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**ADDIS ABABA UNIVERSITY**  
**COLLEGE OF LAW AND GOVERNANCE STUDIES**  
**SCHOOL OF LAW**

**Comparative Analysis of Plant Breeder's Right Proclamation No.1068/17  
against UPOV Convention and African Model Law**

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Declaration I, the undersigned, declare that this article is my original work, has not been presented for a degree in any other university and that all sources of materials used have been appropriately acknowledged.

Declared by:-Thomas Gebremichael



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I confirm the submission of this manuscript



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COMPARATIVE ANALYSIS OF PLANT BREEDER'S RIGHT PROCLAMAION No.1068/17  
AGAINST UPOV CONVENTION AND AFRICAN MODEL LAW

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# **Comparative Analysis of Plant Breeder's Right Proclamation No.1068/17 against UPOV Convention and African Model Law**

Thomas Gebremicael Asfaw

## **Abstract**

Historically plant varieties were not eligible for patentability, making the protection of plant varieties through intellectual property rights a controversial topic. Recent developments within the WTO have heralded a major shift towards the imposition of the sui generis model of plant variety protection in most countries around the world. Article 27.3(b) of the TRIPS Agreement is the only provision regarding to plant variety protection; it stipulates that member states “shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.” However, TRIPS does not specify or offer guidelines for what makes an effective sui generis system to which members and accession countries should conform. As TRIPS did not specifically refer to UPOV as an effective sui generis model of law, members and accession countries have the freedom to establish their own sui generis system for protecting plant varieties. Consequently, the WTO Council has mandated the TRIPS Council with examining the relationship between TRIPS and CBD, along with addressing concerns raised by developing nations. However, the revision of Article 27. (3) (b) of the TRIPS agreement is currently pending. It is anticipated that the proposed changes will alter the essence of Article 27(3) (b) to better suit the needs of developing nations. Consequently, this will provide flexibility for developing countries not to be compelled to join UPOV 91, which has implications for farmers and national interests. Moreover, in accordance with Article 66 of TRIPS and the council's decision for least-developed countries, these nations are not required to adhere to most provisions of the agreement, including Article 27(3)(b) of TRIPS.

To conclude, it can be understood that member's states of WTO does not reach any consensus as to what constitute an effective sui generis system of plant protection system. Therefore, member's states are not duty-bound to join UPOV or to adopt legislation based on it. They are

free to determine their own sui generis plant protection system in the context of respective national interests.

This study addressed the issues associated with what constitutes an effective sui generis plant variety protection system in the context of developing countries and its implications for Ethiopia's accession to the WTO.

**Key word:** Effective sui generis system

## 1) Introduction

The topic of plant variety protection through intellectual property rights has been a subject of debate for many years. Historically, plant varieties were not eligible for patent protection on an international level.<sup>1</sup> As time went on, some countries and regions gradually implemented plant variety protection measures throughout the 20th century. However, there was a general consensus that granting patents in this field was not suitable. In recent times, new developments within the World Trade Organization (WTO) have brought about a significant change towards the imposition of the sui generis<sup>2</sup> model of plant variety protection in most countries of the world<sup>3</sup>. The TRIPS Agreement, intended to make IP protection universal. It does so by enforcing minimum standards in different areas, including agriculture, by requiring the protection of plant varieties.<sup>4</sup>

The TRIPS Agreement, which applies to all fields of technology, necessitates those inventions, whether products or processes, should be patentable. Additionally, the agreement specifically requires the establishment of a legal protection for plant varieties.<sup>5</sup> Article 27.3(b) of the TRIPS Agreement is the only provision in the agreement that deals with plant variety protection.

It mandates member states to establish a system to protect plant varieties, which could be in the form of patents, a sui generis system, or a combination of both.<sup>6</sup>

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<sup>1</sup> Philippe Cullet, 'Plant Variety Protection in Africa: Towards compliance with the TRIPS agreement' (2001) 45(1) Journal of African Law, School of Oriental and African Studies < <https://www.jstor.org/stable/3558970> > accessed September 11 2023. Page 100.

<sup>2</sup> Laurence R. Helfer, 'Intellectual property rights in plant varieties: International legal regimes and policy options for national governments' (2004) FAO LEGISLATIVE STUDY, 85. Page 54

The term sui generis is understood to mean "of its own kind" or "unique, "of its own kind" or "unique,"

<sup>3</sup> Philippe Cullet, (n 1)

<sup>4</sup> Gizachew Silesh, 'The Ethiopian Legal Regime on Plant Variety Protection: Assessments of Its Compatibility with TRIPS Agreement, Implications and the Way Forward' (LLM, Addis Abeba University 2010). Page 5

<sup>5</sup> Philippe Cullet, (n 1) and see The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), Article 27.

<sup>6</sup> Fikremarkos Merso, 'A Critical Reflection on the Legal Framework Providing Protection for Plant Varieties in Ethiopia' (2011) 24 (1) Journal of Ethiopian Law <<http://ejol.aau.edu.et/index.php/JEL/article/view/8040>> accessed 1 February 2024. Page 118.

TRIPS do not offer any definition or guidance on what would make an effective sui generis system effective. This poses a problem as members and accession countries are expected to comply with such a system.<sup>7</sup> Nonetheless, developed countries contend that the International Union for the Protection of New Varieties of Plants (UPOV) is the suitable and efficient system to comply with TRIPS obligations. They urge developing countries to adopt UPOV or modify their laws to align with UPOV standards.<sup>8</sup> In contrast, developing countries argue that the UPOV system is not well-suited for their ethical beliefs (such as protection of living organisms via patent) or economic circumstances, as it primarily caters to developed nations.<sup>9</sup> According to their claims, the TRIPS agreement has given the WTO members the flexibility to develop their own plant variety protection system, which caters to their specific requirements in case they choose a sui generis system. The agreement does not provide any definition of an effective sui generis system, and it also does not include or refer to any particular pre-existing intellectual property agreements, such as UPOV systems.<sup>10</sup> They believe that developing countries adopt the sui generis system as the preferred option for protection of plant varieties.<sup>11</sup> They also stressed that; this approach should be aligned with the guidelines set forth by the Convention on Biological Diversity (CBD)<sup>12</sup> The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR).<sup>13</sup>

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<sup>7</sup> Ibid.

<sup>8</sup> Gizachew Silesh, (n 4).

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> Ibid.

<sup>12</sup> Convention on Biological Diversity was adopted in 1992.

The Convention has brought about a fair and equitable sharing of benefits derived from the utilization of genetic resources among those who provide them. This aims to reconcile the need to safeguard biodiversity with its enduring utilization. Although the Convention does not explicitly touch on plant variety protection, its broad purview encompasses all biological resources and thus has a direct impact on the establishment of protection frameworks for plant varieties.

<sup>13</sup> International Treaty on Plant Genetic Resources for Food and Agriculture was adopted by (FAO) in 2001.

The primary goal of the agreement is to streamline the sharing of seeds and other germplasm for the purposes of research, breeding, and crop development.

However, the acceptance rate of the UPOV system of plant variety protection appears to be increasingly inclined towards reinforcing PBRs, whereas the CBD, ITPGR, and African Model Law attempt to counterbalance the growing emphasis on exclusive rights to plant varieties, but have not received adequate attention<sup>14</sup>.

In this regard, Ethiopia has not adopted both the WTO-TRIPS agreement and the UPOV Convention pertaining to plant variety. Nonetheless, the country adopted a plant variety law in 2006 which was later replaced by a new plant breeders' proclamation, No. 1068/2017.

This article therefore examines the Ethiopian Plant variety protection in the lights of UPOV and African Model law and other international obligations to assess whether there is a need or possibility for expanding the existing legal framework on plant variety regarding farmers right or to maintain the existing **status quo** to comply or adhere to the demand or the requirement of WTO TRIPS agreement and AfCFTA Intellectual Property protocol.

## **2) The Sui Generis System for Protection of Plant Varieties**

The TRIPS Agreement, established in 1994, mandates the implementation of legal protection<sup>15</sup> for plants. Member States must guarantee that their legislation adheres to the prescribed minimum criteria outlined in the TRIPS Agreement within a specified timeframe.<sup>16</sup> Article 27.3(b) permits exemptions to patentable subject matter concerning living matter, while simultaneously necessitating specific types of inventions within this classification to be eligible for protection under patent law. In the case of plant varieties, an effective sui generis system or a combination of both options may also be considered.<sup>17</sup> There is no further explicit direction provided in the TRIPS Agreement regarding the criteria for determining an effective sui generis

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<sup>14</sup> Gizachew Silesh, (n 4).

<sup>15</sup> The UPOV System of Plant Variety Protection. Retrieved February 8, 2024, from the UPOV Web site: <[http://www.upov.int/en/about/upov\\_system.htm#what\\_is\\_a\\_pv](http://www.upov.int/en/about/upov_system.htm#what_is_a_pv)> accessed August 2023. Page 1

Plant variety protection, commonly referred to as a "plant breeder's right," is a form of intellectual property right given to the breeder of a new plant variety in relation to particular aspects concerning the utilization of the protected variety.

