Globalization of Patent Laws through Trade Agreements, and Pressures on Ethiopia's Patent Regime:
The Passenger behind the Wheel

Abdulkader Mohammed Yusuf ♣

Abstract

Given that patent law emerged in domestic systems, there was an obvious diversity of patent regimes. With the advent of cross-border movement of resources, including inventions, there was a need for a harmonized patent regime. The issue went to another level with the entry into force of the WTO/TRIPS Agreement, which requires WTO members to enact new patent laws or amend existing ones to make them TRIPS compliant. The Ethiopian Patent Law, which was enacted in 1995, is strangely TRIPS compliant, tempting many to think that it had Ethiopia's forthcoming accession in mind. However, with Ethiopia yet to complete the accession process, there are further pressures from industrialized countries to ensure that stringent patent rules are complied with in developing countries. This article examines TRIPS, the Cotonou Agreement and AGOA as effective instruments of ensuring compliance. It is argued that the Ethiopian patent system will continue to observe TRIPS and other standards as dictated by the Global North.

Key terms

Globalization · Harmonization · IP · Patent · TRIPS Agreement · BTA · GSP · Cotonou Agreement · AGOA

DOI http://dx.doi.org/10.4314/mlr.v12i1.3

Received: 31 March 2018 Accepted: 30 September 2018

♣ Abdulkader Mohammed Yusuf, PhD student and Part-time Lecturer, School of Law, Addis Ababa University; Managing Partner, Anchor Consulting PLC; Email: abdu.mohammed08@gmail.com / abdu@anchorcplc.com

Frequently used acronyms

ACP	African, Caribbean and Pacific	LDCs	Least Developed Countries
AGOA	African Growth and Opportunity Act	PCT	Patent Cooperation Treaty
BTAs	Bilateral Trade Agreements	TRIPS	Trade Related Aspects of Intellectual Prop. Rights
EIPO	Ethiopian Intellectual Property Office	WIPO	World Intellectual Property Organization
IP	Intellectual Property	WTO	World Trade Organization

Introduction

Although intellectual property (IP) rights existed for so long in some countries, it is fairly a new area of property rights, particularly as compared with real property rights. IP can be classified into two broad areas: copyright and industrial property. These categories cover areas such as copyright and related rights, trademark, geographical indications, industrial designs and patents. With the development of IP protection pertaining to different areas, there is tension between protecting the interests of creators/inventors and public interest.

Indeed, patent laws have developed fast in the past few decades both at the international and national levels. One can notice the development of international patent laws and harmonization efforts starting from the 1883 Paris Convention. However, the globalization of patent law gained momentum upon the establishment of the World Trade Organization (WTO) in 1995. The Agreement on Trade Related Aspects of Intellectual Property (TRIPS) is one of the regimes under WTO which requires members (including those in the process of accession) to enact new laws or amend existing ones, one of the most important fields being patent.

Ethiopia applied for WTO accession in January 2003 and the Working Party on the Accession of Ethiopia was established in February 2003.[1] The Ethiopian Patent Law is largely TRIPS compliant in important aspects which tempts us to think that our house is in order, albeit at the cost of citizens. The Ethiopian Patent Law is the manifestation of the pressure of globalization than a domestic policy objective, and it will further be stretched during the accession process if local production capacity (in using certain inventions in Ethiopia) makes progress. The experience of other countries shows this trend, particularly in view of what it entails on domestic policy decision making.

Apart from TRIPS, there are also some bilateral trade agreements (BTAs) that incorporate provisions on IP. Although numerous in number and diverse in nature, this article looks into the impact of the EU-ACP Economic Partnership Agreement, also known as the Cotonou Agreement.[2] It also explores a Generalized System of Preferences (GSPs), in the form of the African Growth and Opportunity Act (AGOA), which sounds like a non-reciprocal trade benefit but a look at its objectives, the eligibility criteria and the experience of the US *vis-á-vis* certain Sub-Saharan African countries tells a different story. This can

[1] For Ethiopia's accession, see <https://www.wto.org/english/thewto_e/acc_e/a1_ethiopia_e.htm> accessed 28 September 2018.

[2] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and its Member States of the Other Part, signed in Cotonou on 23 June 2000 (the Cotonou Agreement).

be deduced from the emphasis on patent protection in both the Cotonou Agreement and AGOA.

These arrangements in fact have very serious pressures on developing countries. Developed countries have successfully designed such BTAs/GSPs to exert pressures on developing and least-developed countries (LDCs), in the event that there is any policy space left by the TRIPS Agreement. The number and nature of BTAs that the US, for instance, had designed and concluded with many countries since the aftermath of the Doha Declaration is an example of this trend.

Ethiopia is one of the seventy-eight ACP country members of the Cotonou Agreement. It is also one of the eligible countries to the AGOA initiative. It is interesting to look at the extent to which the EU and the US are using the initiatives to enforce their patent interests on countries like Ethiopia. Indeed, by pushing for the inclusion of IP provisions in the Cotonou Agreement and AGOA, the two trade powers sent a clear signal that they viewed IP protection as an integral component of the 'rule of law' and 'good governance', progress which was vital to maintaining trade preferences, even in the poorest countries.[3]

The main objective of this article is to highlight how the Global North is shaping patent laws through trade agreements. This is done by looking into TRIPS as the primary tool of harmonization. But with Ethiopia yet to become a member of the WTO, it also examines the Cotonou Agreement (a partnership agreement) and AGOA (a GSP) based on the experiences of LDC members of the WTO as well as the EU/US *vis-á-vis* member/eligible countries.

Apart from this short introduction, the article is organized in five sections. The first section gives some general background on patent and the major theoretical justifications for patent as well as the international efforts of patent protection. Section 2 briefly discusses Ethiopia's patent law, by focusing on some of the pertinent issues with a view to offering a platform for the discussion in the coming sections. This is followed by a section that discusses the TRIPS Agreement and its impacts on the patent laws of WTO members and countries in the accession process. Section 4 explores the potential implications of the Cotonou Agreement on the patent laws of members such as Ethiopia. Section 5 looks into the AGOA initiative.

[3] Carolyn Deere (2009), *The Implementation Game: The TRIPS Agreement and the Global Politics of Intellectual Property Reform in Developing Countries*, Oxford University Press, p. 269.

1. Theoretical Justifications and Protection for Patent

1.1 Patent

IP, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary and artistic fields.[4] Generally speaking, IP law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain rights to control the use made of those productions.[5] Because of the understanding that these creations of the human mind have multifold social and economic impacts, countries have laws on the protection of IP.

IP is divided into two broad areas: copyright and industrial property. A patent is the right granted to an inventor to exclude others from commercially exploiting the invention for a limited period, in return for the disclosure of the invention, so that others may gain the benefit of the invention.[6] A patent is issued, upon application, by a government office, which describes an invention and creates a legal situation in which the patented invention can (normally) only be exploited with the authorization of the owner of the patent.[7]

In order for a certain invention to be patentable, it has to meet a few criteria. These criteria are found both in international agreements and most national patent regimes. Accordingly, the invention is required to (i) consist of patentable subject matter, (ii) be industrially applicable/useful, (iii) be new/novel, (iv) exhibit a sufficient "inventive step" or be non-obvious, and (v) the disclosure of the invention in the patent application must meet certain standards (be sufficiently clear and set out at least one mode for carrying out the invention).[8]

The system is not, however, free from criticisms. One important criticism against patent is that it creates a monopoly over the invention, as a result of which it is up to the patentee to determine the price at which s/he (it) wants to put the invention on the market. Indeed, the temporary monopoly positions involve very large (up to 90%) margins on sales where a product is priced monopolistically, although the grant of a monopoly right over an invention may be regarded as a tradeoff between the state and the inventor.[9]

---

[4] WIPO, *Intellectual Property Handbook: Policy, Law and Use*, WIPO Publication No. 489 2004, p. 3.
[5] Ibid.
[6] Id., p. 17.
[7] Ibid.
[8] Id., pp. 17-21.
[9] *See* Peter J Groves (1997), *Sourcebook on Intellectual Property Law*, Cavendish Publishing, p. 112; Getachew Mengiste (2009), 'Impact of the International Patent System on Developing Countries', *Journal of Ethiopian Law*, Vol. 23. No.1, p. 172.

1.2 Theoretical justifications for patents

There are four major theories that justify patents from different perspectives. Proponents of the *natural rights theory* argue that an inventor has an inherent right in the fruits of his/her intellect which include patents.[10] Their belief is that "patents are the heart and core of property rights, and once they are destroyed, the destruction of all other property rights will follow automatically.[11] Natural rights theory is put to practice in many jurisdictions via the provisions of the TRIPS Agreement. Oddi notes that on patentable subject matter, TRIPS implements natural rights theory, by providing that all inventions –including certain categories of inventions that have been traditionally excluded from protection by many countries– are now of such importance to international trade that they must be protected universally.[12]

According to *the incentive theory*, patents give the patentee a limited monopoly on his invention to recoup his investment in coming up with his invention. Although some inventions take years and substantial resources, they can easily be copied and put to use, thereby hindering the inventor's chance of recouping cost of investment. Thus, it is a disincentive to other potential inventors if temporary monopoly is not given for their inventions. According to the incentive theory, the principal objective of patent systems is to encourage innovation, to promote the development of technology and to foster dissemination of innovative knowledge to the public.[13]

From the perspective of the *disclosure theory*, the patentee discloses all the information pertaining to his/her invention in exchange for having a certain invention patented. The theory holds that patents are not necessary to induce invention, but rather what patents do is encourage disclosure and, given some assumptions about the transaction costs of licensing the invention, it can be used more widely than it would be without a patent.[14] The idea of this theory, therefore, is that a patent constitutes a bargain between the inventor and the public, in which the patentee obtains exclusive protection for a set-period of time in exchange for giving the public information about the invention.[15] Patent

[10] Poku Adusei (2013), *Patenting of Pharmaceuticals and Development in Sub-Saharan Africa: Laws, Institutions, Practices, and Politics,* Springer p. 115.
[11] Ibid.
[12] Id., p. 116.
[13] Tomoko Miyamoto (2008), 'International Treaties and Patent Law Harmonization: Today and Beyond' in Toshiko Takenaka (ed), *Patent Law and Theory: A Handbook of Contemporary Research*, Edward Elgar, p. 154.
[14] Roberto Mazzoleni and Richard Nelson (1998), 'Economic Theories about the Costs and Benefits of Patents', *Journal of Economic Issues* Vol. XXXII No. 4, p. 21.
[15] Adusei, *supra* note 10, p. 119.

laws usually prescribe a certain form through which the disclosure is made, which is assumed to facilitate the way the technology will be worked when the patent expires and helps promote knowledge and be a catalyst for further inventions.

The *public benefit theory* argues that by coming up with inventions, the inventor is not only benefiting himself through the reward, as the invention by and large also benefits the public. This may be in a variety of forms. First, the public will benefit from the actual invention itself, such as pharmaceutical inventions which treat or cure a disease. Second, the fact that an invention goes to a public domain at the expiry of its protection period benefits the public. Third, as the inventor provides for a clear description of the invention, the public benefits from the knowledge resulting in the invention.

1.3 National/International Patent Protection

As with most other areas, the historical development of patent protection clearly shows that patent law emerged in domestic systems. One of the earlier patent laws emerged in the Republic of Venice in 1474, whose underlying purpose was to attract persons with the incentive of a ten-year monopoly right to their 'works and devices.[16] The next significant legislative development in patent law came in 1624 with the English Statute of Monopolies.[17] Across the Atlantic, although one can cite two Patent Laws (the 1790 and 1793) the 1836 Patent Act is arguably the first modern patent law in the US.[18] Moreover, the 1791 French Law on Useful Discoveries and on Means for Securing the Property therein to the Authors and the German Patent Act of 1877 are notable developments.[19]

Patent laws were divergent among various jurisdictions and this may be attributable to two main reasons. First, there is the centuries-old principle of territoriality.[20] Thus, according to the territoriality principle, IP rights are protected only within and in accordance with the legal rules of the jurisdiction where they have been granted.[21] Second, the diversity is also attributed to the acts of government in using patent law as a policy tool for economic growth.[22] Patents protect inventions/technologies which are very important for countries irrespective of their level of development.

---

[16] Graham Dutfield and Uma Suthersanen (2008), *Global Intellectual Property Law*, Edward Elgar, p. 106.
[17] Ibid.
[18] Id., p. 107.
[19] Ibid.
[20] Dongwook Chun (2011), 'Patent Law Harmonization in the Age of Globalization: The Necessity and Strategy for a Pragmatic Outcome', 93 J. *Pat. & Trademark Off. Soc'y* 127, p. 130.
[21] Ibid.
[22] Id., p. 131.

Patent laws indeed induce inventions which are important for a country's development; and it is up to the country concerned to determine whether to have a patent law and, if so, the form it should take. However, as the world became more and more globalized, there was an increasing movement of economic resources beyond one's national border.[23] The period before the adoption of the Paris Convention was characterized by inadequate protection of foreign inventions and some countries were not even willing to extend protection to foreign inventions.[24]

Since the 19th century, countries and businesses increasingly recognized the value of the IP system as a tool for technological development.[25] This naturally resulted in moves for the adoption of a few international patent agreements. However, it must be noted that as these international agreements need to be reinforced by domestic patent laws, the harmonization of patent laws became an issue. This is done by either enacting or amending patent laws which, for the most part, finds the justification in the territoriality of patent protection according to which patents are protected within the jurisdiction where they have been granted.

The Paris Convention could be described as the institutionalization of patent system at the international level for the first time and signaled a more global concern for the protection of the intangible assets.[26] It incorporated three main principles: national treatment, priority rights and common rules. Accordingly, each member country must provide to nationals of other member countries the same protection as it affords to its own nationals (national treatment) and that the filing of an application for a patent in one member country gives a right of priority to the date of that application in respect of corresponding applications filed in other member countries within 12 months of that date (priority right).[27] The Paris Convention (adopted in 1883) has gone through revisions over the following century to harmonize procedures relating to, inter alia, priority, registration, and licensing.[28]

[23] Id., p. 133.

