS FARMERS’ RIGHTS

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ABSTRACT

Article 27 of the TRIPs Agreement mandates the parties to provide for the protection of plant varieties either by patent or an effective sui generis system or by a combination of both. The provision of the TRIPs on sui generis system at first glance appears to be an opportunity for developing countries to protect their plant varieties without resorting to patentability. However, a close look at the regime suggests incongruities especially in relation to the word “effective”. The only system that is regarded as “effective” is the system of protecting plant breeders’ rights (PBR) codified in the International Convention for the Protection of New Varieties of Plants (UPOV). PBR under UPOV has the effect of creating a monopoly in the market for a new variety. This negatively impacts the rights of the farmers. India adopted a sui generis system for the protection of plant varieties by enacting the Protection of Plant Varieties and Farmers’ Rights Act, 2001. In light of this paper has addressed the question of “effectiveness” of the UPOV model and also attempts to analyze whether the PPVFR Act, 2001 is an appropriate alternative approach to protect the rights of the indigenous farmer or not.

Keywords - PPVFR, UPOV Convention, TRIPs Agreement, Article 27, sui generis system.

INTRODUCTION

TRIPs under Article 27 mandates the parties to provide for the protection of plant varieties either by patent or an effective *sui generis* system or by a combination of both. Article 27.3 (b) necessitates the protection of plant variety by introducing an IP protection regime. The protection need not be by way of the patent but either patent or an effective *sui generis* system of protection is imperative.¹ *Sui generis* means something that is different or unique. A *sui generis* IP system allows for some sort of modification in the IP system to incorporate the special characteristic of a subject matter and to suit the specific policy requirement of a country that necessitated the

¹ Vandana Shiva, *Farmers’ Rights, Biodiversity and International Treaties*, 28 ECON. POLIT. WKLY. 555–560 (1993).

establishment of a unique system.² A *sui generis* protection system requires that the social, political, and economic conditions of the respective country are properly examined as one system does not fit all countries.³

The provision of the TRIPs on *sui generis* system at first glance appears to be an opportunity for developing countries to protect their plant varieties without resorting to patentability. However, a close look at the regime suggests incongruities especially in relation to the word “effective”.⁴ The trend in the industrialized countries shows that the only system recognized as “effective” is the system of protecting plant breeders’ rights (PBR) codified in the International Convention for the Protection of New Varieties of Plants (UPOV).⁵ PBR under UPOV has the effect of creating a monopoly in the market for a new variety. Moreover, the 1991 amendment to UPOV has narrowed the right of the farmers to save the seeds whereby farmers are required to pay royalties for farm saving of seeds.⁶ India adopted a *sui generis* system for the protection of plant varieties by enacting the Protection of Plant Varieties and Farmers’ Right Act, 2001.

In the backdrop of above the paper aims to deal with the question:

- Whether UPOV model is an “effective” *sui generis* system for the protection of plant varieties in developing countries?
- Whether PPVFR Act, 2001 is an appropriate alternative approach to protect the rights of an indigenous farmer?

² Dr Balavanth S Kalaskar, *Traditional Knowledge and sui-generis law*, 3 International Journal of Scientific & Engineering Research 8 (2012).

³ Grethel Aguilar, *Access to genetic resources and protection of traditional knowledge in the territories of indigenous peoples*, 4 ENVIRON. SCI. POLICY 241–256 (2001).

⁴ Koffi Dogbevi, *The Sui generis System of Plant Variety Protection Under the TRIPS Agreement: An Empty Promise for Developing Countries*, SSRN (2017).

⁵ Shiva, *supra* note 1.

⁶ *Id.*

The paper *firstly* deals with the requirement of *sui generis* protection under TRIPS and also delves into the question of UPOV as an effective *sui generis* system. *Secondly*, details the alternative approaches and the *sui generis* system adopted by India in the form of Protection of Plant Variety and Farmers Rights Act, 2001. *Thirdly*, highlights the shortcoming of the PPVFR Act as it fails in securing the rights of indigenous farmers. *Finally*, it provides alternative modalities to protect the right of indigenous farmers.

