



ADDIS ABABA UNIVERSITY

COLLEGE OF LAW AND GOVERNANCE STUDIES

SCHOOL OF LAW

LL.M PROGRAM - PUBLIC INTERNATIONAL STREAM

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

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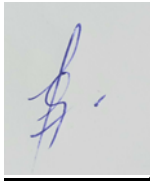
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Addis Ababa

May 2024

Declaration I, the undersigned, declare that this thesis 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.

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Abbreviations and Acronyms

AfCFTA	Africa Continental Free Trade Area
CBD	Convention on Biological Diversity
GRs	Genetic Resource
EDVs	Essentially Derived Varieties
IP	Intellectual Property
IPRs	Intellectual Property Rights
ITPGR	International Treaty on Plant Genetic Resources for Food and Agriculture.
PBRs	Plant Breeders' Rights
PVP	Plant Variety protection
OAU	Organization of African Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UPOV	Union Internationale pour la Protection des Obtentions Végétales) or the International Union for the Protection of New Varieties of Plants
UNDROP.	United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas
WTO	World Trade Organization

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

CHAPTER ONE

INTRODUCTION

1.1 Background of the Study

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.¹ 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* ²model of plant variety protection in most countries of the world³. 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.⁴

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.⁵ Article 27.3(b) of the TRIPS Agreement is the only provision in the agreement that deals with plant variety protection.

¹ 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.

² 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,"

³ Philippe Cullet, (n 1)

⁴ 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

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

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.⁶

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.⁷ Nonetheless, developed countries contend that the International Union for the Protection of New Varieties of Plants (UPOV) is the suitable and effective sui generis system to comply with TRIPS obligations. They urge developing countries to adopt UPOV or modify their laws to align with UPOV standards.⁸ 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.⁹ 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.¹⁰ They believe that developing countries adopt the sui generis system as the preferred option for protection of plant varieties.¹¹ They also stressed that; this approach should be aligned with the guidelines set forth by the Convention on Biological Diversity (CBD)¹² The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR).¹³

⁶ 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.

⁷ Ibid.

⁸ Gizachew Silesh, (n 4).

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

¹² 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

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 attention¹⁴.

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 research, therefore examines the Ethiopian plant variety protection legal system in light of UPOV, 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 rights or to maintain the existing status quo to comply with or adhere to the demand or requirement of the WTO TRIPS agreement and AfCFTA (Africa Continental Free Trade Area) Intellectual Property Protocol.

1.2 Statement of the Problem

Members are required by the WTO framework TRIPS agreement to ensure that plant varieties are protected through patents, an effective sui generis system, or any combination of these.¹⁵ The problem, however, is that the TRIPS Agreement provides no more clear guidance on what constitutes an effective sui generis system.¹⁶

purview encompasses all biological resources and thus has a direct impact on the establishment of protection frameworks for plant varieties.

¹³ 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.

¹⁴ Gizachew Silesh, (n 4).

¹⁵ The TRIPS Agreement was put into effect in 1995, following talks in 1994 at the conclusion of eight rounds of the General Agreement on Tariffs and Trade (GATT) negotiations. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is part of Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization (WTO). Article 27.3(b).

¹⁶ Fikremarkos (n 6).

Most developed members of the WTO is choosing to join the UPOV and implement systems based on it in order to fulfill their TRIPS commitments in this regard.¹⁷ They prompt developing nations to take a similar path. This means that in order to fulfill their TRIPS requirement, they must either join UPOV or at the very least model legislation that is compliant with UPOV.¹⁸ However, most developing countries like India, assert that TRIPS does not require members to join the UPOV to comply with Article 27(3) (b).¹⁹ They contend that there are alternative ways to satisfy the TRIPS requirement for an "effective sui generis system."²⁰ In this regard, the issue is uncertainties about the extent of flexibilities under Article 27(3) (b).

This paper will try to address these problems in the context of the current Ethiopian plant variety protection regime. For this reason, it is crucial to assess if Ethiopian plant variety protection laws needs modification in order to conform to the TRIPS agreement, and how to properly address the interests of farmers and their unique needs as a primarily agrarian economy.

1.3 Research Questions

This paper tries to answer the following major research questions:

- In adopting the plant breeder's proclamation, which model law did Ethiopia choose, and why?
- Does the current Ethiopian plant breeders' proclamation better protect farmers' rights? What should farmers' rights entail?
- Why did Ethiopia not join UPOV? Does it affect its accession process to the WTO and membership in the AfCFTA?

¹⁷ Philippe (n 1). Page 100.

¹⁸ Gizachew Silesh, (n4) and and 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>> February 2024.

¹⁹ 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

²⁰ 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 17

1.4 The Research Objective

The research paper has the following objectives:

This study's main goal is to assess the degree of compatibility of existing Ethiopian legal regimes on plant variety protection against UPOV and the African Model Law on plant variety protection. Its specific objectives are:

- Examining the existing national and international legal frameworks for plant variety protection.
- Examining the nexus with seed proclamation, access and benefit sharing proclamation, and biosafety proclamation.
- This research will guide the accession process in relation to plant variety protection and the implications of acceding to the WTO or in the context of an international trade agreement.

1.5 Significance of the Study

This study will guide the Working Party on Ethiopia's accession to the WTO and AfCFTA in assessing the Ethiopian current legal and institutional statutes on plant variety protection and the implications of acceding to the WTO, TRIPS agreement, and AfCFTA Intellectual Property Protocol.

It will also serve as a basis for future amendments to the existing legal framework on plant variety protection systems.

1.6 The Research Method

The study is primarily based on doctrinal legal research methodology. Data collection will involve the utilization of both primary and secondary sources of data. This includes:

- Literature review, which aims to critically assess the conceptual basis of what constitute an effective sui generis system.
- Analysis and explanation of relevant legislation, specifically Plant Breeder's Right Proclamation No. 1068/17 against the UPOV Convention and African Model Law, will be conducted in light of other international legal instruments that have direct linkage to

the rights of farmers. Such as Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources (ITPGR).

- Key informant interviews conducted.

1.7 Limitation of the Study

One of the limitations of this work is the lack of well-organized literature and research on the area of protection of plant varieties in Ethiopia, with an emphasis on the case of Ethiopia. There are only a few relevant published materials, and all of them are based on the previous Plant Breeders Right Proclamation No. 481/2006. And also, no research shows the interplay between seed proclamation, access and benefit sharing proclamation, and biosafety proclamation.

In addition to that, there will be information constraints on accessing the relevant documents and minutes used in the drafting of the then and current Plant Breeders Right Proclamation.

CHAPTER TWO

HISTORICAL DEVELOPMENT AND THE NATURE OF PLANT VARIETIES PROTECTION AS AN INTELLECTUAL PROPERTY

This chapter will look at the historical and theoretical outlook of the protection of plant varieties and will brief the development of plant variety protection systems. It specifically addresses the need for the protection of plant varieties with an effective sui generis system.

2.1 Historical Development of Plant Varieties Protection as Intellectual Property

Traditionally, plants were not covered by the international framework of intellectual property. Since agriculture was being seen as non-industrial, it was exempt from patent law.²¹ This was associated with traditional agricultural practices such as the exchange and conservation of seeds, along with the belief that meeting food requirements should not be driven by profit.²² The expansion of the commercial seed trade in various European countries towards the end of the 19th century created demands to expand intellectual property rights in agriculture, much like it did for industry. In various countries at this time, breeder associations were also founded.²³ The legal advancement was inherently connected to the growth of a distinct commercial breeding sector apart from agriculture, and, in more recent times, to the emergence of a biotechnology sector.²⁴ Throughout the course of a millennium, farmers have been actively engaged in the practice of saving, selecting, exchanging, and selling seeds, while also utilizing and reutilizing them to cultivate nourishing crops.²⁵

The establishment of the International Bureau of the Union for the Protection of Industrial Property in 1883 provided a boost for plant breeders to substantiate their intellectual property

²¹ Lionel Bently and Brad Sherman, *Intellectual Property Law* (Oxford University Press 2001). Page.539-40

²² 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

²³ The Swedish Seed Association and International Association of Plant Breeders (ASSINSEL) were formed.