[24] Israel Begashaw (2011), 'The Ethiopian Patent Regime and Assessment of its Compatibility with TRIPS Agreement' (LL.M Thesis, Addis Ababa University).

[25] Chun, *supra* note 20, p. 133.

[26] Getachew, *supra* note 9, p. 178.

[27] Anne-Marie Mooney Cotter (2003), *Intellectual Property Law*, (Cavendish Publishing) pp. 31-32. *See* also Miyamoto, *supra* note 13, pp. 157-158.

[28] Laurence Helfer (2015), 'Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines', *Duke Law School Public Law & Legal Theory Series*, No. 2016-18, p. 314.

Although the Paris Convention had established fundamental principles and some substantive rules, national procedural rules continued to be significantly different, while international movement of goods and services expanded considerably since the adoption of the Paris Convention.[29] The Patent Cooperation Treaty (PCT), an agreement for international cooperation, with regard to the filing, searching and preliminary examination of patent applications and dissemination of technical information contained in patent applications, was adopted in 1970 with a view to streamlining the patent granting procedures at the global level.[30] It entered into force in 1978. Whereas the Paris Convention dealt with substantive issues of patent protection, the PCT deals with procedures to obtain international patent protection.[31]

Although the PCT has greatly simplified the filing of patent applications at the international level, substantive patentability requirements varied significantly in different jurisdictions.[32] The negotiation of harmonization of patent law started in 1985 under the auspices of the WIPO. The negotiation addressed a number of substantive issues, the harmonization of which was considered indispensable for a better international patent system.[33] A draft 'Treaty Supplementing the Paris Convention as far as Patents are Concerned' (draft 1991 Patent Harmonization Treaty) was discussed at the first part of the Diplomatic Conference held in The Hague in 1991.[34]

2. The Ethiopian Patent Law

The Inventions, Minor Inventions and Industrial Designs Proclamation (enacted in 1995) governs patent protection in Ethiopia. The Proclamation defines patent as a title granted to protect inventions.[35] An invention is patentable if it is new,[36]

[29] Miyamoto, *supra* note 13, p. 161.
[30] Ibid. *See* also Cotter, *supra* note 27, p. 32; and Getachew, *supra* note 9, p. 179.
[31] Randy Campbell (2003), 'Global Patent Law Harmonization: Benefits and Implementation', *Ind. Int'l & Comp. L. Rev*. Vol. 13:2, p. 609.
[32] Miyamoto, *supra* note 13, p. 164.
[33] Ibid.
[34] Ibid.
[35] Inventions, Minor Inventions and Industrial Designs Proclamation No. 123/1995, 54th Year, No. 25 (The Patent Law) Art. 2 (5). An invention is defined as an idea of an inventor which permits in practice the solution to a specific problem in the field of technology.
[36] The Law considers an invention as new if it is not anticipated by prior art, which consists of everything disclosed to the public, anywhere in the world, by publication in tangible form or by oral disclosure, by use or in any other way, prior to the filing date or, where appropriate, the priority date, of the application claiming the invention. *See* the Patent Law, Art. 3(3).

involves an inventive step[37] and is industrially applicable.[38] Hence, once a patent is granted, a patentee has the exclusive right to make, use or otherwise exploit the patented invention, and a third party cannot exploit the patented invention without securing the patentee's consent.[39]

Conversely, the Law excludes the following from patentability:

- inventions contrary to public order or morality;
- plant or animal varieties or essentially biological processes for the production of plants or animals;
- schemes, rules or methods for playing games or performing commercial and industrial activities and computer programmes;
- discoveries, scientific theories and mathematical methods;
- methods for treatment of the human or animal body by surgery or therapy, as well as diagnostic methods practiced on the human or animal body;
- works not protected by copyright.[40]

The right to a patent belongs to the inventor.[41] Where two or more persons have jointly made an invention, the patent belongs to them jointly.[42] The right to a patent for an invention made in the execution of a contract of service or employment, unless otherwise agreed, belongs to the person who commissioned the work or the employer.[43] On the contrary, inventions made without any relation to an employment or service contract and without the use of the employer's resources, data, means, materials or equipment belongs to the employee.[44] Inventions made by the employer or person commissioned which result from both the personal contribution of the author and the resources, data, means, materials or equipment of the employer will be owned jointly in equal shares.[45]

As indicated earlier, the Ethiopian Patent Law protects inventions, whether products or processes. Prior to TRIPS, many developing countries used to only

[37] An invention involves an inventive step if, having regard to the prior art relevant to the application, it would not have been obvious to a person having ordinary skill in the art. *See* Art. 3(4) of the Patent Law.
[38] An invention is considered as industrially applicable where it can be made or used in handicraft, agriculture, fishery, social services and any other services.
[39] *See* the Patent Law, Art. 22.
[40] Ibid. Art. 4.
[41] Id., Art. 7 (1).
[42] Id., Art. 7 (2).
[43] Id., Art. 7 (3).
[44] Id., Art. 7 (4).
[45] Id., Art. 7 (5).

protect process patents, and not product patents. If the patent is granted for the process, a manufacturer may produce a product through a different process. This is important for certain sensitive sectors such as pharmaceuticals. The TRIPS Agreement came up with the requirement that patents be available for products and processes. But Ethiopia is not a member of the WTO, and the TRIPS Agreement is not applicable. It is to be noted that LDCs normally enjoy some exceptions during the transition period.

Prior to TRIPS, countries used to exclude sectors from the protection of certain inventions such as pharmaceuticals. Indeed, international conventions prior to TRIPS did not specify minimum standards for patents.[46] At the time that negotiations began, over 40 countries in the world did not grant patent protection for pharmaceutical products.[47] Under the Ethiopian system, however, patent is available in almost all fields of technology, provided that the inventions satisfy the requirements provided for therein and subject to the exceptions.

The other area that is substantially influenced by TRIPS is duration of a patent. Although the Paris Convention had been silent on the question of patent duration, TRIPS demands a minimum period of protection for twenty years.[48] In Ethiopia, a patent is granted for an initial period of fifteen years, with a possibility of extension for five more years if there is proof that the invention is being properly worked in the country.[49] This is particularly problematic when it comes to certain sensitive inventions such as pharmaceutical patents, where the patent term coupled with the extension, have huge implications on access to medicine.

Compulsory licensing is another debatable issue in the Ethiopian system. Although compulsory license is envisaged under the Patent Law, one may raise questions on the grounds for the application and grant of such license. A compulsory license may be granted if an invention depends on another patented invention or if a patentee fails to work his/her invention in Ethiopia and fails to justify his/her inaction within 3 years from the day of grant or 4 years from the filing date.[50] There is also the requirement of furnishing a proof that prior negotiations towards a voluntary license could not be concluded.[51] Notably, even the TRIPS Agreement has relatively relaxed the grounds for the grant of compulsory license than the Ethiopian Patent Law. For instance, the

[46] For the TRIPS Agreement and its impacts on pharmaceuticals and health products, see <http://www.who.int/medicines/areas/policy/wto_trips/en/> accessed 19 September 2018.
[47] Ibid.
[48] Deere, *supra* note 3, p. 66.
[49] The Patent Law, Art. 16.
[50] Id., Art. 29
[51] Id., Art. 31

requirements mentioned above may be waived in cases of national emergency or other circumstances of extreme urgency or in cases of public non-commercial use.[52]

The Law further states that a patent shall be invalidated upon the request of an interested party if it is proved that the patent is not patentable or the description does not disclose the invention in a manner sufficiently clear and complete.[53] However, one may easily note that Ethiopia's patent law does not envisage pre-grant patent opposition. Patent systems that require the publication of pending patent applications prior to grant and that allow opposition any time prior to grant[54] are very important.

One may argue that the Ethiopian Patent Law does not promote local interests. A case in point in this respect is the fact that the number of patents issued by the Ethiopian Intellectual Property Office (EIPO) to Ethiopian nationals is so insignificant. This makes it clear that the country relies on technologies from abroad. A strong patent system may impair the capacity of potential recipients in the developing countries to gain access to essential technologies; and that stronger IPs have a considerable negative impact on the process of catching up in developing countries by excluding imitation through reverse engineering on a wider scale while the cost of obtaining licenses are likely to increase, if they are obtainable at all.[55]

This evokes a question as to why the Ethiopian Patent Law was designed this way. There are arguments that stronger patent protection encourages local innovation and facilitates technology transfer. Whether patent protection encourages local innovation, facilitates transfer of technology and thereby promotes economic development or whether it hurts technological progress and economic development by restricting access to knowledge has been the subject of discourse for a long time.[56] There is no empirical evidence that categorically

[52] The TRIPS Agreement, Art. 31 (b).

[53] The Patent Law, Art. 36 (1).

[54] *See* Chan Park et al. (2013), *Using Law to Accelerate Treatment Access in South Africa: An Analysis of Patent, Competition and Medicines Law*, United Nations Development Programme, pp. 54-55.

[55] Carlos Correa (2005) 'Can the TRIPS Agreement Foster Technology Transfer to Developing Countries?' in K Maskus and J Reichman (eds.), *International Public Goods and Transfer of Public Goods under a Globalized Intellectual Property Regime* 254; Habtamu Hailemeskel (2011), 'Designing Intellectual Property Law as a Tool for Development: Prospects and Challenges of the Ethiopian Patent Regime' (LL.M Thesis, Addis Ababa University).

[56] Fikremarkos Merso (2012), 'Ethiopia's World Trade Organization Accession and Maintaining Policy Space in Intellectual Property Policy in the Agreement on Trade-Related Aspects of Intellectual Property Rights Era: A Preliminary Look at the Ethiopian

makes the point that IP/patent protection promotes science and technology or transfer thereof. The channels of acquiring knowledge for LDCs are usually imitation of existing technologies, reverse engineering and applying knowledge and technologies described in patent papers; and patents may in fact become barriers in acquiring technology for such countries.[57]

Advocates for strong patent systems argue that such a system would increase FDI, and associated technology transfers to developing countries.[58] They argue that there is a direct link between strong patent protection and an increased inflow of FDI citing the increase in certain countries.[59] This, however, may not work in every country and very much depends on the sector concerned. Although patent protection has a significant contribution in attracting FDI, this impact depends on some other important social, policy and other factors.

3. Globalization of Patent Laws through the TRIPS Agreement

3.1 General

The Convention Establishing the World Intellectual Property Organization (WIPO) was adopted in 1967 and entered into force in 1970. The WIPO is responsible for promoting IP and administers 23 international treaties on IP matters and has a membership of over 180 countries.[60] Yet, it is perceived as a toothless tiger in the sense that developed countries were 'dissatisfied' with the implementation of the IP rights as WIPO did not have an effective enforcement system.[61]Accordingly, industrialized countries were successful in making sure that IP is one of the Agreements of the WTO and that no reservation or derogation may be made by its members.

As noted earlier, one of the issues tabled during the Uruguay Round of negotiations, which lasted between 1986 and 1994, was an agreement on IP. Along with an Agreement on Services, the negotiation and later the inclusion of an Agreement on IP marks a clear departure from the original General Agreement on Tariffs and Trade (GATT) 1948, whose application only extended to Trade in Goods. As Subhan notes, no other Agreement has been as

---

Patent Regime in the Light of the Agreement on Trade-Related Aspects of Intellectual Property Rights Obligations and Flexibilities', *The Journal of World Intellectual Property* Vol. 15, No. 3, p. 172.

[57] Ibid.

[58] UNCTAD (1996), The TRIPS Agreement and Developing Countries, Geneva, in Getachew, *supra* note 9, p. 185.

[59] *See* Kamil Idris (2002), Intellectual Property: A Power Tool for Economic Growth, Geneva, in Getachew *supra* note 9, p. 185.

[60] Prabodh Malhotra (2010), *Impact of TRIPS in India: An Access to Medicines Perspective*, Palgrave Macmillan p. 10.

[61] Ibid.

much of a driving force behind the globalization and liberalization of trade barriers as the set of these agreements that comprise the WTO.[62]

Hence, while the pre-TRIPS global IP system provided 'a menu of treaties' from which countries could 'pick and choose and in some cases make reservations to', TRIPS obliges all WTO members to implement minimum standards of protection within specified deadlines for virtually all categories of IP including patents.[63] TRIPS puts new and unparalleled emphasis on making privately held IP rights enforceable, demanding stronger provisions in national IP laws to promote enforcement of IP rights at the border and within the domestic market.[64]

The inclusion of IP rights as one of the single undertakings of the WTO package has since received criticisms from different fronts. Some writers hold that the TRIPS Agreement was unnecessary as most of its functions have, for up to a century, been addressed by conventions such as the Paris Convention, Rome Convention, and the UN-based WIPO.[65] However, a critical look at how things evolved clearly reveals that an international patent regime with stronger enforcement was inevitable. The adoption of the PCT and the 1985 WIPO Harmonization Discussions are evidence of how developed countries were persistent in having certain forms of international patent regimes with strong enforcement mechanisms.[66]

---

[62] Junaid Subhan (2006), 'Scrutinized: The TRIPS Agreement and Public Health', *McGill Journal of Medicine* 9(2) p. 153.

[63] Deere, *supra* note 3, p. 10. The TRIPS Agreement, *inter alia*, aims to:

(a) harmonize IP rights protection by providing for the minimum standards that should be adopted by member states;

(b) enhance and broaden the scope of protection of patents by (i) reducing the scope of various restrictions and safeguards which used to be incorporated by national laws to protect the public interest and control abuse of a right by the patentee (ii) expanding the scope of duration of protection by, for instance, requiring that patent protection shall be available in all fields of technology (Art. 27 (1) and making the duration of a patent 20 years (Art. 33)

(c) providing a mechanism that ensures effective enforcement of rights; violation of IPRs and failure of member states to provide with an effective enforcement of the same will entail severe consequence such as loss of trade rights and imposition of sanctions.

See Getachew, *supra* note 9, p. 181.

[64] Deere, *supra* note 3, p. 10-11.

[65] Malhotra, *supra* note 60, p. 10.