1. TRIPS, SUI GENERIS SYSTEM OF PVP AND UPOV

1.1 OBLIGATION UNDER TRIPS

The adoption of TRIPs agreement negotiated in the Uruguay Round in 1994 has led to a debate on the protection of traditional knowledge. The TRIPs agreement under Article 27 provides for patenting of any invention whether in products or processes.⁷ The Article further permits, exclusion from patenting plants and animals and the biological process for the production of those plants and animals, but this exclusion does not extend to microorganism and non-biological processes.⁸ However, the member states of WTO are obligated under Article 27 of the TRIPs to protect the plant varieties either by way of a patent or through a “*sui generis*” system of protection or combination of both.⁹ It is mandatory for the states to come up with some sort of IPR system to protect the plant varieties i.e., either patent or a *sui generis* system. In contrast to a patent which necessitates strict adherence to rules laid down in the TRIPs, the *sui generis* system is more flexible. It allows the countries to come up with their unique IPR system enabling them to determine the scope of rights that is to be granted.¹⁰

⁷ The Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPs Agreement, Art. 27.1.

⁸ The Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPs Agreement, Art. 27.3.

⁹ The Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPs Agreement, Art. 27.3 (b).

¹⁰ Savita Mullapudi Narasimhan, *TOWARDS A BALANCED ‘SUI GENERIS’ PLANT VARIETY REGIME: Guidelines to Establish a National PVP Law and an Understanding of TRIPS-plus Aspects of Plant Rights*, UNDP (2008).

Article 27.3 (b) though prima facie appears to allow for flexible protection of plant varieties, has led to twofold problems. *Firstly*, it has introduced the IPR protection in a field which developing countries were not even aware of prior to TRIPs, raising serious concerns as to the implications of intellectual property protection on the farmers and their right to save and reuse seeds¹¹ and *secondly*, with regard the ambiguity of the phrase “effective” *sui generis* system.¹²

1.2 SUI GENERIS SYSTEM OF PVP

TRIPs use the term *sui generis* in Article 27 but does not define the same or throw any light as to its interpretation. *Sui generis* which literally means “of its own kind”¹³ allows the countries to formulate their own laws and rules suited to provide protection to plant varieties by resorting to the non-patent mechanism. TRIPs is flexible with the *sui generis* system of protection of plant varieties because it allows the country to develop its own system of plant variety protection (*hereinafter referred to as PVP*). A *sui generis* system of protection of plant variety is important to ensure against the commercialization of the knowledge belonging to indigenous people by the scientific community.¹⁴

The 1978 and 1991 Act of International Convention for the Protection of New Varieties of Plants “UPOV Convention” provides the standard for protection of plant varieties.¹⁵ Many countries are party to the UPOV Convention however, TRIPs does not mandate the developing countries, not a party to the convention to comply with the UPOV standard for PVP. The countries have the liberty to depart from the UPOV system and adopt their own PVP laws. A *sui generis* system might differ from one country to another depending on the definition and way in which the same is applied. It

¹¹ *Id.*

¹² Shiva, *supra* note 1.

¹³ *Sui generis* | Definition of *Sui generis* by Lexico, https://www.lexico.com/en/definition/sui_generis (last visited June 30, 2020).

¹⁴ J. Janewa OseiTutu, *A Sui Generis Regime for Traditional Knowledge: The Cultural Divide in Intellectual Property Law Emerging Scholars Series*, MARQUETTE INTELLECT. PROP. LAW REV. 147–216 (2011).

