**Sui Generis IPR Laws vis-à-vis Farmers’ Rights in Some Asian Countries: Implications under the WTO**

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The expansion of scope of intellectual property protection to include plant varieties and ensuing monopoly on genetic resources has raised concerns as it affects traditional rights of farmers. The International Treaty for Plant Genetic Resources for Food and Agriculture (ITPGRFA) provides an international recognition of farmers’ rights. The International Union for the Protection of New Varieties of Plants (UPOV) is one of the most accepted sui generis system for the recognition of plant breeder’s rights. The present study aims to analyse the farmers’ rights development in South Asia from the perspective of intellectual property enforcement. Based on the membership to WTO, ITPGRFA and UPOV, the Asian countries were divided into four groups. It is observed that only Group B countries (which are members of ITPGRFA) have legislations with respect to farmers’ rights. A comparison of the policy and legislation revealed that Nepal, Bangladesh, Pakistan and Philippines have framed the policy but legislations are yet awaited.

**Keywords:** Sui generis, IPR laws, farmers’ rights, WTO

Farmers are an important part of the economic, social and political fabric of the society in genetic resource-rich, developing countries. Their role in agrobiodiversity conservation and innovation is acknowledged worldwide since the revised agreed interpretation under the International Undertaking on Plant Genetic Resources.¹ Farmers’ rights, vital to ensure food security and sustainability, have been recognized under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). International Convention for the Protection of New Varieties of Plants (UPOV Convention) has provided one of the most accepted sui generis systems for plant variety protection vis-à-vis recognition of plant breeder’s right. It recognized farmers’ interests as an optional exception to the plant breeder’s right. In most developing countries, traditional farming is the foundation of agricultural production and seed supply through informal innovations by local farming communities. Intellectual property (IP) protection in agriculture field affects traditional rights of farmers. As per the TRIPS Agreement, some developing nations have used the sui generis plant variety protection clause to address the interests of farming communities as well as plant breeders. However, the exact nature, scope and extent of farmers’ rights are still undefined. This paper aims at comparing the rights available to farmers under different national legislations in Asian countries, including India vis-à-vis sui generis IP protection in agriculture.

**Historical Perspective**

The Paris Convention of 1883 is the first multilateral agreement for harmonizing IP laws.² It extended protection to industrial property, which was recognized to also apply to agricultural and extractive industries and to all manufactured or natural products.³ The next 50 years witnessed various attempts by different countries in Europe to extend IP protection to the field of agriculture. These involved recognition to the seeds and seedlings, introduction of a Register for Newly Bred Plants, and setting up of a Seed Association as well as a Seed Control Committee.⁴ However, the first attempt to recognize the intellectual property right (IPR) of a plant breeder

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was the enactment of the Plant Patent Act by USA in 1930 (ref.5). This Act aimed at protecting asexually propagated plants by patents. However, this enactment also fueled debate regarding the type of IPR protection to be extended to the agriculture. Two divergent views emerged; one was to extend patent protection to plants while the other was to extend the *sui generis* protection, recognizing plant breeder’s right.

In Strasbourg, a group of European countries adopted the Convention on the Unification of Certain Points of Substantive Law on Patents, which prescribed plant or animal varieties or essentially biological processes for the production of plants and animals as exception to patentable subject matter. Thus, Parties were not bound to provide for the grant of patents in respect of plant varieties or animal varieties or essentially biological processes for the production of plants and animals. Later on, the European Patent Convention adopted these exceptions in its Article 53, in year 1973, and the same language was reproduced in the TRIPS Agreement, 1995 in Article 27.3 (b). Thus, by 1970s, it was already settled in the developed world that IP protection will be extended to agriculture. However, the developing nations agreed to it only in 1995 with the adoption of the TRIPS Agreement.

The extension of the IP protection to agriculture also raised a few concerns. One such concern was that farmers in developing countries have traditionally enjoyed the right to save, share, exchange and sell the farm produce as seeds, and the monopoly extended to plant breeders by granting IPR on plant varieties may take away the traditional rights of farmers. Also, monopoly in agricultural products could also raise the prices of such commodities. Above all, the contribution of farmers in the conservation and preservation of varieties was considered important for further plant breeding. To address this, two options were considered relevant: (i) protecting the interests or the privilege of farmers to save and repeatedly use for sowing their farm saved seed of protected varieties as an exception to the plant breeder’s right, and (ii) protecting the right of farmers in terms of getting equitable share of benefits derived from the use of plant genetic resources conserved and preserved by them. The first approach is reflected in the UPOV Act, the European nations’ effort towards securing the plant breeders’ right, while the second approach is reflected in the Food and Agriculture Organization (FAO) International Undertaking on Plant Genetic Resources, which was renegotiated and adopted as the International Treaty on Plant Genetic Resources for Food and Agriculture.

