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Trade Related Intellectual Property Rights (TRIPS) Agreement and the Agriculture Sector in Sri Lanka

by

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Executive Summary

One of the main objectives of the World Trade Organization (WTO) is to facilitate the world's trade and production. It enforces legally binding multilateral agreements on trade in goods, services, and trade-related aspects of intellectual property rights to manage global trade efficiently. At the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) in 1994, the Trade Related Intellectual Property Rights (TRIPS) agreement was implemented to regulate standards of Intellectual Property (IP) regulations in WTO member countries. Being a member of the WTO and a signatory to the TRIPS agreement, it is compulsory for Sri Lanka to formulate its IP regulations to comply with the TRIPS agreement by the year 2006. There are seven types of intellectual properties which are protected by the TRIPS agreement and it establishes minimum universal standards concerning copyrights and related rights, trademarks, geographical indicators, industrial designs, patents, layout designs of integrated circuits and undisclosed information. Section 5, Article 27 is the most important provision involving the agricultural sector.

According to the agreement Sri Lanka had to provide legal protection to plant varieties and farmers traditional knowledge via patents or by an effective sui generis system or by both, by the said year 2006. However, the agreement provides for each country to determine and adopt a suitable procedure to implement the provisions of the agreement within its legal system and practices.

Sri Lanka passed its Intellectual Property Rights Act No.36 to comply with the TRIPS agreement in the year 2003. However, this Act does not directly provide protection for plant varieties and farmers' traditional knowledge as it does not allow patenting of plants. Prior to the IPRs Act in 2003, Sri Lanka drafted a protection of new plant varieties (Breeders rights) Bill in 2001; which is still at the initial bill stage.

Due to several reasons such as; lack of demand from civil society, poor legal system, lack of properly established institutional system, etc., Sri Lanka was unable to build an effective intellectual property rights regime complying with the agreement, especially for the agricultural sector. Further, due to delay in establishing relevant rules and regulations to comply with the agreement, the Sri Lankan agricultural sector has to face several difficulties especially in international trade and also it has lost a number of opportunities to use its own plant varieties for the benefit of future generation due to loss of patentability in plant varieties and farmers traditional knowledge.

The TRIPS agreement has given flexibility to all countries in selecting the protection methods and techniques for plant varieties and farmers traditional knowledge. Thus, most of the developed countries have adopted well-built intellectual property regimes using strong patent systems and plant breeder's rights. The main reason for developed countries to choose patents for protection is due to their technological capabilities and the immense financial benefits that a patent system is expected to generate. Whereas, developing countries have weak regimes due to lack of financial and technical support.

The perception survey and face to face interviews amongst key stakeholders attempted to identify the best possible method for Sri Lanka to adopt in order to protect plant varieties and farmers traditional knowledge. Simultaneously, it suggested several techniques and methods that could be followed in implementing intellectual property right rules in agriculture in order to promote investments and accelerate trade internationally.

1. Introduction

Approximately 33 percent of the labour force in Sri Lanka is engaged in agriculture which constitutes 12 percent of the Gross Domestic Product. (Central Bank, 2009). Although, the importance of the agricultural sector is gradually declining, it continues to play a dominant role in the economy where approximately, 75 percent of the population still falls into the rural category, most of whom are engaged in agricultural activities.

Sri Lanka is rich with a repository of natural resources; in fact it has been recognized as one of the best places in the world for wild and agro biodiversity, with Sri Lanka holding more than 50 percent of the flowering plant families recorded in the world. The country is rich in biological diversity including its agricultural biodiversity, and is identified as one of the 24 biodiversity hotspots in the world (Nanayakkara, 2007). Sri Lankan agro biodiversity has plant varieties with special traits which suits different uses and different agro climatic conditions. Farming practices and the continuous selection of plant varieties by Sri Lankan farmers over centuries have made a wide range of cultivated plants. Those involved in farming and cultivation specialize their knowledge in several areas, especially knowledge of science in soil, rotation and mixing of crops, methods of sowing, watering and reaping, saving seeds for future use etc. Hence, their knowledge of science in farming is also recognized as an important element in agriculture as is labour. This knowledge individually is the intellectual property of the farmer, which gradually become the property of a country as a common property.¹

In any country, agricultural development is primarily based on different crop varieties grown by farmers which results in high productivity. Traditional knowledge of plant genetic resources is under threat (Trade Insight, 2007). In the recent past, the demand for private ownership on plant varieties increased rapidly due to the global push for privatization of biodiversity. Many developed countries, and the large businesses increasingly want to control these resources and the knowledge associated with farmers for commercial purposes.

Issues concerning plant genetic resources in Sri Lanka are multifaceted (Weerasinghe, 2004). This comprises all endangered flora, agricultural resources such as vegetables, fruits and grains, horticulture and medicinal plant resources. The exploitation and over exploitation of plants genetic resources takes place mainly in the form of bio-theft and bio-piracy (Gunasekera, 2007). As far as Sri Lankan legislation is concerned, it is evident that Sri Lanka does not have the necessary rules and regulations to halt bio-theft and bio-piracy (Gunesekera, 2007).