[66] The US "Special 301" procedure is the most well-known example of such national strategies. It authorized the US Trade Representative to investigate countries with weak intellectual property protection. The US deployed Special 301 against more than a dozen countries between the 1970s and early 1990s, successfully pressuring governments to

As one of the protected fields, patents should be available for any invention, whether product or process in all fields of technology.[67] Two major issues have, thus, been introduced by the TRIPS. First, in the pre-TRIPS era, developing countries were only giving process patents and not product patents. Second, while many countries did not recognize certain areas as patentable subject-matters, under the TRIPS all inventions are patentable irrespective of their field of technology.

For the most part, developed countries already had TRIPS standards and IP institutions in place and needed to make only minor revisions to domestic IP laws and administration to implement TRIPS.[68] For developing countries, on the other hand, implementation of TRIPS requires them to raise their IP standards (increasing the terms and scope of protection).[69] For most countries, this involves a complex set of reforms to update or redraft existing laws, adopt new laws, and/or promulgate new administrative regulations and guidelines.[70]

Needless to say, the fact that WTO Members are required to bring their domestic patent laws in compliance with the minimum TRIPS standards is a clear instance that shows the impacts of the globalization of patent law. Developed countries were given a one year period to be fully TRIPS compliant, while developing countries were given 5 years to have their patent laws conform to the TRIPS.[71] LDC members of the WTO were initially given 11 years which has now been extended to 2021. Hence, save these LDC members of the WTO,[72] the other members of the WTO have made their domestic patent laws compatible with the TRIPS. This implies that such moves are contributing

enact IP reforms that benefitted foreign industries, including US based pharmaceutical companies. *See* Helfer, *supra* note 28, p. 315.

[67] The TRIPS Agreement, Art. 27.

[68] Deere, *supra* note 3, p. 11.

[69] Ibid.

[70] Ibid.

[71] Although developing countries were given period of compliance until 2000, countries like India that had previously disallowed product patents in pharmaceuticals were granted additional five years i.e. 2005. *See* Malhotra, *supra* note 60, p. 19.

[72] However, this must not be taken to mean that all LDC members of the WTO have not made their domestic patent laws compatible with the TRIPS. The effect of globalization of patent laws has proved to be powerful in the sense that powerful states are forcing poor countries to come up with a patent regime that best serves their interest. This is done, inter alia, through the use of BTAs. Moreover, the experience of certain LDCs that have finalized their accession process to the WTO shows that there are certain TRIPS-Plus requirements whereby these LDCs are required to conform to the entire TRIPS provisions, notwithstanding the transitional arrangements envisaged under the TRIPS Agreement and reinforced by the WTO Ministerial Conference Decision.

towards a harmonized patent law when it comes to certain important aspects such as patentable subject matter and term of protection.

3.2 TRIPS and the Ethiopian patent law

Ethiopia is currently in the accession process to join the WTO. The WTO Agreement[73] envisages two kinds of membership: original membership and membership through accession. Countries that were the Contracting Parties of the GATT are referred to as the original members of the WTO.[74] At the end of 1994, GATT had 123 members, which accordingly became original members of the WTO. Accession is the other way through which membership of the WTO is acquired.[75] Over two dozen countries have become members of the WTO, after having completed the rigorous accession process which, in most cases, takes several years.

For Ethiopia to become a member of the WTO, it has to go through the scrupulous accession process of the WTO. A country (or a separate customs territory) may become WTO observer before making an application to the WTO. Accordingly, Ethiopia became an observer in 1997 and made a declaration of intent to apply for accession.[76] It later submitted its application in January 2003, and a Working Party was established in February of that year and the negotiations are still underway.[77]

The accession process is carried out on two parallel and often overlapping tracks. The first track is *multilateral* that aims to find out the relevant laws, policies and practices of the acceding country and ensure that they are brought into conformity with WTO rules, and the second track is a *bilateral* track that aims to extract as many specific commitments from the acceding country.[78] The one that is of immediate importance here is the multilateral track. It starts with the applicant country's submission of a Memorandum on its Foreign Trade

[73] Also referred to as the Marrakesh Agreement, the WTO Agreement was adopted on 15 April 1994 and entered into force on 1 January 1995. It incorporates, in its Annexes, the Multilateral Trade Agreements on Trade in Goods, Services and IP, the Understanding on the Settlement of Disputes, the Trade Policy Review Mechanism. In Annex IV, it also has Plurilateral Trade Agreements for countries that have accepted them.

[74] The WTO Agreement, Art. XI.

[75] Id., Art. XII.

[76] For the reasons for accession and status of Ethiopia's WTO accession, see also <http://www.mfa.gov.et/internationalMore.php?pg=35> accessed 6 January 2018.

[77] For the status of Ethiopia's accession, see <http://www.wto.org/english/thewto_e/acc_e/status_e.htm> accessed 6 January 2018.

[78] Melaku Geboye (2008), 'Ethiopia's Reluctant Move to Join WTO: A Preliminary Look at Legal and Institutional Aspects of Accession', *Journal of Ethiopian Law*, Vol. 22 No. 1, p. 10.

Regime (MFTR), a crucial document that is prepared in accordance with the detailed outline format provided by the WTO Secretariat.[79] Once the MFTR is submitted, members of the Working Party start the questions and answers process in which they try to learn about the applicant country's trade and legal regime and identify areas of possible inconsistency with WTO Agreements.[80] This multilateral process then moves on to negotiate "the terms of accession", which covers WTO rules on goods and TRIPS as well.[81]

The Working Party enquires into a country's trade and legal regimes with a view to identifying areas of inconsistency with WTO Agreements, and the TRIPS is one of such Agreements that have particular importance. With limited exceptions pertaining to the status of the applying country, a country that has applied for membership has to 'bring its house in order' and ensure that its IP related trade and legal regime is compatible with TRIPS.

As stated above, patent is one of the areas of protection under the TRIPS Agreement. Thus, notwithstanding the special and differential treatment and certain flexibilities that Ethiopia as an LDC is entitled to, its patent regime has to be consistent with TRIPS. There is an argument which is associated with the time when the Patent Law was enacted, which coincides with the entry into force of the Marrakesh Agreement establishing the WTO. Fikremarkos opines that the Patent Proclamation might have been informed by the TRIPS Agreement with the possible understanding on the part of the drafters that sooner or later the country would start the accession process and ensuring TRIPS compatibility of the Patent Proclamation was a forward looking approach.[82]

The experience of certain countries which had acceded to the WTO indeed substantiates the argument that making national patent laws compatible with TRIPS is a prerequisite. Assessing China's accession, Maskus notes that external pressure has been an important impetus for legal change in the country, which culminated with the introduction of numerous changes in China's IPRs regime in anticipation of joining the WTO.[83] There are also other examples in the same vein. Cambodia, for example, submitted its Memorandum on the Foreign Trade Regime (MFTR) in 1999, enacted a new Patent Law in January

[79] WT/ACC/1, in Melaku, *supra* note 78, p. 10.
[80] WT/ACC/10/Rev.3, 28 November 2005 in Melaku, *supra* note 78, p 10.
[81] Melaku, *supra* note 78, pp. 10-11.
[82] Fikremarkos Merso (2008), 'Ethiopia's Accession to the WTO: Does it Imply anything on Access to Affordable Medicines in Ethiopia?' *Ethiopian Business Law Series*, Vol. 2, pp. 166-167.
[83] Kieth Maskus (2002) 'Intellectual Property Rights in the WTO Accession Package: Assessing China's Reforms' available online at <siteresources.worldbank.org>maskus_tips> accessed 11 January 2018.

2003 and was admitted to WTO in September of the same year. Saudi Arabia promulgated, inter alia, a new Patent Law in 2004 during the course of the accession process and became a member by the end of 2005. As noted earlier, the trend is also the same when one looks into the experience of original members of the WTO, particularly developing and least-developed ones, whereby they had to enact a new patent law or amend existing ones to ensure conformity with the TRIPS Agreement.

As noted, LDC members of the WTO are entitled to certain transitional arrangements in respect of the TRIPS Agreement. It may be argued that, even if the Patent Law is TRIPS compliant, Ethiopia may not (upon completion of the accession process) be obliged, as an LDC, to fully implement the TRIPS Agreement during the transitional period embodied under WTO rules. However, this may not work equally for original members of the WTO and those which became members through accession.[84] This is because the obligations of acceding members are determined by their terms of accession and these countries may not necessarily be entitled to the rights accorded to existing LDC members.[85] What the accession experience of Cambodia and Nepal suggests is that acceding countries may not necessarily be entitled to the rights of the LDCs, and WTO members and their fate is determined more by the terms of accession than the WTO rules.[86]

One may, therefore, argue that the Ethiopian Patent Law had its focus on WTO membership. And in order to do that, it was clear that one of the requirements was to make the Patent Law TRIPS compatible, because the TRIPS is one of the Agreements in the WTO single undertakings package. It can further be argued that there was no way for the drafters of the Ethiopian Patent Law to foresee the transitional arrangements and the flexibilities that were made available for countries like Ethiopia, even if special and differential treatment of LDCs is not something new introduced by the TRIPS Agreement and subsequent WTO Decisions. That said, there seems to be no argument that going for a strong a patent law was not the right thing to do. After 25 years since

[84] The Marrakesh Agreement establishing the WTO envisages two kinds of membership: original membership and membership through accession. Once admitted to the WTO, all members have the same rights, irrespective of the mode of acquiring membership. Although such double standard between countries of the same level of development (witnessed throughout the years) defeats the provisions of Art. XX of the WTO Agreement, it has remained the trend.

[85] Fikremarkos, 'Ethiopia's Accession to the WTO' *supra* note 82, p. 190.

[86] R. Grynberg & R. M. Joy (2004), 'The Accession of Vanuatu to the WTO –Lessons for the Multilateral Trading System', *Journal of World Trade*, 34, 159–73 in Fikremarkos, 'Ethiopia's Accession to the WTO', *supra* note 82, p. 190.

Ethiopia's request to join the WTO, its concessions in the IP regime have been futile, and the accession process appears to have stalled.

4. Bilateral Trade Agreements and the Globalization of Patents: The Cotonou Agreement and Ethiopian Patent Law

4.1 Bilateral Trade Agreements and Patents

The world today is witnessing the proliferation of BTAs, whose underlying motivations are diverse. There are two broad categories of BTAs: the first are regional or country-specific BTAs and the second fall under subject-specific bilateral trade and cooperation agreements.[87] There are a few agreements in the first category such as trade and investment framework agreements. They are initial agreements concerned with laying down the foundations for negotiations of a bilateral free-trade or investment agreement between two countries.[88] There are also FTAs which deal with extensive issues like investment, where bilateral investment treaties establish the terms and conditions for private investment by nationals and companies of one state in another state.[89] Bilateral cooperation, partnership and association agreements deal with market reforms, investment and IP protection.[90] Under the second category, i.e. subject-specific bilateral treaties and agreements, we find bilateral science and research and development cooperation agreements and bilateral IP agreements.[91]

BTAs of various kinds have grown in number and membership. One of the interesting characteristics of most BTAs is that they do not make room for reservations to be made in respect of the provisions incorporated in the agreements. Accordingly, as with other issues, a country willing to be part of such agreements accepts every provision in a given agreement, including certain purely non-trade matters such as political aspects, poverty reduction, fight against terrorism, combating corruption, the provisions on human rights including IP protection. As will be seen later, the provisions on IP protection in most cases make reference to multilateral IP agreements and clearly provide that patent is among the IP rights to be protected.

One may notice the proliferation of BTAs since the turn of the century. This is particularly true since the adoption of the Doha Declaration.[92] The adoption of

[87] Mohammed K El Said (2010), *Public Health Related TRIPS-Plus Provisions in Bilateral Trade Agreements: A Policy Guide for Negotiators and Implementers in the WHO Eastern Mediterranean Region*, WHO and ICTSD p. 47.
[88] Id., pp. 47-48.
[89] Id., pp. 48-49.
[90] Id., pp. 51-52.
[91] Id., pp. 52-54.
[92] The Doha Declaration is the result of the WTO Fourth Ministerial Conference launched in Doha in 2001. In the area of IP, the Doha Declaration was successful in a number of

this Declaration and, subsequently, of a decision aimed at facilitating the importation of medicines by developing countries without manufacturing capacity in pharmaceuticals, was an attempt to ensure, through the effective use of the permitted flexibilities; and this shows some balance in the implementation of the TRIPS Agreement and, in particular, it indicates that public health should be given priority in case of conflict with IP rules.[93]

Most developed countries, which were frustrated at the manner in which the TRIPS flexibilities were interpreted at Doha, turned to BTAs to get back what they believed to have lost at Doha by imposing stricter IP rules in these agreements.[94] The wave of BTAs, particularly those by the US and EU with developing countries,[95] represents a drastic setback in this respect, since they not only erode flexibilities but impose a number of additional obligations on states that can further restrict their endeavor in promoting access to medicine.[96]

These BTAs include a chapter on IP, and they further impose restrictions in the criteria of patentability, patent territory, patent duration and disclosure of clinical data, which restrict the flexibility otherwise provided by the TRIPS Agreement.[97] The ones promoted by the US oblige partner signatory countries to extend the patent term to compensate for 'unreasonable' delays 'beyond' a certain period (a) in the procedures for the marketing approval of a medicine and (b) in the examination of patent applications.[98] A very good example is the US-CAFTA Agreement (US-Central America Free Trade Agreement, which provides that "each party shall make available a restoration of the patent term to

important aspects: granting of compulsory licenses, an umbrella clarification and flexibility, moratorium for LDCs not to observe pharmaceutical for another 10 years i.e. until 2016, and allowing eligible importing country under the system to request an exporting country to manufacture the patented product all or predominantly for export to the requesting eligible importing country. *See* Centre for Human Rights Access to Medicines Course Book (Reader, Unpublished), Advanced Human Rights Course on Intellectual Property, Human Rights and Access to Medicines, pp. 98-99.

[93] Carlos Correa (2006), 'Implications of Bilateral Free Trade Agreements on Access to Medicines' *Bulletin of the World Health Organization*; 84, p. 400.