<sup>16</sup> World Trade Organization, 'Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations' (World Trade Organization 2015) (Patents: An Indian perspective by Jayashree Wata). Page 295

<sup>17</sup> Ibid. Page 123

system, as elaborated in chapter. According to Biswajit Dhar, there are three ways to interpret the TRIPS requirement of an "effective" sui generis system of plant varieties: from the standpoint of effective enforcement, to that of UPOV as an "effective" system and the degree of protection that is available as a gauge of "effectiveness." Leskien and Flitner argue that for a national PVP law to be considered an "effective sui generis system" under TRIPS Article 27.3(b), it must consist of four essential components. Firstly, the law should encompass all plant varieties across different species and botanical genera. Secondly, plant breeders should be granted an intellectual property right (IPR), which grants them exclusive control over specific actions related to the protected varieties. Alternatively, they should at least have the right to compensation when third parties engage in certain acts. Thirdly, breeders from other WTO member states should receive National Treatment and Most Favored Nation Treatment. Lastly, the law should include procedures that enable breeders to enforce the rights granted to them under such legislation.<sup>18</sup>

Several scholars have also endeavored to delineate the efficacy of the sui generis system. According to Graham Dutfield, an effective sui generis system is if it is based on the UPOV Convention, whether in its 1978 version or its 1991 modification.<sup>19</sup> On the other hand, Mona Ashiya and other academics by disregarding UPOV model of law argue that a sui generis" system could presumably allow for other systems for plant variety protection, including provisions for "farmers' rights" and community intellectual property rights in keeping with the diverse needs of different countries.<sup>20</sup> Some developing countries have embraced this approach; India, for example, established a "sui generis" framework to ensure the equitable distribution of benefits, to conserve indigenous knowledge, and to ease technological transfer and access. Lucas Sese, supports this claim by stating that the creation of efficient benefit-sharing agreements and the maintenance and sustainable development of agro-biodiversity are the main goals of the "sui

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<sup>18</sup> Leskien, Dan and Michael Flitner. ' Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System. Issues in Genetic Resources'(1997) 6 International Plant Genetic Resources Institute < [https://www.wipo.int/edocs/mdocs/arab/en/wipo\\_ip\\_uni\\_dub\\_04/wipo\\_ip\\_uni\\_dub\\_04\\_10.pdf](https://www.wipo.int/edocs/mdocs/arab/en/wipo_ip_uni_dub_04/wipo_ip_uni_dub_04_10.pdf)>accessed 17 January 2024.

<sup>19</sup> Graham Dutfield,' Food, Biological Diversity and Intellectual Property: The Role of the International Union for the Protection of New Varieties of Plants (UPOV))' (2011), Quaker United Nations Office, Global Economic Issue Publications: Intellectual Property Issue Paper Number 9.

<sup>20</sup> Fatima Hajnour,'Plant Variety Protection Under International Intellectual Property Laws and National Laws with Special Emphasis on Sudan and India'(LLM, University Khartoum 2005).Page xxxv.

generis" system for plant variety protection. According to him, the law must take into account the rights of farmers and plant breeders, much like the African Model Law does.<sup>21</sup>

In an interview with the Economic Times, titled "We don't have a choice." A.V. Ganesan (who was among a lead negotiator by representing India, in the making of the TRIPS Agreement) brought out another important point; He asserted that India would not recognize plant patents. It would only develop a sui generis system for the protection of new plant varieties, which need not be based on the UPOV (1991).<sup>22</sup> According to A.V. Ganesan, the TRIPS agreement negotiators did not attempt to reach a consensus on what constituted an effective sui generis system. Such points were left to the pending TRIPS revision, which was originally planned to be conducted four years after the agreement went into effect.<sup>23</sup> To fulfill their TRIPS commitments in this regard, many WTO members have opted to join the UPOV and implement systems based on it.<sup>24</sup>

However, there is no requirement that members forced to join the UPOV in order to comply with these TRIPS, while it is widely acknowledged that there are alternative ways to meet the TRIPS option of an "effective sui generis system. In addition to that, the rules of the previous IPR conventions (Paris, Berne, and others) are also incorporated by reference in the TRIPS Agreement.<sup>25</sup> However, the TRIPS agreement lacks any reference to UPOV Convention. This omission means that WTO members are not obligated to join UPOV or implement national laws that align with either UPOV Act in order to fulfill their TRIPS obligations.<sup>26</sup> Furthermore, the UPOV 91 came in to effect in 1998. Therefore; there is no way for the negotiators of TRIPS or the council to make reference of such in effective act at that time.

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<sup>21</sup> Ibid.

<sup>22</sup> World Trade Organization, (n 16). Page 310.

<sup>23</sup> Article 27.3(b) of TRIPS agreement provides for the provision to be reviewed four years after the entry into force of the WTO Agreement.

<sup>24</sup> Karine Peschard, Christopher Golay, and Lulbahri Araya, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas and the Right to Seeds in Africa', (2023) Academy Briefing <[https://www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2022\\_web](https://www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2022_web)> accessed 7 September 2023. Page 18-19

<sup>25</sup> Pawarit Lertdhamtewe, 'The Reformation of Legal Regime for Intellectual Property Protection of Plant Varieties in Thailand' (PhD, Queen Mary & Westfield College, University of London 2013). Page 132

<sup>26</sup> Laurence R. Helfer, (n 2). Page 39

Based on this presumption, some countries, including Ethiopia, Zimbabwe's, India and Thailand, Zambia's, Uganda's, and Malaysia, have implemented sui generis laws that strive to safeguard the interests of both farmers and plant breeders.<sup>27</sup> To that end, India - a WTO member and TRIPS Agreement signatory but not a UPOV member - enacted the Protection of Plant Varieties and Farmers Rights Act in 2001.<sup>28</sup>

### **3) Review of Article 27.3(b) of the TRIPS Agreement**

In 1999, the TRIPS Council initiated a revision of Article 27.3(b). The Council initiated the review through an information-gathering exercise. It requested members who were already required to implement this provision to reply to inquiries from the WTO Secretariat and asked a number of members to share information about how the topics covered in this article were handled in their national legal systems. The Council had received information from members up until the end of 2006 (the most recent version document), and it had gathered all of the data into a structured summary.<sup>29</sup> This document or report includes charts showcasing the ways in which these individuals fulfilled the requirements outlined in Article 27.3(b). Accordingly, there have been differing opinions on the effectiveness of the sui generis protection system, with two distinct perspectives on what perceived to be an "effective" system for plant variety protection under Article 27.3(b).<sup>30</sup> The first view asserted that there are specific criteria available to judge the effectiveness of a sui generis system.<sup>31</sup> The proponent of the second view argued that the TRIPS Agreement does not specify criteria by which to judge whether a sui generis system is effective, and therefore this should be left to members to decide.<sup>32</sup> Nevertheless, the majority of representatives hailing from developing nations contend that there is a pressing need to revise Article 27.3(b) in order to forbid the patenting of innovations derived from traditional knowledge

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<sup>27</sup> Karine Peschard, ( n 24).

<sup>28</sup> Ibid. Also see Government of India, Protection of Plant Varieties and Farmers' Rights Act (2001).

<sup>29</sup> The Council for TRIPS, Review of the Provisions of Article. 27.3(b): Summary of Issues Raised and Points Made (WTO, IP/C/W/369/Rev.1, 9 March 2006)

<sup>30</sup> Ibid.

<sup>31</sup> Review of the provision of Article 27.3(b) further views of the United States, ( WTO,IP/C/W/209/Rev. 3 October 2000).This view is advocated by developed nation under the guidance of United States.

<sup>32</sup> Review of the provision of Article 27.3 (b) (WTO, India, IP/C/M/25, para. 70; Zimbabwe, IP/C/M/36/Add.1, Para. 201; African Group, IP/C/W/404, p.2; Kenya, IP/C/M/40, Para. 108. March 2006).This view is advocated by developing countries.

or those that contravene Article 15 or any other stipulations outlined in the CBD.<sup>33</sup> The WTO Secretariat has compiled summary notes of the points raised and issues deliberated in the connection between the TRIPS Agreement and the CBD, taking into account the suggestions and the so-called 'outstanding implementation issues' highlighted by developing nations.<sup>34</sup>

However, up-to-date there is no consensus reached on what constitute an "effective" system of sui generis protection for plant varieties or on the relationship between the TRIPS Agreement and the CBD. Furthermore, member states have not made any decisions on this matter yet. The only available information is concise summaries of notes or reports from the Council for TRIPS meetings held from January 1999 to January 2006.<sup>35</sup> These documents only reflect the progress made by the Council for TRIPS regarding the following points: the evaluation of the provisions of Article 27.3(b), the correlation between and the CBD and the TRIPS Agreement and the protection of traditional knowledge and folklore.<sup>36</sup>

#### **4) The 1991 UPOV Convention**

UPOV has implemented four acts (1961, 1972, 1978, and 1991) since its establishment. The UPOV Convention underwent revision in 1991. In this updated edition, the rights of plant breeders are expanded to encompass all plant genera and species that fulfill the criteria of novelty, distinctiveness, uniformity, and stability. Moreover, contracting parties are obligated to bestow and safeguard these rights.<sup>37</sup> This act mandates that states safeguard a minimum of 15 plant genera or species upon joining the act, and provide protection to all plant varieties within 10 years.<sup>38</sup> In general, the safeguarding encompasses not only the material reproduced from the safeguarded variety but also the material obtained from safeguarded and "essentially derived

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<sup>33</sup> WTO Council, (29).