Due to the lack of a strong legal and institutional system, Sri Lanka had to face many cases of bio-piracy and loss of patents based on indigenous knowledge. The case of Kothalahibutu (Salacia Reticulate) clearly highlights the exploitation of wild varieties and the production of drugs based on traditional knowledge to which patent rights have been granted to Japan. The patent granted to the Japanese company prevents future generations of Sri Lankans from using

¹ Protecting farmers' rights in the global IPR regime, available at;

www.farmersrights.org/resources/global_articles_16.html).accessed on 25/03/2009

and producing similar drugs. It was identified that by the year 1985, twelve plants from Sri Lanka were patented in Japan² (Gunesekera, 2007).

However, Sri Lanka has certain rules and regulations to protect plant and animal varieties. Most of these Acts and Ordinances³ provide physical protection for natural resources and there are no specific laws relating to plant genetic resources and farmers traditional knowledge. Most of these laws were passed many decades ago. More recently, Sri Lanka has ratified international conventions⁴ regarding plant varieties and farmer's rights.

Most of the developing countries have faced several difficulties in protecting their plant varieties and farmers' traditional knowledge from the developed world which mainly attributes to lack of strong rules and regulations. Biological resources and farmers' traditional knowledge and skills have not been registered or documented in most developing countries and with the globalization process, bio-diversity and the traditional knowledge, skills and technologies possessed by local farmers in developing these varieties are at stake. Global Multi-National Companies (MNCs) have engaged in bio-piracy of vital genetic resources and associated traditional knowledge found in developing countries to get patent rights for their own countries. In this process, the developing countries are continuously denied the benefits which legitimately belong to them.⁵

Hence, the need for universally accepted rules and regulations to protect plant varieties and farmers rights has strongly been felt. One of the main highlights of the Uruguay Round negotiations which concluded in 1994, was the establishment of the World Trade Organization (WTO). It was the first ever comprehensive international organization which provided necessary recognition to Intellectual Property Rights (IPRs). The agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) is the most comprehensive international instrument ever negotiated on intellectual property rights. It establishes minimum universal standards concerning patents, copyrights, trademarks, industrial designs, geographical indications, integrated circuits and undisclosed information (trade secrets). It further supplements by providing additional

² Patent licenses have also been obtained for Snake Gourd (Trichosanthis Krilowii), Bitter Gourd (Momodica Chatantia), Kekatiya (Aponnogeton Crispus) etc.

³ For an example; Fauna and Flora Protection Ordinance, Forest Ordinance as amended in 1995, Plant Protection Act No: 35 of 1999 etc.

⁴ UN Convention on Biological Diversity (CBD) etc.

⁵ E.g. The patenting of Indian basmati rice variety by the Rice Tech company, USA, granting patent of an Indian traditional wheat variety by the European Patent Office to Monsanto over NapHal, patenting the entire gene sequences of rice by the Swiss M.N.C Syngenta, and patenting medicinal properties of turmeric, neem, jamoon, bitter gourd and such other Indian varieties and the associated knowledge, by the USA and the European M.N.Cs are only a few well known cases of bio piracy of Indian biological diversity and traditional knowledge. The Pakistan basmati rice patent was owned by the USA, Philippines Soil microbes was patented in the USA, Philippines Banaba (Lagerstroemia sp) was patented by Japan, Thailand Jasmine Rice was patented in the United States of America etc. (GRAIN and Kalpavriksh, 2002). These can be identified as some of the famous bio-piracy cases recorded in Asia – Pacific regions.

obligations to the previously established Paris, Berne, Rome and Washington conventions⁶ in their respective fields (The TRIPS agreement a guide to South).

The most relevant section in the TRIPS agreement with regard to agriculture is section 5, Article 27, which is titled "Patentable Subject Matter". This article states: "Patent shall be available for any invention, whether product or process in all fields of technology, provided that they are new, involves an inventive step and are capable of industrial application".

Being a member of the WTO, the Sri Lankan intellectual property rights regime has to be in conformity with the TRIPS agreement. It allows member countries to grant patent protection to microorganism and non biological and microbiological process and to provide protection for plant varieties, either by patent or an effective *sui generis* system or a combination thereof (Article 27, TRIPS agreement).

Sri Lanka passed its Intellectual Property Act No.36 in 2003 to comply with TRIPS. However this law does not have direct bearing on biodiversity and farmers' rights as it does not allow patenting of plants. However, previously Sri Lanka has drafted a protection of new plant varieties (Breeders rights) Bill in 2001.

IPRs have being well formulated and well applied more in developed countries than in developing countries. It is said that TRIPS has resulted in gross injustice to the South Asian countries, particularly to its farming and indigenous communities.⁷ However, Sri Lanka is lagging far behind the other countries in formulating and implementing property rights pertaining to the agricultural sector, especially on plant varieties and farmer's traditional knowledge. Therefore, the agricultural sector in Sri Lanka is vulnerable to outside exploitation because of its inability to provide necessary protection for plant varieties and farmers' traditional knowledge. Hence, having sufficient rules and regulations to protect plant varieties and farmers traditional knowledge is a strongly felt need at present.

2. Intellectual property rights and economics

Economic theory suggests that intellectual property rights could either enhance or limit economic growth. However, evidence is emerging that stronger and more certain IPRs could increase economic growth and foster beneficial technical change, thereby improving development prospects (Maskus, 2000). Nevertheless, the significance of these growth effects would be dependent on the circumstances in each country. However, with the appropriate

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