

Programme

30th November

- 2.00 – 5.00 pm Arrival and check in of participants and speakers
- 5.45 – 6.00 pm Welcome speech by SEACON's Executive Director: Ms
Indrani Thuraisingham
- 6.00 – 7.30 pm
- Ice Breaking Session
 - Introduction of the TRIPs workshop and its related topics
- 7.30 pm Dinner

1st December

- 9.00 – 10.00 am Overview of WTO
- 10.00 – 11.00 am Introduction to Intellectual Property Rights
- 11.00 – 11.15 am Tea Break
- 11.15 – 12.30 pm IPRs in Agriculture: What are at stake for farmers?
- 12.30 – 1.30 pm Lunch
- 1.30 – 2.30 pm How patent and PVP affect farmers' rights?
- 2.30 – 3.30 pm Why is UPOV seeking backdoor entry into the WTO system
through TRIPs?
- 3.30 – 3.45 pm Tea Break
- 3.45 – 5.00 pm Are there any responses that we have against of UPOV?
- 5.00 – 6.30 pm Open discussion on UPOV
- 6.30 – 7.00 pm Synthesis

2nd December

- 9.00 – 11.00 am Re-cap of the previous day's events
- 11.00 – 11.15 am Tea Break
- 11.15 – 1.00 pm CBD and ITPGRFA: Seeking to secure farmers' rights
- 1.00 – 2.00 pm Lunch Break
- 2.00 – 4.00 pm Alternative models for PVP: Lessons for South East Asian countries
- Case study of India
 - Case study of Nepal
 - African Model
 - CoFAB
- 4.00 – 4.15 pm Tea Break
- 4.15 – 5.30 pm Continuation on Alternative models for PVP: Lessons for South East Asian countries
- 5.30 – 6.30 pm How to capitalize on the TRIPs Review Process?
- 6.30 – 7.30 pm Synthesis/Conclusion

3rd December

- 9.00 – 11.00 am Discussion on SEACON's action plan for project on Farmers' Rights
- 11.00 – 11.15am Tea Break
- 11.15 – 12.15 pm Finalisation of SEACON's action plan for project on Farmers' Rights
- 12.15 – 12.45 pm Synthesis/Conclusion

Glossary

CBD	Convention on Biological Diversity
CoFAB	Convention of Farmers and Breeders
FAO	Food and Agriculture Organisation
GATT	General Agreement on Tariffs and Trade
GRs	Genetic Resources
IPRs	Intellectual Property Rights
ITPGRFA Agriculture	International Treaty on Plant Genetic Resources for Food and Agriculture
OAU	Organisation for African Unity
PVP	Patent and Plant Variety Protection
TK	Traditional Knowledge
TRIPs	Trade Related Aspects of Intellectual Property Rights
UPOV	International Union for the Protection of New Plant Varieties
WTO	World Trade Organisation

Welcome Address

By Ms Indrani Thuraisingham

Executive Director, SEACON-Food Security and Trade

Good morning to our SEACON partners from the region, our resource person, Mr Kamalesh Adhikari from Nepal, Mr Ramon San Pascual from Philippines and friends. Welcome to Malaysia for those who are joining us for the first time

SEACON's work on the impact of international and regional trade on agriculture in the region is gaining credible reputation among civil society organizations and regional institutions like the ASEAN Secretariat, the FAO etc. This credibility comes from the committed work put in by our partner members in the region that is you. I hope that the initiatives taken at the regional level will have an impact on your national governments for better policies which are pro-farmer and pro food sovereignty.



Ms.Indrani Thuraisingham

Our AFTA research project, I understand is completed with the final reports being drafted, our next step is, using these findings from our countries research to lobby and advocate for small farmers protection in this era and environment of trade and liberalization. We have lined up an advocacy training scheduled on 3rd December to provide guidance to you for effective campaigning and lobbying. Our AFTA research further highlighted the fact that farmers control over productive resources such as land, water, seeds is increasingly eroding in light of trade. In that respect, SEACON's work for the next three years will concentrate on farmers' rights and food sovereignty.