<sup>34</sup> The Council for TRIPS, Review of the Provisions of Article 27.3(b): Summary of Issues Raised and Points Made (WTO, IP/C/W/368/Rev.1, 9 8 February 2006).

<sup>35</sup> The Council for TRIPS, The relationship between the TRIPS Agreement and the Convention on Biological Diversity: Summary of Issues Raised and Points Made (WTO, IP/C/W/369/Rev.1, 9 (WTO, IP/C/M/21-35, 36/Add.1, 37/Add.1, 38-40 and 42-49 8 February 2006).

<sup>36</sup> See Annex of The Council, (29).

<sup>37</sup> The 1991 UPOV Convention. Article. 2 & 3. 2 (ii)

<sup>38</sup> Ibid

varieties".<sup>39</sup> Moreover, the 1991 edition broadened the scope of breeders' privileges by incorporating additional provisions that require the breeder's prior authorization. These provisions encompass activities such as production or reproduction, conditioning for propagation, offering for sale, selling, or engaging in other marketing activities, as well as exporting, importing, and stocking for any of the aforementioned purposes. Furthermore, it extended the minimum period of protection from 15 to 20 years.<sup>40</sup> The salient features of the convention discussed in section 9.

## **5) African Context of Plant Variety Protection System**

The section is divided into two Parts. The first part explores the background and rationale for the African Model Law and second part deals with the African Continental Free Trade Area IP Protocol.

### **5.1 African Model Law for Protection of the Rights of Local Communities, Farmers and Breeder**

The African Model Law, which was adopted in the year 2000, is designed to secure the conservation, assessment, and sustainable use of biological resources, including genetic resources for agriculture, as well as knowledge and technologies, to protect and enhance their diversity as a means of supporting the entire life support system. The specific aims of the law are: i) to acknowledge, safeguard, and promote the inalienable rights of local communities, including farming communities, over their biological resources, knowledge, and technologies; and ii) to acknowledge and safeguard the rights of breeders.<sup>41</sup>

. The African Model Law was designed as an alternative for the UPOV Convention on plant variety protection, tailored to address the specific requirements of African nations. It aims to strike a balance between the concerns of farming communities and commercial plant breeders, while providing a thorough and consistent legal structure for meeting international obligations regarding intellectual property, farmers' rights, and the management of biological resources.<sup>42</sup> It

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<sup>39</sup> Ibid

<sup>40</sup> Ibid

<sup>41</sup> Johnson A. Ekpere, *The OAU's Model Law: An Explanatory Booklet* (OAU, 2000)

<sup>42</sup> Adebola, Titilayo Adunola, 'The regime complex for plant variety protection: revisiting TRIPS implementation in Nigeria' (PhD, University of Warwick 2017).

is intended to have relevance for the development of policy and legislation in Africa and is by and large in line with farmers' rights as enshrined in UNDROP and the ITPGRFA.<sup>43</sup>

## **5.2 African Continental Free Trade Area IP Protocol**

The African Continental Free Trade Area (AfCFTA), which encompasses all of Africa with the exception of Eritrea, was created in 2018 under the AU's auspices. Its goal is to establish a market for products, services, and people across a single continent. The second phase of negotiations is when the protocols governing trade competition, investment, and intellectual property are supposed to be implemented under the AfCFTA Agreement. Similar to the WTO, member states are bound to adhere to the obligations set out in the protocol.<sup>44</sup>

As per the proposed IP Protocol article 8, it is imperative for States Parties to ensure the safeguarding of plant varieties through a unique system that encompasses farmers' rights, plant breeders' rights, and appropriate regulations on access and benefit sharing. Each State Party has the autonomy to establish its own distinct system of protection. However, it is crucial for States Parties to adhere to the additional obligations specified in the Annex to the protocol on Plant Varieties.<sup>45</sup> It also further states that “State Parties agree that the Annex to this protocol on Plant Variety Protection may draw from relevant African and related international instruments that meet their development priorities and interests.”<sup>46</sup> However, the protocol does not directly referring to UPOV or African Model Law as an effective sui generis system. But, State Parties can refer to this model based on their development priorities and interests. In addition to that, the protocol states “State Parties shall prohibit the protection of plant varieties through patents.”<sup>47</sup>

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<sup>43</sup> Karine Peschard, (n 24). Page. 41.

<sup>44</sup> Ibid. Page 40

<sup>45</sup> Draft Protocol on Intellectual Property to the Agreement Establishing The African Continental Free Trade Area ,Article 8 (3).The protocol ratified in 2023.However,not yet been made public.

<sup>46</sup> Ibid. Article 8(4)

<sup>47</sup> Ibid. Article 8(2). Tanzania, Namibia, Lesotho, Zambia, Gambia, South Africa and Morocco proposed to delete this paragraph.

## 6) The Ethiopian Plant Variety Protection System

Ethiopia introduced legal regimes for the protection of patents in 1995; however the plant varieties or essentially biological processes for the production of plants are not patentable inventions under the patent proclamation.<sup>48</sup> The patent regime is now under reform; however the reform process was not intended to include the plant varieties protection in to the patent regime.<sup>49</sup> However, Ethiopia enacted its own sui generis plant variety protection proclamation in 2006<sup>50</sup> which was intended to be an alternative intellectual property to the patent system.<sup>51</sup>

Different triggering reasons can be mentioned for introducing the plant variety regime in the Ethiopian legal system. Such as 1) the growing interest in the Ethiopian flower and horticulture industry, particularly the Ethio-Netherland investment deals in 2005.<sup>52</sup> 2) The World Bank spearheaded initiatives to standardize the African seed market. Consequently, the Bank leveraged its authority to convince the government to enact laws allowing breeders to formally register their rights to new seed strains.<sup>53</sup> 3) Ethiopia had been actively engaged in the international environmental negotiations and the draft process of the African Model Law.<sup>54</sup> 4) Ethiopia has been in the process of accession to the WTO since 2003, which requires the introduction of a sui generis plant protection system. However, it is assumed that the introduction of the sui generis system before joining the WTO will increase the possibility of being relieved and not forced to join UPOV 91.<sup>55</sup> 5) To encourage the involvement of the private sector and researcher roles.<sup>56</sup> 6) In order to acknowledge the valuable role played by farming and pastoral

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<sup>48</sup> Inventions, Minor Inventions and Industrial Designs, Proclamation, Proclamation No. 123/1995, Neg. Gaz., year 54, No. 25 Article 4(b).

<sup>49</sup> Interview with Getachew Tafa, Head of Patent and Technology Transfer Directorate at Ethiopian Intellectual Property Authority (Addis Abeba, Ethiopia 29 January 2024).

<sup>50</sup> Plant Breeders Right proclamation No. 481/2006\_Fed. Neg. Gaz., Year 12, No. 1.

<sup>51</sup> Parliamentary Explanatory note to Plant Breeders' Rights Proclamation No. 481/2006. Page 2/3.

<sup>52</sup> Personal interview with Ethiopian Netherland Seed Partnership Senior Expert (Addis Abeba, Ethiopia 6 January 2024).

<sup>53</sup> Explanatory Note, ( n 51).

<sup>54</sup> Adebola,( n 42)

<sup>55</sup> Explanatory Note, (n 51).

<sup>56</sup> Proclamation,( n 50).

communities in preserving agro-biodiversity resources, which are essential for the development of new plant varieties, as well as their longstanding tradition of seed utilization and exchange, their contribution must be duly recognized.<sup>57</sup> The outlined national policy on biodiversity conservation and research emphasizes the importance of enacting essential laws and regulations concerning access and benefits sharing, biosafety, as well as the rights of plant breeders, farmers, and communities.<sup>58</sup>

As stated in the parliamentary explanatory note, the initial version of the proclamation was developed by the Ethiopian Seed Agency following guidance from the World Bank within the framework of the Sub-Saharan African Seed Initiative, in which Ethiopia participates. The draft was designed in according to the UPOV system. Later on, the second version was prepared by the Ethiopian Institute of Biodiversity and Research under the auspices of the then Ministry of Agriculture and Rural Development. It was intended to harmonize and make it compatible with the ongoing draft on access and benefit sharing proclamation at that time. The second version, unlike the first draft, incorporates many provisions from different sources, such as the UPOV Convention, African Model Law, and other national jurisdictions like India regarding to farmers variety as discussed in section 9. Therefore, it can be understood that the Ethiopian PVP law did not adopt any single model of law.

### **7) The Implied Stance of Ethiopia against UPOV 91**

Ethiopia is globally acknowledged for its rich diversity of wild and plant genetics, and plays an active role in international biodiversity governance.<sup>59</sup> It is known for its strict and conservative approach to the administration of plant genetic resources.<sup>60</sup> This stand emanated from Ethiopia's active role in the negotiation of international environmental law, and maintaining farmer rights to seed has been a very core issue among Ethiopian academics. One of the primary reasons Ethiopia is not a party to UPOV is because of concerns about the possible harm that IPRs could cause to

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<sup>57</sup> Ibid.

