

## Discussion on Access and Benefit Sharing in Relation to Crop Genetic Resources

### Organized by

**SAWTEE and FNI**

5 August 2013  
Kathmandu, Nepal

### Presentation on TRIPS Dimension by

**Kamalesh Adhikari**

Australian National University,  
Canberra

## About the WTO

### The WTO in global trade

- Established in 1995
  - Initially, it was GATT 1947
- WTO principles
  - Rules-based
  - Non-discriminatory
  - Transparency and predictability
  - Supportive for developing and least-developed countries
  - Dispute settlement mechanism

### Scope of the WTO

- Trade in goods
  - General Agreement on Tariffs and Trade (GATT) 1994, and several other GATT-annexed agreements such as Agreement on Agriculture
- Trade in services
  - General Agreement on Trade in Services (GATS)
- Intellectual property rights
  - Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)

## About IPRs

### What are intellectual property rights?

- In a broad sense, IPRs are monopolies that inventors enjoy for a certain period of time while excluding others from making, using, offering for sale, selling, or importing the invented products and technologies
- IPRs are considered an important set of tools to advance the knowledge-based economy in the globalized era, but there are criticisms as well.

## About the IPRs and TRIPS

### What are the types of intellectual property rights?

- Copyright and related rights
  - Artistic and literary works, computer programmes, performances and sound recordings, etc.
- Industrial property rights
  - Patent
  - *Sui generis* plant variety system
  - Industrial design
  - Trademark
  - Geographical indications
  - Trade secrets
  - Layout-designs of integrated circuits

### How does the WTO/TRIPS deal with intellectual property rights?

- Setting new multilateral rules and disciplines on the enforcement of IPRs at the national level, e.g.,
  - Maintaining minimum standards of protection
  - Making mandatory the non-discriminatory principles
- Making provisions of procedures for the multilateral prevention and settlement of disputes between governments
- Compliance by Members is compulsory

## Why does TRIPS matter for agriculture?

### Patent

- Patent is a monopoly right given by the state to the inventor over an invention (such as seed) for its sale, distribution, export, import, etc. for at least 20 years
- Patent applies to products as well as processes (technologies), and covers all fields of technologies
- However, in order to obtain patents, products and processes must meet these criteria:
  - Novelty, Inventive Step, Industrial Use

### Plant variety protection

- Plant breeders' right certificate is also a monopoly right given by the state to the breeder of a new plant variety for its sale, distribution, export, import, etc.
- Period of time for protection as well as criteria have not been mentioned in TRIPS
- However, it is held by many countries that plant varieties must meet these criteria:
  - Distinctness, Uniformity, Stability and Novelty

## TRIPS Article 27. 3 (b) and agriculture

### Patentability exceptions

- Members may exclude plants, animals and essentially biological processes for the production of plants and animals
- But not microorganisms, and non-biological and microbiological processes
- *Fundamental concern is:* What is the difference between discovery and invention? Is everything patented?

### Plant variety protection

Members shall provide protection to plant varieties either through :

- patents, or
- effective *sui generis* system , or
- a combination of both

*Fundamental concern is:* What is an effective *sui generis* (of its own kind) system? Do all the countries in the world have similar concerns in the field of agriculture?

As per the mandate of this Article itself, review negotiations of this Article are being held in the WTO's Council for TRIPS?

## Concerns with regard to TRIPS

### Implications of patent provisions under TRIPS

- Provide market power and profits to companies, promoting:
  - unethical exploitation and use of life forms; violation of socio-cultural norms; environmental risks and hazards; displacement of traditional and sustainable agriculture systems.
- Authorize and legalize unauthorized access to and use of biodiversity and traditional knowledge
  - threatening biodiversity conservation, community rights and sovereign rights of states over their resources

### Implications of plant variety protection provisions under TRIPS

- UPOV is not the only *sui generis* system, at least for agrarian poor economies
- Breeders' rights must not extend to threaten farmers' rights to save, exchange, reuse and sell (in non-branded form) farm-saved seeds of IPR-protected varieties
- A mechanism should be there to guarantee farmers' rights in relation to access and benefit sharing, prior informed consent, and obtaining ownership over their new varieties and knowledge (India is a classic example in South Asia).