¹⁵ Narasimhan, *supra* note 10.

can be a combination of IP and other forms of protection or it can be a completely different protection mechanism.¹⁶ The *sui generis* system offers a variegated range of choices as it can exhibit any arrangement for protection of plant varieties whether reflecting or not reflecting the IP protection system. It can also be based on a system of protection dealing with traditional protocols, for instance, separate legislation that protects traditional knowledge and incorporates the rights of the local communities holding such knowledge.¹⁷

However, the wordings of Article 27.3 (b) has generated controversy with regard to the *sui generis* protection as the same is qualified by the word “effective”. The word *sui generis* has created a false impression that the countries have the liberty to develop their own system of protection. TRIPs Agreement does not suggest what an “effective” *sui generis* system means. Moreover, in case of any dispute as to what qualifies as an effective *sui generis* system, the WTO itself has the authority to adjudicate.¹⁸

Due to the ambiguous nature of the “effective” *sui generis* system, it is very likely that the developed countries will promote the plant breeders’ rights as an effective *sui generis* system. The use of plant breeders’ rights as the benchmark of effectiveness under the TRIPs might hinder the process of developing countries in formulating a unique system that effectuates various social and economic requirements of their own. This might even push many countries to adopt UPOV arrangements. This brings us to the more rudimentary question of whether UPOV is an “effective” *sui generis* system?

¹⁶Note, *Comparative study of sui- generis and other techniques of protecting traditional knowledge in food and medicines and the existing protection mechanism*. 1-24.
<https://shodhganga.inflibnet.ac.in/bitstream/10603/145304/10/chapter%206.pdf> (last visited June 30, 2020).

¹⁷ *Id.*

¹⁸ Dr. John Mugabe, *Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse*, www.wipo.int/edocs/mdocs/tk/en/wipo_unhchr_ip_pnl_98/wipo_unhchr_ip_pnl_98_4.pdf (last visited June 30, 2020).

1.3 UPOV WHETHER AN EFFECTIVE SUI GENERIS SYSTEM?

The adoption of Intellectual property protection (IPP) for plant varieties originated in developed countries. With the proliferation of seed trade and breeders' association in Europe the initiative for the protection of plant breeders right (PBR) was pushed for by European plant breeders. This led to the formation of the UPOV Convention in 1961 with its central focus on PBRs.¹⁹ The International Union for protection of New Varieties of Plants (UPOV) an independent intergovernmental organization was bestowed with the task of administering the UPOV Convention. The UPOV Convention has been amended three times since it came into effect in 1968. The first two amendments in 1972 and 1978 brought few procedural changes, but significant changes were introduced with the 1991 amendment.²⁰

The UPOV convention entails that the plant varieties for protection must satisfy the criterion of distinctiveness, uniformity, and stability (DUS). These criteria mirror the requisites for grant of patent except the threshold for "distinctiveness" and "novelty" is lesser in case of protection of the rights of plant breeders' as against that of the patent. Many developing countries thought of adopting the UPOV model of protecting plant breeders right as an effective *sui generis* system of protection instead of patenting of plant varieties.²¹ The WTO as well as the secretariat of the UPOV considers the framework adopted by the UPOV convention as an "effective" *sui generis* system. In fact, before the finalization of the TRIPs Agreement, it was suggested by the secretariat of the General Agreement on Tariffs and Trade (GATT) that TRIPs would obligate parties to protect plant varieties either by way of a patent or through an effective *sui generis* system as provided by UPOV. Moreover, plant breeders' associations like ASSINSEL also defined an effective *sui generis* system for the protection of plant varieties in terms of distinctness, uniformity, and stability.²²

¹⁹ BISWAJIT DHAR & QUAKER UNITED NATIONS OFFICE, *SUI GENERIS SYSTEMS FOR PLANT VARIETY PROTECTION: OPTIONS UNDER TRIPS: A DISCUSSION PAPER* (2002).

²⁰ *Id.*

²¹ Mugabe *supra* note 18.

²² DHAR AND QUAKER UNITED NATIONS OFFICE, *supra* note 19.