<sup>58</sup> Teshome H. Mulesa and Ola T. Westengen, ' Against the grain? A historical institutional analysis of access governance of plant genetic resources for food and agriculture in Ethiopia' (2020) *Journal of World Intellectual Property* < <https://hdl.handle.net/11250/2650218>> accessed February 2024. Page 92.

<sup>59</sup> Ibid. Page 84

<sup>60</sup> Ibid.

farmers' rights.<sup>61</sup> Additionally, there was a belief that the UPOV system mainly rewarded seed developers who made breeding their profession, leaving most farmers' rights to seed and their own varieties unprotected.<sup>62</sup> An official with the Ethiopian Agriculture Authority also reiterated this claim: From the in-person interviewee, here is a straight quote:

*“Ethiopia does not have a recent plan to revise the existing plant breeders’ rights unless the proclamation No. 1068/2017 and to join the UPOV. We have three reservations on UPOV: It requires regulation on the seed exchange level, but we need to extend it to saved seed, and we also allow compulsory licenses, but UPOV did not allow that. It requires us to protect all varieties, but we have priorities. Though we are not members, we follow its criteria to assess plant breeders’ rights. Our main reason is that they did not accept farmer rights. Because of that, we are afraid to join UPOV. When it comes to cost-benefit analysis, we do not have seed to export (except in horticulture, where we are willing to grant 100% in this sector). Apart from the fact that we have a shortage of seed for local demand, if we are dependent on foreign seed, we may face difficulty in the case of a dollar shortage, and creating seed dependence on main and staple foods or priority crops will have consequences and chaos. Therefore, we have no plan to join recently. Even though it seems minor, there is also a payment for membership, like 5000 USD, and a contribution’<sup>63</sup>*

However, there is no explicit policy decision regarding the UPOV convention, and the government has not yet made any official statement against UPOV 91.

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<sup>61</sup> Ibid. Page 87

The UPOV acts, with the exception of the 1991 act, do not allow new countries to join the Union. Only the 1991 act is open for new membership.

<sup>62</sup> Explanatory Note, (51). Page 2/3 and see Teshome, (n 58). Page 96

<sup>63</sup> Personal interview with a government official of the Ministry of Agriculture (Addis Ababa, 9 January, 2024)

## **8) Comparative analysis of the Ethiopian plant variety protection system against the UPOV 91 and the African Model Law and its implications for acceding for to international trade agreement**

This section is devoted to a comparative analysis of the Ethiopian legal regime on plant variety protection with UPOV 91 and the African Model Law. It devotes itself to exploring its implications for accession to the TRIPS agreement and the AfCFTA Intellectual Property Protocol.

### **9.1 Forms of Protection**

A plant species covered by PVP is not eligible for patent protection under UPOV 1978. On the other hand, qualified plant species may be protected by both PVP and patents under the 1991 Act.<sup>64</sup> In response to calls for the introduction of the patent system in agriculture and the growing use of biotechnology in plant breeding operations, result the revision for 1978 Act's.<sup>65</sup>

In this regard, the African Model Law was designed by customizing the context of the essential nature of Africa's rich diversity and obligations under different international environmental agreements and the achievements of local and indigenous communities in the conservation of biological diversity.<sup>66</sup> In this sense, the model law disapproved of patents and other intellectual property rights on living things that monopolize for profit what belongs to communities through privatization. It the only recognized the sui generis plant variety protection system.<sup>67</sup> This position is also reflected in the AfCFTA Intellectual Property Protocol, which was adopted in 2023.

The Ethiopian legal system also has similar features to the African Model Law. As we discussed in Chapter 4, plant varieties, or essentially biological processes for the production of plants, are not patentable inventions under the Ethiopian patent proclamation. Therefore, both the African

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<sup>64</sup> Jorge Cabrera, and others,' Comparative Study of the Nagoya Protocol, the Plant Treaty and the UPOV Convention: The Interface of Access and Benefit Sharing and Plant Variety Protection' (January 2019), CISDL Biodiversity and Biosafety Law Research Programme. Page 13.

<sup>65</sup> Biswajit Dhar, ' Sui Generis Systems for Plant Variety Protection '(2002) Quaker United Nations Office, A Discussion Paper <<http://www.quno.org>> accessed 22 August 2023.).Page 11.

<sup>66</sup> Johnson (n 41).

<sup>67</sup> Johnson (n 41)

Model Law and the Ethiopian legal system protect plant varieties only through the sui generis plant protection system, as discussed earlier.

## 9.2 Protectable Subject Matter

Plant varieties themselves are the focus of plant variety protection. There is different academic discourse regarding what constitutes plant variety. However, for the sake of comparative analysis, this section will only focus on the definitions enshrined in international legal texts.

The 1991 Act of the UPOV Convention defined "variety"<sup>68</sup> as the object of protection in conformity with ITPGRFA definition that states "variety" as "a plant grouping, within a single botanical taxon of the lowest known rank, defined by the reproducible expression of its distinguishing and other genetic characteristics."<sup>69</sup> According to this concept, a plant variety comes from the lowest division within the kingdom of plants. It makes clear that a variety must be distinguished by its attributes, stand out from other varieties, and maintain its identity throughout the propagation process. In the UPOV system, a plant grouping is not regarded as a variety if it does not satisfy this requirement.<sup>70</sup> However, there is no definition and further clarification in the TRIPS Agreement regarding "plant variety." It only introduces a form of effective sui generis plant varieties legal protection system that needs to be adhering by the member's state.

The Ethiopian PVP law adopted a similar definition for variety under Article 2(16)<sup>71</sup> as defined under UPOV 91. Further proclamation defines the term "farmers or pastoral communities' variety" as a variety that has been traditionally cultivated and developed by the farmers or

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<sup>68</sup> The 1991 Act of the UPOV Convention ,Article 1(vi)

"Variety means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be defined by the expression of the characteristics resulting from a given genotype or combination of genotypes, distinguished from any other plant grouping by the expression of at least one of the said characteristics, and considered as a unit with regard to its suitability for being propagated unchanged."

<sup>69</sup> Article 2 of ITPGRFA

<sup>70</sup> Peter Button, ' Key requirements for an effective system of plant variety protection' Session 3 "Responding to the challenges of a changing" available at ("Impact Study") <http://www.upov.int/en/publications/impact.html> accessed on August 23,2023

<sup>71</sup> Verbatim copy of Article 1(vi) of UPOV 91 (n 68).

pastoral communities in their fields and is predominately bred or selected by farmers or pastoral communities from various plant sources.<sup>72</sup> On the other hand, the African Model Law recognizes plant varieties of the local communities, farmers' varieties, as well as breeders' new varieties.<sup>73</sup> However, the model law did not define variety.

Regarding coverage of varieties UPOV 91 requires the grant of protection for the varieties of all plant genera and species. In this regard, the current Ethiopian plant breeder's proclamation states that the scope of protection shall apply to all genera and species of plants throughout the country, except those genera and species of plants excluded by the directives of the Ministry of Agriculture.<sup>74</sup> The African Model Law is silent on this point.

In this regard, scholars like Leskien and Flitner argue that to comply with the TRIPS requirement, the acceding country is not duty-bound to extend protection to all genera and species of plants.<sup>75</sup> In addition to that, as discussed earlier, TRIPS is not intended to govern the details aspects of the plant variety protection system; therefore, it did not set criteria as to the minimum number of genera or species to be covered by an effective Sui generis.

### **9.3 Condition**

UPOV established criteria for granting and assessing the validity of plant variety rights and became a model law for other PVP laws. The UPOV 1991 requires that a plant variety be new<sup>76</sup>, distinct<sup>77</sup>, uniform<sup>78</sup> and stable<sup>79</sup> in order to be eligible for protection.<sup>80</sup> In evaluating plant

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<sup>72</sup> Article 2(7) of Ethiopian Plant Breeders Right Proclamation No.1068/17.

<sup>73</sup> Article, 1, 26/27 & 28 of the African Model Law.

<sup>74</sup> Ibid.

<sup>75</sup> Leskien ( n 18).Page.49

<sup>76</sup>Article 6 of UPOV 91 states that the term "new" is defined as follows: "At the time of submitting the application for a breeder's right, the propagating or harvested material of the variety has not been sold or disposed of to others, either by or with the breeder's consent, for the purpose of exploiting the variety."

<sup>77</sup> Article 7 of UPOV 91 states that a variety is considered distinct if it can be easily distinguished from any other variety that is commonly known at the time of the application. It's worth noting that the term "variety of common knowledge" isn't limited to protected varieties and national or geographical boundaries.