To have a better understanding on farmers' rights, we have organized this training workshop on farmers' rights and TRIPs. This workshop was made possible with the support from SEACA, the Southeast Asia Committee for Advocacy based in Philippines that provides support to build capacity of NGOs/CSOs who are working with grassroots. We are also very thankful that we have two excellent resource person, Mr Kamalesh from SAWTEE, who is based in Nepal and Mr Ramon from PLCPD, who is based in Philippines to provide us a deeper understanding on this issue of farmers' rights and its technicalities.

With that, I wish you a productive workshop for the next two days and please raise your questions on this topic with our resource persons to clarify the issues.

Thank you.

Trade Related Intellectual Property Rights in Relation to Farmer's Rights

By Mr Kamalesh Adhikari

Senior Program Officer, South Asia Watch on Trade, Economics & Environment (SAWTEE), Nepal

Overview of WTO

Mr Kamalesh started the training workshop by explaining a brief history of the World Trade Organisation (WTO) to the participants. The WTO – which came into being on January 1, 1995 - is the legal and institutional foundation of the multilateral trading system and successor to the General Agreement on Tariffs and Trade (GATT). The WTO acts as a rules-based global trade body and forum for multinational trade negotiations. It administers dispute settlements, reviews the trade policies of member nations and works with organizations such as the International Monetary Fund and the World Bank in developing coherent global economic policies. The WTO also covers new commercial activities beyond the jurisdiction of GATT, such as intellectual property rights, services and investment.

TRIPS and Agriculture

Mr Kamalesh then explained that the most comprehensive global standards for Intellectual Property Rights (IPRs) are governed by the WTO's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). He stated that WTO members, both the developed and developing countries are required to harmonize their national IPR rules to that of global ones under TRIPs.



Mr Kamalesh Adhikari

He briefed the participants that the IPRs in agriculture are likely to restrict the livelihood options of farmers in developing countries. Some of the stakes for farmers were on their privileges and rights, their ownership, their resources, their traditional knowledge (TK), skills and technologies and also agrobiodiversity and lastly food security.

He explained to the participants that there were two forms of IPRs within TRIPs: Patent and Plant Variety Protection (PVP) are particularly the ones that restrict farmers' rights to livelihood. Both provide exclusive monopoly rights over a creation for commercial purposes over a period of time. A right granted to an inventor to prevent all others from making, using and/or selling the patented invention for 20 years is known as patent. Three criteria for a patent are novelty, inventiveness (non-obviousness) and utility. As for PVP, it provides patent like rights to plant breeders. What gets protected in this case is the genetic makeup of a specific plant variety. The criteria for PVP include novelty, distinctness, uniformity and stability (DUSN).

PVP can provide exemptions for breeders whereby allowing them to use protected varieties for further breeding. It also allowed farmers to save seeds from their harvest. For the seed industry, PVP is regarded as the weaker sister of patenting mainly because of these exemptions. However, PVP could be as threatening as patents.

A case on Indian Basmati rice was shared with the participants as an example. Basmati, a variety of *Oryza Sativa*, is the fragrant, long, slender rice with a nutty flavor that has been grown in the northern parts of the Indian sub-continent for hundreds of years. Among the 100 or more types of aromatic rice in the world, Basmati is probably the most expensive. In September 1997, the Texas based Rice Tec Inc. was awarded Patent number 5663484 on Basmati rice lines and grains by the USPTO. This caused a furore in the subcontinent and provoked India to lodge an immediate protest.

Rice Tec had made 20 patent claims essentially covering rice plants with characteristics identical to Basmati, grain produced by such plant and method of selecting rice plant based on starch index test. Following the Indian challenge, Rice Tec withdrew 4 of its 20 claims. In March 2001, USPTO told Rice Tec that of its 20 claims only 3 were approved, issuing it a “varietal patent” to market the types of Basmati developed by itself and not cultivated and bred traditionally by farmers in India and Pakistan.