In 1961, five European countries agreed to provide *sui generis* IP protection to plant varieties and formed the International Union for the Protection of New Varieties of Plants (UPOV) which provided for the rights of plant breeders, and prohibited two or more types of protection to a particular plant species. Article 5 of UPOV Act, 1961 provides for the protection of the interests of the farmers as against those of plant breeders. The act of farmers to save a part of their farm produce as seeds for the next crop season and to exchange seeds with other farmers were not considered ‘commercial marketing’ under Article 5(1). Therefore, such acts were kept out of the scope of plant breeder’s right as farmers’ privilege. However, the farmers’ rights as such were not recognized under the UPOV Act. The UPOV Acts underwent three amendments in 1972, 1978 and in 1991. There are at present two main Acts of 1978 and 1991 which govern parties to the Convention.

The 1978 amendment of UPOV Act left the provision of farmers’ privilege unaltered. However, it provided for restricting the plant breeders’ right on the ground of public interest to prevent adverse effect of the monopoly. This provision indirectly addressed the right of farmer to the adequate availability of seeds. This aspect is also present in the UPOV Act, 1991.

The third amendment of UPOV Act, in 1991, made the farmers’ privilege optional to the member countries. This provision allows farmers to use product of the harvest of the protected variety, which they may obtain by planting on their own holdings, for further propagating purposes. However, the Convention requires that the farmers’ privilege be regulated ‘within reasonable limits and subject to safeguarding of the legitimate interests of the breeder.’

The concept of farmers’ rights came up in 1980s as a response to the increased demand for plant breeders’ rights, to draw attention to the unremunerated innovations of farmers. It was based on the fact that the farmers have been engaged in the informal breeding process besides conserving and preserving biological and genetic resources for time immemorial. Hence, they deserved to be recognized and rewarded like the contribution of breeders in development of the new varieties was recognized and rewarded.
through plant breeders’ right. The first mention of farmers’ rights was made in the meeting of the Working Group of the FAO Commission on Plant Genetic Resources, 1986, in the context of the International Undertaking on Plant Genetic Resources (IUPGR).\textsuperscript{10}

The 25th session of the FAO Conference of 1989 was a landmark in the history of recognition of farmers’ right. The FAO Conference Resolution 4/89 first introduced the concept of farmers’ rights into the IUPGR and also defined farmers’ rights in its resolution 5/89. The IUPGR observed that generations of farmers have conserved, improved and made available plant genetic resources, however, the contribution of these farmers were not sufficiently recognized or rewarded. It was felt that the farmers should benefit fully from the improved and increased use of the genetic resources that they have preserved. It was in the light of these facts that the FAO Conference endorsed the concept of farmers’ right, and defined these as right arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity. These rights were to be vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of IUPGR.

In 1992, the Convention on Biological Diversity was adopted. It recognized the sovereign rights of the nation on their biological resources. The Article 8 (j) of the Convention also recognized the contribution of communities and indigenous local people in the conservation and preservation of biological resources. It also recognized the rights of community and indigenous people to have a fair and equitable share in the benefits arising out of utilization of such knowledge.\textsuperscript{11} Later, this benefit sharing was seen as an important component of the realization of farmers’ right.

The 27th session of the FAO Conference recognized the need to further the process of renegotiations for unresolved issues, including the realization of farmers’ rights within the framework of IUPGR, and requested the Director-General to provide a forum for such negotiations among governments.\textsuperscript{12} These negotiations culminated in the adoption of the ITPGRFA (also known as Seed Treaty), through Resolution 3/2001, by the FAO Conference in November 2001 (ref. 13). The Treaty recognized the enormous contribution that the local and indigenous communities and farmers have made and will continue the efforts on conservation and development of plant genetic resources (Article 1.1). It recognized following rights as main components of the farmers’ right; (i) right to save, use, exchange and sell farm-saved seed and other propagating material (Article 9.3), (ii) right to fair and equitable sharing of the benefits arising from the use of plant genetic resources for food and agriculture, (iii) right to participate in national decision-making process about plant genetic resources [entrusting national governments with the responsibility for implementing these rights in accordance with their needs and priorities subject to national legislation (Article 9.2)], and (iv) protection of traditional knowledge. Thus, a full-fledged concept of farmers’ rights came to an existence at the international forum.