<sup>78</sup> Article 8 of UPOV 91 states that a variety is considered uniform if it displays enough consistency in its relevant characteristics, while allowing for expected variation resulting from its propagation techniques. This standard only applies to traits that are essential for safeguarding the variety.

variety protection, the DUS criteria—distinctiveness, uniformity, and stability—are crucial and intricately linked elements.<sup>81</sup>

In relation to additional requirements, it is specified that the bestowal of the breeder's privilege shall not be contingent upon any supplementary or distinct conditions, so long as the plant variety is assigned a denomination in accordance with the guidelines outlined in Article 20, the candidate adheres to the necessary procedures as per the regulations of the relevant contracting party, and fulfills the mandatory fee payments.<sup>82</sup> It indicates that a "denomination," or general designation, will be assigned to the variety that is the subject of a protection application.

The Ethiopian current plant breeder's proclamation has set similar criteria as UPOV 91, with variety denomination included as an additional criterion.<sup>83</sup> It also recognizes the distinctiveness, uniformity, and stability of the results obtained for the same variety in other countries recognized as having equivalent testing procedures.<sup>84</sup> However, the Ethiopian current plant breeder's proclamation differs from UPOV regarding setting additional requirements, which are scattered through different articles<sup>85</sup>. For example, Plant breeders' rights may only be granted and exercised in accordance with the current national law on access to and benefit-sharing of the country's biodiversity when an improved variety is developed using material from farmers' or pastoral communities' variety, wild relatives of crop plants and other varieties, and community knowledge.<sup>86</sup> This is intended to minimize the risks of bio-piracy and preventing the misappropriation of genetic resources of local communities. This criterion included in an attempt to conform to Article 66 of African Model Law and other international environmental agreements such as CBD and ITPGRFA. In this regards, the CBD has outlined the benefits that

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<sup>79</sup> Article 9 of UPOV 91 states that a variety is considered stable when its relevant traits remain consistent after repeated propagation or at the end of a specific propagation cycle. This provision solely pertains to the pertinent characteristics of a variety.

<sup>80</sup> The 1991 Act of the UPOV Convention ,Article 5(1).

<sup>81</sup> Ibid

<sup>82</sup> Ibid Article 5(2)

<sup>83</sup> Article 4 (1) and Article 12 of Plant breeders' Right Proclamation No 1068/17.

<sup>84</sup> Ibid. Article 4(4).

<sup>85</sup> Ibid .Article 4(3), 15(2) (a) and 18(1) (c).

<sup>86</sup> Ibid. Article 5(3).

should be granted to the owner of genetic resources, knowledge, innovations or practices upon their use by another party and ITPGRFA also set the same notion. In addition to that the applicant has to obtain all necessary authorization from Environmental Protection Authority regarding bio safety procedure.<sup>87</sup> Furthermore, there is also another strict criteria enshrined under the new Seed Proclamation for assessment of conventional seed registration which is also applicable to plant variety protection.<sup>88</sup> This is the "usefulness" (also known as "Value for Cultivation and Use"; VCU, condition.<sup>89</sup> . However, no notion of utility/usefulness was included in the UPOV.<sup>90</sup>

In this regard, the African Model Legislation does not have specific provisions dealing with conditions of protection. However, it provides a definition for the characteristics of new varieties<sup>91</sup>; in a similar fashion to the previous plant breeders' proclamation of Ethiopia. It says that with regard to his new plant variety, a breeder will be granted a plant breeder's right.<sup>92</sup>

In general, the UPOV-modeled criteria have been criticized for not recognizing farmers' varieties and for paving the way for genetic erosion. Promoting monocultures can reduce genetic diversity, which is one way that UPOV's advocacy for stable and uniform varieties can do. The protection of 'traditional varieties' is undoubtedly hindered by the demand of novelty. i.e., these varieties are widely known and existed for a long time. It could not be sufficiently uniform to qualify for being protected. However, Farmers that rely on the stability and dependability of

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<sup>87</sup> Ibid. Article 15 (2).

<sup>88</sup> Seed Proclamation No. 1288/2023\_Fed. Neg. Gaz., Year 29, No. 30.

<sup>89</sup> Leskien,(n 18)

<sup>90</sup> Ibid.

Before the UPOV Convention (1961), a few existing PBR systems (such as the German Saatgutgesetz of 1953) incorporated this requirement prerequisite for a variety to qualify for protection.

<sup>91</sup> Article 29 of African Model Law.

It reads: "a variety will be considered new if it is, by reason of one or more identifiable characteristics, clearly distinguishable from all varieties the existence of which is a matter of common knowledge at the effective date of application for the grant of a plant breeders' rights; is stable in its essential characteristics, in that after repeated reproduction or propagation or, where the applicant has defined a particular cycle of reproduction or multiplication, at the end of each cycle, remains true to its description; and is, having regard to its particular features of sexual reproduction or vegetative propagation, a sufficiently homogenous variety."

<sup>92</sup> Article 4 of Plant breeders' Right Proclamation No 481/17.

production provided by genetic variety need genetic diversity. It is pointed out by other critics that uniformity may result vulnerability to pest. Nevertheless, the DUS characteristics are not mandatory protection requirements of a sui generis system under the TRIPS Agreement. Thus, the Ethiopian PVP inculcated these criteria without any obligation, which is against its obligations under CBD and ITPGRFA's objectives of conserving biological diversity and the rights of farmers, respectively.

#### **9.4 Scope of Rights Enjoyed by the Breeders'**

The UPOV Convention confers an exclusive right the protected variety and also to "varieties not clearly distinguishable" from the protected variety.<sup>93</sup>The scope of protection is extending to three areas: (a) the propagating material, (b) the harvested material, and (c) Essentially derived varieties.<sup>94</sup>

The African Model Law gives breeders the sole authority to create and sell plants or propagating material of new varieties, as well as to license third parties to create and sell propagating material. Member nations have an obligation to recognize local communities' rights to biological resources and their rights to intellectual property.<sup>95</sup>The model law is silent on the issue of harvested materials and essentially derived varieties

The Ethiopian PVP law is designed in a similar fashion to the African Model Law and incorporates some elements of UPOV 91. It also has its own unique features regarding protecting farmers' variety. Regarding the structure of the scope of protection <sup>96</sup> with a slight modification, it was adopted from the African Model Law that the scope of protection is limited to propagating material, unlike UPOV 91, which extended to harvested material. Similar to UPOV 91, the scope of protection is extended to an essentially derived variety.

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<sup>93</sup> The 1991 UPOV Convention. Article 14(5)(a)

<sup>94</sup> Ibid. Article 14.

<sup>95</sup> Article 30 (1) (2) (a) (b) of African Model Law.

<sup>96</sup> Article 5 of the Plant Breeders' Right Proclamation No.1068/17".It states that a plant breeders' right entitles the holder an exclusive right to: a) sell, or give permission to other persons to sell, and b) produce, or give permission to other person to produce for market, the protected seed or propagating material of the protected variety."

## **9.5 The Exemption and Limitation to the Right Conferred**

The UPOV 91 Convention prescribed three compulsory exceptions to the breeder's right and one optional exception. These include activities carried out in private and non-commercial settings, experiments, and the purpose of breeding of other varieties, while keeping in mind breeders' rights over essentially protected variety. In this context, members are free to define the farming practices they believe come under the purview of this exception, as UPOV 1991 does not define this mandatory exception further. Regarding the optional "farmer's privilege" exception, it limits the breeder's rights with regard to any variety by allowing farmers to use the harvest product they have planted on their own holdings for propagation purposes as long as they stay within reasonable bounds and as long as the breeder's legitimate interests are protected." This indicates that the exemption is limited to a particular crop set and precludes the exchange of farm-saved seed in any way.

In this regard, the current Ethiopian PVP proclamation deviates from the previous trend that tends toward African Model Law. This provides broader exceptions to breeders' rights to grow, propagate, and utilize plants of a particular variety for non-commercial purposes, sell plants or propagation materials of that variety as food or for other non-growing purposes, sell plants or propagation materials within the location where they are grown, use the variety as a starting point for developing a new plant variety, sprout the protected variety for consumption, use the variety for research, breeding, or teaching, and obtain such a protected variety from gene banks or plant genetic resource centers. Furthermore, farmers are free to save, exchange, and use a portion of the seed from their initial crop to sow subsequent crops on their own farms. The current proclamation bears a resemblance to UPOV 91 and incorporates solely three exclusions: for private or non-commercial usage; for the purpose of experimentation, research, or education; or for the breeding of other varieties. As stated above under the previous proclamation farmers enjoy extensive right over a protected variety from exemptions to Plant breeders' Right.

In relation to limitation, in order to protect the public interest, UPOV 91 permits reasonable limitations on the use of breeders' right in Article 17. Thus; the convention does not define the word "public interest" or specify who determines when r the "public interest" is affected.

In this regard, the Africa Model Law may also impose restrictions on the rights of plant breeders, subject to certain conditions. The previous Ethiopian Plant Breeder's Right Proclamation is a verbatim copy of this model law as incorporated under Article 7. However, the current Ethiopian Plant Breeder's Right proclamation deviated from the previous tendency and adopted an almost similar context to the UPOV Convention, except that the proclamation attempted to provide guidelines as to the imposition of public interests.