[94] Access to Medicines Course Book (Reader), *supra* note 92, p. 208.

[95] The US has initiated 11 bilateral and regional free trade agreements with 23 countries. For example, in justifying the reasons for entering into negotiations with Southern African Countries Union (SACU), the US Trade Representative's letter to the Congress read "we plan to use our negotiations with the SACU countries to address barriers in these countries to US exports…including inadequate protection of IP rights".

[96] Correa, *supra* note 93, p. 400.

[97] N Lalitha (2008), 'Doha Declaration and Public Health Issues', *Journal of Intellectual Property Rights*, Vol. 13, pp. 411-412.

[98] Correa, *supra* note 93, p. 400.

compensate the patent owner for unreasonable curtailment of the effective patent term as a result of marketing approval process".[99]

4.2 The Cotonou Agreement and its influence on Ethiopian patent law

With the decolonization process gaining ground in the early 1960s, the hegemony came back through the backdoor, this time with a trade cooperation tag. This culminated in the signing of the Yaoundé Convention in 1963. In 1975, forty-six African, Caribbean and Pacific (ACP) States, largely made up of former colonies of European states, entered into an agreement to formally establish the ACP Group of States in order to consolidate and strengthen existing solidarity among them and promote understanding between ACP peoples and governments.[100] In 2000, representatives from the EU and seventy-seven ACP countries met in Cotonou, Benin to sign a trade and aid accord to replace the Lomé IV Convention, which had expired earlier that year, and to set the seal on a quarter of a century of cooperation between a number of partners from North and South.[101]

In the 2000s, the European Commission explicitly included a TRIPS-plus mandate in its trade goals, stating that "the EU should seek to strengthen IPR provisions in future bilateral agreements and the enforcement of existing commitments".[102] Initial public statements by the EU suggested that IP would not play a significant part in EPAs (European Partnership Agreements) and consistently noted that the EU does not need market access to the ACP Countries and that the goal of the Agreement is the development of the ACP Countries.[103] However, recent proposals, papers and statements from the EU, including the new EU Trade Policy review paper suggest that the Agreements are a crucial element of the EU's global trade strategy and that, in particular, the EU is seeking higher IP standards, which includes patents.[104]

Indeed, while the Cotonou Agreement notes the need to take into account different levels of development, it has several TRIPS-plus aspects, including recognition of the need to accede to all relevant international conventions on IP for patent protection of biotechnological inventions, and for the legal protection

---

[99] Lalitha, *supra* note 97, p. 412.

[100] Nsongurua Udombana (2004), 'Back to Basics: The ACP-EU Cotonou Trade Agreement and Challenges for the African Union', *Texas International Law Journal*, Vol. 40, p. 63.

[101] Id., p. 60.

[102] European Commission "Global Europe: competing in the world", *EC Policy Review*, October 4, 2006, available at <http://ec.europa.eu/trade/issues/sectoral/competitiveness/global_europe_en.htm>

[103] Center for International Environmental Law, 'The European Approach to Intellectual Property in European Partnership Agreements with the African, Caribbean and Pacific Group of Countries' Discussion Paper, April 2007, p. 1.

[104] Ibid.

of non-original databases (also not required by TRIPS).[105] This goes beyond TRIPS which does not call on countries to accede to any additional international IP conventions. It is, therefore, clear that the EU has a long history of including IP in its bilateral agreements, and that the majority of the negotiated EU BTAs reflect undertakings to adopt higher standards of IP protection, i.e. "to provide," or "to ensure," "suitable and effective" or "adequate and effective levels of protection of IP rights in accordance with the highest international standards".[106]

There are also a number of EU official documents which suggest that agreements, which have become part of the EU trade strategy such as the Cotonou Agreement are important tools to enforce EU IP/patent interests. The "Global Europe –Competing in the World" Report emphasizes on the importance of market access and IP as tools for greater European advancement.[107] Part iii of Section 3.2 of the Report deals with "Opening Markets Abroad" and states that the EU "will require a sharper focus on market opening and stronger rules in new trade areas of economic importance, notably IP.[108] According to Part ii of Section 4.2 relating to 'Free Trade Agreements', "FTAs should include stronger provisions for IPR and competition, including, for example, provisions on enforcement of IP rights along the lines of the EC Enforcement Directive".[109] Part v of the same Section also states that "the EU should seek to strengthen IP provisions in future bilateral agreements and the enforcement of existing commitments in order to reduce IPR violations…"[110]

The Cotonou Agreement provides that the Parties to the Agreement recognize the need to ensure an adequate and effective level of protection of intellectual, industrial and commercial property rights, and other rights covered by TRIPS in line with the international standards with a view to reducing distortions and impediments to bilateral trade.[111] This provision clearly represents a BTA attempting to enforce the TRIPS Agreement on countries such as Ethiopia that are not WTO members, even if the provision is framed in such a way that it acknowledges the importance of TRIPS compliant IP regime in the ACP Countries for reducing distortions and impediments to bilateral trade.

Also interesting is that Parties to the Cotonou Agreement underline the importance of adherence to the TRIPS Agreement and have agreed on the need to accede to all relevant international conventions on intellectual, industrial and

[105] Deere, *supra* note 3, p. 153.
[106] Center for International Environmental Law, *supra* note 103, p. 4.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Id., pp. 4 -5.
[111] The Cotonou Agreement, Art. 46 (1).

commercial property under Part I of the TRIPS Agreement, in line with their level of development.[112] Although the provisions employ soft words such as '…underline the importance…' and '…agree on the need to accede to…', they still target at accession to TRIPS and the adherence of ACP countries to international agreements, even if such adherence were to compromise their domestic policy objectives.

Ethiopia was one of the Parties to the ACP-EU Partnership Agreement signed in Cotonou in 2001 and ratified the Agreement through Proclamation No. 242/2001. According to the Proclamation, the Ministry of Economic Development and Cooperation was empowered to implement the Cotonou Agreement.[113] There was no mention of other government organs under Proclamation No. 242/2001, with which the Ministry of Economic Development and Cooperation was to collaborate in implementing the Agreement. However, under Proclamation No. 524/2007 which ratified the amending Agreement, the Ministry of Finance and Economic Development (MoFED) was authorized to implement the Cotonou Agreement in collaboration with appropriate government organs.[114] This provision is repeated verbatim in the Proclamation which ratified the further amendment to the Cotonou Agreement.[115]

As the Cotonou Agreement incorporates provisions on IP, one of the Government organs that MoFED is expected to collaborate with in implementing the Cotonou Agreement is the Ethiopian Intellectual Property Office (EIPO), which is established pursuant to Proclamation No. 320/2003. One of the objectives of the Office is to facilitate the provision of adequate legal protection for and exploitation of IP in the country, which includes patent.[116] This is also clear from the reading of Article 16 of the Proclamation whereby the Office assumed rights and obligations of the Ethiopian Science and Technology Commission concerning patents and related matters under Proclamation No. 7/1995 as well as the Patent Proclamation. Furthermore, one of the duties of the Office is to implement and/or follow up the implementation of international IP agreements to which Ethiopia is a party.[117] MoFED is, therefore, expected to collaborate with EIPO in implementing IP related provisions of the Cotonou Agreement.

---

[112] Id., Art. 46 (2) and (3).

[113] The Cotonou Agreement Ratification Proc. No. 242/2001, 7th Year No. 30, Art. 3.

[114] The Cotonou ACP-EU Partnership Agreement Amendment Ratification Proclamation No. 524/2007, 13th Year No. 27, Art. 3.

[115] The Cotonou ACP-EU Partnership Agreement Amendment Ratification Proclamation No. 779/2012, 19th Year No. 21, Art. 3.

[116] Ethiopian Intellectual Property Office Establishment Proclamation No. 320/2003, 9th Year No. 40, Arts. 2 (1) and (2) and Art. 5.

[117] Id., Art. 6 (12).

One may ask what the Cotonou Agreement brings to the Ethiopian Patent system, as it already is largely TRIPS compliant. For one thing, Ethiopia is not yet a member of the Paris Convention. As a Party to the Cotonou Agreement, Ethiopia has undertaken to accede to all international conventions on IP, including the Paris Convention. Moreover, the Parties have agreed to strengthen their cooperation with regard to IP, which, inter alia, extends to the preparation of laws and regulations for the protection and enforcement of IP rights, the prevention of the abuse of such rights by right holders and the infringement of such rights by competitors, the establishment and reinforcement of domestic and regional offices and other agencies including support for regional IP organizations involved in enforcement and protection, including the training of personnel.[118] In view of current realities, the term 'cooperation' apparently means European influence in the ACP Countries in the abovementioned areas and certainly, it is not a two way relationship between the EU and the ACP Countries.

5. The Generalized System of Preferences and the Globalization of Patents: AGOA and the Ethiopian Patent Law

5.1 The Generalized System of Preferences

Preferential treatment of trade was considered as one of the most trade distorting manifestations of the pre-GATT period. In response to this challenge, the Most-Favored Nations Treatment Principle (MFN) appears in the very first Article of GATT 1948. According to the principle, GATT members treat every contracting party as the most favored, and as a consequence, a favor granted to a party will also be made available for all the trading partners. It is not surprising that the principle forms the cornerstone of the other Agreements in the WTO package.

The MFN Principle has a few exceptions, and the GSP is one of these exceptions which grants unilateral arrangements to developing countries and LDCs to export their products for a reduced [or no] tariff. A few practical issues were not clear for some time. However, the end of the Tokyo Round in 1979 brought up clarification on such arrangements, when developing countries secured adoption of the Enabling Clause, a permanent deviation from MFN by joint decision of the GATT Contracting Parties.[119] The Clause states that notwithstanding GATT Article I, "Contracting Parties may accord differential and more favorable treatment to developing countries, without according such

[118] The Cotonou Agreement, Art. 46 (6).

[119] *See* Jeanne Grimmett (2011), 'Trade Preferences for Developing Countries and the World Trade Organization (WTO)' Congressional Research Service 1-2 available at <https://pdfs.semanticscholar.org/9b25/e78969d3fbea63f27f933ec5d349ef8b44f7.pdf>

treatment to other Contracting Parties" and this exception applies to (1) preferential tariff Trade Preferences for Developing Countries; (2) multilateral nontariff preferences negotiated under GATT auspices; (3) multilateral arrangements among less developed countries; and (4) special treatment of LDCs in the context of any general or specific measures in favor of developing countries.[120]

The US has been administering GSPs with many countries. According to the Office of the United States Trade Representative, US trade preferences such as the GSP is the largest and oldest US trade preference program that provides opportunities for many of the world's poorest countries to use trade in pursuits of economic growth and to climb out of poverty.[121] The US currently administers and has obtained waivers for the Caribbean Basin Economic Recovery Act (CBERA), the Andean Trade Preference Act (ATP), and the African Growth and Opportunity Act (AGOA) which extend duty-free treatment and waiver of other conditions such as non-discrimination in administering quotas.[122]

5.2 AGOA and US influence on Sub-Saharan African countries

Irrespective of the reasons provided in an attempt to justify conditionalities attached to aid or loan, it has been a while since they have become a global phenomenon. The IMF has been one of the international institutions which have pursued this trend. In exchange for financial support, borrowing countries agree to implement a package of obligatory policy reforms (conditionality), phased over one or more years, and its implementation is assessed on a regular basis.[123]

Apart from the international financial institutions, trade benefit initiatives such as AGOA have also been attracting attention as conditionalities continue to be attached, some of which have nothing to do with trade. AGOA is one of the examples in this category. It was signed into law by President Clinton in 2000 with the objective of expanding US trade and investment with sub-Saharan Africa, to stimulate economic growth, to encourage economic integration, and to facilitate sub-Saharan Africa's integration into the global economy.[124] The US Congress requires the President to determine annually the sub-Saharan African countries that are eligible for AGOA benefits based on certain criteria, including progress towards the establishment of a market-based economy, rule of law,

---

[120] Ibid.

[121] *See* <https://ustr.gov/issue-areas/trade-development/preference-programs/generalized-system-preference-gsp> accessed 9 January 2018.

[122] Grimmett, *supra* note 119, pp. 3-4.

[123] Alexander Kentikelenis et al. (2016), 'IMF Conditionality and Development Policy Space, 1985-2014', Review of International Political Economy 6, available at <http://dx.doi.org/10.1080/09692290.2016.1174953> accessed 12 January 2018.

[124] *See* <https://ustr.gov/issue-areas/trade-development/preference-programs/african-growth-and-opportunity-act-agoa> accessed 9 January 2018.

economic policies to reduce poverty, protection of internationally recognized worker rights, and efforts to combat corruption.[125] Hence, if the President for whatever reason holds that a country is "engaged in activities that undermine US national security or foreign policy interests" or "engaged in gross violations of internationally recognized human rights or provided support for acts of international terrorism and cooperated in international efforts to eliminate human rights violations and terrorist activities",[126] the country will not be eligible for the opportunity.

GSP dictates are purely unilateral in nature in the sense that the country which grants it to another may withdraw it anytime. Yet, AGOA goes a step further as the eligibility of sub-Saharan countries is put under the mercy of an incumbent US President. One may also presume the influence of the big US corporations behind selecting the African countries eligible for the opportunity. Mushita, for example, asks if it is African countries or American companies that really benefit from the arrangement.[127]

The determinative eligibility criteria of AGOA demand that a country "has established, or is making continual progress toward establishing," *inter alia*:

a) a market-based economy that protects private property rights;
b) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;
c) the elimination of barriers to United States trade and investment;
d) economic policies to reduce poverty, increase the availability of health care and educational opportunities;
e) a system to combat corruption and bribery [and];
f) protection of internationally recognized worker rights, including the right of association, [and] the right to organize and bargain collectively.[128]

[125] Ibid.

[126] David Fuhr and Zachary Klughaupt (2004), 'The IMF and AGOA: A Comparative Analysis of Conditionality', *Duke Journal of Comparative and International Law*, Vol. 14.