However, the 1991 amendment brought several changes to the 1978 convention that pushed the plant breeders' rights more towards patent making it suitable only for industrialized countries.²³ *Firstly*, the amendment extended the protection by expanding the subject matter of protection earlier limited to nationally defined species of plant varieties to now include varieties of all genera. *Secondly*, the UPOV convention by way of the amendment has extended the protection to the commercial use of all material which was earlier limited to the reproductive material of protective variety.²⁴

In addition to this, the 1991 amendment has had far-reaching consequences on the farming community as it restricted the re-use of seeds. The amendment has narrowed the right of farmers as now it is left to the discretion of member state to determine whether or not to provide an exemption for saving the traditional form of seeds. In other words, the farmer is liable if the protected variety is produced from the saved seeds unless the same is permitted by the law of the land. The farmers are prohibited from using the farm-saved seeds and thus they have to pay for those seeds for subsequent harvest even if they already possess the seeds. This not only weakens farmers' economic position but also obstructs innovation in traditional and local knowledge. The UPOV Convention does not recognize the knowledge generated by local indigenous people nor does it acknowledge the contribution made by the indigenous communities to plant breeding programs.²⁵ Consequently, the right of local farmers will be undermined as well as the possibility of sharing benefits equitably derived from plant genetic resource (PGR) will be eroded.²⁶

The advocates of the UPOV Act of 1991 argue that the amendment has encouraged the breeders to experiment on minor crops so that new kinds of plant variety can be brought into the market. This line of argument favouring the convention comes from developed nations like the US having

²³ International Convention for The Protection of New Varieties of Plants of December 2, 1961 as Revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991 (UPOV Convention), https://www.upov.int/edocs/pubdocs/en/upov_pub_221.pdf (last visited July 2, 2020).

²⁴ Mugabe *supra* note 18.

²⁵ *Id.*

²⁶ *Id.*

advanced biotech industries that want to prevent the developing nations from formulating their own *sui generis* system of protection. It cannot be ruled out that conforming to UPOV as the “effective” system will deprive farmers of their right to re-sow or re-use the seeds that originally were part of their biodiversity.²⁷

Thus, the plant breeders right incorporated in the UPOV formulated to further the interest of commercial plant breeder does not provide adequate protection to the traditional knowledge generated by the indigenous community and is not an adequate system of protection in developing countries where a large portion of the population is dependent on agriculture for income.²⁸

2. ALTERNATE APPROACHES FOR PVP

An “effective” *sui generis* system needs to ensure that the system has a suitable mechanism to address the needs of both the domestic breeders as well as the general public. Intellectual property is generally understood to grant an exclusive right to the holders of such rights. But it is not feasible to grant exclusive protection to holders of plant variety, as the domestic plant varieties also include farmers variety cultivated by the indigenous community. It is only when to plant varieties can be distinguished into two categories- new and domestic varieties, that it is possible to grant exclusive rights for “new” plant variety.²⁹

2.1 EXCLUSIVE PROPERTY RIGHT APPROACH AND COMPENSATORY LIABILITY SYSTEM

IP protection system depicts the exclusive property right approach and entails the third party to obtain permission from the right holder for accessing and using the protected subject matter. The

²⁷ Christoph Antons, *Sui Generis Protection for Plant Varieties and Traditional Knowledge in Biodiversity and Agriculture: The International Framework and National Approaches in the Philippines and India*, 6 IJLT 1-51 (2010).

²⁸ *Id.*

²⁹Narasimhan, *supra* note 10.

exclusive property right can be granted for the protection of plant variety that is "new" in certain cases with appropriate qualifications and conditions. The exclusive right will prevent the third party from the sale or distribution of protected plant varieties.³⁰ In contrast to which the liability rule permits the user to access the subject matter of protection without prior permission from the right holder of such material. However, it requires such users to compensate the provider/holder of such a variety of knowledge. The liability approach is, in fact, a "*use now, pay later*" approach.³¹ The liability rule system is useful when the subject matter of protection like in this case plant variety, is already in the public domain. The liability rule is beneficial as it fosters innovation in already existing plant varieties.³²

Many countries have adopted the liability regime to formulate a *sui generis* system of protection of plant varieties. India is one of the first countries to come up with their own sui generis system to protect plant varieties. India resorted to a hybrid approach i.e., a mixture of both exclusive property rights and compensatory liability systems is incorporated in the Indian legislation enacted to protect plant varieties.