Mr Kamalesh further discussed in detail the four core farmers’ rights issues that came under threat due to these two forms of IPRs: .



i) *Right to Seed*

Farmers in developing countries depend on informal seed supply system: they save, exchange, reuse and sell seeds. But under the IPR system, farmers will be denied the right to save patented or protected seeds for subsequent planting and will have to buy seeds for each season. Failing to do so, will mean a sue from seed companies and breeders.

ii) *Right to Traditional Knowledge*

Developing countries are home to 90 percent of world’s greatest genetic resources (GRs) and TK. But there seems no respect for such GRs and TK of farmers within the IPR system. Reportedly, they are being used by companies or in other words were not providing any remuneration to the farmers. Bio-piracy and knowledge-piracy are two common phenomenons.



- iii) *Right to Equity in Benefit Sharing Process*
Throughout the world, farmers and their communities have developed a vast portfolio of genetic diversity within crops and other plant species. Modern plant breeding also depends on plant germplasm traditionally developed/donated by farmers. But then there are cases that farmers are not involved in the commercial utilization of their resources and knowledge.

- iv) *Right to Participate in Decision Making*
Farmers are unorganized group in the developing countries and are excluded from the decision making process. However, breeders and commercial companies are organized and hold an important SAY in the decision making. Such an exclusion from the decision making process, which determines their fate, obviously is a violation of their right.

Article 27.3 (b) of TRIPS

The next topic that was being discussed was TRIPs' Article 27.3(b), which is considered to be the most controversial provision of the WTO TRIPs Agreement. Mr Kamalesh did a very simple presentation to enable the participants to understand the provision and their implications on farmers' rights. Citing some interesting examples such as if a multinational company used a variety of seed from the farmer in Malaysia; then made some genetic modification to it, this means the multinational company can then claim patent on the modified seed without paying royalty to the Malaysian government or to the farming community from where they derived the variety from. Therefore, he stated that this Article has favored mostly the commercial seed companies and breeders of developed countries undermining the farmers in the developing countries.

This Article requires member countries to legislate for the protection of their new plant varieties by either of the following means:

- i) Patent – Right granted to an inventor to prevent all others from making, using and/or selling the patented invention for 20 years. Mandatory patent protection is required for microorganisms, non-biological and microbiological processes. The provision for patenting on life form is the most contentious issue within TRIPs.
- ii) *Sui Generis* (of its own kind) – Countries can design and implement their PVP laws by themselves according to their national interests and local realities. Developing countries have chosen to adopt this system because it provides a flexibility to develop the law in a manner that protects the national interest. Nevertheless, in this Article, it requires members to adopt an “effective” *sui generis* system but does not mention what effective means. The ambiguity of this word has strengthened the position of developed countries to interpret what an effective *sui generis* system is.
- iii) Combination of patent *Sui Generis*.



UPOV and Farmers' Rights

Mr Kamalesh explained that UPOV is the short form of International Union for the Protection of New Plant Varieties (UPOV). It was introduced in 1961, amended in 1972, 1978 and 1991. The amendments made in 1991 no longer have Farmers' Privilege, which was "though farmers were not allowed to sell seeds obtained from the protected varieties, there was no bar on them to store these seeds for cultivation, replant them and develop new plants from them". He also explained on how the developed countries are pressurizing the developing countries to become members of UPOV due to the ambiguity of the word "effective" *sui generis* system in Article 27.3(b). He mentioned that UPOV is only fit for the agricultural systems in the developed countries and not for the agricultural systems of developing countries. Developed countries are hell-bent in forcing developing countries to adopt PVP laws based on UPOV.

As of June 2004, there are 54 countries that are members of UPOV. Up to date, there are 5 countries in the Southeast Asian region who are not members of UPOV but have enacted their PVP laws based on consultation with UPOV are:

- i) Thailand (1999)
- ii) Indonesia (2000)
- iii) Philippines (2002)
- iv) Vietnam (2004) – has applied to be a member of UPOV
- v) Malaysia (2004)

The Southeast Asian countries that are not members of UPOV but are drafting PVP laws in consultation with UPOV are:

- i) Cambodia
- ii) Laos
- iii) Myanmar (Burma)

Based on a publication by SAWTEE, Mr Kamalesh shared the following reasons with the participants on why they should not allow their country to join UPOV.