## **9.6 Farmers Right**

The definition of farmers' rights is a highly debated topic, lacking a clear consensus. It encompasses more than what is outlined in Article 9 of the ITPGRFA, which solely addresses plant genetic resources for food and agriculture. The wider range of rights that relate to individuals working in rural areas, as expressed in international human rights law, are also pertinent to this discussion.<sup>97</sup> However, for the purpose of discussion under this section, farmers' rights should be understood within the ambit of the ITPGRFA, which focuses on the potential for plant breeder's rights.

In this regard, one major limitation of UPOV is its failure to acknowledge farmers' rights. Consequently, farmers' rights are delineated as exceptions to breeders' rights, presented as an alternative option.<sup>98</sup> On the other hand, in an attempt to address farmers' rights, the African Model Law is a pioneering international legal text that tries to balance farmers' rights with plant breeders' rights. Farmers right is covered in separate chapter 5 it constitutes Article 24, that recognize farmers right and set principle, Article 25 deals with farmers' varieties, Article 26 elaborate what constitute farmers' rights and, Article 27 states certification of farmers varieties and farmers privilege over protected variety is addressed under Article 31.

Farmers have the ability to preserve, utilize, trade, and vend farm-saved seed or propagating material of their own cultivated varieties. They can also employ a newly protected breeders' variety to enhance their own varieties, incorporating material acquired from gene banks or plant genetic resource centers. Additionally, farmers are permitted to collectively preserve, utilize,

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<sup>97</sup> Kamalesh Adhikari and others 'What Should Farmers' Rights Look Like? 'The Possible Substance of a Right (2021) 11, 367 *Agronomy* < [https:// doi.org/10.3390/agronomy1102036](https://doi.org/10.3390/agronomy1102036)> accessed 21 December 2024. Page 8 and see UNDROP.

<sup>98</sup> The 1991 UPOV Convention, Article 15.

multiply, and process farm-saved seed of protected varieties. Nevertheless, it is prohibited for them to commercially sell farm-saved seed of a protected variety to the seed industry.<sup>99</sup>

In this regard, the previous Ethiopian plant breeders' proclamation also followed in the footsteps of the African Model Law. Farmers' rights are addressed in a separate Chapter 5, which consists of Article 27, which recognizes and sets principles. Article 27 elaborates on what constitutes farmers' rights, and the issue of exemptions or farmers' privilege over protected varieties is addressed under Article 6. Article 27 is directly taken from Article 26 of the African Model Law as indicated in the above paragraphs.

Nevertheless, the current Ethiopian Plant Breeders' Proclamation deviated from its previous trend that farmers right now take different shapes, unlike the African Model Law. In the previous proclamation, the provisions that set principles and recognized farmers' rights and the provisions that dealt with farmers' privileges were now eliminated. There is no separate chapter that covers farmers' rights. The current proclamation confuses a farmer's privilege with a farmer's right. The assumed farmer's right is included in Chapter 2 of the proclamation, which deals with the right of breeders'.<sup>100</sup> The proclamation excluded farmers or pastoral communities from the exemption of use of protected varieties and devised another separate article to deal with farmers or pastoral communities in the same fashion as provided under UPOV 91 as an optional exception or "farmer's privilege."<sup>101</sup> It deviated from the previous trend that considered farmers rights as absolute or inherent rights. In this proclamation, the only provision that grants farmers' rights is Article 7, which states: "Smallholder farmers or pastoral communities shall have the right to save, use, exchange, and sell farm-saved seed of any variety for non-commercial marketing<sup>102</sup> and ... to save and use farm-saved seed of any variety of food crops and other species that directly supporting his livelihoods. The merit of this provision is to limit the extent of the

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<sup>99</sup> Article 26(1) (d) (e) and (f) and 2 of African Model Law.

<sup>100</sup> Article 11(1) & (2) of Plant Breeders' Rights Proclamation No. 1068/2017.

"The proclamation explicitly states that any plant breeder, including farmers or pastoral communities, may apply for a plant breeder's right in respect of a new plant variety that is bred either locally or abroad'.

<sup>101</sup> Article 7 of Plant breeders' Right Proclamation No 1068/17.

<sup>102</sup> Art. 2.4 of Plant Breeders' Rights Proclamation No. 1068/2017 defines non-commercial market is as any trade in seed conducted between small holder farmers, pastoral communities and their cooperative societies.

circulation of the supply of seeds from the informal sector and attempt to replace it with the formal sector, which is dominated by the public sector.

However, the proclamation recognized and set different, less stringent criteria for farmers' and pastoral community varieties<sup>103</sup> to be determined by the Ministry of Agriculture by directives (Ethiopian Plant Breeder's Rights Directive No. 769/2021).<sup>104</sup> In this regard, UPOV does not recognize such variety at all. In response to this issue, the African Model Law has taken steps to acknowledge and safeguard farmers' varieties as recognized and protected breeds and varieties under intellectual property law. Through the issuance of a variety certificate, which does not require meeting the criteria of distinction, uniformity, and stability, the community is granted the exclusive right to cultivate, multiply, use, sell, or license the variety.<sup>105</sup>

### **9) Implications for Acceding to International Trade Agreement**

The TRIPS Agreement incorporates the rules of the Paris Convention, the Berne Convention, the Rome Convention, and the Treaty on Intellectual Property in Respect of Integrated Circuits by reference in its relevant provisions.<sup>106</sup> Nonetheless, the TRIPS agreement did not recognize UPOV as an effective sui generis mechanism for safeguarding plant varieties, as previously discussed. Additionally, Article 27(3) (b) mandates that member nations must safeguard plant varieties through patents, sui generis systems, or a combination of both. The sui generis system option or exception was established as a feasible alternative to the patent system for plant varieties, as it grants ample flexibility for developing countries to create a system that is tailored to their situation and meets their objectives and aspirations.<sup>107</sup>

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<sup>103</sup>Article 2(7) of Ethiopian Plant Breeders Proclamation 1068/17 defines: “farmers or pastoral community’s variety as variety which is: a) traditionally cultivated and developed by farmers or pastoral communities in their fields; or b) predominantly breed or selected by farmers or pastoral communities from various plant source”.

<sup>104</sup>Article 4(3) of of Ethiopian Plant Breeders Proclamation 1068/17.

<sup>105</sup> Article 25 of African Model Law.

<sup>106</sup> Pawarit Lertdhamtewe, '( n 25). Page 132

<sup>107</sup> Rohan Dang and Chandni Goel, ' Sui Generis Plant Variety Protection: The Indian Perspective' (2009) 1 (4) American Journal of Economics and Business Administration < <https://doi.org/10.3844/ajebasp.2009.303.312>> accessed 17 January 2024. Page 308.

Although, in implementing TRIPS Article 27.3b, many countries (acceded or in the process of accession to the WTO) have adopted the model proposed by UPOV Convention.<sup>108</sup> However, as discussed in chapter 2, some countries, such as Ethiopia<sup>109</sup>, Zimbabwe's, Thailand, Zambia's and Uganda's India, and Malaysia, have chosen to develop their own sui generis legislation to protect the right of farmers as well as plant breeders' rights.<sup>110</sup> India, a member of the WTO and a state party to the TRIPS Agreement, has not yet joined the UPOV. Instead, India has enacted the Protection of Plant Varieties and Farmers' Rights Act in 2001 to provide a legal framework for the protection of plant varieties and the rights of farmers.<sup>111</sup>The Indian Act has even broader protection to farmers than the Ethiopia PVP does as highlighted in the recommendation section.<sup>112</sup>

Generally, it can be understood that TRIPS Article 27.3(b) is flexibility relating to the sui generis system of PVP, and members or acceding countries like Ethiopia are not duty-bound to join UPOV or to adopt legislation based on it.<sup>113</sup> Therefore, Ethiopia is free to determine its own Sui generis plant protection system in the context of its national interests, as allowed in TRIPS Article 8<sup>114</sup> and to benefit from the exemption conferred on least-developed countries as per Article 66.<sup>115</sup> However, Ethiopia has already enacted its own sui generis plant variety protection

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<sup>108</sup> Karine Peschard, (n 24).Page 18-19.

<sup>109</sup> Ethiopia has been in a process of accession to WTO since 2003.And Ethiopia has signed AfCFTA in 2018 and ratified through proclamation number 1124/2019.

<sup>110</sup> Anja Christinck, and Morten Walle Tvedt, 'The UPOV Convention, Farmers' Rights and Human Rights'(2015) An integrated assessment of potentially conflicting legal frameworks, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)< <https://wocatpedia.net/images/c/cd/Giz2015-en-upov-convention>> accessed September 1,2023.Page 78 and see Karine Peschard (n 27).

<sup>111</sup> Ibid. Also see Government of India, Protection of Plant Varieties and Farmers' Rights Act (2001).

<sup>112</sup> Rohan Dang, (n 107).

<sup>113</sup> Srividhya Ragavan & Jamie M. O'Shields, 'Has India Addressed Its Farmers' Woes? A Story of Plant Protection Issues' (2007) 97(20) <<https://scholarship.law.tamu.edu/facscholar/510>> accessed September 2023.Page 100-103.

<sup>114</sup> Article 8(1) of TRIPS Agreement provides "Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement."