[127] Mushita criticizes AGOA because (a) the eligibility criteria and conditionality on the beneficiary countries are based on free market models designed to create markets for US corporations in the name of trade liberalization and privatization and (b) the countries, as a strategic market for US producers and investors, are being forced to implement WTO/TRIPS provisions through the backdoor for the benefit of American transnational corporations on a bilateral basis. T Mushita (2007), 'An African Response to AGOA' in Southern African Economist, Vol. 14, No 6, p. 17.

[128] AGOA, Art. 104 in Fuhr and Klughaupt, *supra* note 164, p. 137. It should be noted, however, that IP or the eligibility requirement found under Art. 104 are not the only factors that the U.S. President takes into consideration in determining eligibility of a

It is easy to see that most of these eligibility requirements have nothing to do with trade issues, particularly when weighed against the objectives of AGOA itself. Moreover, inserting a clause on the "elimination of barriers to US trade and investment" is bizarre and reinforces the argument that AGOA in fact appears in the interest of the US, and not solely in the interests of African countries. It also conveniently refutes the claim that AGOA is non-reciprocal. Although eligible countries do and will continue to benefit from AGOA, the claim that the US is benefiting from the initiative in pursuing its trade and political objectives (in the countries it selects as eligible) is palatable.

5.3 AGOA and its impact on Ethiopia

In the Trade and Tariff Act of 1984, Congress clearly linked trade and IP, where IP was a 'new' trade issue, along with services.[129] The Trade Act made IP infringement a subject of the National Trade Estimates Report on Foreign Trade Barriers, a cause of action under Section 301, and a consideration in the designation of countries for inclusion in the GSP.[130] The US held bilateral discussions with many countries to improve their IP regimes and enforcement by, inter alia, using the GSP review process.[131]

The provision of immediate importance is found under Article 104(c) of AGOA where it is required to afford protection to IP rights to US investors. As effective IP protection and enforcement mechanism is one of the criteria for determining eligibility of sub-Saharan African Countries in AGOA, it remains one of the tools for the US Government (as well as companies) to impose their interests.[132] The International Intellectual Property Alliance, for example, noted that the US Government's AGOA review is one of the few regularly occurring opportunities to examine IP protection and enforcement in AGOA-eligible countries and to provide guidance to make those mechanisms more effective.[133]

---

country to benefit from AGOA. There are also other strange factors that determine eligibility, such as human rights record and democracy.

[129] Richard Morford (1989), 'Intellectual Property Protection: A United States Priority', *Georgia Journal of International and Comparative Law*, Vol 19:2, p. 337.

[130] Ibid.

[131] Id., pp. 338-339.

[132] It is stating the obvious that the US takes issues relating to US IP rights seriously. For example, in 1997 in a dispute over IP protection, the US removed half of Argentina's GSP privileges. Also in 2001, Ukraine was suspended from the GSP for reasons of IP rights. *See* Generalized System of Preferences: Handbook on the Scheme of the United States of America UNCTAD/ITCD/TSB/Misc.58/Rev.2 available at: <http://unctad.org/en/Pages/DITC/GSP/Generalized-System-of-Preferences.aspx> accessed 13 January 2018.

[133] Filing of the International Intellectual Property Alliance (IIPA) Public Comments on Annual Review of AGOA Country Eligibility October 2013, available at

The above discussion shows how AGOA has become a very effective instrument to enforce US IP interests in African countries. For instance, South Africa is one of the sub-Saharan African countries that have relatively optimal benefits from the AGOA initiative. In 2013, there was an effort to revise the South African IP Policy, which was motivated by the need to promote access to medicines particularly for people living with HIV. Two years later, the American Chamber of Commerce in South Africa (which represents 250 companies operating in South Africa, including several multinational pharmaceutical firms) urged the US Trade Representative to use its review of AGOA to pressure South Africa's Government to revise the draft policy in favor of US Companies, which many civil societies vehemently opposed and rallied against.[134] This clearly shows how US companies who have interests in Africa put pressure on the US Government to make effective use of AGOA to serve their interests, essentially by exerting pressures against the domestic policy space of the eligible countries.

Insofar as the objectives of arrangements is to establish commitments for countries to significantly strengthen their domestic enforcement procedures through different mechanisms,[135] patent protection in Ethiopia cannot be free from the interests of foreign-based companies. As indicated earlier, failing to protect patent may be a cause for disqualification from AGOA, an initiative which, if Ethiopia were to benefit from it, considerably increases the value of exports eligible for preferential market access to the US.[136] The experience of other countries under the AGOA initiative also reinforces this argument.

Concluding Remarks

This article has attempted to examine the impact of globalization on patent laws of developing countries. As the experience of developing countries indicates, developed countries continue to use various international agreements to enforce their interests. The TRIPS Agreement is a prime suspect in this regard, as it requires developing countries to enact new patent laws or amend existing ones and give patent protection for products and processes in any field of technology. Following certain flexibilities and transitional arrangements (granted to certain developing and LDCs as the result of the Doha Declaration), developed countries started to negotiate and enter into different sorts of BTAs with a view

<http://www.iipawebsite.com/pdf/2013_Oct25_AGOA_Annual_Report.PDF> accessed 13 January 2018.

[134] <agoa.info/news/article/5788-sa-trade-official-digs-in-on-intellectual-property-draft.html> accessed 13 January 2018.

[135] Adusei, *supra* note 10, p. 91.

[136] *See* Deere, *supra* note 3, p. 269.

to reclaiming what they thought they would lose as a result of the Doha Declaration or any other development in the field. Moreover, BTAs and the benefits that they entail appear non-reciprocal. The important place accorded to IP/patent protection in both the Cotonou Agreement and AGOA makes it clear that the initiatives are in fact important tools to ensure that IP interests of foreign-based companies are enforced.

As discussed earlier, Ethiopia has a strong and a TRIPS compliant Patent Law. In light of the experience of some developing countries, Ethiopia may further be forced to give up its entitlements at the business end of the accession process. Cambodia, for example, had been a subject of TRIPS-plus measures, as it was forced to ratify the International Union for the Protection of New Varieties of Plants Convention and adhere to the entire TRIPS Agreement by January 2007 (as opposed to 2021) including pharmaceutical patents (as opposed to 2033).

All these experiences lead to one direction. With the growth in the Ethiopian domestic production capacity of some inventions, it is to be expected that the trade agreements may be used to put pressure on Ethiopia to maintain the existing patent regime. The pharmaceutical industry offers a good example in this regard. There is said to be a glimmer of hope in Ethiopia when it comes to medicines, as the pharmaceutical sector is expected to make progress in the coming years. For example, there is the 10 years Strategy and Plan of Action for Pharmaceutical Manufacturing Development.[137] To this end, the pharmaceutical industry zone (that the Government is planning to make available for pharmaceutical producers) is being built in the outskirts of Addis Ababa. If these and other initiatives succeed, the pharmaceutical industry can produce important generic medicines, and this will certainly induce pressures to force Ethiopia to come up with stricter patent protection and enforcement measures by using the arrangements discussed above.

Ethiopia has already surrendered too much by opting for a strong Patent Law and should not surrender anymore as it would result in unprecedented shrinking of its domestic policy space for the sake of getting (if at all) some trade benefits out of WTO membership. The same holds true in negotiating and concluding BTAs of any kind, as, needless to say, public interest prevails over any trade interest. ■

[137] Federal Democratic Republic of Ethiopia, Ministry of Health and Ministry of Industry, National Strategy and Plan of Action for Pharmaceutical Manufacturing Development in Ethiopia: Developing the Pharmaceutical Industry and Improving Access (2015-2025) available at <http://apps.who.int/medicinedocs/documents/s21999en.pdf> accessed 18 January 2018.

Res Nullius vs. *Res Communis* in Matters of Communal Lands of Smallholder Farmers in Ethiopia

Daniel Behailu Gebreamanuel[♣] and Getiso Detamo Mekebo[**]

Abstract

Communal land is among the key factors in the enhancement of rural livelihood because it enables mixed farming practices. Although communal lands are prime sources of livelihood in rural farming communities, empirical evidence shows gaps in their legal recognition and protection in Ethiopia. There are encroachments which include government intrusion, informal land sale, distribution, and handing out land (selling communal land in informal markets) as *Kebele's* contribution for development projects. These factors entrench poverty by sidelining the rural poor at the grassroots whose life is anchored on these lands. These problems also entail violation of human rights of the rural population. This article interrogates the misconception which tends to consider communal lands (customary land tenure) as *res nullius* (ownerless property) while such lands are in fact *res communis* (community property). The article uses the *Hadiya* Zone as a case study. It is argued that there is the need for the effective implementation and amendment of land laws which require political will to ensure tenure security of communal lands thereby securing and diversifying the livelihoods of poor smallholder rural farmers and ensuring human rights.

Key terms

Communal lands · Livestock · Poverty · Livelihoods · Rural Poor · Tenure security

DOI http://dx.doi.org/10.4314/mlr.v12i1.4

Received: 13 February 2018 Accepted: 28 September 2018

[♣] Daniel Behailu Gebreamanuel (PhD), Asst. professor of law, Hawassa University**,** Email: <danielbehailu@yahoo.com>

[**] Getiso Detamo Mekebo (LL.M). The coauthor has collected the data for this article and drafted sections 6 and 7 of the article. Email: <getdetamo@gmail.com>.

Introduction

In Ethiopia, communal land rights and attendant matters are largely discussed in terms of pastoral society or semi-pastoral society. However there are communal lands among the smallholder farmers as well. Hadiya Zone (in SNNPRS) is taken for the purpose of case study so that it can give insight to the problems discussed in this article. There are gaps in the legal regime in the protection of communal land rights thereby undermining livelihood diversification. Little attention is given to protect communal lands among smallholder farmers, and the steady erosion of customary rules and institutions call for serious reform.

Land is among the most important assets for the rural population.[1] It is vital source of livelihood and can be part of cultural and social identities.[2] Especially, it is the sole source of livelihood for the overwhelming majority of the rural poor and is the most crucial medium to alleviate rural poverty.[3]According to World Bank and IFAD (International Fund for Agricultural Development) report, out of the total population of third world countries, 75% are rural dwellers.[4] In Ethiopia, more than 83% of the total population are rural dwellers.[5] Land in Ethiopia, for rural residents, is more than source of livelihood.[6] Landlessness can put one's life into jeopardy and erode social identity (personhoods).[7]

---

[1] Desalegn Rahmato **(**2008), *The Peasant and The State: Studies in Agrarian Change in Ethiopia 1950s – 2000s* (Create Space Independent Publishing Platform) 1-15; Berhanu Abegaz (2004), 'Escaping Ethiopia`s Poverty Trap: The Case for a Second Agrarian Reform' *Journal of Modern African Studies*, No.42; John W. Bruce and Others (2006), *Land Law Reform, Achieving Development Policy Objectives* (The International Bank for Reconstruction and Development / The World Bank) 1-5.

[2] Rachael S. Knight (2006), 'Statutory Recognition of Customary Land Rights in Africa: An Investigation into Best Practices for Law Making and Implementation' (FAO 2010) 1-3.

[3] Muradu A. Srur, (2015) *State Policy and Law in Relation to Land Alienation in Ethiopia* (University of Warwick, School of Law, PhD Thesis 2014) 1-3; Muradu A. Srur, 'Reforming Expropriation Law of Ethiopia', *Mizan Law Review*, Vol. 9, No.2, 301.

[4] 2017 World Bank Poverty Assessment, *infra* note, 41; *see* also, Klauis Dieninger (2011) and others, 'Rising Global Interest in Farm Land: Can it yield Sustainable and Equitable Benefits? (The World Bank) 1-7.

[5] Daniel Behailu, (2015) *Transfer of Land Rights in Ethiopia: Towards Sustainable Policy Frame Work* (Eleven International Publishing); Richard Pankhurst (1966), *State and Land in Ethiopian History*, Preface (Central Printing Press) 1-10.

[6] Daniel Behailu Geberamanuel and Gemmeda Amelo Gurero, (2017),'The Enigma of Informal Rural Land Deals In Ethiopia: Evidence from Peri-urban Areas of Hawassa City,' *Haramaya Law Review* 6, 43-66

[7] Daniel W. Ambaye, (2012), 'Land Rights in Ethiopia: Ownership, Equity, and Liberty in Land Use Rights', *FIG Working Week Rome*, Italy, 6-10, pp. 1-5.

The main concern on land rights in Ethiopia relates to tenure insecurity and productivity-related problems. As a result, the majority of Ethiopia's rural poor live below the poverty line.[8] This is due to the enduring legacy of land policy which presupposes natural resource control to maintain political power.[9] Some of the manifestations of poor land policies of all successive regimes are landlordism, acute exploitation, land fragmentation, resource degradation and abject poverty.[10] According to Sen, Pogge and others, persistence of severe poverty amounts to violation of the fundamental human rights.[11]

Currently, land and natural resources in Ethiopia are under public ownership. The state and nations, nationalities and peoples are collective owners of land and natural resources.[12] Furthermore, land laws both at federal and regional levels recognize three types of land holdings; these are private, communal and state holdings.[13] However, customary land tenures (communal land) are severely undermined especially in the farming community because the law states that communal land can be subject to distribution as private landholding where the need arises.

Notwithstanding three regime changes (absolute monarchy, the Derg, and the present regime), and in spite of various land-based measures, agricultural productivity has fundamentally remained stagnant.[14] Moreover, given the current population which is over 100 million, demand for land is too high while land is too scarce and private holdings have become fragmented. The vast majority of rural communities depend on subsistence farming, and tenure security is a precondition for reaping the benefits of land rights.[15] Key to the effectiveness of subsistence farming is the availability of communal lands which

[8] Dessalegn, *infra* note, 14

[9] Hussein Jemma (2004), 'The Politics of Land Tenure in Ethiopia: Experience from South, Paper Prepared for XI World Congress of Rural Sociology, Norway, July 25-30; Chala Dechasa (2015), 'Environmental Management System: During Imperial, Derg and EPRDF Periods in Ethiopia: Review Paper' Vol.5, No.3 *Journal of Environment and Earth Science*, pp. 1-10.

[10] Ibid.