Ten Reasons Not To Join UPOV

TEN REASONS NOT TO JOIN UPOV

- 1. UPOV denies farmers' rights both in the narrow and the wide sense.** In the narrow sense, the right to freely save seed from the harvest is curtailed. In the wide sense, UPOV does not recognise or support communities' inherent rights to biodiversity and their space to innovate.
- 2. Northern companies will take over national breeding systems in the South.** There is no code of technology transfer implicit in UPOV, other than the net effect that multinational companies (MNCs) will be able to market varieties in the South under legal conditions adjusted to their global ambitions. National breeders and local seed companies will be bought out by the foreign companies.
- 3. Northern companies will get ownership of the South's biodiversity with no obligation to share the benefits.** Contrary to the CBD, UPOV does not provide for any sharing of benefits from the North's exploitation of the South's biodiversity. Farmers of the South end up paying royalties for their own germplasm, which has been tampered with and repackaged in the North.
- 4. UPOV criteria for protection will exacerbate erosion of biodiversity.** This is extremely dangerous, especially in poor countries. Chemicals or genetic engineering will be needed to compensate for crop vulnerability, which farmers cannot afford. Uniformity leads to harvest loss and further food insecurity.
- 5. Privatisation of genetic resources affects research negatively.** Impact studies in the US and elsewhere show a clear correlation between PVP and reduced information and germplasm flows. Also, UPOV rules on 'essential derivation' will act as a disincentive to researchers since MNCs can bully researchers to submit to accusations of plagiarism.
- 6. Moves to keep biodiversity under negotiated access systems – for example at CBD and FAO – will be undermined.** PVP laws give private ownership over resources that fall under national sovereignty and, more truthfully, community sovereignty.
- 7. Joining UPOV means becoming party to a system that increasingly supports the rights of industrial breeders over those of farmers and communities.** Every revision of UPOV broadens the rights of breeders and weakens the rights of farmers and the public interest.
- 8. UPOV is not in harmony with TRIPS, and conflicts with the CBD.** UPOV extends mutual privileges within a membership of 52 countries. TRIPS requires the similar privileges to be mutually shared among 147 member countries of the WTO. Someone has to revise their rules. Further the CBD, with a full 189 member states, requires benefit sharing that UPOV does not provide for.
- 9. TRIPS is being reviewed.** This means that the obligations concerning patent and PVP can be removed. The opportunity to remove such obligations is legitimately on the table.
- 10. The lion's share of the benefits will flow to the North.** UPOV is designed to facilitate monopolies in corporate plant breeding. Most of the breeding is for international markets. Joining UPOV will ensure that the South's integration into Northern-controlled markets increases, but not for the benefit of those who are hungry today.

Adopted from www.grain.org

Conclusions from the First Day

The developing countries have criticised the UPOV model on several grounds, not least because becoming a member of UPOV or enacting the legislation in tune with this model is not a requirement of TRIPs. The developed countries must understand that *sui generis* means of its own kind of system that suits countries' own agro-biodiversity and farming systems and practices. How can one '*sui generis system*' be the model for all countries? Does *sui generis* imply that? Do all countries have same nature of agricultural systems and practices and share same plant varieties?

The developed countries have chosen UPOV because it suits the requirement of their industrial farming – where farmers' constitute merely one to five percent of their total population. Agriculture for them is, therefore, a matter of trade and business but for the developing countries, it is a matter of 'life and death'. Most of their population comprises farmers, whose livelihood is farming and their economies are heavily dependent on agriculture.

Farmers in the developing countries practice subsistence farming and have been saving and reusing seeds for time immemorial. They have been exchanging their seeds with their neighbours. Some farmers, who do not have enough land to engage in full-fledged agricultural production of seed, though in a very limited quantity and do sell them at the local market to eke out their living. Thus, saving exchanging, reusing and selling seeds are the means of their livelihood.

The UPOV Convention, however, restricts the ability of farmers to exercise these livelihood options. UPOV's Article 15.2 allows farmers to reuse protected material only if the "legitimate interests of the breeders" are taken care of – the legitimate interests being nothing but the royalty that the breeders should be paid. The FAO views it as "downgrading of the Farmers' Privilege".