2.2 PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHT- AN INDIAN SUI GENERIS APPROACH

India in compliance with its obligation under TRIPs Agreement, and to give effect to Article 27 enacted the Protection of Plant Varieties and Farmers' Right (PPVFR) Act, 2001. The PPVFR Act was enacted with the objective of providing an effective system of protection for plant varieties keeping in mind the interest of both the right of farmers as well as commercial plant breeders. The Indian Government enacted the PPVFR to satisfy two opposing demands- one to introduce IPP

³⁰ D. Robinson, *Sui generis plant variety protection systems: liability rules and non-UPOV systems of protection*, 3 J. INTELLECT. PROP. LAW PRACT. 659–665 (2008).

³¹ *Id.*

³² *Id.*

system that recognizes the right of commercial breeders in the development of plant varieties and other coming from the local farmers opposed to the idea of IPP of plant varieties.³³

Indian PPVFR Act is heavily inspired by UPOV model in protecting the Plant Breeders Rights as it requires new variety to be distinct, uniform and stable (DUS) but at the same time makes provision for the protection of extant or existing varieties.³⁴ The Act enlists three classes of varieties for protection: new variety, extant variety and farmers variety.³⁵ The PPVFR Act allows for registration of new plant varieties that fulfill the requirement of DUS. It also permits the registration of essentially derived varieties. The purpose of registration is to give breeders exclusive right to produce, sell, market, distribute, import and export the varieties.³⁶

The system adopted by India is said to be *sui generis* and distinguished from UPOV in numerous ways. The PPVFR Act entitles farmers of authorial claims as well as grant them certain privileges and immunities. The authorial claim entitles the farmers with ownership in the form of primary rights, and privileges like protection, compensation, reward, etc are secondary rights of the farmers. The criterion of novelty necessary for the registration of new variety does not apply to the registration of extant varieties or farmers variety. *Firstly*, the farmers are granted the right to “save, use, sow, re-sow, exchange, share or sell” farm produce except the sale of branded seeds of a protected variety.³⁷ *Secondly*, the farmers are rewarded if the new variety is developed from the genetic material preserved by the farmers.³⁸ *Thirdly*, the farmers are entitled to compensation from breeders if the variety purchased from a breeder does not perform as per the representation made

³³ DHAR AND QUAKER UNITED NATIONS OFFICE, *supra* note 19.

³⁴ Shaila Seshia, *Plant Variety Protection and Farmers’ Rights: Law-Making and Cultivation of Varietal Control*, 37 ECON. POLIT. WKLY. 2741–2747 (2002).

³⁵ § 14 of PPVFR Act, 2001.

³⁶ Sujith Koonan, *India’s Sui generis System of Plant Variety Protection* 1 IELRC Briefing Paper (2014).

³⁷ § 39(1)(iv) of PPVFR Act, 2001.

³⁸ § 39(1) of PPVFR Act, 2001.

by the breeders.³⁹ *Finally*, farmers are immunized from legal action for innocent infringement.⁴⁰ The PPVFR is distinguished from the UPOV model in recognizing farmers' rights and is more in accordance with the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (ITPGRFA).

3. IMPLICATION OF PPVFR ON FARMERS RIGHT

In 1989 the FAO was commissioned by the Indian government to study the desirability of legislation introducing the PBR in India. The report advised India to draft the plant breeders right as per the UPOV model at the same time recognizing farmers rights as articulated in International Undertaking (IU). This formed the basis of India's PVP legislation. It is suggested that the implementation of farmers right cannot be limited to the needs and priorities of a country but also need to be harmonized at the international level.⁴¹

The PPVFR Act was enacted to effectuate dual purpose – to encourage the development of new varieties and to respect the farmers' contribution in terms of genetic material for developing new varieties. This was done to facilitate the growth of the seed industry, ensure that farmers have access to high-quality seeds and planting material and provide economical support to the farmers by protecting them from market fluctuations. The aim of the Act was thus to protect the interest of various stakeholders like commercial breeders, indigenous and local farmers, researchers, NGO and inter-governmental organisations.