<sup>115</sup> The Council for TRIPS, made decision on June 29th, 2021, which extended the general transition period under Article 66.1 for Members classified as least developed countries until July 1st, 2034, or until they no longer fall

law in 2006 and replaced it in 2017. Furthermore, Ethiopia's working party filed its thorough reports on TRIPS on intellectual property laws, particularly to its PVP law to the WTO assessment committee.<sup>116</sup>

Regarding AfCFTA as we have discussed under section five, member countries are free to determine their own sui generis plant variety protection law by taking in to account their national interest.

## **10) Conclusion**

The whole idea of harmonizing intellectual property as part of the global trading system was introduced by TRIPS. Article 27.3(b) of TRIPS requires to 'providing for the protection of plant varieties either by patents, by an effective sui generis system, or by any combination thereof. It can be understood that TRIPS is flexible in determining plant variety protection systems by taking into consideration national interests.<sup>117</sup>

Since TRIPS did not mention UPOV as an effective sui generis model of law, members and accession countries are free to determine their own effective sui generis system of plant protection. As discussed in chapter 2, the WTO Council has mandated the TRIPS Council to investigate the relationship between TRIPS and CBD as well as other issues raised by developing countries. However, the TRIPS revision of Article 27. (3) (b) is still pending. It is expected that the proposed revision will shape the nature of Article 27(3) (b) to accommodate the interests of developing countries. Therefore, this also gives space for developing nations not to be compelled to join UPOV 91, which affects the interests of farmers and the national interest in lager. Having this in mind, the African Model Law was designed to fit the context of farmers and national interests and to counterbalance UPOV.<sup>118</sup>In addition to that some countries, such as Ethiopia<sup>119</sup>,

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under that category, whichever happens first. The reference document number for this decision is IP/C/88 <[https://www.wto.org/english/news\\_e/news21\\_e/trip\\_30jun21\\_e.htm](https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm)> accessed 4 January 2024.

<sup>116</sup> Ethiopia's foreign trade regime. <[https://www.wto.org/English/thewto\\_e/acc\\_e/a1\\_ethiopia\\_e.htm](https://www.wto.org/English/thewto_e/acc_e/a1_ethiopia_e.htm)> accessed February 2024. Ethiopia present its report based on the previous plant breeders' proclamation No.481/2006.

<sup>117</sup> Article 8 of TRIPS Agreement.

<sup>118</sup> Johnson, (n 41).Page 3.

<sup>119</sup> Ethiopia has been in a process of accession to WTO since 2003. And Ethiopia has signed AfCFTA in 2018 and ratified through proclamation number 1124/2019.

Zimbabwe's, India, Uganda's, Thailand, Zambia's, and, Malaysia have chosen to develop their own sui generis legislation to protect the rights of farmers as well as plant breeders' rights.<sup>120</sup>

Ethiopia has not yet joined the WTO and is not obligated to implement a strict plant protection system, as previously mentioned. Nevertheless, in reality, there might be pressure to adopt a plant variety protection system similar to UPOV due to the increasing interest in the Ethiopian flower industry (That was one of the motivations behind the establishment of a plant variety protection law framework in Ethiopia's) and to attract investment in biotechnology.

Furthermore, the adoption of a robust plant variety protection system may be influenced by our bilateral relationship with European countries and the seed harmonization efforts undertaken by the World Bank and regional organizations such as COMESA. Hence, it is imperative for the Ethiopian government to establish a firm policy stance on this matter, prioritizing the protection of farmers' interests and the national economy. It is crucial to approach this issue with utmost care, thoroughly assessing the costs and benefits before making any decisions

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<sup>120</sup> Karine Peschard, (n 24). And see Anja Christinck, (n 110).

## **BIBLIOGRAPHY**

### **1. Books**

- Bently L and Sherman B, Intellectual Property Law ( Oxford University Press 2001)
- Blakeney, M. Plant Variety Protection, International Agricultural Research, and Exchange of Germplasm: Legal Aspects of Sui-Generis and Patent Regimes. In Intellectual Property Management in Health and Agriculture Innovation: A Handbook of Best Practice (Eds. Akkrattiger) ( MIHR: Oxford, U.K. 2007)
- Ekpere J, The OAU's Model Law: An Explanatory Booklet (OAU 2000)
- William L, and Eckert S, Plant Breeders' Rights: An Introduction: A Handbook of Best Practice (Cornell University 2007)
- World Trade World Trade Organization, Making of the TRIPS Agreement: Personal Insights from the Uruguay Round Negotiations (World Trade Organization 2015)

### **2. Journals and Articles**

- Adhikari, K and others, 'What Should Farmers' Rights Look Like? 'The Possible Substance of a Right ( 2021) 11, 367 Agronomy < <https://doi.org/10.3390/agronomy1102036>> accessed 21 December 2023
- Christinck A and Tvedt M,'The UPOV Convention, Farmers' Rights and Human Rights'(2015) An integrated assessment of potentially conflicting legal frameworks, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)< <https://wocatpedia.net/images/c/cd/Giz2015-en-upov-convention>> accessed 6 January 2024
- Cullet P, 'Plant Variety Protection in Africa: Towards compliance with the TRIPS agreement ' (2001) 45(1) Journal of African Law, School of Oriental and African Studies< <https://www.jstor.org/stable/3558970>> accessed September 11 2023
- Dan L, and Flitner M,' Intellectual Property Rights and Plant Genetic Resources: Options for a Sui Generis System. Issues in Genetic Resources'(1997) 6 International Plant Genetic Resources Institute < [https://www.wipo.int/edocs/mdocs/arab/en/wipo\\_ip\\_uni\\_dub\\_04/wipo\\_ip\\_uni\\_dub\\_04\\_10.pdf](https://www.wipo.int/edocs/mdocs/arab/en/wipo_ip_uni_dub_04/wipo_ip_uni_dub_04_10.pdf)> accessed 17 January 2024

- Dang R and Goel C, 'Sui Generis Plant Variety Protection: The Indian Perspective' (2009) 1 (4) American Journal of Economics and Business Administration < <https://doi.org/10.3844/ajebasp.2009.303.312>> accessed 17 January 2024
- Dejen Bekis Fentie, 'Status of Seed System in Ethiopia' (2021) Adv. Crop Sci Tech, an open access journal ISSN: 2329-6879<: <https://www.omicsonline.org/open-access/status-of-seed-system-in-ethiopia-115296>> accessed 30 January 2024
- Dhar B, 'Sui Generis Systems for Plant Variety Protection' (2002) Quaker United Nations Office, A Discussion Paper <<http://www.quno.org>> accessed 22 August 2023
- Dufield G, 'Food, Biological Diversity and Intellectual Property: The Role of the International Union for the Protection of New Varieties of Plants (UPOV)' (2011), Quaker United Nations Office, Global Economic Issue Publications: Intellectual Property Issue Paper Number 9 Paper <<http://www.quno.org>> accessed 22 August 2023
- Fikremarkos Merso, 'A critical Reflection on the Legal Framework Providing Protection for Plant Varieties in Ethiopia' (2011) 24 (1) Journal of Ethiopian Law <<http://ejol.aau.edu.et/index.php/JEL/article/view/8040> > accessed on 1 February 2024
- GRAIN, 'TRIPS-plus through the back door: How Bilateral Treaties Impose Much Stronger Rules for IPRs on Life than the WTO' (2001) < <https://grain.org/en/article/5-trips-plus-through-the-back-door>> accessed February 2024
- Helfer L, 'Intellectual property rights in plant varieties: International legal regimes and policy options for national governments' (2004) 85 FAO LEGISLATIVE STUDY
- Jorge Cabrera, and others, 'Comparative Study of the Nagoya Protocol, the Plant Treaty and the UPOV Convention: The Interface of Access and Benefit Sharing and Plant Variety Protection' (January 2019), CISDL Biodiversity and Biosafety Law Research Programme.
- Logan C, 'Worldviews Apart: Agricultural Extension and Ethiopian Smallholder Farmers' (2017) 32(1) Journal of Rural Social Sciences<: <https://egrove.olemiss.edu/jrss/vol32/iss1/7>> accessed 7 February 2024

- Ngwediagi P,' Establishment of Plant Breeders' Rights System In Tanzania: Achievements and Challenges' A Case Study Under the Ministry of Agriculture Food Security and Cooperatives, Tanzania -CAS-IP NPI Collaboration Project.
- Peschard K, Golay C, and Araya L, 'The United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas and the Right to Seeds in Africa', (2023) Academy Briefing)<[https://www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2022\\_web](https://www.geneva-academy.ch/joomlatools-files/docman-files/Briefing%2022_web)> accessed 7 September 2023
- Peter Button,' Key requirements for an effective system of plant variety protection' Session 3 "Responding to the challenges of a changing" available at ("Impact Study") <http://www.upov.int/en/publications/impact.html> accessed on August 23,2023
- Ragavan S and O'Shields J, 'Has India Addressed Its Farmers' Woes? A Story of Plant Protection Issues' (2007) 97(20)<<https://scholarship.law.tamu.edu/facscholar/510>> accessed September 2023
- Teshome Hunduma, and Westengen, Ola,' Against the grain? A historical institutional analysis of access governance of plant genetic resources for food and agriculture in Ethiopia'(2020) Journal of World Intellectual Property< <https://hdl.handle.net/11250/2650218>> accessed February 2024
- Thippeswamy, S, ' Plants Variety Protection: An Historical Perspectives' (2007) 07(11) International Journal of Development Research< [https://scholar.google.com/citations?view\\_op=view\\_citation&hl=en&user=OiO9PtoAAAAJ&citation\\_for\\_view=OiO9PtoAAAAJ:u5HHmVD\\_uO8C](https://scholar.google.com/citations?view_op=view_citation&hl=en&user=OiO9PtoAAAAJ&citation_for_view=OiO9PtoAAAAJ:u5HHmVD_uO8C)> accessed 7 September 2023.