Securing Farmers' Rights through International Instruments

On the second day of the training workshop, the two International Instruments in Securing Farmers' Rights were discussed: the Convention on Biological Diversity (CBD), 1992 and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), 2001.

i) *Convention on Biological Diversity (CBD), 1992*

The CBD, 1992 is the international agreement that for the first time incorporated the principles of ethics and equity in the conservation and utilization of global biodiversity. There are 187 countries that are parties to CBD. Article 8(j) binds each contracting party to:

- Respect, preserve and maintain traditional knowledge, innovations and practices of indigenous and local communities relevant for the conservation and sustainable use of biological diversity.
- Promote wider application with the approval and involvement of the holders of such knowledge/innovations/practices.
- Encourage equitable sharing of benefits arising from the utilization.
- Prior informed consent and under mutually agreed terms are stressed.



The shortcoming of CBD is that this convention is a bilateral agreement, i.e. country-to-country deals. If a variety is found in more than one country, this poses problem as to who the actual owner of the variety is.

ii) *International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), 2001*

This treaty came into being in November 2001. After more than 15 sessions of the United Nations Food and Agriculture Organisation (FAO) Commissions on Genetic Resources and its subsidiary bodies, the ITPGRFA was approved during the FAO Conference.

i) Article 9.2 of this treaty states that each contracting party in the accordance with their needs and priorities, should, as appropriate and subject to its national legislation, take measures to protect and promote farmers' rights, including;

- protection of traditional knowledge relevant to plant genetic resources for food and agriculture
- the right to equitable participate in sharing benefits arising from the utilization of plant genetic resources for food and agriculture



- the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture
- ii) Article 9.3 of this treaty states that:
 - nothing in this article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm saved seed/propagating material, subject to national law and as appropriate

The shortcomings of ITPGRFA are:

- that only 64 Plant Genetic Resources are covered in this treaty
- it is vague in dealing with IPR regime
- it is unclear as to the extent to which farmers will be allowed to freely use, exchange and breed the seeds
- unclear about the multilateral fund
- enforcement procedure to be used by national governments for ensuring compliance is not detailed out
- policies are stated broadly and often without significant practical detail

Mr Kamalesh then advised the participants to pay attention to these treaties when developing their own *sui generis* PVP law as these treaties champion the rights of farmers.

Alternative Models in Securing Farmers' Rights

The next topic that was being discussed was on the alternative models for PVP. The Convention of Farmers and Breeders (CoFAB) model developed by Gene Campaign, a Delhi based non-governmental organisation and the Legislation of Namibia (The Access to Biological Resources and Associated Traditional Knowledge (ABRATH) Act) were good examples of models where farmers' rights are incorporated when laws in India and Namibia, respectively were developed.

The CoFAB model seeks to secure the interests of developing countries in agriculture and protects farmers' rights. Each contracting state will recognize the rights of farmers by making arrangements to collect farmer's rights fee from the breeders of new varieties. Revenue collected from farmer's rights fees will flow into a National Gene Fund, the use of which will be decided by a multi-stakeholder body set up for that purpose. The Legislation of Namibia was developed by the Organisation for African Unity (OAU). It was based on the African Model Law for the protection of the rights of local communities, farmers and breeders for the Regulation of Access to Biological Resources. It provides for the grant of farmers' rights and plant breeders' rights, while recognizing the rights of local communities over their biological resources and associated knowledge, innovations and practices.

TRIPs Review Process

Mr Kamalesh provided some suggestions and recommendations to participants on how to capitalize the TRIPs review process. He said that the developing countries should press hard at the WTO level to ensure that 27.3 (b) Article of TRIPs be amended to protect the interests of developing countries. He emphasized that developing countries should unite for collectively lobbying for the amendment of the said Article. Unless TRIPs define the terms of its Article explicitly, there are chances of pressures from the developed countries like in the case of UPOV. He stressed that civil society groups of developing countries should work together to convince their governments that they need to be proactive during TRIPs Review negotiations.