By 1995, with the establishment of WTO, the TRIPS Agreement provided that IP in agriculture should be protected either by patents or by an effective sui generis protection or both.\textsuperscript{14} This implied extension of some kind of protection to agriculture by all the developed as well as developing WTO member nations. Also, the provision for extending the sui generis protection provided the legitimacy to protect the farmers’ rights and balance the rights of the breeder and the farmer. It also provided to extend or limit the extent of farmers’ right as per the need of the concerned nation.

Farmers’ right thus, continuously gained importance. Various nations passed their sui generis plant variety protection (PVP) legislations in order to comply with the TRIPS Agreement. Few countries have also used their sui generis PVP system to extend the farmers’ rights. However, farmers’ rights, thus extended, are not uniform. Countries have adopted the sui generis models as per their needs.

\textbf{Position of Farmers’ Rights in Asian Nations}

Although UPOV was established and revised to give IP rights to breeders, it also acknowledged to some extent the privileges of farmers. However these privileges were diluted and made optional in later amendments.\textsuperscript{15} Given this scenario, it is notable that only a few Asian countries became party to the UPOV convention.\textsuperscript{16} Some countries, who are not members of UPOV, treated UPOV as a guiding legislation in
matters of PVP and the grant of plant breeders’ rights. Since most of the Asian countries are WTO members, they were required to comply with the minimum standard as laid down in the provisions of TRIPS. The *sui generis* provision of the TRIPS Agreement has been used by interested countries to recognize farmers’ rights. Further, members of the ITPGRFA treaty also recognized farmers’ rights.

In this paper, the status of the farmers’ rights has been considered in Asian countries which are members of WTO and further sorted into four groups based on whether they are members of UPOV and/or ITPGRFA as shown in the following Fig. 1.

Out of the four groups of WTO member Asian countries (Fig. 1), only some of the Group B countries who are members of ITPGRFA but not the UPOV members, have opted for a *sui generis* system, which provides for the farmers’ rights.

Of the Group A countries, which have not joined either UPOV or ITPGRFA, only Sri Lanka has drafted a plant breeders rights legislation, known as Protection of New Plant Varieties (Breeder’s Rights) 2001, which follows the model of UPOV 1991 and does not recognize the farmers’ rights.

Of the Group B countries, which are members of ITPGRFA but not UPOV, India, Thailand, Indonesia, Malaysia and Philippines have enacted legislations with respect to farmers’ rights (Table 1); Bangladesh and Pakistan have prepared draft legislations; and Nepal has prepared a policy document, which discusses the farmers’ right. Other countries in the group do not have any legislation relating to farmers’ rights or plant variety protection.

### India’s Protection of Plant Varieties and Farmers’ Rights Act

India has enacted PPV&FR Act in compliance to the TRIPS requirement. The Act deals with PVP as well as the farmers’ rights and follows a holistic approach. The *sui generis* system adopted by India is unique in the world in the sense that it has taken the farmers’ rights concept a step forward and genuinely addresses the concerns of farmers as breeders, innovators, conservers, etc. It has tried to incorporate the features of UPOV and ITPGRFA along with certain distinctive features of its own as per requirement of farmers. PPV&FR Act of India recognizes various rights of farmers as per Section 39 (Table 2). The definition of a farmer and further farmers’ rights in other Asian countries’ legislations may be compared to the Indian legislation.

### Provisions Related to Farmers: Comparative Analysis of Group B Countries

#### Definition of Farmer

Farmer in Indian PPV&FR Act (Section 2k) and in the Malaysian PVP Act (Section 2) has been defined as: ‘any person who cultivates crops by cultivating the land himself; or cultivates crops by directly supervising the cultivation or land through any other person; or conserves and preserves, severally or jointly, with any other person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties’. The Philippines Plant Variety Act does not define farmer. However, Community Intellectual Rights Protection Act, 2001 of Philippines defines farmers as ‘all engaged in the cultivation of crops living within the

<table>
<thead>
<tr>
<th>WTO members</th>
<th>Member</th>
<th>ITPGRFA</th>
<th>Non-member</th>
</tr>
</thead>
<tbody>
<tr>
<td>UPOV Member</td>
<td>(Group D) Jordan, Republic of Korea, Kyrgyzstan, Oman</td>
<td>(Group C) China, Israel, Japan, Singapore, Turkey, Vietnam</td>
<td></td>
</tr>
<tr>
<td>Non-member</td>
<td>(Group B) Armenia, Bangladesh, Cambodia, India, Indonesia, Malaysia, Maldives, Myanmar, Nepal, Pakistan, Philippines, Qatar, Saudi Arabia, Thailand, United Arab Emirates</td>
<td>(Group A) Bahrain, Brunei Darussalam, Hong Kong (China), Kuwait, Macao (China), Mongolia, Sri Lanka, Chinese Taipei</td>
<td></td>
</tr>
</tbody>
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Fig. 1 – Asian WTO member countries: Membership in UPOV and ITPGRFA
Nevertheless, conservation or preservation of any wild species or traditional variety is a distinctive feature in the definition of the farmer in Indian and Malaysian Plant Variety Act. It is not so well defined in other Asian countries legislations. However, the Community Intellectual Rights Protection Act of Philippines does define farmer-innovator as an individual who has provided parent strains or the local community which has helped to conserve and develop the genetic stocks or the residents of a plant genetic resource area from which new variety has developed.