²⁴ 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> accessed 7 September 2023. Page 19

²⁵ Regine Andersen, 'The History of Farmers' Rights': A Guide to Central Documents and Literature (Fridtjof Nansen Institute, 2005) and Karine Peschard, (n 24) Page 17.

rights on new plant varieties.²⁶ The Bureau oversaw the activities of the Paris Convention, which initiated the first international agreement aimed at harmonizing patent laws.²⁷ This Convention envisaged agriculture as an area of enterprise in respect of which property rights could be secured.²⁸ Given the technological advancements of 1883, it is probable that the Paris Convention incorporated agricultural subjects within the framework of safeguarding trademarks and geographical indications of origin.²⁹ There were also an attempt made by Germany, Czechoslovakia, and France to introduce a register for newly bred plants and set up a seed control system.³⁰ However, an endeavor to implement the plant breeders' rights law in Germany proved to be unsuccessful at that time.³¹

Despite European efforts to establish PBRs, the US Plant Patents Act of 1930 was the first intellectual property law to include agricultural innovations.³² This act developed a sui generis system of protection for agricultural innovations, limiting the scope of protection to plants reproduced asexually due to the belief that sexually reproduced varieties lacked consistency. Notably, it specifically excluded plants propagated through tubers, primarily driven by apprehensions over potential monopolies in essential food commodities.³³ It accelerated the process of IPR adoption in agriculture by a broader range of nations, which led to the establishment of the UPOV system in 1961. However, being the nation that originally established IPRs in agriculture; the USA joined the UPOV Convention lately after enacting the Plant

²⁶ Biswajit Dhar,(n20)

²⁷ Ibid

²⁸ Ibid

²⁹ S Thippeswamy,' 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> accessed 7 September 2023.

³⁰ Biswajit Dhar, (n 20)

³¹ Ibid

³² S Thippeswamy, (n. 29)

³³ Michael Blakeney, 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) and see Thippesawany (n 28).

Varieties Protection Act in 1970.³⁴ Unlike Plant Patents Act of 1930, the 1970 Plant Varieties Protection Act, protects both plant varieties reproduced by sexually and asexually.

2.2 The Nature and Rationale for Plant Varieties Protection as Intellectual Property

The enormous plant kingdom has been divided into numerous sub-divisions and divisions according to a ranking system. The category that is widely recognized by most individuals is known as the "species." The classification of species, to which the majority of plants belong, is likely the most crucial as it serves as the foundation for the entire classification system.³⁵

While the classification of plants into species is an important aspect of botanical categorization, it is clear that there can be significant variation between individual plants within a species. For farmers and breeders, it is crucial to have access to plants that are well-suited to their cultivation techniques and growing environment. This is why they often rely on a specific group of plants, carefully selected from within a species, which is known as a "plant variety".³⁶

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. These aspects necessitate the breeder approval beforehand and prohibit certain unauthorized activities involving the variety.³⁷ It applies only to plants, and hence they are among the sui generis systems, that is, special-purpose systems. It is similar to other forms of intellectual property law, which are subject to national legislation, and it requires prior examination and is granted by the relevant authority to establish

³⁴ Ibid

³⁵ 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> accessed August 2023.

For example:

Division: Spermatophyta, Class: Liliopsida (Monocotyledonae), Order: Poales, Family: Poaceae, Genus: Triticum and Species: Triticum aestivum L. (Soft Wheat).

³⁶ The UPOV 91 Convention (Article 1(vi)) defines plant variety as "a plant grouping within a single botanical taxon of the lowest known rank." This confirms that a plant variety results from the lowest sub-division of the species.

³⁷ UPOV (n 35). Page 1

the breeder's rights. In other words, protection is only applicable in nations where it has been requested and approved.³⁸

2.3 The Sui generis System for Protection of Plant Varieties

The TRIPS Agreement, established in 1994, mandates the implementation of legal protection for plants. Member States must guarantee that their legislation adheres to the prescribed minimum criteria outlined in the TRIPS Agreement within a specified timeframe.³⁹ 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.⁴⁰ However, there is no further explicit direction provided in the TRIPS Agreement regarding the criteria for determining an effective sui generis system, as discussed earlier. 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.⁴¹

³⁸ Lesser, William H & Susan Eckert Lynch, "Plant Breeders' Rights: An Introduction" A Handbook of Best Practice (Cornell University, 2007).Page 382.

³⁹ World Trade Organization, (19).

⁴⁰ Ibid. Page 123

⁴¹ 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>accessed 17 January 2024.

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 designed based on the UPOV Convention, whether in its 1978 version or its 1991 modification.⁴² 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.⁴³ 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 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.⁴⁴

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).⁴⁵ 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.⁴⁶ To fulfill their TRIPS commitments in this regard, many WTO members have opted to join the UPOV and implement systems based on it.⁴⁷

⁴² 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.

⁴³ Fatima Hajnour, (n 22) .Page xxxv

⁴⁴ Ibid.

⁴⁵ World Trade Organization, (n 19). Page 310.

⁴⁶ 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.

⁴⁷ Karine Peschard, (n 24) Page 18-19

However, there is no requirement that members forced to join the UPOV in order to comply with this 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.⁴⁸ 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.⁴⁹ 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 ineffective act at that time.

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.⁵⁰ 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 2001.⁵¹

2.4 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.⁵² This document or report includes charts showcasing the ways in which these countries 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

⁴⁸ 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

⁴⁹ Laurence R. Helfer, (n 2).Page 39

⁵⁰ Karine Peschard, (n 24).

⁵¹ Ibid. Also see Government of India, Protection of Plant Varieties and Farmers' Rights Act (2001).

⁵² 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)

distinct perspectives on what perceived to be an "effective" system for plant variety protection under Article 27.3(b).⁵³ The first view asserted that there are specific criteria available to judge the effectiveness of a sui generis system.⁵⁴ 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.⁵⁵ 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 or those that contravene Article 15 or any other stipulations outlined in the CBD.⁵⁶ 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.⁵⁷

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 2006.⁵⁸ 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.⁵⁹

⁵³ Ibid.

⁵⁴ 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.

⁵⁵ 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.

⁵⁶ WTO Council, (52).

⁵⁷ 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).

⁵⁸ 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).

⁵⁹ See Annex of The Council, (52).

CHAPTER THREE

INTERNATIONAL AND AFRICAN REGIONAL FRAMEWORK ON PLANT VARIETIES PROTECTION

This chapter explores the UPOV system, the African Model Law of plant Variety Protection, and the AfCFTA IP Protocol.

3.1 UPOV Convention

The UPOV Convention, adopted in 1961, is the only international agreement for the legal protection of plant varieties, proposed by developed countries as the only unique sui generis system for their protection, following the Diplomatic Conferences held in Paris in 1957.⁶⁰

UPOV has implemented four acts (1961, 1972, 1978, and 1991) since its establishment. While members have the option to adopt a newer act, the older acts are no longer open for adoption. Countries seeking to become UPOV members can only adhere to UPOV 1991 and must commit to enforcing strict protection measures to safeguard plant breeders' rights.⁶¹ Until 1978 amendments, the basic structure remained almost unchanged.⁶² The UPOV Convention underwent revisions in 1978 and 1991, expanding breeders' rights to retain original quality and extend their rights over propagating material to harvest, aiming to strengthen their rights.⁶³

The UPOV Convention establishes a basic level of protection and provides members with the option to consider their own national or regional conditions when creating legislation. Plant breeders' rights, similar to other forms of intellectual property rights, are granted for a specific duration—25 years for trees and vines, and 20 years for other plants—after which the protected varieties become part of the public domain. These rights are also subject to regulations that aim to prevent any potential misuse, in order to safeguard the public interest.⁶⁴

⁶⁰ Lesser, (38).

⁶¹ Lesser, (38).

⁶² Lesser,(38).

⁶³ Pawarit Lertdhamtewe, (n 48). Page 22

⁶⁴ Patrick Ngwediagi, ' 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. Page 9.