Recommendations

At the end of the session, some recommendations in amending existing PVP laws for countries that have one and drafting of the PVP law for countries that do not have one yet were being derived. Following are the suggestions from the participants and Mr Kamalesh himself:

- i) Design a *sui generis* legislation that suits the respective countries' socio-economic, cultural and political realities
- ii) Adopt a *sui generis* PVP law to protect farmers' and communities' rights
- iii) Refer to the international instruments (CBD and ITPFGRA) and alternative models (PVPFR Act, India; ABRATK Act, Namibia; CoFAB, Gene Campaign; OAU Model Legislation, Africa; Community Registry, BOHOL) while designing *sui generis* legislation
- iv) Consult farmers' groups and CSOs while designing *sui generis* legislation and preparing negotiating positions for the international negotiations
- v) Engage in the TRIPs review process to advocate for appropriate reforms to Article 27.3 (b)
- vi) Oppose the UPOV model of PVP law
- vii) Refrain from becoming a member of UPOV
- viii) Ratify the CBD and ITPGRFA



SEACON's Action Plan on Farmers' Rights

By Mr Ramon San Pascual

Philippine Legislators' Committee on Population & Development (PLCPD), Philippines

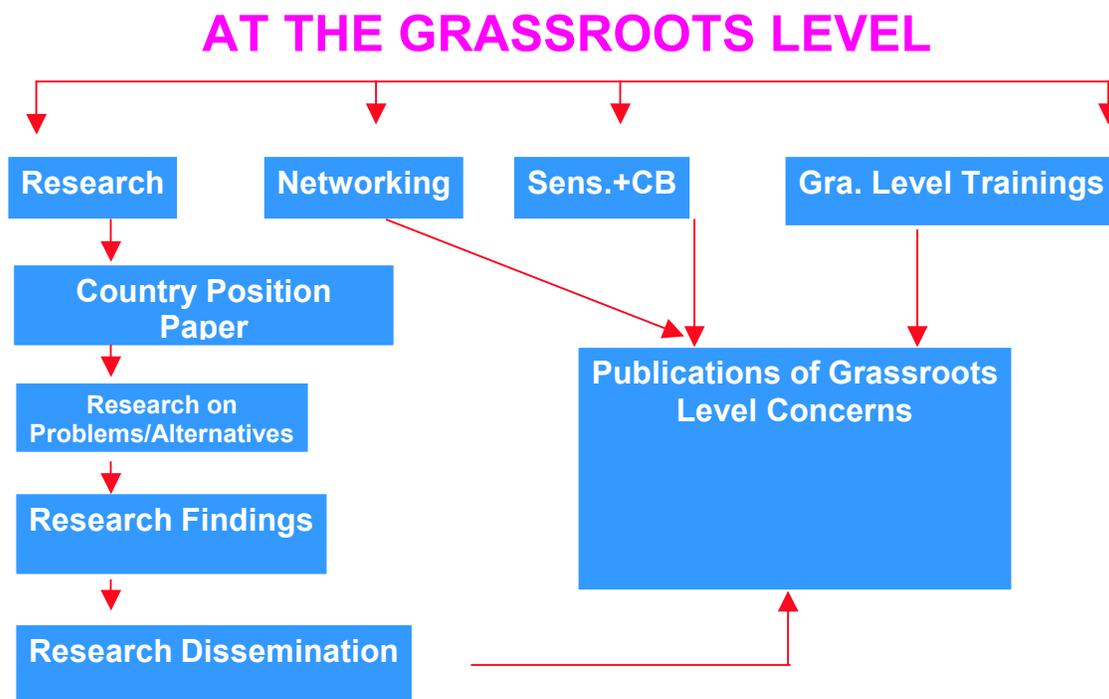
Participants provided input and feedback into SEACON's action plan for the project on Farmers' Rights with the aid of our second resource person, Mr Ramon San Pascual. Upon the finalization of the action plan, participants were requested to discuss this action plan with their respective networks and target beneficiaries i.e. farming community in their home countries as when the project on Farmers' Rights can begin in their respective countries.