The Indian PPVFR Act adopted a coequal model to ensure that farmers rights as well as breeders right is at par and both can claim protection for the varieties they improve or innovate. India formulated a system that not only treats farmers as stewards of biodiversity but also recognizes

³⁹ § 39(2) of PPVFR Act, 2001.

⁴⁰ § 42 of PPVFR Act, 2001.

⁴¹ Koonan *supra* note, 36.

them as creators and innovators of plant varieties. It provides for a decent alternative system which accommodates the right of the farmers with the breeders such that they both could co-exist. The term *sui generis* allowed the states to come up with a provision that protected the right of farmers without jeopardizing the right of breeders. However, the question is whether the farmers can access the rights that are formally granted to them by letter of the law.⁴²

3.1. PROBLEMS OF CO-EQUAL RIGHTS

The Act embodies the notion of "equality" suggesting that both the breeders and farmers will be granted rights over their varieties in the same manner. Farmers were bestowed with certain authorial status which gave them proprietorial claims to commercialize their knowledge besides stopping others from doing the same. However, it fails to recognize *firstly*, that this equality in fact jeopardizes the rights of the farmers by disabling the varied entitlement that concerns only the farmer under the act. For instance, the ownership provides farmers the right to save, use, and sell the seeds – but this right to sell is limited only to the open-pollinated plant varieties and not to cross-pollinated hybrid seeds. The hybrid seeds exhibit a hundred percent seed replacement tendency and hence the farmers are required to purchase new seeds every season. The boom in biotechnology's hybrid seeds has compelled the farmers to buy new seeds every season thereby weakening farmers' seed rights. Technology has displaced the right of the farmers over open-pollinated seeds cultivated traditionally. Thus, the ownership of farmers over their varieties granted by the Act holds little significance.⁴³

Secondly, the Act inspired by the UPOV model provides protection by registration to all varieties based on the DUS standard. This causes problems for the protection of farmers variety as seeds conventionally are exchanged through an informal system. The process of repeated propagation of farmers variety leads to homogeneity among farmers variety (intra-species) even though the same

⁴² Seshia, *supra* note 34.

⁴³Rajshree Chandra, *Farmers' Rights in India: "Globally Sui Generis"* 26 edoc.hu-berlin.de/bitstream/handle/18452/9170/7a.pdf?sequence=1 (last visited July 4, 2020).

exhibit uniqueness (inter-species). As a result of which, the requirement of distinctness of one variety from another for registration might not be identifiable.

Thirdly, farmers are not driven by proprietorial claims and DUS for selection of seeds in contrast to commercial breeders who engage in mass selection to breed varieties that excel in performance. Hence, the chance of commercial breeders getting their varieties registered outweighs that of farmers which might fall short of meeting UPOV standard of distinctness, uniformity, and stability.⁴⁴

Fourthly, the financial incapacity and socio-economic condition of farmers add to the obstruction in establishing the distinctiveness of variety. The farmers' variety has the highest number of applications for registration with the lowest conversion rate. Moreover, farmers variety that has been successfully registered exhibits a set pattern, that is, the registration is granted only for seeds having a low replacement rate, on the other hand, registration for new varieties mostly hybrid is in the name of private corporations like Monsanto, Pioneer, etc.⁴⁵

Hence, the entitlement of farmers variety in legislation is quite ironical as it is only the breeder's innovation enabled through biotechnology that really gets protection and the farmers only have notional claim over their varieties.