### 3. Thesis

- Gizachew Silesh,'The Ethiopian Legal Regime on Plant Variety Protection: Assessments of Its Compatibility with TRIPS Agreement, Implications and the Way Forward' (LLM, Addis Abeba University 2010).
- Hajnour F,'Plant Variety Protection Under International Intellectual Property Laws and National Laws with Special Emphasis on Sudan and India'(LLM,University of Khartoum 2005)

- Lertdhamtewe P,' the Reformation of Legal Regime for Intellectual Property Protection of Plant Varieties in Thailand' (PhD, Queen Mary and Westfield College, University of London 2013)
- Titilayo A, The regime complex for plant variety protection: revisiting TRIPS implementation in Nigeria. (PhD , University of Warwick 2017)

#### 4. Working Papers, Reports ,Documents and Others

- Feyissa Regassa,' Farmers' Rights in Ethiopia A Case Study (Fridtjof Nansen Institute, 2005)
- Gaia Foundation/GRAIN Briefing, Ten reasons not to join UPOV, May 1998
- GRAIN, 'UPOV and WIPO attack Africa's Model Law on community rights to biodiversity: Genetic Resources Action International' (2001)<<http://www.grain.org/publications/oau-en.cfm>> accessed February 2024.
- Institute of Biodiversity Conservation,' Convention on Biological Diversity (CBD) Ethiopia's 4th Country Report'(November 2009)
- ISSD Africa, 'Creating space for 'informal' seed systems in a plant variety protection system that is based on UPOV 1991' (2017) Synthesis paper<<https://www.kit.nl/publication/working-paper-series-2017-7-creating-space-for-informal-see>> accessed on 12 August 2023
- Review of the provision of Article 27.3 (b) (WTO, India, IP/C/M/25, para. 70; Zimbabwe, IP/C/M/36/Add.1, Para. 201; African Group, IP/C/W/404, p.2; Kenya, IP/C/M/40, Para. 108. March 2006).
- Review of the provision of Article 27.3(b) further views of the United States, ( WTO,IP/C/W/209/Rev. 3 October 2000)
- The Council for TRIPS, Review of the Provisions of Article 27.3(b): Summary of Issues Raised and Points Made (WTO, IP/C/W/369/Rev.1, 9 March 2006).
- The Council for TRIPS, Review of the Provisions of Article 27.3(b): Summary of Issues Raised and Points Made (WTO,IP/C/W/368/Rev.1, 9 8 February 2006)
- The Council for TRIPS, made decision on June 29th, 2021, which extended the general transition period under Article 66.1 for Members classified as least developed countries until July 1st, 2034, or until they no longer fall under that category, whichever happens first. The reference document number for this decision is IP/C/88

<[https://www.wto.org/english/news\\_e/news21\\_e/trip\\_30jun21\\_e.htm](https://www.wto.org/english/news_e/news21_e/trip_30jun21_e.htm)> accessed 4 January 2024

- The Council for TRIPS, The relationship between the TRIPS Agreement and the Convention on Biological Diversity : Summary of Issues Raised and Points Made (WTO, IP/C/W/369/Rev.1, 9 (WTO,IP/C/M/21-35, 36/Add.1, 37/Add.1, 38-40 and 42-49 8 February 2006)
- The Ethiopian Agriculture Authority Organization Human Resource strategic Plan (2023)
- UNECA, 'The TRIPS and WTO negotiations: Stakes for Africa' (2017) Analytical Note <[int/wp-content/uploads/2017/03/AN\\_DIIP\\_TRIPS1\\_The-TRIPS-and-WTO-Negotiations-Stakes-for-Africa\\_EN-1](int/wp-content/uploads/2017/03/AN_DIIP_TRIPS1_The-TRIPS-and-WTO-Negotiations-Stakes-for-Africa_EN-1)> accessed 20 April 2024

#### 5. News letters

- Addis Fortune, 'Property Rights on Horizon for Private Seed Breeders' January 2, 2022
- The Ethio-Netherlands Seed Partnership, 'Variety Testing for Registration Pilot Moving Forward'(ENSP Newsletter Issue 05, October 2023)
- The Ethio-Netherlands Seed Partnership, 'Counterfeit Seed: A growing challenge that is threatening the sector in Ethiopia'(ENSP Newsletter Issue 03, March 2023)
- The Ethio-Netherlands Seed Partnership, ' Ethiopia Netherlands Seed Partnership launched' (ENSP Newsletter Issue 01, July 2022)

#### 6. National laws, Policy and Explanatory Notes

- Access to Genetic Resource and community knowledge, and community Rights proclamation No. 482/2006, Fed. Neg. Gaz., year 13, No. 13
- Biodiversity Convention Ratification Proclamation, Proclamation No. 98/2004, Neg. Gaz, year 53, No. 88
- Cartagena Protocol on Biosafety Ratification Proclamation No. 362/2003\_Fed. Neg. Gaz., Year 9, No. 87
- Definition of organization, Power and Duties of the Ethiopian Agriculture Authority Regulation No 509/2022. Fed. Neg. Gaz., Year 28, No. 31
- Institute Of Biodiversity Conservation And Research Establishment Proclamation, Proclamation No. 120/1998, Fed. Neg. Gaz., Year4, No.49

- International Treaty on Plant Genetic Resources for Food and Agriculture Ratification Proclamation No.330/2003, Fed.Neg.Gaz., Year 9, No.50
- International Treaty on Plant Genetic Resources for Food and Agriculture Ratification Proclamation 330/2003\_Fed. Neg. Gaz.,Year 9, No. 50
- Inventions, Minor Inventions and Industrial Designs, Proclamation, Proclamation No. 123/1995, Neg. Gaz., year 54, No. 25.
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of the Benefits Arising from their Utilization Ratification Proclamation No.753/2012\_Fed. Neg. Gaz., Year 18, No. 46
- National Bio-safety Proclamation No. 896/2015\_Fed. Neg. Gaz., Year 21, No. 66
- National Policy on Biodiversity Conservation and Research, 1998/ National Seed Policy1992, Revised 2020.
- Parliamentary Explanatory Note to Plant Breeders’ Rights Proclamation No. 481/2006.
- Parliamentary Explanatory Note to Plant Breeders’ Rights Proclamation No. 1068/2017
- Plant Breeder’s Rights Directive No. 769/ 2021
- Plant Breeders Right proclamation No. 481/2006\_Fed. Neg. Gaz., Year 12, No. 1
- Plant Breeders’ Rights Proclamation No. 1068/2017-Fed.Neg.Gaz,Year 24,No.29
- Proclamation to Provide For the Definition of the Powers and Duties OF the Executives Organs of the Federal Democratic Republic OF Ethiopia.No.1263/2021\_Fed. Neg. Gaz., Year 28, No. 4
- Seed Proclamation No. 1288/2023\_Fed. Neg. Gaz., Year 29, No. 30
- The Protection of Plant Varieties and Farmers' Rights Act.No.53/2001.

## **7. International Agreements and Explanatory Notes**

- African Model legislation for the protection of the rights of local communities, Farmers and Breeders, and for the regulation of access to biological resources (2000)
- Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreements, (1994)
- Convention on Biological Diversity (1992)

- Draft protocol on intellectual property to the Agreement Establishing The African Continental Free Trade Area ( 2022)
- International Convention for the Protection of New Varieties of Plants of December 2,1961 as Revised at Geneva on November 10,1972, on October 23, 1978,and on March 19,1991.
- International Treaty on Plant Genetic Resources for Food and Agriculture, November 2001
- UPOV, Explanatory note on exceptions to the plant breeders' rights under the 1991 Act of the UPOV Convention (2009), 8-11

#### **8. List of Interviewees**

- Interview with Ermiyas Yeshitla,Legal Expert at Biodiversity Institute ( Addis Abeba,Ethiopia 4 January 2024)
- Interview with Fiseha Teshome, Variety Release, Registration & Seed Quality Control Lead Executive Officer of Ethiopian Agricultural Authority
- Interview with Getachew Tafa, Head of Patent and Technology Transfer Directorate at Ethiopian Intellectual Property Authority ( Addis Abeba, Ethiopia 29 January 2024)
- Interview with Kenenia Deksiso, Deputy of seed producer association of Ethiopia. ( Addis Abeba,Ethiopia December 29 2024)