Both the Malaysian and Philippine Acts use and identify small farmer, a feature absent in the Indian legislation, in the context of the limitations imposed upon the rights of the breeder. Section 2 A of the Malaysian Plant Variety Act defines small farmer in terms of size of holdings while the Philippines Plant Variety Protection Act of 2002 does not define it. However, Magna Carta of Small Farmers, another Philippine Act, defines small farmer in terms of income. The term ‘farmers’ rights’ per se is used only in the Indian legislation, ITPGRFA and Bangladesh draft. No other Asian countries’ Act uses the term ‘farmers’ rights’. There are subtle differences in the type of rights provided in the various legislations in the countries and are enumerated below.

**Right to Farm Saved Seeds**

Right to seeds is the traditional right of farmers to save, use, exchange and sell farm-saved seed and other propagating material. UPOV 1978 Act included this as farmers’ privilege while UPOV 1991 Act made it an optional exception. This privilege has been recognized as fundamental to the realization of farmers’ rights by ITPGRFA as described in its preamble.

### Table 1 — Legislations/policies in Asian countries to protect farmers’ rights

<table>
<thead>
<tr>
<th>Countries</th>
<th>Legislations/Policies dealing with Farmers’ Rights</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>India</td>
<td>The Protection of Plant Varieties and Farmers’ Rights Act, 2001</td>
<td>In force</td>
</tr>
<tr>
<td>Indonesia</td>
<td>Law on Plant Variety Protection 2000</td>
<td>In force</td>
</tr>
<tr>
<td>Thailand</td>
<td>Plant Varieties Protection Act 1999</td>
<td>In force</td>
</tr>
<tr>
<td>Malaysia</td>
<td>Protection of New Plant Varieties Act 2004</td>
<td>Adopted</td>
</tr>
<tr>
<td>Philippines</td>
<td>Magna Carta of Small Farmers, 1992</td>
<td>Adopted</td>
</tr>
<tr>
<td>Philippines</td>
<td>The Indigenous Peoples Rights Act, 1997</td>
<td>In force</td>
</tr>
<tr>
<td>Philippines</td>
<td>Plant Varieties Act, 2002</td>
<td>Draft</td>
</tr>
<tr>
<td>Philippines</td>
<td>Community Intellectual Rights Protection Act, 2001</td>
<td>Draft</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Legislation on Access to Biological Resources and Community Rights, 2004</td>
<td>Draft</td>
</tr>
<tr>
<td>Pakistan</td>
<td>Plant Breeders’ Rights Ordinance, 2000</td>
<td>Draft</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Biodiversity and Community Knowledge Protection Act, 1998</td>
<td>Draft</td>
</tr>
<tr>
<td>Bangladesh</td>
<td>Plant Varieties Act, 1998</td>
<td>Draft</td>
</tr>
</tbody>
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### Table 2 — Rights provided to farmers in PPV&FR Act, 2001 of India

<table>
<thead>
<tr>
<th>Description of right</th>
<th>Also available in</th>
</tr>
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<tbody>
<tr>
<td>Rights to seeds</td>
<td>ITPGRFA, UPOV</td>
</tr>
<tr>
<td>Right to register varieties</td>
<td>UPOV</td>
</tr>
<tr>
<td>Right to reward and recognition as conserver</td>
<td>ITPGRFA</td>
</tr>
<tr>
<td>Right to information about expected performance and compensation for under-performance</td>
<td>-</td>
</tr>
<tr>
<td>Right to benefit sharing</td>
<td>ITPGRFA</td>
</tr>
<tr>
<td>Right to compensation for undisclosed use of traditional varieties</td>
<td>ITPGRFA</td>
</tr>
<tr>
<td>Right to adequate availability of registered material</td>
<td>UPOV</td>
</tr>
<tr>
<td>Right to free services</td>
<td>-</td>
</tr>
<tr>
<td>Protection from innocent infringement of breeders’ rights</td>
<td>-</td>
</tr>
</tbody>
</table>
The Indian legislation according to Section 39, protects the farmers’ right to save, use, sow, re-sow, exchange, share or sell their farm produce including seed of a protected variety. The right is available to all farmers irrespective of the size of their holdings. However, it prohibits the farmer from selling branded seeds of protected variety.