The fact that there are multiple stakeholders to claim right over a variety results in overlapping of claims and entails considerable negotiations. This jeopardizes the right of farmers who mostly are not even aware of their rights given poor literacy and hence, they barely resort to the right of benefit sharing. Therefore, though the text of law provides the farmer with all the proprietorial right suggesting that they have a strong position in reality, as the socio-economic condition of farmers is disregarded, and they are treated at par with commercial breeders who have access to technology the rights of the farmers get reduced to a weak nominal right.

⁴⁴ *Id.*

⁴⁵ *Id.*

3.2 PROBLEMS OF THE ANTI-COMMONS

The Indian PPVFR Act besides protecting the interest of farmers and breeders provides for an arrangement that attempts to secure the interest of various stakeholders including public sector institutions, private sector institutions and NGOs under a proprietary framework. The Act protects four kinds of varieties by way of registration- New variety, Farmer's variety, Extant, and Essentially Derived variety. Though the aim of granting multiple rights is to ensure equitable distribution of such right but it can result in the overlapping of claims necessitating complex bargaining with several actors to utilize the resource. This results in an “anti-common tragedy”. The anti-common tragedy refers to the obstruction faced by an individual in creating an input as it would require access to the various protected inputs. This involves complex bargaining with multiple authors of existing varieties who enjoy the right to independently possess the variety and exclude all others resulting in underutilization of resources.⁴⁶ This in turn could result in disputes amongst farmers belonging to different groups. The extant variety need not be novel; hence the right-holder could gain control over a variety which is used by a wide range of other farmers.⁴⁷

4. BETTER MODALITIES TO PROTECT THE RIGHT OF FARMERS

4.1 RELAXING THE DUS REQUIREMENT OF PROTECTION

The UPOV Convention provides protection to a new plant variety that satisfies the DUS criteria. The Indian PPVFR Act inspired to a great extent from UPOV permits registration of plant variety upon satisfaction of the DUS requirement. The DUS requirement is applied by the Thai PVP Act, 1999 as well, however, an exception is carved with regard to the novelty of local domestic

⁴⁶ Anitha Ramanna, *INDIA'S PLANT VARIETY AND FARMERS' RIGHT LEGISLATION: POTENTIAL IMPACT ON STAKEHOLDER ACCESS TO GENETIC RESOURCES*, AGECON SEARCH (2003), <https://ageconsearch.umn.edu/record/16105> (last visited July 8, 2020).

⁴⁷ Robinson, *supra* note 30.

variety.⁴⁸ On the other hand, the OAU Model Law has relaxed the requirement of DUS and allows for the protection of varieties exhibiting “special attributes identified by a community”.⁴⁹

It is argued by many that the requirement of uniformity provided under the UPOV model should be relaxed with regard to farmers variety which consists of numerous genotypes as the selection process is never concerned with increasing uniformity. It is difficult for small farmers to satisfy the criteria of uniformity.⁵⁰

A *sui generis* regime that stresses the requirement of uniformity and stability for PVP does not benefit farmers in any manner and often results in disqualification from protecting the farmers variety. The criteria of uniformity and stability should be loosened in the case of farmers’ variety. The standard of identifiability for protecting farmers variety as against the stricter and difficult to conform DUS requirement should be adopted. The relaxed criteria of distinctness and identifiability will help in the protection of farmers’ variety which is the aim of a *sui generis* regime in the first place.⁵¹

4.2 DISTINCT PROTECTION TO DIFFERENT VARIETIES

The Plant Variety Protection Act, 1999 of Thailand protects the plant varieties under two head "new and local varieties" and "local domestic and wild varieties". A *sui generis* regime adopted by Thailand is also better as it differentiates in terms of the right that is to be granted for different kinds of plant varieties. Hence, the varieties can be divided into various categories and exceptions can be set out for certain kinds of varieties.

⁴⁸ Pawarit Lertdhamtewe, *Thailand’s sui generis system of plant variety protection*, 3 QUNO BRIEF PAP 1–5 (2014).