3.1.1. The 1961 UPOV Convention

The Convention, which came into effect in 1968, was designed to make sure that parties recognized the achievements of plant breeders by providing them with intellectual property protection based on a set of precise guidelines.⁶⁵ The Convention recognized the rights of individual plant breeders who develop or discover new, distinct, uniform, and stable plant varieties.⁶⁶

3.1.2. The 1978 UPOV Convention

In order to qualify for protection under the 1978 Act, a plant variety must exhibit clear distinguishable and a high degree of uniformity with respect to characteristics related to sexual reproduction and vegetative propagation.⁶⁷ The rights of breeders have been extended to protect their commercial marketing, sale offers, and the marketing of reproductive or vegetative propagating material of their variety.⁶⁸ The 1978 Act does not necessitate safeguarding all types of plant varieties. Rather, Article 4 stipulates that member states must progressively extend the range of species or genera to which they choose to provide protection.⁶⁹

Furthermore, the act acknowledges the significance of "farmers' privileges." Farmers are authorized to utilize the material produced from the previous year's harvest and are able to exchange seeds of safeguarded varieties with fellow farmers without any restrictions. Additionally, plant breeders are granted the permission to create and promote alternative new varieties utilizing the protected variety.⁷⁰

Member states have the choice to grant protection rights to new cultivars through either a sui generis protection or a patent, as per the UPOV Conventions of 1961 and 1978. However, they are obligated to provide only one of these forms for a single botanical genus or species.⁷¹

⁶⁵ Pawarit Lertdhamtewe, (n 48). Page 22.

⁶⁶ Ibid. Page 21.

⁶⁷ Ibid. Page 22.

⁶⁸ The 1978 UPOV Convention, Article 6.

⁶⁹ Laurence, (n 2).

⁷⁰ The 1978 UPOV Convention, Article 5

⁷¹ Fatima Hajnour,(n 22).Page xxi

3.1.3 The 1991 UPOV Convention

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.⁷² 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.⁷³ In general, the safeguarding encompasses not only the material reproduced from the safeguarded variety but also the material obtained from safeguarded and "essentially derived varieties".⁷⁴ 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.⁷⁵

The UPOV Act of 1991 includes a provision that offers a discretionary exemption, empowering the parties involved to restrict the rights of breeders concerning a specific variety. This provision enables farmers to utilize the harvested produce obtained by planting the protected variety on their land for propagation purposes.⁷⁶ The UPOV Act of 1991 contains a clause that provides a voluntary exemption, giving contracting parties the power to constrain the rights of breeders in regards to a particular variety. This provision enables farmers to employ the yield they have acquired by growing the protected variety or varieties on their own property for the purpose of propagation.⁷⁷ The farmers' privilege under the 1991 Act does not permit farmers to sell or exchange seeds with other farmers for propagation purposes, which is different from what was allowed under the 1978.⁷⁸ In states that have agreed to UPOV 1991, farmers are prohibited from

⁷² The 1991 UPOV Convention. Article. 2 & 3. 2 (ii)

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ The 1991 UPOV Convention, Article 15.

⁷⁷ Ibid.

⁷⁸ S Thippeswamy,(n 29).Page _16841

storing or reusing protected seeds unless they are used on their own farms or if their government has made an optional exemption to this rule.⁷⁹ The exception to plant variety protection rights must be reasonable and protect the legitimate interests of the breeder. This can be achieved by limiting the exception to certain crops or by requiring the payment of license fees.⁸⁰ There has been backlash due to the discrepancy between the practices of farmers in numerous developing countries, who typically exchange seeds for crop and variety rotation, and the regulations outlined in the 1991 Act for plant variety protection. Consequently, several developing nations have shown reluctance in embracing the 1991 Act as the benchmark for their plant variety protection laws.⁸¹ The key issues that concern developing countries are the Convention, which exclusively protects the rights of breeders, does not address the rights of farmers for sharing or selling their farm output, as well as for saving, using, and trading seeds, and does not recognize farmer variety, traditional knowledge, or contribution to the informal breeding system, which is a collective process.⁸²

The adoption of UPOV-based PVP regulations at the regional level in developing nations is a subject of dispute because it restricts national autonomy and curtails the participation of farmers in decision-making processes.⁸³ Moreover, the approach has drawn criticism for its incongruity with the CBD, as it lacks provisions for sharing the benefits arising from the exploitation of the South's biodiversity by the North. The farmers in the South are forced to pay royalties for their own germplasm that has been altered and repackaged in the North, impeding their right to freely save seed from the harvest. Furthermore, the criteria for protection under this approach will only worsen the problem of biodiversity loss.⁸⁴

⁷⁹ The 1991 UPOV Convention, Article 15.

⁸⁰ UPOV, Explanatory note on exceptions to the plant breeders' rights under the 1991 Act of the UPOV Convention (2009), 8-11 and see Karine Peschard (n 24). Page 20

⁸¹ S Thippeswamy (n 29). Page 16841

⁸² Gaia Foundation/GRAIN Briefing, Ten reasons not to join UPOV, May 1998

⁸³ 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 71

⁸⁴ Gaia Foundation (n 82)

3.3 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 the second part deals with the African Continental Free Trade Area IP Protocol.

3.3.1 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.⁸⁵

The African Model Law was designed with the purpose of providing African nations with a framework to develop their own laws and policies that are in line with their responsibilities under the TRIPS Agreement, the CBD, and the ITPGRFA. It is important to emphasize that the intention behind this law was never to grant it the same level of authority as a Convention or Treaty.⁸⁶ This model law tries balance between farmers' rights, the conservation of biological diversity, and the sustainable use of genetic resources, while also addressing issues related to intellectual property.⁸⁷

The preamble of the African Model Law asserts that the foundation of human survival is all forms of life. As a result, patenting life or the sole appropriation of any life form, part, or byproduct thereof infringes upon the basic human right to life.⁸⁸ It further states, patents on life forms and biological processes are prohibited⁸⁹. This provision may seem in contrast with Article 27.3b of the TRIPS Agreement, which allows for certain exceptions to patentability. However, it

⁸⁵ Johnson A. Ekpere, *The OAU's Model Law: An Explanatory Booklet* (OAU, 2000).

⁸⁶ Ibid.

⁸⁷ Ibid.

⁸⁸ OAU, *African Model Law*.

⁸⁹ Ibid. Article 9 of the African Model Law

is consistent with the African Group's established position at the WIPO and the WTO, advocating against the patenting of living forms.⁹⁰

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.⁹¹ It 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.⁹²

However, with the exception of Ethiopia, the African Model Law did not get proper attention and garner much popularity. Contrarily, other African nations, particularly those in the west, took the opposite course and passed PVP laws that were based on UPOV 1991. They also adopted industry standards for the use of biotechnology and the unification of seed regulatory frameworks.⁹³

In general, the African Model Law faced international opposition from developed world that promotes stringent intellectual protection system and WIPO.⁹⁴ Two further considerations that also prevented its effective implementation were that, unlike UPOV (which offers a binding recommendation), it did not provide a ready-made template for legislation, nor did the AU provide support in the formulation of PVP laws, whereas the UPOV Secretariat does.⁹⁵

⁹⁰UNECA, '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> accessed 20 April 2024. Page 8.

⁹¹ Adebola, Titilayo Adunola, 'The regime complex for plant variety protection: revisiting TRIPS implementation in Nigeria' (PhD, University of Warwick 2017).

⁹² Karine Peschard, (n 24). Page. 41.

⁹³ Ibid.

⁹⁴ 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.

⁹⁵ Karine Peschard ,(24)

3.3.2 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.⁹⁶ The earlier endeavor to establish a continental intellectual property (IP) regime through the Pan-African Intellectual Property Organization (PAIPO) under the African Union (AU) has been superseded by the proposed AfCFTA IP Protocol. Originally scheduled for completion in January 2021, coinciding with the official commencement of trading under the African Continental Free Trade Area (AfCFTA), the Protocol faced delays due to the COVID pandemic.⁹⁷

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.⁹⁸ 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.”⁹⁹ 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.”¹⁰⁰

⁹⁶ Karine Peschard (n 24).Page 40

⁹⁷ Karine Peschard (n 24).Page 40 and see also WIPO Magazine, The African Continental Free Trade Area: A significant role for IP (2020).

⁹⁸ 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.

⁹⁹ Ibid. Article 8(4)

¹⁰⁰ Ibid. Article 8(2). Tanzania, Namibia, Lesotho, Zambia, Gambia, South Africa and Morocco proposed to delete this paragraph.

CHAPTER FOUR

THE ETHIOPIAN PLANT VARIETY PROTECTION SYSTEM

This chapter is devoted to exploring the Ethiopian PVP legal system.