Mr. Ramon San Pascual

From the discussion, SEACON's members came out with two main TRIPs action plan for farmers' rights:

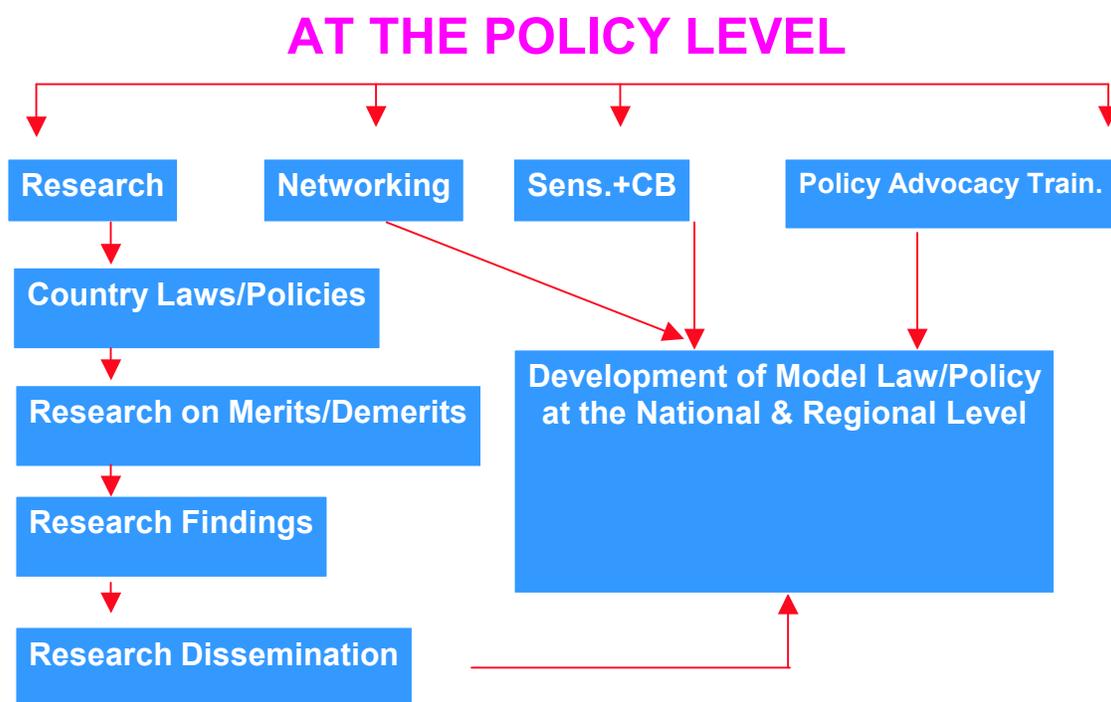
- 1) At the grassroots level



At the grassroots level, interventions should be made through different measures – research, networking, sensitisation and capacity building, trainings, and publications. While research would deal with the status and situation analysis, problem identification and alternative options, networking would help in creating a linkage among different

concerned stakeholders. Sensitisation and capacity building, and training would help in increasing the level of awareness of stakeholders so that they are able to voice their concerns at the policy and decision making level. These different activities would then be published in the form of leaflets or books or briefing papers so that wider section of the stakeholders and concerned national and international authorities could come to know about the problems at the grassroots level.

2) At the policy level



At the policy level, interventions should be made through – research, networking, sensitisation and capacity building, advocacy trainings, and development of model law/policy at the national and regional level. While research would deal with the status and situation analysis, problem identification and alternative options at the policy level, networking would help in creating a linkage among different concerned stakeholders at the local, national, regional and international levels. Sensitisation and capacity building and advocacy training would help in increasing the level of awareness of policymakers and planners so that they address the concerns raised at the grassroots level. Ultimately, a model law/policy at the national and regional level should be developed as guidelines for the policymakers and planners.

Conclusions

SEACON members agreed that work on farmers' rights was crucial and that SEACON should take up the issues. SEACON members also agreed to talk to their network partners in the country to discuss possible actions and follow-ups to the discussions held on TRIPs and farmers' rights.

Ms Indrani thanked the resource persons, Mr Kamalesh and Mr San Pascual for their contributions towards making this conference a success.