[11] Amartya Sen (2007), *Development as Freedom* (Oxford University Press 2001) 1-35; Thomas Pogge, *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford University) 1-45.

[12] Article 40 (3) of the FDRE Constitution.

[13] Article 2 (12,13,14) of the Federal Rural Land Administration and Use Proclamation No. 455/2005.

[14] Dessalegn Ramato (1984), *Agarian Reform in Ethiopia* (Scandinavian Institute of African Studies, Uppsala) 22.

[15] De Soto, *infra* note, 104.

are crucial for livelihood diversification in rural Ethiopia.[16] Communal land is a complementary or sole means of livelihood for the rural poor via mixed farming/ agriculture, i.e., a mix of crop with livestock farming.[17] Its advantage is more pronounced for women and the youth who are landless.

The preambles of Ethiopia's rural land laws at federal and regional state levels state the need to realize land tenure security. However, communal lands, pastoral lands and state holdings have not been identified and kept in land registry and records towards ensuring tenure security albeit recent effort towards registering communal land in the lowlands. Only private small scale holdings are registered on a massive scale at first and second registration and certification programs.[18] This article examines the communal land insecurity and its adverse impact in rural livelihood in *Hadiya* Zone, SNNPRS, so that it can give insights to the problems in Ethiopia at large.

In practice, communal lands are usually considered as '*res-nullius'*; i.e., 'ownerless lands' and this renders them susceptible to different encroachments. As revealed in this study, the act of the government and private illegal intrusions are the two major problems that are adversely affecting communal lands.

This article examines the problems affecting communal lands and it addresses the relevant questions in this regard: (i) What is the role of communal lands in securing livelihoods of the rural poor? (ii) What constitutes communal lands in the study area? (iii) What were and/are the causes of tenure insecurity of community lands? (iii) How do land law regimes treat rural communal lands? (iv) Can the government retake communal lands to the detriment of rural poor and what are the gaps? (v) What are the effects of loss of communal lands, and their interface with poverty and fundamental human rights? Empirical data have been collected from the study area through interviews and Focus Group Discussion. Court cases are also used to examine communal land encroachments.

1. The Nexus between Land Tenure and Poverty

Land tenure is the relationship among people, as individuals or groups, with respect to land.[19] According to Rose M. Musyoka & Herbert Musoga, 'land tenure refers to the mode by which land is held or owned by an individual,

[16] Muradu, *infra* note 70.
[17] Wily, *infra* note, 56, 34-45.
[18] Sosina Bezu and Stain Holden, (2014), 'Demand for Second-Stage Land Certification in Ethiopia: Evidence from Household Panel Data', *Land Use Policy* Vol. 41, 193.
[19] FAO, (2017), Corporate Document Repository, Land Tenure and Rural Development: Available at <http://www.fao.org/docrep/005/y4307e/y4307e05.htm>

group or the state and is governed by the laws, customs and practices governing those rights.'[20]

In pre-1975 Ethiopia, *rist* tenure system conferred rights in land based on descent from the founder father of the land; while the *gult* tenure system applied to lands given by the state (in lieu of salary) for those who rendered military services or any other service to the government. Moreover, land can also be owned by individuals, churches, the state and communities.[21] Before 1975, land ownership was mostly in the hands of absentee landlords, and tenants were subject to arbitrary eviction.[22] As Muradu notes:

> The pre-1975 State land tenure systems were characterized by exploitative rural tenancy, tenure insecurity and evictions of peasants and pastoralists as a result of initiation of commercial agriculture by the state and private investors especially in late 1960s and early 1970s.[23]

During the 1960's and 1970's, managing rural communal land and natural resources such as forests, wildlife and so on, were not designed with the view to securing the livelihoods of the rural poor[24] even though hunger, starvation and famine were commonplace especially among the rural poor.[25]

In the next phase of land tenure, after the fall of absolute monarchy in 1974, the *Derg* government transferred ownership of all rural land to the state and distributed the same on the basis of use rights to cultivators.[26] Furthermore, transfer of land rights was highly restricted, because transfers through sale, lease, exchange, or mortgage were prohibited and inheritance was severely

[20] Rose Mumbua Musyoka & Herbert Musoga (2015), **'**Typologies of Land Tenure and their Impact on Urban Form in Africa: The Case of Eldoret City in Kenya' (Paper Prepared For Presentation at the World Bank Conference on Land and Poverty, Washington DC, March 23-27, 2015.

[21] Bruce, *supra* note 1; Arthur Schiller (1969), 'Customary Land Tenure among the Highland Peoples of Northern Ethiopia': A Bibliographical Essay, African Law Studies (1 June 1969): 2-4.

[22] Donald Crummey (2000), 'Land and Society in Christian Kingdom of Ethiopia, From the Thirteen to the Twelfth Century' (Addis Ababa University Press,); John M. Cohen and Peter H. Koehn (1977), 'Rural Urban Land Reform in Ethiopia' No.14, Land Tenure Center University of Wisconsin-Madison, Reprinted by Permission from African Law Studies.

[23] Muradu, *supra* note 3.

[24] Challa, *supra* note 9.

[25] Ibid.

[26] Article (5) of the Rural Land Public Ownership Proclamation No. 31/1975

restricted.[27] Tenure security was further weakened and land was subject to recurrent redistribution.[28]

Derg's villagization and collectivization program exacerbated the rural poverty by detaching them from their habitual homesteads and fertile land.[29] Farmlands were usually far apart from villages and were quite inconvenient to manage.[30] The regime created acute tenure insecurity for rural farming communities and this had unique features of sustaining rural poverty.[31] Schemes such as 'food for work' launched at the eve of Derg's downfall with the support of foreign donors and intergovernmental organizations, were not fruitful.[32] There was frequent redistribution of the private holdings and steady encroachments on communal land.

After EPRDF[33] came to power in 1991, it has sustained the land policy it inherited from its predecessor. There has only been little substantive change with regard to the land rights of rural smallholder farmers, and it is still inadequate to meet the interest of the rural poor in the alleviation of rural poverty. The Constitution confirms the inalienability of landholdings and collective ownership of land by the people and the state.[34] Thus, discourse on the need for property rights in land is still underway. There is an argument that the land law regime is motivated by political power consolidation, and it has sustained massive poverty due to tenure insecurity.[35]

From the *Derg* period onward including the current legal regime, Ethiopia's land laws are built on 'egalitarian principle' and 'equity thesis' at the cost of

[27] Mengistu Abebe (2016), 'The March 1975 'Land to the Tiller Proclamation: Dream or Reality'? Vol. 2, 1 *American Research Journal of History and Culture* (ARJHC).

[28] Paul Brietzke (1976), 'Land Reform in Revolutionary Ethiopia' *Journal of Modern African Studies*, Vol. 14, No. 4. pp. 637-660.

[29] Dessalegn Rahmato (2009), *The Peasant and the State: Studies in Agrarian Change in Ethiopia 1950s`-2000s`* (Addis Ababa University Press); Muradu A. Srur (2009), 'Land Law and Policy in Ethiopia since 1991: Continuities and Changes', *Ethiopian Business Law Series*, Vol. 3 Addis Ababa University

[30] Mengistu, *supra* note 27.

[31] Dessalegn Rahmato (1993), 'Agrarian Change and Agrarian Crisis: State and Peasantry in Post-Revolution Ethiopia', *Journal of the International African Institute*, Vol. 63, No. 1, pp. 36-55.

[32] James Keeley and Ian Scoones (2000), 'Knowledge, Power and Politics: The Environmental Policy-Making Process in Ethiopia', *Journal of Modern African Studies*, Vol. 38, No. 1, pp. 9-12.

[33] Ethiopian People's Revolutionary Democratic Front

[34] Article 40 (4) of the FDRE Constitution

[35] Daniel, *supra* note 5.

efficiency.[36] Even though tenure security is a precondition for reaping benefits that accrue from communal lands, the problem in this regard has not yet been rectified.[37] Rural poverty alleviation strategies in Ethiopia lacked active public participation and pursued 'top-down approaches' thereby ending up in exacerbating poverty.[38] Yet, communal lands including pastoral lands constitute more than 61% of the total land size of the country.[39] It is also governed by customary norms of a given local people.[40] These lands are considered as '*ownerless'* by the law (de jure) or are simply subsumed under the generic domain of 'state lands'.

This goes against the responsibility of the government to revisit the legal regime with a view to reforming it, including community empowerment by acknowledging the unique features and benefits of community lands to rural livelihoods. This calls for extensive survey and registration of the size and nature of such lands in view of their positive contribution to rural livelihoods if they are legally recognized and protected.

1.1 The Rural Poor in Ethiopia and the poverty-line threshold

More than 75% of the people in poor countries are rural dwellers.[41] These people live below [UNO] poverty line.[42] Sub-Saharan Africa hosts more than half of the world's poor.[43] World Bank study (2016) shows that the international extreme poverty line standard is the threshold below income-US$1.90 per a day.[44] The global poor are predominantly rural young, poorly educated, mostly employed [under-employed] in the agricultural sector, and households with more children.[45] According to 2017 World Bank estimation, the current

[36] Tesfaye Teklu (2005), 'Land Scarcity, Tenure Change and Public Policy in the African Case of Ethiopia: Evidence on Efficacy and Unmet Demands for Land Rights': Available *at* <*www.leariningace.com,doc*> accessed on 3 July 2017.

[37] Ege Svein (2000), 'Peasant Participation in Land Reform: The *Amhara* Land Redistribution of 1997' (Norwegian University of science and Technology). Available at <*http://www.researchgate.net*> accessed on August 1, 2017.

[38] James Krueger and Others (2013), 'Environmental Permitting in Ethiopia: No Restraint On 'Unstoppable Growth?', *Haramaya Law Review*, Vol. 1:1, 73.

[39] Mohammud Abdulhai (2007), 'The Legal Status of the Communal Land Holding System in Ethiopia: The Case of Pastoral Communities', *International Journal on Minority and Group Rights*, 14, 85-125.

[40] Muradu A. Srur, *infra* note 70.

[41] The World Bank Group, 'Poverty and Shared Prosperity' (2016), International Bank for Reconstruction and Development, the World Bank Washington, DC, p. 42.

[42] Ibid

[43] Id., at 49.

[44] Id., at 51.

[45] Id., at 52.

population size of Ethiopia is over 100 million.[46] More than 83% of Ethiopia's population are rural dwellers. Over 12 million people persistently or at least periodically cannot secure livelihoods.[47]

Agricultural production is extremely vulnerable due to climate variability such as persistent lack of rainfall. One may also wonder that in the advent of '*El Nino'* and '*La Nina Catastrophes*'[48] (2015/2016 to mid-2017), the rural poor failed to secure livelihoods.[49] At the time, official declaration by the government indicated that more than 8 million people were in need of food aid. Thus, the rural poor in Ethiopia are small-scale farmers, poorly educated, and live in larger households with more children, landless youth and persons who are (on average) cultivating less than 0.5 hectares of land.[50] Acute land fragmentation and shortage of cultivable land are among the major challenges to secure livelihoods.[51] However, without the political will to change Ethiopia's land policy, poverty eradication strategies and programs are futile.

Land is a sole means of livelihoods for more than 83% of the rural poor in Ethiopia; however, it is misgoverned.[52] Land has not been efficiently utilized and it has no market value under Ethiopian law while lease auctions by municipalities prove otherwise. The poor and the poorest of the poor constitute about 37% percent and they live near or below the poverty line with daily per capita income of approximately less than 40 Ethiopian Birr.[53] Ethiopia is still a

[46] United Nations Population Forecast, on July5/2017<http://www.worldometers.info/world-population/ethiopia-population/> accessed on July 7, 2017.

[47] IFAD (International Fund for Agricultural Development), Assessment of Rural Poverty in Ethiopia: Available at: <http://www.ruralpovertyportal.org/web/guest/country/home/tags/ethiopia> accessed on September 5/2017.

[48] '*El Nino'* Catastrophe is a warming of the Tropical Pacific that may occur roughly every three to seven years and lasts for 12-18 months. The opposite of '*La Nina*' accompanied by heavy Rain and Cold Weather.

[49] IFAD, *supra* note 47

[50] Ibid

[51] Jon Anderson LRMT and Others (2006) , 'Issues in Poverty Reduction and Natural Resource Management' (USAID Washington, DC) 1-7; Belay Habtemariam (2003), 'Livestock and Livelihood Security in the Harar Highlands of Ethiopia', Implications for Research and Development, Swedish University of Agricultural Sciences (SLU).Uppsala, Sweden.

[52] Daniel, *supra* note 5.

[53] Oxford Poverty and Human Development Initiatives (2017), 'Ethiopia Country Briefing' Multidimensional Poverty Index Data Bank. OPHI, University of Oxford. Available at <*www.ophi.org.uk/multidimentional-poverty-index/mpi-country-briefings/.* > accessed on January 25 /2017 ; *see* also, World Bank, Ethiopia's Country Poverty Profile, Posted on October /2017.

least developed nation, and the poorest of the poor live in Sub-Saharan Africa.[54] Ethiopia should thus face these facts head on and revisit its land policy to secure the livelihoods of the rural poor and secure tenure, including communal land tenures.