4.1 Policy and Legal Framework Governing Biodiversity

Ethiopia boasts an abundance of plant genetic resources, showcasing exceptional diversity. As a Vavilov center of origin and/or genetic diversity for crop plants and their wild relatives, Ethiopia is among the twelve distinguished countries. Furthermore, it ranks as one of the top 25 nations in the world in terms of biodiversity richness and hosts two of the 34 biodiversity hotspots globally, namely the Eastern Afromontane and the Horn of Africa hotspots.¹⁰¹

The Ethiopian government has implemented measures and tactics to ensure the sustainable management of natural resources, encompassing the preservation of biodiversity and the promotion of sustainable development.¹⁰² In this regard, the Ethiopia Biodiversity Institute was established to oversee the administration of biological or genetic resources.¹⁰³ Later on, Access to Genetic Resources and Community Knowledge, and Community Rights Proclamation¹⁰⁴ enacted in order to compressively regulate Conservation of Biodiversity in the context of international agreement which Ethiopia adhere to¹⁰⁵ and the proclamation was put into effect to encourage the execution of the objectives outlined in the National Biodiversity and National Seed Policy.¹⁰⁶ However, the proclamation enacted 6 years before Ethiopia ratified Nagoya Protocol.¹⁰⁷

¹⁰¹ Institute of Biodiversity Conservation, 'Convention on Biological Diversity (CBD) Ethiopia's 4th Country (Report' (November 2009).

¹⁰² National Policy on Biodiversity Conservation and Research, 1998/ National Seed Policy 1992, Revised 2020.

¹⁰³ Institute Of Biodiversity Conservation And Research Establishment Proclamation, Proclamation No. 120/1998, Fed. Neg. Gaz., Year 4, No. 49.

¹⁰⁴ Access to Genetic Resource and community knowledge, and community Rights proclamation No. 482/2006, Fed. Neg. Gaz., year 13, No. 13.

¹⁰⁵ CBD AND ITPGR.

¹⁰⁶ 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 91.

¹⁰⁷ Ibid.

Ethiopia ratified the CBD in 1994¹⁰⁸, the Cartagena Protocol on Biosafety,¹⁰⁹ Nagoya Protocol on Access and Benefits Sharing,¹¹⁰ and ITPGR in 2003.¹¹¹ Since the African Model Law is not a binding guideline, there is no ratification proclamation to that effect. However, it was adopted in 2000 by African Union.

4.2 The Agriculture Sector Overview

Ethiopia's economy is centered on agriculture, which is a primary livelihood practice throughout the country. Agriculture is seen as both a means of enhancing household food security and lowering malnutrition, as well as a vehicle for macroeconomic growth, mostly through exports.¹¹² The agricultural sector contributing over 50% to the gross domestic product, it generates 90% of export earnings and accounting for 85% of total employment and.¹¹³ Smallholder farmers cultivate 97% of agricultural land. Of these smallholders, 60% are farming on less than 0.9 hectares of land.¹¹⁴

The proportion of seed supplied by the formal seed system both from public and private companies provided only is estimated to be around 10-20% in Ethiopia.¹¹⁵ In Ethiopia, the production of formal seeds is primarily carried out by public enterprises, which account for 75% of the total seed production. On the other hand, private seed companies and cooperatives/unions have limited participation in the formal seed system, contributing only 25% of the seeds

¹⁰⁸ Biodiversity Convention Ratification Proclamation, Proclamation No. 98/2004, Neg. Gaz, year 53, No. 88.

¹⁰⁹ Cartagena Protocol on Biosafety Ratification Proclamation No. 362/2003_Fed. Neg. Gaz., Year 9, No. 87.

¹¹⁰ 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.

¹¹¹ International Treaty on Plant Genetic Resources for Food and Agriculture Ratification Proclamation No.330/2003, Fed.Neg.Gaz., Year 9, No.50.

¹¹² Cochrane Logan, '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.

¹¹³ Regassa Feyissa, 'Farmers' Rights in Ethiopia A Case Study'(FNI Report 7/2006)

¹¹⁴ Ibid.

¹¹⁵ 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.

produced.¹¹⁶ Currently, there is no private plant breeding companies in Ethiopia that focus on developing new plant varieties. Instead, private enterprises in the seed market primarily engaged in importing and distributing improved seeds or obtaining certified seeds from state-owned research centers.¹¹⁷ On the other hand, the informal sector plays a significant role in providing crop seed. This informal sector includes farmer-to-farmer seed exchanges and self-saved seed, and it is the primary source of crop seed for smallholder farmers. In fact, it provides 90% of the seed used by them.¹¹⁸

In regards to the overall agricultural production, the farmer's varieties, plays a significant role. Smallholder farmers continue to cover the majority of the country's seed demand, which are crucial for food and agriculture. Thus, the utilization and advancement of farmers' varieties, as well as the local farmers' involvement in seed production and traditional seed exchange methods, are key elements of Ethiopia's seed system.¹¹⁹

4.3 Plant Variety Protection System in Ethiopia

4.3.1 Historical Background of Ethiopian Plant Variety Protection

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.¹²⁰ 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

¹¹⁶ The Ethio-Netherlands Seed Partnership, 'Ethiopia Netherlands Seed Partnership launched' (ENSP Newsletter Issue 01, July 2022).

¹¹⁷ Addis Fortune, 'Property Rights on Horizon for Private Seed Breeders' January 2, 2022.

"For example, Bayer Crop Science Ethiopia which is private company engaged in seed sector since 1960s. It imports basic seeds from Zambia and Kenya before producing certified seeds domestically and Hi-Bred Seeds company which is a the first foreign owned private company in Ethiopia also imports hybrid seeds mainly from South Africa and multiplies domestically."

This also confirmed in an Interview with Kenenia Deksiso, Deputy of seed producer association of Ethiopia. (Addis Abeba, Ethiopia December 29 2024)

¹¹⁸ Dejen, (n 115).Page 4.

¹¹⁹ Regassa, (n 113). Page 3.

¹²⁰ Inventions, Minor Inventions and Industrial Designs, Proclamation, Proclamation No. 123/1995, Neg. Gaz., year 54, No. 25 Article 4(b).

as most developing countries do.¹²¹ However, Ethiopia enacted its own sui generis plant variety protection proclamation in 2006¹²² which was intended to be an alternative intellectual property to the patent system.¹²³

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 2005.¹²⁴ 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.¹²⁵ 3) Ethiopia had been actively engaged in the international environmental negotiations and the draft process of the African Model Law.¹²⁶ 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 91.¹²⁷ 5) To encourage the involvement of the private sector and researcher roles.¹²⁸ 6) In order to acknowledge the valuable role played by farming and pastoral 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.¹²⁹ The outlined national policy on biodiversity conservation and research emphasizes the importance of enacting essential laws and regulations

¹²¹ Interview with Getachew Tafa, Head of Patent and Technology Transfer Directorate at Ethiopian Intellectual Property Authority (Addis Abeba, Ethiopia 29 January 2024).

¹²² Plant Breeders Right proclamation No. 481/2006_Fed. Neg. Gaz., Year 12, No. 1.

¹²³ Parliamentary Explanatory note to Plant Breeders' Rights Proclamation No. 481/2006. Page 2/3.

¹²⁴ Personal interview with Ethiopian Netherland Seed Partnership, Senior Expert (Addis Abeba, Ethiopia 6 January 2024).

¹²⁵ Explanatory Note, (n 123).

¹²⁶ Adebola,(n 91)

¹²⁷ Explanatory Note, (n 123).

¹²⁸ Proclamation,(n 123).

¹²⁹ Ibid.

concerning access and benefits sharing, biosafety, as well as the rights of plant breeders, farmers, and communities.¹³⁰

In this sense, the previous Plant Breeders' Rights Proclamation and the parliamentary explanatory note differ somewhat in their justifications for the introduction of the plant protection system in Ethiopia. For instance, the proclamation did not refer to the obligation under TRIPS or other international treaties, which served as justification for its enactment. Nonetheless, it is possible to draw the conclusion that each of the aforementioned factors affected and played a role in the introduction of the plant protection system in the Ethiopian legal system.

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 system¹³¹ 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.¹³² The second version, unlike the first version, incorporates many provisions from different sources, such as the UPOV Convention, African Model Law, and other national jurisdictions like India, as discussed in Chapter 5.¹³³ Therefore, it can be understood that the Ethiopian PVP law did not adopt any single model of law.