The Malaysian, Thai, Philippine and Indonesian Acts do not recognize right to farm saved seeds under farmers' rights as such but provide it as an exception to the breeder's right. The exceptions are limited to small farmers only in the Indonesian, Malaysian and Philippine Acts. The small farmers in Malaysia can propagate by using the harvested seed material of the protected variety planted on their own holdings, and the amount to be sold must not be more than what is required in one’s own holding.19 In Philippines, the provision of farmers’ privilege in Section 43 of its PVP Act, allows a small farmer to exchange and sell seeds among and between other small farmers only. The Indonesian Act provides that if part of the harvested crop of a protected variety is used for non-commercial purposes it does not contravene PVP rights [Article 10(1)]. Non-commercial purpose is further explained as individual activities particularly those of small farmers for their own needs and does not include activities to meet the needs of larger community.

Section 33(4) of Plant Varieties Protection Act, 1999 of Thailand recognizes the right of farmer to cultivate and propagate the protected new plant variety from the propagating material made by himself, but restricts the quantity to be used to three times of the quantity obtained. It also recognizes the right to sale or distribution by any means, for non-commercial purpose [Section 33(5) read with 33(6)].

Right to Register Varieties
Right to register varieties for the grant of IPR has not been recognized as farmers’ right by either the UPOV or ITPGRFA. However, the Indian Act in Section 39, provides farmers the right to register a variety bred, evolved or conserved (whether new or extant) by them, as its breeder.

The Malaysian, Thai and Philippine Acts do not define the term farmers’ variety but these legislations recognize the right of farmer to register a new variety at par with the breeder.20 The definition of a breeder in the Indonesian and Philippine Acts does not preclude the farmers from claiming breeder’s rights.21 Therefore, if new varieties developed by farmers comply with the distinctiveness, uniformity, stability and novelty (DUSN) criteria, farmers are entitled to a PVP title.

In the Thai Act, farmers, as a group, cooperative or community, have the right to register a domestic plant variety22, which may exist only in a particular locality. Nevertheless, any sui juris person can also register a local plant variety if he has conserved and developed it exclusively.23

The Philippine Act, on the other hand, provides for a framework for community registration of locally bred varieties. Farming communities and bona fide farmers’ organizations can establish their respective local registry system to register or build an inventory of locally bred varieties.24

Right to Reward and Recognition
Right to reward and recognition to farmers is based on the fact that their generations have conserved, improved and made available plant genetic resources, and this contribution has not been sufficiently recognized or rewarded. ITPGRFA has recognized such a contribution but not identified it as a component of farmers’ right under Article 9. Rather, Articles 13 and 18 of the Seed Treaty provide for support to farmers who conserve plant genetic resources.

In India, Section 39 (1) (iii) of the PPV & FR Act also provides for recognition and reward, based on the contribution of farmers to conserve and preserve the genetic resources of land races and wild relatives, which have formed the basis for the development of registrable varieties. The reward is to be given from gene fund. In 2007, the PPV&FR Authority started the Plant Genome Savior Community Recognition for this purpose.25 However, such a provision does not exist in any other Asian country.

Right to Information about Expected Performance and Compensation for Under-performance
The Indian Act provides for farmers to be informed about the expected performance of a registered variety. The right is further extended by the right to compensation, if the registered variety does not perform up to the promised level. The farmers’ right to compensation on non-performance of the variety seeds up to the expectation promised by the breeder is unique, and specific to India.26 No other Asian country provides for such a right. Besides, ITPGRFA and UPOV also do not identify it as farmers’ right.
Right to Benefit Sharing

Right to benefit sharing is recognized as one of the farmers’ rights under Article 9 of ITPGRFA. Section 26 of the PPV & FR Act of India recognizes the right of benefit sharing with the breeder of initial variety, where a breeder may include a farmer.

The Thai Act provides for the person who is involved in conserving or developing local domestic plant variety a ‘right to profit sharing’. It also provides for the percentage of profits to be allocated to these groups.