1.2. Arguments for and against communal land rights

The *nature* of a thing is defined (by the black's law dictionary) as a fundamental quality that distinguishes something from other. It is an essence of something. According to Wily, community lands are all lands that fall under the customary governance of the community whether or not this is recognized in national law.[55] Rural communal lands are lands which rural communities possess and use collectively in accordance with community-derived norms and are areas maintained as the communal property of all community members.[56] It is *res-communis*. Lands for grazing and wildlife, forests and woodlands, mountaintops, sacred localities, lakes and streams within the community lands are usually retained purposely as collective property in which all members have use rights.[57] A right to use this *commons* exists within a community where each member has a right to use the holdings of the community.[58] A member of a community may have rights such as grazing cattle on a communal pasture and fishing activities.[59]

Although communal lands are essential to the community as a source of livelihood, there are different views regarding the nature of communal lands. According to Hardin, commons are available for many to use, however, it grants only privileges for the users and imposes neither right nor duty.[60] Moreover, in light of economic assumption, they have no proprietary rights.[61] Nevertheless, he does not deny that communal lands (commons) are means of livelihoods. But, he urged for better property rights in land, and he advocated for the abolition of communal land tenures and supported private property because there can be the risk of free riding and overexploitation of such resources as

[54] *See* the United Nations' Human Development Index (UNHDP) 2017 Report.
[55] Liz. A. Wily and others (2016), 'What National Laws say about Indigenous & Community Land Rights' Methodology document from Land Mark: The Global Platform of Indigenous and Community Lands Available at: *www.landmarkmap.org*. retrieved on March 16 /2017.
[56] Liz Alden Wily (2011), *The Tragedy of Public Lands: The Fate of the Commons under Global Commercial Pressure* (the International Land Coalition).
[57] Ibid.
[58] IFAD, *supra* note 47.
[59] Ibid.
[60] Garret Hardin (1968), 'The Tragedy of the Commons', ***Science***: *New Series*, Vol. 162.
[61] Ibid.

every member strives to maximize his/her own economic benefits from the common resource. This line of argument was further confirmed by De Soto (and evolutionary land rights mainstream economists) who preferred property rights in land rather than upholding communal land tenure.

On the other side, Broomy and Cerina argued that communal land is characterized by lands as intra and trans-generational asset. It was and is managed at different levels of social organization and may be used for hunting, grazing, fishing, transit, recreation and biodiversity conservation and so on.[62] There are also clear rights and duties in respect of the use of these resources.[63] Broomy and Cerina noted that communal lands are not open access systems or species of state or socialist property.[64]

According to Salman and Munir, communal lands are source of livelihoods for many poor households.[65] Oketh Ogendo, has objections, to Hardin's view and criticizes the denial of the proprietary nature of the rights of communities and their members in African commons during the colonial period and he also criticizes the absence of compensation during the expropriation of communal lands.[66]

Ostrom's new common pool resource theory, justifies protecting finite resources (common pool resources) such as, grazing lands, forests and irrigation waters by the concerned local people from ruin or depletion by underlining its significance for their needs and future generations.[67] According to Ostrom, private property is not the only possible way to promote safe protection of the land and attached resources.[68] Yet, there are overriding interests or individual interests[69] on communal lands which may include unwarranted encroachments.

[62] Broomy and Cerina, (1989), 'The Management of Common Property Natural Resources: Some Conceptual and Operational Fallacies', Washington DC: World Bank, Discussion Paper No. 57; C. Niyamu Musembi (2006), 'Breathing Life into Dead Theories about Property Rights: De Soto and Land Relations in Rural Africa', Working Paper (Institute of Development Studies, 1-10.

[63] Broomy, ibid.

[64] Ibid.

[65] Mohd S. Salman and Abdul Munir, *infra* note 75.

[66] Oketh Ogendo, (2002), 'The Tragic African Commons: A century of Expropriation, Suppression and Subversion' University of the Western Cape, Land Reform and Agrarian Change in South Africa an Occasional Paper Series No 24, pp. 1-17.

[67] Elinor Ostrom (1994), *Governing the Commons' The Evolution of Institutions for Collective Action* (Cambridge (University Press 1990)1-10; E. Ostrom, R. Gardner, & John. M. Walker, *Rules, Games, and Common-Pool Resources* (Ann Arbor, University of Michgan Press) 3-23.

[68] Ibid.

[69] FAO, *supra* note 48.

As Muradu notes, communal lands are complementary or sole means of livelihood for the rural poor:

> In some occasions, because of the [small size], the low quality of the private farmholdings and rainfall variability, the benefits which the rural poor obtain from commons might by far exceed those obtained from private land possessions.[70]

Tanzania recognizes up to 61 million hectares of the total land as communal property owned and used by some 10,400 discrete village communities.[71] Some States like Madagascar, Ethiopia and Nigeria attempt to protect rural commons for the benefit of the community with ineffective system.[72] In the case of Madagascar, rural commons –especially, forested lands and grasslands– are important for the 10 million cattle herders, and yet have been retained as *de facto* unused or state property.[73] In Nigeria and Ethiopia, communal lands are subject to change to private holdings or commercial purposes.

Crop farming is not yet the sole source of the livelihoods. The majority of the rural poor's livelihood depends on herding livestock.[74] Besides, these lands are sole means of livelihood for the landless rural poor. This is further, confirmed by Wily:

> Known higher dependence on commons by families without farmlands of their own or farms which are too small to provide full subsistence, it is predicted that land losses will proportionately affect very poor people the most.[75]

[70] Muradu A. Srur (2013), 'Rural Commons and the Ethiopian State Law', *Social Justice & Global Development*, University of Warwick (an Electronic Law Journal); Lasse Krantz, 'Securing Customary Land Rights in Sub-Saharan Africa Learning from New Approaches to Land Tenure Reform'(2015) Working Papers in Human Geography, p. 1.

[71] Wily, *supra* note 56; JM Lugga Kironde (2009), 'Improving Land Sector Governance in Africa: The Case of Tanzania', Paper Presented to the Workshop on Land Governance in Support of the MDGs, Responding to new challenges (The World Bank, Washington DC) 1-5.

[72] Liz A. Wily and D. Hammond, (2001), 'Land Security and the Poor in Ghana: Is there A Way forward'? (Accra,) DFID.

[73] Ibid.

[74] IFAD, *supra* note 47.

[75] Wily, *Tragedy of Public Lands*, *supra* note 56, pp 4-58; *see a*lso, Mohd S. Salman and Abdul Munir (2016), 'Common Land Resources, Livelihood And Sustaining The Rural Poor in India: A Geographical Analysis, *European Journal of Geography*, Vol.7, No. 4:6 – 18.

Thus, secure communal land tenure or access to land is vital to address rural poverty.[76] It also serves as social guarantee or insurance to secure livelihoods of the rural poor.[77]

2. The Role of Access to Land in Livelihood and Human Rights

Livelihood refers to the means of securing the necessities of life such as food, water, shelter and clothing.[78] These basic necessities such as food, potable water, health facilities, educational opportunities, housing, etc., are the main facets to assure adequate living standards.[79]According to FAO, the household's livelihood security is strongly related to living with dignity.[80] Furthermore, the issue relates to sustainable livelihood opportunities for the next generation.'[81]

Land provides nearly all the food used in the world and will continue feeding life on earth.[82] Access to land is effective in helping rural households to generate higher income and feed their family[83] and it is important for socio-economic development and poverty reduction. It also serves as a gateway for many civil and political rights.[84]

Poverty negatively impacts more on vulnerable people within a community.[85] The continuation of extreme poverty in developing countries amounts to

[76] Akand M.F Uddin and Jabin T. Haque, 'Agrarian Transition and Livelihoods of the Rural Poor: Agricultural Land Market' (Bangledish, UnnayanOnneshan,-the Innovators) 4-5.

[77] Wily, *supra* note 56.

[78] Livelihoods defined as by Oxford dictionary: Available at <https://en.oxforddictionaries.com/definition/livelihood> accessed on March 27/2017

[79] R. Chambers & GR Conway (1992), 'Sustainable Rural Livelihoods: Practical Concepts for the 21st Century' IDS Discussion Paper No. 296, Brighton, UK, Institute of Development Studies.

[80] Scoones Ians, Sustainable Rural Livelihoods Framework Analysis. Available at:<https://www.staff.ncl.ac.uk/david.harvey/AEF806/Sconnes1998.pdf>accessed on June 25/2017

[81] T.R. Frankenberger and M.K. McCaston, FAO, The Household Livelihood Security Concept (citing Chambers & Conway, *supra* note 79). Available at <www.fao.org/docrep/X0051T/X0051t05.htm> accessed on July 23/2017

[82] Lindsay, *infra* note, 114.

[83] Elisabeth Wickeri and Anil Kalhan, infra note, 109.

[84] Thomas Pogge, World Poverty And Human Rights (London Polity Press 2002) 1-15<http://www2.ohchr.org/english/issues/poverty/expert/docs/Thomas_Pogge_Summary.pdf,> accessed on May 5 2017.

[85] Denis G. Arnold (2010), 'Transnational Corporations and the Duty to Respect Basic Human Rights' *Business Ethics Quarterly* 372-398: *see also*, Arnold, D.G. & Williams, L.H.D, (2012), 'The Paradox at the Base of the Pyramid: 'Environmental Sustainability and Market-based Poverty Alleviation', International *Journal of Technology Management*, 60 (1/2) pp. 44-59.

violation of human rights.[86] Furthermore, its severe forms amount to a violation almost all socio-economic rights, and negatively affect civil and political rights through marginalization and discrimination.[87]

Accordingly, the right to livelihoods is backed by both national and international human rights declarations, Conventions and Instruments. The Universal Declaration of the Human Rights (UDHR) stipulates that 'everyone has the right to adequate living standards', and that means, both social and economic means shall be facilitated without discrimination.[88] Similar legal provisions are embodied in the International Convention on Economic, Social and Cultural Rights (ICESCR) which protects the right to adequate standard of living. Those numerous economic, social and cultural rights enshrined in the UDHR and ICESCR are intimately connected to access to land, including the rights to housing, food, health and work.[89]

In Ethiopia both UDHR and ICESCR and other human rights instruments are adopted and ratified and are thus considered as an integral part of Ethiopia's law in accordance with articles 13(1) and 9(4) of the FDRE Constitution. Ethiopia is thus duty bound to ensure adequate living standards to its citizens. It is to be noted that Article 43(1) of the Constitution expressly states the right to improved living standards and to sustainable development. To this end, Article 89(1) obliges the government to formulate policies to ensure that all Ethiopians benefit from the country's resources. The realization of these rights, *inter alia*, envisages protection against eviction[90] including non-eviction from community lands. The state may not be justified not to fulfill this objective and rather it obliges the government to work hard to address the problems that relate to livelihoods in light of the nature of human rights which are interrelated, interdependent and indivisible.

[86] Ibid.

[87] R. Haug & E. Ruan (2002), Integrating Poverty Reduction and the Right to Food in Africa: Available At: http://www.Nlh.No/Noragric/Publications/Reports/Noragricrep2b.Pdf, accessed at 3 April, 2017.

[88] UDHR, Article 25.

[89] Elisabeth Wickeri and Anil Kalhan, *infra* note, 109.

[90] Article 41 (4) of the FDRE Constitution.

3. The Legal Regime on Communal Land Rights in Ethiopia

3.1. The FDRE Constitution

Land laws and policies of various countries address land tenure issues including the protection of communal land rights of the local people. For instance, Ghana, Tanzania and Botswana, South Sudan, etc., formally recognize community land in spite of differences in the degree of effectiveness.[91] Ghana's constitution has recognized 80% of the communal land tenure system.[92]

Article 40(3) of the FDRE Constitution provides that land 'is the common property of Nations, Nationalities and Peoples of Ethiopia'. Under Article 51(5) of the FDRE Constitution, the federal government is entitled to enact laws on the utilization and conservation of land and natural resources. On the other hand, the power to administer land and natural resources is the responsibility of the regional states as per article 52(2)(d) of the same Constitution. However, the issue of communal land is not well articulated, even though it is mentioned in various provisions in a manner that does not coherently articulate communal rights and their implementation.

3.2 Federal rural land law on *res communis*

Communal lands under FDRE rural land legislation refers as rural land, which is allocated by government to local residents for common grazing, forestry and other social services.[93] Thus, customary rights are undermined and the state has an overarching role. Communal lands are subject to change to private holdings or be allocated for other commercial or non-commercial purposes as found appropriate.[94] Thus, the status of communal land is insecure even compared to private holding which is largely registered and certified. In practice, there are no communal landholdings identified and registered in the land registry. The state does not give due attention to communal land and it often considers it as *res nullius*, thereby rendering it susceptible to distribution as private landholding at the discretion of the government.

There is a new move to reform the land law in Ethiopia. The 2007 revised draft federal rural land legislation, under Article 2(4) while defining the state holdings, confirmed that communal lands could exist irrespective of government allocation. Furthermore, under Article 2(11) of the draft proclamation, recognition is to be accorded to communal land rights as it exists

[91] Wily, *supra* note 56.
[92] Ibid.
[93] Article 2(13) of the Federal Rural Land Administration and Use Proclamation, No. 456/2005.
[94] Id., Article 5(3).

in different forms. Upon approval, the draft legislation needs detailed subsidiary laws that recognize and protect communal lands.

3.3 Regional Rural Land Laws on Res Communis

There are two distinct features of communal lands according to Ethiopian land laws. It is a state grant as per the federal rural land law but community ownership is recognized *ipso facto* according to some laws of regional states. According to rural land laws of Oromia, SNNPRS, Ethiopian Somali, and Afar regional states, communal lands are recognized and homage is paid to the community norms. In these regional states, communal holdings constitute a land which is outside both state holdings and private holdings.[95] Hence, lands which are not designated under private or state holdings are communal holdings. Yet again, these lands are subject to distribution to land users and could easily be given to investors.

The rural land laws of the regional states duly recognize the use rights of communal lands. However, the practical problems relate to considering the government as owner of the communal lands, and the act of assigning communal land for any other purpose including their conversion to private holdings. This renders communal land insecure and undermines its socio-economic contribution to the rural community. As highlighted above, communal lands indeed positively contribute towards enabling mixed farming and the retention of cultural heritages of different communities.[96]

Owing to the steadily increasing population pressure that is exacerbating land fragmentation and decline in productivity, many households have failed to secure their livelihood. It is thus essential for Ethiopia to ensure communal lands rights in both agricultural and pastoral communities (for the benefit of the rural poor) towards securing livelihood and diversification of economic activities. It is to be noted that communal lands are essential, especially for the landless who engages in modest scales of cattle rearing, with due *caveats* against encroachments by its individual members to use communal land for private cultivation.