4.3.2 The Current Plant Breeders' Proclamation Number 1068/2017

The current proclamation consists of six parts and 34 articles. The need for replacing the previous proclamation with the new one is outlined in the preamble of the proclamation and

¹³⁰ Policy. (n 102) and Teshome. (n 106).Page 92.

¹³¹ Explanatory Note (n 123).

¹³² Ibid and see Teshome (n 106).Page 92.

Legislation pertaining to access in Ethiopia stands apart from other African nations as it aims to amalgamate access regulation and the enforcement of breeders', farmers', and community rights. This accomplishment has been made possible by integrating elements from the CBD and ITPGRFA.

¹³³ The concept of Farmers' variety as defined under Article 2(9) of the proclamation No.481/2006 and Article, 2(7) of the current proclamation No.1068/2017 is directly imported from Article 2(L) of India Protection of Plant Varieties and Farmers' Rights Acts of 2001.

parliamentary explanatory note. These include: 1) Guarantees of plant breeders' rights by harmonizing them with international standards and the best practices of other jurisdictions. 2) To extend the definition of farmers to include pastoral communities and to materialize the concept of farmer varieties. 3) In order to strengthen the administrative and instructional capacity of executive organs. 4) It is imperative to establish a clear and responsible operational framework in order to address conflicts that may arise among breeders regarding the safeguarding of their research outcomes.

The previous and current proclamations have an almost similar structure; however, there are changes regarding clarity and the definition part, on the extent of farmer's rights and breeders rights, and on the mandates of the Ministry of Agriculture.

On the definition part, Article 2(3) was added to define "botanical seed," Article 2(7) expanded the previous definition of farmers' varieties to include pastoral communities, Article 2(8) was added to define "genotype," Article 2(10) was added to define "multiline," and Article 2(11) changed the previous definition of "plant.". As discussed above, the scope was also expanded.

An article that deals with breeders' rights was also subjected to some modification. For example, in the previous proclamation condition of protection, it required only new plant varieties. In the current proclamation, Article 4 changed these criteria to include distinctness, uniformity, stability, and newness. The inclusion of Article 5(3) establishes a set of conditions for the development of an enhanced variety using resources from farmer or pastoral communities. The breeder's entitlement to rights can only be authorized and implemented if the breeder has obtained prior informed consent and entered into a benefit sharing agreement, in compliance with the existing national legislation on access and benefit sharing of biodiversity within the country. Article 6 was modified from the previous long list of exemptions to plant breeders' rights, and Article 22(4) was added, which deals with damages arising from the use of the protected variety.

Regarding the farmer's rights included in Part 2 of the current proclamation that deals with plant breeders', the definition and other parts of the farmer's variety extend to include pastoral

communities. Article 4(3), which deals with the criteria of farmers and pastoral communities, was added.

The revision was also made to the mandates of the Ministry of Agriculture. In this regard Article 14 which deals with the responsibilities of the Ministry expanded to include registration, administration, and power of investigation in case of infringement, Article 27(2) also gives power to the Ministry to order injunction in case of breaches of rights and Article 19 added to give power to the Ministry to deposit the protected variety.

4.4 Interfaces with Other Related Proclamation

4.4.1 Seed Proclamation

The Seed Proclamation¹³⁴ has a direct impact on the overall agricultural economic development, food and nutrition, feed, and forest product security; it regulates the quality and supply of improved varieties and plays a very important role in promoting and coordinating the public and private partnership in the sector. The Plant Breeders' Right Proclamation did not mention any direct linkage with the Seed Proclamation. However, in practice, the conventional seed registration (hybrid seed) system and plant variety registration system are administered by a single variety release, registration, and seed quality control regulatory. Any seed (new variety) that is susceptible to the plant breeder's rights shall pass the conventional seed registration and certification process

4.4.2 Access and Benefit Sharing Proclamation

The proclamation that governs access to genetic resources, community knowledge, and community rights¹³⁵ has direct relevance to the determination of plant breeders' rights. As discussed earlier, According to Article 5 of the Plant Breeder's Proclamation, the rights of plant breeders are outlined. Sub-Article 4(3) specifically addresses the situation where an improved variety is developed using the variety of communities, wild relatives of crop plants, and other varieties and community knowledge. In such cases, a plant breeder's right can only be granted and exercised if the breeder has fulfilled certain requirements in accordance with the nation's law

¹³⁴ Seed Proclamation No. 1288/2023_Fed. Neg. Gaz., Year 29, No. 30.

¹³⁵ Access Proclamation, (n 104).

on access and benefit-sharing of biodiversity. These requirements include obtaining prior informed consent for the use of materials and associated knowledge, as well as entering into a benefit-sharing agreement based on mutually agreed terms. Articles 15(2) (a) and 18(1) (c) also require the breeder's to present the origin and source of the genetic resource used to breed or develop variety. This requirement is also enshrined in Article 11 of the Access to Genetic Resources, Community Knowledge, and Community Rights Proclamation.

In addition to that, based on Article 4(3) of the Plant Breeders' Right Proclamation, the Ministry of Agriculture prepared directives that were subject to approval by the Ministry of Justice. The registration of farmers' varieties necessitates that the crop species in question must either originate from Ethiopia or be acknowledged as having genetic diversity centered in Ethiopia, as stated in Article 5(1) of the directives. The Ethiopian Biodiversity Institute verifies this requirement upon the request of the Federal Ministry of Agriculture. In practice, the registration process is not yet effective, and institutional integration on this issue is not yet established.¹³⁶

Furthermore, Article 4 of the Access to Genetic Resources and Community Knowledge and Community Rights Proclamation provides a waiver for the need to acquire permits for traditional plant genetic resource utilization within local communities. This waiver aims to streamline farmers' ability to access ex situ collections preserved at the national gene bank and enhance the connection between the gene bank and the on-farm supervision of crop diversity by farmers.¹³⁷

4.4.3 Biosafety Proclamation

In developing new plant variety the plant breeder's proclamation Article 15 (2) (c) requires plant breeders' to comply with the National Bio-safety proclamation.¹³⁸ It requires that the applicant obtain all necessary authorization from the Environmental Protection Authority. The particulars shall be determined according to biosafety proclamation and regulation in cases where the plant breeders' use of genetically modified organisms (GMOs) in developing new varieties.

¹³⁶ Interview with Ermiyas Yeshitla, Legal Expert at Biodiversity Institute (Addis Abeba, Ethiopia 4 January 2024).

¹³⁷ Teshome, (n 106).Page 93.

¹³⁸ National Bio-safety Proclamation No. 896/2015_Fed. Neg. Gaz., Year 21, No. 66.

4.5 Institutional Framework

The administration of plant breeder's and associated rights was entrusted to the Ministry of Agriculture under Article 14 of the Plant Breeder's Rights Proclamation. However, the proclamation, which was first introduced in 2006 and revised in 2017 in practice, is not yet effective. Till 2024, there is no registered plant breeder's or farmer's variety. In practice, there was one application from individual foreign plant breeders on flower varieties, and two applications from domestic or regional states on farmers' varieties were presented to the Ethiopian Agricultural Authority; however, the Ethiopian Agricultural Authority has not yet approved the application for undisclosed reasons.¹³⁹

In 2021, the government of Ethiopia issued a proclamation to reorganize the organizational structure and define the powers and duties of the executive organ of the federal government.¹⁴⁰ Under Article 45 of the proclamation, the Ethiopian Agricultural Authority was established as an autonomous federal government organ with its own legal personality. And the powers, duties, and organization of the authority as determined in Regulation 509/2022¹⁴¹ as stated in this article. Having this in mind, in practice, the administration of plant breeders' rights is assumed, as the power of the Ministry of Agriculture is transferred to the newly established authority. However, the legal context is not properly handled. Firstly, the proclamation that dealt with the powers and duties of the executive organ of the federal government did not explicitly repeal Article 14 of the Plant Breeder's Rights Proclamation, which prescribed the mandates of the Ministry of Agriculture in such matters, and the transfer of power was not mentioned. In addition to that, regulation 509/2022 cannot override the same article because of the hierarchy of the law. Secondly, regarding the administration's rights, Article 5(5) of the regulation can only be mentioned. But this sub Article states, "the performance of imported and locally developed agriculture technology and registers such; grants and administration breeder's right upon request by any applicant and conducting the necessary examination". This article is not properly

¹³⁹ Interview with Fiseha Teshome, Variety Release, Registration & Seed Quality Control Lead Executive Officer of Ethiopian Agricultural Authority.