The Philippine PVP Act is silent regarding benefit sharing. Nevertheless, the Magna Carta for Small Farmers, Section 2 affirms the government policy for equitable distribution of benefits and opportunities realized through empowerment of small farmers. Further, Section 1 of the Guidelines for Bioprospecting Activities in the Philippines Series of 2005 declares that the state is to ensure fair and equitable sharing with the resources providers of the benefits derived from the utilization of biological resources. Moreover, Section 5 of Community Intellectual Rights Protection Act of Philippines provides that a community, as a general owner of any form or product of traditional knowledge, is entitled to collect a justifiable percentage from all profits derived from the commercial use of their knowledge, for a period of ten years starting from the date of registration.

Right to Compensation for Undisclosed use of Traditional Varieties

Article 9.2 (a) of the ITPGRFA identifies protection of traditional knowledge relevant to plant genetic resources for food and agriculture as one of the farmers’ rights. Section 41 of PPV & FR Act of India provides for the right of farmers as a community to claim for compensation even if the breeder has not disclosed the source of varieties. Any NGO, individual or government institution may file a claim for compensation on behalf of the local community. This compensation will be granted from Gene fund. This right is unique to India.

Right to Adequate Availability of Registered Material

Compulsory licensing is a provision, which provides for the grant of licence on the ground of public interest or non-adequate availability of the product for a certain period, to be used as a means to ensure the availability of the protected material. It may be arguably seen as the right of a farmer to have adequate availability of protected variety at a reasonable price. Both UPOV 1978 and 1991 Acts provide for restricting the plant breeders right on the ground of public interest. Compulsory licensing has been used by UPOV member countries as a means to restrict the breeders’ right. However, ITPGRFA does not recognize it as a component of farmers’ rights.

Sections 8 (2 e) and 51 (1)(ii) of the PPV & FR Act, 2001 of India provides for the provision of compulsory licensing if the registered variety is not adequately available. Similarly, Section 36 of the Malaysian Act provides for ensuring availability of the protected material by granting compulsory license. Article 46 of Law on PVP 2000 of Indonesia provides for the compulsory licensing on the ground of public interest. In the Philippines’ Act, compulsory licence can be sought in public interest and for reasonable requirement of the public. However, compulsory licensing can be opted for after two years while in other countries such as Indonesia, India or Malaysia it can be applied for only after the expiry of three years. Grant of compulsory licensing is an executive action in India, Malaysia and Philippines while in Indonesia it is a judicial action. Provision for compulsory licensing does not exist in any of the other Group B countries.

Right to Free Legal Services

The Indian PPV&FR Act in Section 44 has exempted farmers from paying any fees with respect to any proceeding before the Authority or Registrar or the Tribunal or the High Court. They also need not pay fees for registration of farmers’ variety, DUS testing, etc. This provision is exclusive to India. However, the Philippine Act provides for the free distribution of Plant Variety Gazette to small farmers groups but does not provide any exemption from fees to the farmers.

Right to Protection from Legal Infringement Suits

Section 42 of Indian PPV&FR Act protects innocent infringement of the rights created under this Act by a farmer, if the farmer was not aware of existence of such right at the time of infringement. Therefore, no relief or cognizance of any offence under the Act can be taken as the act is not considered as infringement.27

Thailand protects any act committed in good faith relating to a protected new plant variety under Section 47(2) of its PVP Act, 1999. Section 33(3) of the Thailand Act has recognized such acts as an
exception to the rights of the right holder of the new plant variety. It also protects any act done for non-commercial purposes from being legal infringement.

Malaysian Act provides for certain limitation on the breeders’ right under Section 31. It protects any act done privately on a non-commercial basis or any act done for an experimental purpose from being an infringing act. It, however, does not mention act done in good faith as an exception to the rights of the breeders.

Emerging Scenario in Other Asian Nations

Nepal
Nepal recognizes in its Biodiversity Strategy that IPR and farmers’ rights are two important aspects, which have not been touched by the Nepal legislation. It declares its policy to ensure protection of the IPR of farmers and local communities through appropriate strategies and legislation. Farmer’s rights in Nepal will focus on rights arising out of past, present and future contributions by the farming community in conserving, improving and making available plant genetic resources, particularly those originating in Nepal.28

Pakistan
Pakistan has passed Plant Breeders’ Rights Ordinance, 2000. As per this ordinance, the farmer has been recognized as a breeder and is entitled to register new varieties.29 Farmers’ right to save, use, exchange, share or sell his farm produce of protected variety has been protected in Section 31 but not seed. Section 30 of the ordinance provides for compulsory licensing also. The ordinance is silent about benefit sharing though draft legislation on access to biological resources and community rights seeks to provide for the benefit sharing. Farmers’ right in benefit sharing as such has not been recognized but as a community right, farmers are entitled to 10 per cent of the benefit obtained from any commercial use of biological resources.30

Bangladesh
Farmers’ right in the Bangladesh draft does not include right to seed but provides for the right to collect, conserve, propagate and use the propagation material of any protected variety if it is for personal and non-commercial use.31 Exchange of propagating material for any monetary and financial gains is strictly prohibited. A farmer has not been explicitly recognized as a breeder and provision for the protection of farmers’ variety is missing. However, Article 3 of the Act recognizes the farmers’ right as innovator and rewards have been proposed in the draft provision.