## Nepal's commitments on patent and plant variety protection

### On patenting

- "Nepal said...Intellectual property protection was provided by Patent, Design and Trademark Act 1965. Nepal was preparing the new Industrial Property (Protection) Act, which would incorporate all the substantive provisions of TRIPS...cover all categories of industrial property rights ...and..., and be promulgated by December 2005. ..., Nepal had enacted the Copyright Act, 2002. This Act will be amended as necessary."

### On plant variety protection

- "...Nepal said that the present legislation did not cover the protection of plant varieties..., the protection of plant varieties would be included in the new Plant Variety Protection Act to be promulgated by *December 2005*. The drafting of the ... Act was not yet initiated, however it would be intended to *protect the rights of related stakeholders in accordance with the needs of the country*. This law would be a *separate free-standing Act*."

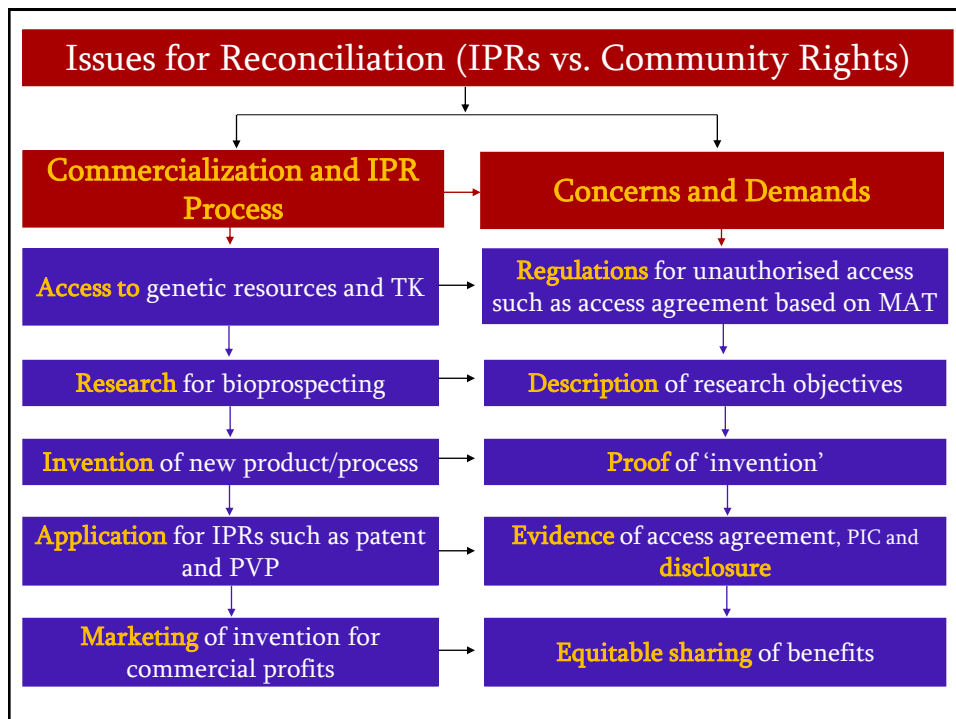
## Nepal's implementation status

### Law and policy making, and consultation

- Concerned ministries such as Ministry of Industry and Ministry of Agriculture and Cooperatives have taken some initiatives to draft the legislation
- Nepal, however, lacks a comprehensive IPR policy that is essential to guide lawmakers and concerned stakeholders to work in the interest of Nepal

### Institutional set up and strengthening

- Focal points have been identified, and WTO cells have been formed
- However, WTO issues have not been prioritized keeping in consideration their implications at the government level
- There is also lack of interest, and in some cases, commitment and capacity to follow-up with implementation agenda, including negotiation agenda for the ongoing and future negotiations at the WTO, and in other forums, incl. SAARC, WIPO, IT and CBD.



## Future action

**Period up to 2021 is a transition period and an opportunity.**

- Develop a comprehensive IPR policy also addressing farmers' rights, and develop "negotiation positions/agenda and strategies" for negotiations at WTO, WIPO, SAARC, CBD, ITPGRFA, etc. levels.
- Design an industrial property law, excluding plant varieties from patenting.
- Design a plant variety protection law, in consideration of the need to prevent bio-piracy and protect farmers' rights to livelihoods.
- Registration of genetic resources and traditional knowledge (Assessment of Implications of ITPGRFA Annex 1 and its extension).
- Take measures for sensitization, capacity building, networking as well as institutionalization of consultative mechanisms/processes.