¹⁴⁰ 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. Year 28, No. 4

¹⁴¹ Definition of organization, Power and Duties of the Ethiopian Agriculture Authority Regulation No 509/2022. Fed. Neg. Gaz., Year 28, No. 31

constructed and seems vague, and it did not properly incorporate the power of the Ministry of Agriculture that was promulgated in Article 14 and other articles such as Article 2(1) 4, 8, 13, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 28, and 32 of the plant breeder's right proclamation. The Ministry of Agriculture may only reserve the power to issue directives according to Article 32 of the proclamation. This was the case in the newly enacted seed proclamation¹⁴² Article 29.

Therefore, the Authority does not have the power to entertain the subject matter of plant breeders' rights unless Proclamation No. 1068/2017 is amended in the same manner that transferred the power of the Ministry of Agriculture to the Ethiopian Agricultural Authority in the Seed Proclamation.

Regarding organizational structure the issues of plant breeders right is administered under Variety Release, Registration and Seed Quality Control Regulatory¹⁴³. This regulatory assigned to administer both the conventional (Hybrid) seed registration and plant breeder's and farmer variety.

Regarding human resources in the proposed plan, the regulatory will have eighty experts. One executive, one secretary, one head of the plant variety examination team, eight plant variety examination experts, one head of the seed inspection team, and six seed inspection experts will be assigned to the post. As we can see from the list, only eight generalist experts were assigned to deal with the subject matter of plant breeder's rights, and the proposed plan did not indicate the diversity of expertise. In practice, there are no more than four experts in the directorate for both teams. In India, this subject matter is administered under the independent Protection of Plant Varieties and Farmers' Rights Authority.¹⁴⁴

When we assess the institutional capacity, the authority does not have laboratory and independent testing sites or fields to conduct DUS and VCU tests, and there is no specialized expert assigned for this purpose, as we can see above. The Authority is dependent on governmental research centers. Such as the Debrezeit research center, the Kulumsa research

¹⁴² Seed Proclamation, (n 134).

¹⁴³ The Ethiopian Agriculture Authority organization Human Resource strategic Plan .Page 207.

¹⁴⁴ The Protection of Plant Varieties and Farmers' Rights Act.No.53/2001.

center, and the Bekoji and Dhera sub-stations.¹⁴⁵ Since this research center is also plant breeders', it will discourage private plant breeders' and create conflict of interest in case of disputes arising in the future.

The entire above factor contributes to the delay in the operationalization of PBR in Ethiopia and continues to be the reason for its not being implemented.

4.6 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.¹⁴⁶ It is known for its strict and conservative approach to the administration of plant genetic resources.¹⁴⁷ 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 farmers' rights.¹⁴⁸ 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.¹⁴⁹ 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

¹⁴⁵The Ethio-Netherlands Seed Partnership, ‘Variety Testing for Registration Pilot Moving Forward’ (ENSP Newsletter Issue 05, October 2023).

¹⁴⁶ Teshome, (n 106).Page 84

¹⁴⁷ Ibid.

¹⁴⁸ 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.

¹⁴⁹ Explanatory Note, (123).Page 2/3 and see Teshome (n106).Page 96

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 ’’¹⁵⁰

In this regard, there is no explicit policy decision regarding the UPOV convention, and the government has not yet made any official statement against UPOV 91. However, there was a workshop recently held in 2022.¹⁵¹ Two presentations on the current PVP law in Ethiopia and historical insights on the development of PVP were presented during the session. The discussion mainly focused on implementation issues and Ethiopia’s membership to the UPOV 91 convention.¹⁵² Professionals in the sector were debated on the pro and cons of accession to UPOV 91.¹⁵³ There were arguments for and against UPOV during the session. “Those who supported UPOV have raised a point that if varieties are not adequately protected, foreign companies will not be interested in entering the seed market, making the implementation of PVP less relevant”.¹⁵⁴ However, others opposed to UPOV 91 contend that the Convention restricts farmers’ rights and requires a country to protect all genera. Because the informal seed system is so prevalent, they further argued that farmers ought to be allowed to preserve, use, and sell any kind of seed for crops that are utilized as basic foods. Although consensus was not reached, the

¹⁵⁰ Personal interview with a government official of the Ministry of Agriculture (Addis Ababa, 9 January, 2024)

¹⁵¹ In Bishoftu Town, December 23rd, 2022. It was Co-Hosted by Ethiopian Agricultural Authority and Ethiopia Netherlands Seed Partnership (ENSP).

¹⁵² The Ethio-Netherlands Seed Partnership, ‘Counterfeit Seed: A growing challenge that is threatening the sector in Ethiopia’ (ENSP Newsletter Issue 03, March 2023).

¹⁵³ More than 25 representatives from research institutes, Ethiopian Biodiversity Institute, ICARDA, Bioversity International, GIZ, ATI, and Ethiopian Agricultural Authority (EAA), private seed companies, senior professionals in the seed sector, ENSP, and consultants participated in the workshop.

¹⁵⁴ The Ethio-Netherlands, (n 152).

discussion leaned towards not adhering to the UPOV 91 convention and instead evaluating the effect of implementing a sui generis law on PVP.¹⁵⁵

To conclude, Ethiopia, because of its long-standing strict position on the administration of plant genetic resources, is not willing to adopt a stringent ownership trend through IPRs in agriculture and is not willing to join the UPOV Convention recently.¹⁵⁶

¹⁵⁵ The Ethio-Netherlands, (n 152).

¹⁵⁶ Personal interview with a government official of the Ministry of Agriculture (Addis Ababa, 9 January, 2024) and see Teshome, (106).Page 96.

CHAPTER FIVE

COMPARATIVE ANALYSIS OF THE ETHIOPIAN PLANT VARIETY PROTECTION SYSTEM AGAINST THE UPOV 91 AND THE AFRICAN MODEL LAW AND ITS IMPLICATIONS FOR ACCIDING TO INTERNATIONAL TRADE AGREEMENT

This chapter 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.

5.1 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.¹⁵⁷ 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.¹⁵⁸

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.¹⁵⁹ 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.¹⁶⁰ 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

¹⁵⁷ 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.

¹⁵⁸ Biswajit Dhar, (n 20).Page 11.

¹⁵⁹ Johnson (n 85).

¹⁶⁰ Johnson (n 85).

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

To conclude, imposing a patent system on the plant variety protection system as provided for by TRIPS or the UPOV Act of 1991 is incompatible with farmers' rights enshrined under CBD and ITPGRFA.¹⁶¹ Specifically patents shall be supportive of and do not run counter to the objectives of the CBD¹⁶² However, Art. 22 of the CBD only relates to pre-existing agreements and is therefore not applicable to the TRIPS Agreement, which was signed after the entry into force of the CBD. This is one of the areas in conflict with TRIPS that was proposed by developing countries to be revised under the pending TRIPS revision process.¹⁶³ Particularly, the African Union, under “African Common Position, requested that TRIPS be harmonized with the CBD and the ITPGRFA.¹⁶⁴ To make matters worse, an increasing number of scholars also think that trade priorities should not control aspects necessary for ecological health and, consequently, the survival of microorganisms, plants, and animals, including humans. As a result, they propose the complete removal of Article 273(b) of TRIPS from the agreement.¹⁶⁵

5.2 Protectable Subject Matter

Plant varieties themselves are the subject matter 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”¹⁶⁶ as the object of protection in conformity with ITPGRFA definition that states “variety” as “a plant grouping, within a single

¹⁶¹ UNECA, (n 90) and see Article 9 of ITPGRFA.

¹⁶² UNECA, (n 90) and see Article 16 (5) of CBD.

¹⁶³ WTO Council, (n 57).

¹⁶⁴ Johnson (n 85).Page 6/8.

¹⁶⁵ Ibid.Page 9.