The right to information in the Bangladesh draft guarantees access to biological and genetic resources, information regarding the new varieties and their holders, application and examination of the registration procedures and decision thereof. Moreover, Bangladesh draft aims to provide for protection if the infringing act has been done in the good faith or for non-commercial purpose.32 It also provides certain other rights to farmers, such as, right to appoint an advisor, receive exemption of tax, and participate in research with the National Agricultural Research System, etc.

Group C Countries
Among the Group C countries, which are members of UPOV as well as WTO, China is governed by the UPOV 1978 Act while all the other Asian members of UPOV are governed by the UPOV 1991 Act.33 China, thus, enjoys a greater liberty to provide farmers privilege in comparison to the others. All the other Asian countries in Group C have provided for plant breeder’s right and have recognized only the right of farmer to save and use the seed in his own holding as a privilege of the farmer. These countries do not recognize the right of a farmer to the seed as well as other rights such as benefit sharing, recognition of farmers’ contribution in conservation and preservation and right to protection of traditional knowledge relevant to plant genetic resources for food and agriculture, etc.

Group D Countries
The provisions of ITPGRFA guide the status of farmers’ rights in Group D countries, which are members of WTO, UPOV as well as ITPGRFA. The farmers in these countries enjoy rights such as benefit sharing, recognition of their contribution in conservation and preservation of plant genetic resource. These countries do not recognize right to seed but have an option to recognize farmers’ privilege to seeds.

Conclusion
Sui generis protection to the IP in agriculture has helped the nations to incorporate plant breeders’ rights as well as provide for farmers’ rights. However,
understanding of farmers' rights is diffused and lacks strict definition. The ITPGFRA has attempted to provide a uniform concept but the components of the farmers' rights vary from country to country as countries have freedom to choose ways and means depending on their priorities and resources.

Farmers' rights are mainly adopted as collective rights of farming populations and not as those of individual farmers. The emphasis is on the traditional crop varieties, wild races or land races. Almost all Asian nations have considered the farmers' right to seed as a farmer right barring the countries which are members of UPOV who have recognized the saving and exchange as an exception in the form of farmers' privilege. These countries obviously provide for plant variety protection to recognize the plant breeders' rights, but the legislations recognizing the rights of farmers are lacking. It is the countries in South and Southeast Asia that have highlighted farmers' right to the maximum. India has used the sui generis protection tool to balance the plant breeder's rights and the farmers' rights with wide scope. However, many other Asian countries have used it to protect plant breeder's right rather than the farmers' right.

The sui generis protection as provided in WTO clearly allows the member countries to adopt a legislation, which fulfills their need while protecting their interests. It is, nevertheless, up to the countries to decide how to identify and address the merits and/or inadequacies and deficiencies of the present day IPR system.