⁴⁹ AFRICAN MODEL LEGISLATION FOR THE PROTECTION OF THE RIGHTS OF LOCAL COMMUNITIES, FARMERS AND BREEDERS, AND FOR THE REGULATION OF ACCESS TO BIOLOGICAL RESOURCES, 26 (2000) <https://www.wipo.int/edocs/lexdocs/laws/en/oau/oau001en.pdf> (last visited July 8, 2020).

⁵⁰ Carlos M. Correa, *Sui generis protection for farmers’ varieties*, FARMERS’ CROP VARIETIES AND FARMERS’ RIGHTS (2016), <https://www.taylorfrancis.com/> (last visited July 10, 2020).

⁵¹ *Id.*

Thailand distinguishes the new and local variety from that of general categories of domestic or wild varieties whereby new varieties are protected relying on the exclusive property right approach but in contrast to this, the general domestic and wild varieties form part of a benefit-sharing mechanism. Access to the genetic and wild variety for commercial purposes is not allowed without the permission of the government.⁵²

4.3 LIABILITY REGIME MORE SUITABLE FOR PROTECTION OF FARMERS RIGHTS

Thailand's Plant Varieties Protection Act, 1999 is tilted more towards liability regime in contrast to India which resembles property regime. In India, the benefit-sharing is achieved by way of bilateral agreements between the user and provider of genetic resources. This leads to various complexities ranging from negotiation to high cost of the transaction. Instead of this, an alternative mechanism in the form of a PVP fund should be established. The establishment of a fund for effectuating benefit-sharing as against the grant of exclusive rights has many advantages. Firstly, the variety will be accessible for use and exchange by farmers as well as breeders at any time; secondly, a simpler procedure for benefit sharing is substituted for complex negotiation procedure; thirdly, the contribution to such fund will be rewarded without blocking the diffusion for infringement of exclusive rights.⁵³

CONCLUSION

Developing countries are concerned about the impact of intellectual property right in protecting the traditional knowledge of indigenous communities and local farmers. This paper evaluates the implication of *sui generis* system for the protection of plant variety on farmers' rights and concludes that the measures sought to secure the right of farmers and their knowledge is not effective. The *sui generis* system based on intellectual property rights obstructs the rights of certain

⁵² *Id.*

⁵³ *Id.*

traditional knowledge communities. The creation of exclusive property right over traditional knowledge may not benefit indigenous farmers. The protectionist model suggested by international intellectual property models benefits only the industrialized countries and not the industrializing countries by creating a monopoly over the resources generated by the community of local farmers. The international standard for protection of plant variety provides a uniform standard by way of UPOV for all countries ignoring the socio-economic condition of different countries thereby leading to misappropriation of traditional knowledge. The *sui generis* system adopted by India though provides formal protection to farmers by making provision to secure their rights but fails to recognize that providing a coequal right to farmers and breeders only benefits the commercial breeders given the socio-economic condition of local indigenous farmers. The provision of Indian PPVFR Act is not appropriate in securing the rights of indigenous farmers as it is heavily based on the UPOV model. Developing countries are faced with difficulty in complying with the minimum standards of protection provided by the international framework. It is necessary to recognize that the goal of progress promised by adherence to intellectual property regime can be best achieved only by adopting a balanced approach that does not shrink the public domain. There is a need to address the issue by adopting a bottom-up approach in order to secure the concern of indigenous farmers. This is to ensure that the rights of knowledge holders are protected and at the same time users enjoy adequate protection. If the access of knowledge by the public is necessary, then the assessment of traditional knowledge from the lens of the distributive justice mechanism suggests that the *sui generis* model based on intellectual property regime is not the most suitable measure to counter the issues relating to bio-piracy. Hence, there is a need to ensure that the *sui generis* system is not similar to the uniform international framework otherwise it will only provide formal protection and not benefit the farmers situated at the grass-root level who primarily create the knowledge.