¹⁶⁶ 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

botanical taxon of the lowest known rank, defined by the reproducible expression of its distinguishing and other genetic characteristics.¹⁶⁷ 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.¹⁶⁸ 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)¹⁶⁹ 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 pastoral communities in their fields and is predominately bred or selected by farmers or pastoral communities from various plant sources.¹⁷⁰ On the other hand, the African Model Law recognizes plant varieties of the local communities, farmers’ varieties, as well as breeders’ new varieties.¹⁷¹ 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. Following their ratification of the 1991 Act, new members of the Union are granted ten years to attain this status, whereas current member states have five years to do so. At the time of accession, the new members are required to safeguard at least fifteen plant genera and species, and ten years after that, all plant genera and species.¹⁷² Members can choose to

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.”

¹⁶⁷ Article 2 of ITPGRFA

¹⁶⁸ 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

¹⁶⁹ Verbatim copy of Article 1(vi) of UPOV 91 (n 166).

¹⁷⁰ Article 2(7) of Ethiopian Plant Breeders Right Proclamation No.1068/17.

¹⁷¹ Article, 1, 26/27 & 28 of the African Model Law.

¹⁷² The 1991 Act of the UPOV Convention, Article 3

expand protection to include things like perfumes, essential oils, and medications that are made from a protected variety.¹⁷³

On this issue, the Ethiopian legal system, unlike the previous trend of only plant varieties of specified genera or species shall be the subject matter of protection,¹⁷⁴ the current Ethiopian plant breeders proclamation to some extent resembles to UPOV 91, it states 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.¹⁷⁵ 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.¹⁷⁶ 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.

5.3 Conditions

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 new¹⁷⁷, distinct¹⁷⁸, uniform¹⁷⁹ and stable¹⁸⁰ in order to be eligible for protection.¹⁸¹ In evaluating plant

¹⁷³ Ibid.

¹⁷⁴ Art. 3 of Ethiopian Plant Breeders Right Proclamation No.481/2006,

The then Ministry of Agriculture and Rural Development has the authority to decide and update the list of plant genera/species or varieties that qualify for protection.

¹⁷⁵ Ibid.

¹⁷⁶ Dan Leskien (n 41).Page.49

¹⁷⁷ 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."

¹⁷⁸ 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.

¹⁷⁹ 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.¹⁸²

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.¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ However, the Ethiopian current plant breeder's proclamation differs from UPOV regarding setting additional requirements, which are scattered through different articles¹⁸⁶. 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.¹⁸⁷ 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

¹⁸⁰ 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.

¹⁸¹ The 1991 Act of the UPOV Convention ,Article 5(1).

¹⁸² Ibid

¹⁸³ Ibid Article 5(2)

¹⁸⁴ Article 4 (1) and Article 12 of Plant breeders' Right Proclamation No 1068/17.

¹⁸⁵ Ibid. Article 4(4).

¹⁸⁶ Ibid .Article 4(3), 15(2) (a) and 18(1) (c).

¹⁸⁷ 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.¹⁸⁸ 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.¹⁸⁹ This is the "usefulness" (also known as "Value for Cultivation and Use"; VCU, condition.¹⁹⁰ . However, no notion of utility/usefulness was included in the UPOV.¹⁹¹

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 varieties¹⁹² 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.¹⁹³

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.¹⁹⁴ The protection of 'traditional varieties' is undoubtedly hindered by the demand of novelty. i.e.,

¹⁸⁸ Ibid. Article 15 (2).

¹⁸⁹ Seed Proclamation 1288/2023, (n 134).

¹⁹⁰ Leskien, (n 41).

¹⁹¹ Leskien, (n 41).

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.

¹⁹² 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."

¹⁹³ Article 4 of Plant breeders' Right Proclamation No 481/17.

¹⁹⁴ 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. P 108.

these varieties are widely known and existed for a long time.¹⁹⁵ It could not be sufficiently uniform to qualify for being protected. However, Farmers that rely on the stability and dependability of production provided by genetic variety need genetic diversity.¹⁹⁶ It is pointed out by other critics that uniformity may result vulnerability to pest.¹⁹⁷ Nevertheless, the DUS characteristics are not mandatory protection requirements of a sui generis system under the TRIPS Agreement.¹⁹⁸ 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.

5.4 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.¹⁹⁹ The scope of protection is extending to three areas: (a) the propagating material, (b) the harvested material, and (c) Essentially derived varieties.²⁰⁰

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.²⁰¹ 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 ²⁰² with a slight modification,

¹⁹⁵ Leskien, (n 41).Page p 51.

¹⁹⁶ Srividhya, (194).Page 109.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

¹⁹⁹ The 1991 UPOV Convention. Article 14(5)(a)

²⁰⁰ Ibid. Article 14.

²⁰¹ Article 30 (1) (2) (a) (b) of African Model Law.

²⁰² 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."

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.

5.5 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.²⁰³ 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.²⁰⁴ 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."²⁰⁵ This indicates that the exemption is limited to a particular crop set and precludes the exchange of farm-saved seed in any way.²⁰⁶

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.²⁰⁷ The

²⁰³ The 1991 UPOV Convention, Article 15 (1).

²⁰⁴ 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, page 5.

²⁰⁵ The 1991 UPOV Convention, Article 15(2).

²⁰⁶ Ibid.

²⁰⁷ Article 30, 31 and 33 of African Model Law.

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.²⁰⁸ As stated above under the previous proclamation farmers enjoy extensive right over a protected variety from exemptions to Plant breeders' Right.²⁰⁹

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 the "public interest" is affected.²¹⁰

In this regard, the Africa Model Law may also impose restrictions on the rights of plant breeders, subject to certain conditions.²¹¹ 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.

5.6 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.²¹² 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.

²⁰⁸ Article 6 Plant breeders' Right Proclamation No 1068/17.

²⁰⁹ Article 6 of Plant breeders' Right Proclamation No 481/2006.

²¹⁰ Srividhya, (194). Page 111.

²¹¹ Article 33 (1) of African Model Law.

²¹² 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.

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.²¹³ 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, 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.²¹⁴

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

²¹³ The 1991 UPOV Convention, Article 15.

²¹⁴ Article 26(1) (d) (e) and (f) and 2 of African Model Law.

of breeders’.²¹⁵ 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.”²¹⁶ 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 marketing²¹⁷ 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 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.

The preamble of the proclamation on plant breeders' rights emphasized that the rights of farmers are derived from the significant contributions made by local farmers, both in the past and in the future, towards the preservation and sustainable utilization of plant genetic resources. These resources form the fundamental building blocks for the development of food and agricultural production through breeding.²¹⁸ However, the proclamation does not mention of how farmers are supported and recognized for the role they play in conserving and developing crop genetic diversity.²¹⁹ Rather, it discredits the past and the present actual contribution of farmers in the context of ITPGRFA. In addition to that, for the sake of this mission, the proclamation inserted a new definition for “smallholder farmer or pastoral community” to limit who enjoys such a right and to exclude farmers who are applying advanced systems and using mechanized farming

²¹⁵ 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’.

²¹⁶ Article 7 of Plant breeders’ Right Proclamation No 1068/17.

²¹⁷ 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.

²¹⁸ The proclamation, takes up the statement from Article 9.1 of ITPGRFA that states the “enormous contributions farmers have made and will continue to make in the conservation and sustainable use of plant genetic resources that constitute the basis of breeding for food and agricultural production”.

²¹⁹ Regassa Feyissa, (n 113).Page VI. This gap not yet changed in this proclamation.

techniques.²²⁰ The proclamation also prescribed civil and criminal liability if farmers breached plant breeder's rights.²²¹

However, the proclamation recognized and set different, less stringent criteria for farmers' and pastoral community varieties²²² to be determined by the Ministry of Agriculture by directives (Ethiopian Plant Breeder's Rights Directive No. 769/2021).²²³ 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.²²⁴

5.7 A Comparison of the salient features of UPOV 91, African Model Law with Ethiopian PVP Law.

The following table prepared to summarize the comparative aspects in relation to scope of protection, type of protection, genera or species protected criteria of protection, exceptions, farmer's rights and duration of protection.

²²⁰ Article 2(15) of Ethiopian Plant Breeders Proclamation No.1068/17.

²²¹ Article 29/30 of Ethiopian Plant Breeders Proclamation No.1068/2017.

²²² 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 bred or selected by farmers or pastoral communities from various plant source".

²²³ Article 4(3) of Ethiopian Plant Breeders Proclamation 1068/17.