References
3 Paris Convention, Article 1 (3), Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, mineral waters, beer, flowers, and flour.
5 Later, USA extended plant variety protection by enacting the 1970 Plant Variety Protection Act (PVPA). Advances in breeding technology provided the momentum for the PVPA. It provided protection to sexual reproduction in plants, including seed germination. The protection has two major exemptions, namely, seed saving by farmers and use for research purposes. Under PVPA brown bag exemption, farmers could continue to save, replant, and resell protected seeds to other farmers. However, these exemptions were later on diluted by several judicial decisions.
7 The countries, which joined UPOV before 1999, could opt to be governed by the 1978 Act but countries joining now shall be governed by the UPOV Act, 1991.
8 http://www.grain.org/briefings/?id=1 (17 October 2010).
12 Resolution 7/93 of the 27th Session of the FAO Conference.
17 According to the Community Intellectual Rights Protection Act of Philippines, a farmer-innovator means: (i) an individual who has provided or was the source of parent strains used in the development of a new plant variety; (ii) the local community which has helped to conserve and develop the genetic stocks which have gone into the pedigree of a new variety; or (iii) the residents of an area rich in plant genetic resources from where breeders or breeding institutions responsible for the new variety have obtained donors of genes for resistance/tolerance/avoidance to biotic and/or abiotic stress or other valuable characters.
18 Magna Carta of Small Farmers, Philippines, Section 4 (1), ‘Small farmer’ refers to natural persons dependent on small-scale subsistence farming as their primary source of income and whose sale, barter or exchange of agricultural products do not exceed a gross value of One hundred eighty thousand pesos (P180,000) per annum based on 1992 constant prices. An inter-agency committee composed of the Department of Agrarian Reform, the Department of Trade and Industry, the Department of Finance and the National Economic and Development Authority and headed by the Department of Agriculture may conduct periodic review and adjustments of the income level to take into account the effects of changes in inflation, devaluation and consumer price index.
19 Section 310f Protection of New Plant Varieties Act 2004 of Malaysia reads: ‘Limitations on the breeder's right (1) The breeder's right shall not extend to... (l) 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.’
Section 13 (1d) of Malaysian Protection of New Plant Varieties Act recognizes farmer or group of farmers, local community or indigenous people who have carried out the functions of a breeder as an applicant to register the new varieties. Moreover, Section 14 (2) of the Malaysian Act recognizes the farmers right to register a variety as new variety if a plant variety is bred, or discovered and developed by a farmer, local community or indigenous people and the plant variety is new, distinct and identifiable. Under the Thai PVP Act, if a farmer has bred or developed a new variety, he can register the plant variety if he qualifies the definition of breeder (Section 3).

According Section 3 (c) of the Philippine Plant Varieties Act of 2002, ‘Breeder means: 1. The person who bred, or discovered and developed a new plant variety; or 2. The person who is the employer of the aforementioned person or who has commissioned the work; or 3. The successors-in-interest of the foregoing persons as the case may be; or 4. The holder of the Certificate of Plant Variety Protection’, whereas, according to Article 1 (5) of the Indonesian Law on PVP, plant breeders, are those who carry out breeding activities.

Thai PVP Act, Section 45, When a plant variety only exists in any particular locality and has been conserved or developed exclusively by a particular community, that community shall have the right to submit, to the local government organization in whose jurisdiction such community falls, a request for initiating an application for registration of the local domestic plant variety in the name of such community. Upon receipt of the request from the community under paragraph one, the local government organization shall proceed to apply to the Commission for registration of the local domestic plant variety as from the day documents and information necessary for the registration have duly been obtained. In the case where the community under paragraph one is formed as a farmers’ group or co-operative under the law on co-operatives, such farmers’ group or co-operative shall have the right to apply for registration of the local domestic plant variety on behalf of the community.

Thai PVP Act, Section 44, A sui juris person, residing and commonly inheriting and passing over culture continually, who takes part in the conservation or development of the plant variety which is of the descriptions specified in Section 43 may register as a community under this Act. For this purpose, there shall be appointed a representative who shall submit an application in writing to the Changwad Governor of the locality.

Philippine Plant Varieties Act, Section 72, Farming communities and bona fide farmers' organizations are encouraged to build an inventory of locally-bred varieties as an option to protect these resources from misappropriation and unfair monopolization.

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Indian PPV & FR Act, Section 39 (2), Where any propagating material of a variety registered under this Act has been sold to a farmer or a group of farmers of any organization of farmers, the breeder of such variety shall disclose to the farmer or the group of farmers or the organization of farmers, as the case may be, the expected performance under given conditions, and if such propagating material fails to provide such performance under such given conditions, the farmer or the group of farmers or the organization of farmers, as the case may be, may claim compensation in the prescribed manner before the Authority and the Authority, after giving notice to the breeder of the variety and after providing him an opportunity to file opposition in the prescribed manner and after hearing the parties, may direct the breeder of the variety to pay such compensation as it deems fit, to the farmer or the group of farmers or the organization of farmers, as the case may be.

Indian PPV & FR Act, Section 42, Notwithstanding anything contained in this Act,-(i) a right established under this Act shall not be deemed to be infringed by a farmer who at the time of such infringement was not aware of the existence of such right; and (ii) a relief which a court may grant in any suit for infringement referred to in Section 65 shall not be granted by such court, nor any cognizance of any offence under this Act shall be taken, for such infringement by any court against a farmer who proves, before such court, that at the time of the infringement he was not aware of the existence of the right so infringed.


Legislation on Access to Biological Resources and Community Rights (Draft), Article 5, http://www.grain.org/brl/?docid=683&lawid=1456 (17 October 2010).


Article 21(4) of the Bangladesh draft provision have included exceptions to Rights of Recipients of the New Plant Variety Certificate under Article 21(4) viz. any act for personal benefit with no commercial purposes or any act that has been conducted in honest faith.