²²⁴ Article 25 of African Model Law.

Table. 1				
	UPOV 91	African Model Law	Ethiopian PVP Law	
Scope of protection	-On the propagating material, the harvested material, and essentially derived varieties. - Expands the scope of the breeder's authorization to also require permission for importing, stocking, and exporting.	Only on propagating material of the variety.	Propagating material and extended to an essentially derived variety.	
Type of Protection	Dual protection allowed.	Doesn't allow patent protection for plant varieties.	Doesn't allow patent protection for plant varieties.	
Genera or Species Protected	Five Genera on joining UPOV and all thereafter.	-Not specified.	Extend to all except those excluded by the directives.	
Criteria of Protection	Novelty, DUS.	-Does not have specific provisions dealing with conditions of protection. -It provides for the characteristics of new varieties.	Novelty and DUS.	
Exceptions to exclusive rights	Acts done privately and for noncommercial, experimental and for the purpose of breeding of other varieties	It gives broader exemption as discussed in section 5.5.	Acts done privately and for noncommercial, experimental and for the purpose of breeding of other varieties	

Farmers' Right	- Farmers' rights are recognized as part of the exceptions to breeders' rights as an optional clause. - Farmers' are not allowed to sell or exchange seeds with other farmers for the purpose of propagation. - Allowed to use products of harvest of protected variety for the purpose of protection and personal use on their own lands. -Farmers varieties are not recognized	- Farmers' can "save, use, exchange, and sell farm-saved seed and propagating material of protected varieties. - Farmers' cannot sell farm-saved seed of a protected variety in the seed industry on a commercial scale. - Farmers' varieties are recognized but do not require distinction, uniformity, or stability.	- 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. -Farmers' varieties are recognized, and proclamation requires less stringent distinctness, uniformity, and stability requirements for the eligibility of farmer or pastoral community's varieties for plant breeders' rights by ministerial directive.
Duration of Protection	25 years for trees and vines and 20 years for other varieties	25 years for trees, vines and other perennials and 20 years for annual crops.	25 years for trees, vines and other perennials and 20 years for annual crops.

5.8 Implications for Accessing 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.²²⁵ Nonetheless, the TRIPS agreement did not recognize UPOV as an effective sui generis mechanism for protecting plant varieties, as previously discussed. Additionally, Article 27(3) (b) mandates that member nations must protect plant varieties through patents, sui generis systems, or a combination of both. The sui generis system option or exemption 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.²²⁶

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.²²⁷ However, as discussed in chapter 2, some countries, such as Ethiopia²²⁸, 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.²²⁹ 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.²³⁰ The Indian Act has even broader protection to farmers than the Ethiopia PVP does as highlighted in the recommendation section.²³¹

²²⁵ Pawarit Lertdhamtewe, (48).

²²⁶ 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.

²²⁷ Karine Peschard, (n 23). Page 18-19.

²²⁸ 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.

²²⁹ Karine Peschard (n 24) and See Anja, (n 83) .Page 78.

²³⁰ Ibid. Also see Government of India, Protection of Plant Varieties and Farmers' Rights Act (2001).

²³¹ Rohan Dang, (n 226).

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.²³² 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 8²³³ and to benefit from the exemption conferred on least-developed countries as per Article 66.²³⁴ However, Ethiopia has already enacted its own Sui generis plant variety protection 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.²³⁵

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

²³² Srividhya Ragava, (n 194) .Page 100-103.

²³³ 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.”

²³⁴ 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> accessed 4 January 2024.

²³⁵ Ethiopia's foreign trade regime. <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.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.1 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.’²³⁶

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.²³⁷ In addition to that some countries, such as Ethiopia²³⁸, 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.²³⁹

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

²³⁶ Article 8 of TRIPS Agreement.

²³⁷ Johnson, (n 85).Page 3.

²³⁸ 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.

²³⁹ Karine Peschard, (n 24). And see Anja Christinck, (n 83).

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 Ethiopia 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

6.2 Recommendations

The writer suggests the following considerations in light of the research's findings and the previously stated conclusions:

In general, the Ministry of Agriculture ought to define its position against the UPOV-91 system in a clear and unequivocal manner. Otherwise, it may advocate the re-opening of the UPOV 1978 Convention. As it is known, the UPOV system has double-standard applications in this regard. Those who have already adopted UPOV 78 have the privilege to better protect the interests of farmers. But those who adopt UPOV 91 are not entitled to such rights since UPOV 78 is closed now.²⁴⁰

In general, we have to come up to the stand that not adhering to UPOV and any other international agreement that limit farmer right.

The writer will recommend the following general points regarding the revision of the proclamation:

There are three options for the revision process such as:

1. To revise the proclamation and to adhere to the previous proclamation²⁴¹ on farmer right (to go back to the approach of the previous proclamation which provided better protection for farmers right which was based on African model law).

²⁴⁰ ISSD Africa, (n 204). Page 6.

²⁴¹ Plant Breeder's Right Proclamation No. 481/2006.

- Regarding farmer's rights, the legislator shall differentiate between farmer's rights, farmer's privileges, and farmer's variety. The proclamation shall establish a separate chapter for farmers' rights. In the current proclamation, the assumed farmer's right is included in the plant breeder right, part two. Plant Breeders' Right Proclamation No. 1068/17.
- Ethiopia is a party to the Cartagena Protocol on Biosafety and has enacted the Cartagena Protocol on Biosafety Ratification Proclamation No. 362/2003 and Nation Biosafety Proclamation No. 896/2015. It shall be better to include provisions in the Scope of Plant Breeders' Rights (Article 5(3)) or in the Criteria part as an additional criterion in the same way for access and benefit sharing to explicitly deny any plant breeders who developed a variety using genetically modified organisms. Article 15(2) (b) shall be modified.
- Exemptions and restrictions on plant breeders' rights shall be imported from the previous proclamation, Articles 6 and 7 that better suit the interests of farmers. Therefore, exemptions and restrictions on plant breeders' rights shall be enacted in the same manner as the previous proclamation.
- The proclamation shall better include clear provisions that deal with institutional integration among the Ministry of Agriculture, Ethiopian Agricultural Authority, Ethiopian Biodiversity Institute, Ethiopian Environmental Authority, Ethiopian Intellectual Property Authority, and any other relevant organization in order to better implement the proclamation in coordinated efforts.
- As stated under Article 66 of TRIPS, the agreement did not exempted even for Least-developed country over the application of article 3 (National Treatment) and 4 (Most-Favored-Nation Treatment). In this regard, Article 14 (3) of the proclamation shall be extended to all members.²⁴² Therefore, this article shall be revised and any privilege shall be extending to any WTO members and must be in line with Article 11 of the proclamation that extend plant breeders right to any plant breeder's whether he is an Ethiopian or foreign national.

²⁴² Article 14(3) states the Ministry "maintain in the list of countries from which plant breeder's right varieties distinctness, uniformity and stability testing shall directly be accepted in the application process pursuant to Article 4(4) this Proclamation No. 1068/2017."

2. To follow in the footsteps of the Indian approach. India, being a member of the WTO and a state party to the TRIPS Agreement but not a member of UPOV, enacted the Protection of Plant Varieties and Farmers Rights Act (2001). The Indian legislation provides farmers with even more extensive protection compared to the Ethiopian PVP.²⁴³
3. To develop separate proclamations that consolidate farmer rights and farmer variety in seed proclamations, access and benefit sharing proclamations, breeder's proclamations, and others. This approach will better help us determine farmers' rights in a broader context, as enshrined under ITPGRFA and UNDROP.

²⁴³ For instance the Indian act establishes an independent Plant Varieties and Farmers' Rights Authority, Farmers right are covered under separate Chapter VI in which Article 39 unto 46 devoted for this purpose. Unlike the Ethiopian approach which set criminal penalty for any breach, In the Indian act farmers are entitled Protection of innocent infringement and farmers are exempted from fees during application process and entitled gene fund in a clear manner and have independent Protection of Plant Varieties and Farmers' Rights Authority.

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- Institute Of Biodiversity Conservation And Research Establishment Proclamation, Proclamation No. 120/1998, Fed. Neg. Gaz., Year4, No.49

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- 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)
- Personal interview with Ethiopian Netherland Seed Partnership, Senior Expert (Addis Abeba, Ethiopia 6 January 2024).