---

[95] Article 2 (3) of the Oromia National Regional State Rural Land Administration and Use Proc.No.130 /2007; Article 2(14) of the SNNPRS, Rural Land Administration and Use Proc. No.110/2007; Article 2 (17) of the Afar Regional State National Regional State Rural Land Administration and Use Proc. No 49/2009*: see also*, The Ethiopian Somali National Regional State Rural Land Administration And Use Proc. No. 128/2013.

[96] Diversified Farming, 'Define Diversified Farming at Dictionary.com': Available at: <*www.dictionary.com/browse/diversified-farming*> accessed 25 June 2017: *see also*, Liz A. Wily (2012), 'Customary Land Tenure in the Modern World Rights to Resources in Crisis: Reviewing the Fate of Customary Tenure in Africa' Brief. No, 1, 3

4. Challenges of Communal Land Registration and Certification

Land registration means 'the process whereby information on the expression of rural land use rights and holding is gathered and analyzed'.[97] To realize these tasks, various countries have land policies and laws.[98] In the 1950's and 1960's, land registration programs in Africa were designed to administer and recognize land rights and replace customary land rights by formal (state) laws.[99] At present, there are states that predominantly use laws in dealing with communal lands, while others have recognized community lands that are held under customary rules.[100] Irrespective of the routes chosen, many countries have secured communal land tenure in various forms.

Tenure security in communal land protects communities from arbitrary eviction, and it secures their use rights over communal lands. As Solomon states, tenure security "defined broadly, pertains to the assurance, confidence, or expectations" that landholders are ensured "to remain in physical possession of, and the rights to, and the fruits of their land holdings and investments by their labor excluding the state, private individuals and other entities, either in the course of use or transfer".[101]

Under insecure tenure, on the other hand, rights to land are threatened by competing claims, and can even be lost as a result of eviction.[102] Without security of tenure, households or families are considerably impaired in their ability to secure sufficient food and to enjoy sustainable livelihoods.[103] The introduction of titling (via certification for land rights) positively contributes toward tenure security if it goes beyond mere records of landholdings and parcel locations.

Formalization theorists contend that titling via certification could bring tenure security which is advocated by De Soto, Klausand others.[104] They argue

---

[97] Article 2(15) of the Federal Rural Land Law, *supra* note 95; Article 2 (17) of the SNNP Regional Rural Land Law, *supra* note 95.

[98] Liz A. Wily, *supra* note 72.

[99] Ibid

[100] Knight, *supra* note 3

[101] Solomon Fikre (2015), *the Challenges of Land Law Reform, Smallholder Agricultural Productivity and Poverty in Ethiopi*a (PhD Thesis, Warwick University, School of Law) 53.

[102] FAO, *supra* note 81.

[103] Ibid.

[104] De Soto Hernando (2000), *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books) 166-217; Jean-Philippe Plateau (1996),'The Evolutionary Theory of Land Rights as Applied to Sub-Saharan Africa: A Critical Assessment' Vol. 27 pp 29-86 Blackwell Publishers; Yigremew Adal (2002), 'Review of Landholding Systems and Policies in Ethiopia under the Different Regimes', EEA/Economic Policy Research Institute, Working paper No. 5.

that clearly defined property rights to land and the ability to draw on the state's enforcement capacity will, inter alia, reduce the risk of eviction, increase incentives for land-related investment (development).[105] Formal property rights are also the key to poverty reduction by unlocking the capital potential of assets held customarily by the poor people.[106] Yet, especially for the poor and persons in special need, formality increases the need for land owners to expend resources to stake out or defend their claims.[107]

Meanwhile, however, the role of customary rules over communal land ownership must not be undermined. Perz *et al* argue that even if formalization proceeds via titling, the task of titling by itself may not be sufficient to ensure tenure security.[108] According to Elisabeth Wickeri and Anil Kalhan '[t]enure security in land or secure usage rights in land, in the form of formal legal, customary or religious rights, can provide more predictability and secure access to fundamental rights, including to food, housing, water, and health'.[109]

Thus, the issue as to how and in whose name communal lands could be registered needs to be addressed. Ghana's experience shows that, traditional authorities are eligible for the title. Furthermore, China's current statutes enable rural agricultural lands to be collectively owned. A positive development in this regard is that various regional rural land laws in Ethiopia stipulate that landholding certificate for communal land shall be prepared in the name of the beneficiary community and be kept at *Kebele* administration office.[110] However, these laws are not effectively implemented.

5. Compensability of *Res Communis*

An owner of private property has the right to use, transfer, reap benefits and claim compensation in the event of legitimate expropriation.[111] According to Article 40(8) of the FDRE Constitution, private property is subject to

[105] De Soto, Ibid.
[106] Ibid.
[107] Klaus, *supra* note 5.
[108] Perz and Others (2014), 'Private and Communal Lands? The Ramifications of Ambiguous Resource Tenure and Regional Integration in Northern Bolivia', *International Journal of the Commons*.
[109] Wickeri Elisabeth and Kalhan Anil (2010), 'Land Rights Issues in International Human Rights Law,' *Malaysian Journal on Human Rig*hts, Vol. 4, No. 10: Drexel University Earle Mack School of Law Research Paper : Fordham Law Legal Studies Research Paper No. 1921447.
[110] *See* Article 5 (12) of the SNNP Rural Land Law; Article 15 (16) of the Oromia Rural Land Law.
[111] FDRE Constitution Article 40 sub articles (1), (7) and (8).

expropriation for public purpose. This is also embodied in other legislation.[112] Yet, what constitutes *public purpose* lacks clarity and again the situation is further complicated when the taking involves communal land.

The *public interest test* can, for example, be contested before the courts in countries like USA, UK and many other African countries. The underlying advantage of restricting wider construction of public purpose in Ethiopia is that it will ensure tenure security for individual holdings or communal holdings. Such restriction against wider construction enhances better development and discourages unwarranted intrusions by the government. It could also address the gaps that enhance conflicts in this regard.

Compensation in Ethiopia upon expropriation is nominal. Compensable rights in land only relate to improvements made on the land or buildings on the land. An evicted person can only contest the amount of compensation before the court; and cannot contest whether there is *public interest*. Land use rights (or land) *per se* are not considered as property in Ethiopia for the law confirms that it belongs to the state and the people. Tenure insecurity is graver in communal lands because such lands have no formally defined owner. This gap is mainly attributable to the legal regime (at federal and regional state levels) that are vague and confusing with regard to legal titling thereby confirming lack of defined/identified owner for the purpose of compensable interest.

As the experience of various countries such as Ghana, Tanzania and Botswana indicates, communal holdings are compensable. In Tanzania, even bare (undeveloped lands) are compensable. In Ghana, traditional authorities are entitled to exercise full ownership on the land on behalf of their communities; and hence compensation is due to the community in the event of expropriation.[113] At present, communal lands are statutorily held by groups.[114] China recognizes the rights of a collective entity[115] with regard to rural agricultural land. The law treats the collective entity as the holder of the compensable interest in land.

Recent good practices in Ethiopia involve pastoral lands, and this can be scaled up to communal lands used by non-pastoral communities. *Borena* communal land (pastoral land) has been registered and certified in the name of

---

[112] Article 2(5) of the Expropriation of Land holdings for Public Purposes and Payment of Compensation Proc. No. 455/2005.

[113] John Tiah Bugri (2013), 'Issues and Options for Improved Land Sector Governance in Ghana': Application of the Land Governance Assessment Framework', World Bank, Synthesis Report, pp. 11-23.

[114] Jonathan Mills Lindsay (2012), 'Compulsory Acquisition of Land and Compensation in Infrastructure Projects' Vol. 1, Issue 3 p.2; PPP in Infrastructure Resource Center for Contracts, Laws, and Regulation (PPPIRC).

[115] Ibid.

Abaa Dheeda, and its effect and modalities of exercising this right remains to be seen. The same effort is underway in Afar region. The certification process in *Borena* was preceded by intensive discussion among communities and government authorities.

The experience of countries such as Tanzania, Botswana and Ghana confirm that local communities can be consulted and informed when communal lands are expropriated for public purpose. On the contrary, such public participation is either nominal or unavailable in Ethiopia. Thus, the amount of compensation is not commensurate with the cost of alterative livelihood because it is only the private property on the land (without including the value of land) that is considered in the valuation of compensable property. And, in the case communal land, even such nominal compensation is not available owing to lack of individual title.

6. Communal Lands and the Concerns of the Rural Poor: Experience from *Hadiya* Zone, SNNPRS, Ethiopia

Southern Nations, Nationalities and Peoples Regional State (SNNPRS) is structured into 14 zones and four special *Woredas.* The region's economy is based on subsistence farming and mixed agriculture. In some parts of the region (e.g. pastoral communities), people's livelihoods are based on livestock herding.[116] The region is one of the most densely populated rural areas in Ethiopia and it is in the midst of ecological crisis. Farmland is too scarce and heavily overutilized. The Rainfed agriculture is vulnerable due to climate changes and degraded resources. Even when farming seasons are good, more than half of the youth in the region are either unemployed or underemployed, owing to the lack of farmland.[117] Most families in the region live on less than 0.50 US dollars per day.[118]

[116] Roots Ethiopia is a 501(c) 3 Non-Profit organization that works in Southern Ethiopia and supports locally managed projects to help the most vulnerable families and children in this Region of East Africa; available at <http://www.rootsethiopia.org/about-the-region/> accessed on July 15, 2017; *see also* , RIPPLE was a five-year research programme consortium funded by the UK's Department for International Development (DFID) between 2006 and 2011, 20 Feb 2013 <http://www.rippleethiopia.org/page/snnpr> accessed on 16 August 2017

[117] Ibid.

[118] USAID, 'Livelihoods Ethiopia Southern Nations, Nationalities and Peoples Region (SNNPR) Livelihood Zone Reports SNNPR Follow-On to Regional Livelihoods Baseline Study', Available at<http://pdf.usaid.gov/pdf_docs/Pnadj866.pdf>accessed on 25/2018.

Hadiya is one of the zonal administrations in the region. It shares boarders in the North with *Silti* and *Gurage,* in the south with *Wolayitta,* in the south east with *Kambata* and *Tambaro,* in the West with *Omo* River which separates it from *Oromia* region and the *Yem Special Woreda*. It is structured into 10 *Woreda*s and two City administrations. The current population of the zone is estimated to be over 1.6 Million.[119] The population density per square kilometer is more than 342.64.[120] The average rural household has less than 0.6 hectare of land compared to the national average of one hectare of land and an average of 0.89 for the region.[121] More specifically, the study areas focused at *Duna Woreda (Haa, Lee* and *Semen Wagabeta Kebeles*) and at *Gibe Woreda* (*Gemojja, Ollawa* and *Halilicho Kebeles*). The rural poor are leading their livelihoods by subsistence agriculture, especially mixed farming.

With respect to land tenure, tenancy had a long history, in *Hadiya*.[122] The feudal system introduced the *gebar* system with its entrenched exploitative landlord-tenant relationship in the zone.[123] The farmers were harshly exploited by *Melkegna's* (landlords) in collaboration with local land lords.[124] During this period, there was no tenure security in land rights whether it was communal or private holding. The livelihood of the inhabitants was overwhelmingly affected.

During the *Derg* regime tenure insecurity due to land redistribution continued in spite of the land reform. However, '*Land to the tiller*' gave temporary relief to the society. It was initially welcomed by the inhabitants of *Hadiya*. Nevertheless, the recurrent redistribution policy and forced resettlement programs had led to tenure insecurity. Thus abject poverty of the rural poor continued. The current EPRDF led government has opted to pursue the public ownership of land regime. There are no effective transformative rural strategies and land law reforms. In effect, the rural poor in *Hadiya zone* still lives under poverty. The land regime of all the three governments, therefore, worked for the ruling groups and the political elites as an instrument of political control or as a scheme of exploitation.

Land tenure has been and is still a contentious public policy issue in Ethiopia.[125] The politics behind land issue has the underlying assumption that

---

[119] Agago Sadoro and Others (2017), *Hadiyya Zone* Socio-Economic and Geo-Spatial Data Analysis (Hosanna, 2009/2017) 10-15.

[120] Ibid 53-70.

[121] Ibid 55.

[122] Tilahun Mishago, (2002), A*n overview of Hadiyya History from 12th to 18th Centuries* (May 2004) 15; Alebachew Kemiso and Samuel Handamo, *Hadiyya People: History and Culture* (Sefer Publishing) (Amharic version) 68-69.

[123] Tilahun, id.,14

[124] Alebachew & Samuel, *supra* note 122.

[125] Berhanu, *supra* note 1.

'*who controls land controls power*',[126] in addition to which it is the main source of all economic pursuits and source of livelihoods. Land is flesh and blood for *Hadiya* people.[127] Communal lands, in particular, are of substantial use for more than 75% of the rural poor and the landless. The youth and families with many children are overwhelmingly dependent on communal land. It complements crop farms or can be sole means of livelihood for the landless.[128]

According to respondents in this study, incursion on community lands entails loss of livelihoods. The long-standing practice among *Hadiya* population is that community lands serve as 'alternative' medium to secure livelihoods. Smallholder farmers in *Hadiya* Zone are still engaged in livestock farming and, they reserve plots from small scale farmlands, often uncultivated (*baadulliuulla)* to fodder (for their cattle). The fodder from community land is thus indispensable owing to the land shortage.

According to some respondents, *Hadiya* population has special attachment to their cattle. It is traditionally believed that the spirit of traditional gods (*waa'a*) dwells in the cattle. Besides, it is source of wealth and social status. The tradition is still practised and is known as *garad* or *abgaz,* or *woganaa* in local parlance. This, traditional belief is expressed by *tibimma* practice, i.e., counting 100 (hundred cattle) and *kummimma* practice which means counting more than 1000 (thousand cattle).[129] These titles enable title holders to serve in *gas seera*, i.e., a traditional administrative power in customary institutions of the people.[130] Even though enhanced numbers of cattle for the purpose of social status is impractical under the current realities, these institutions have positive functions in resolving conflicts and in dealing with offences ranging from petty to grave criminal cases (such as homicide) by using customary ritual and compensation known as *xiigguula*. This institution also resolves land disputes such as trespass, boundary issues or other claims in land rights.[131] Hence, communal land is a key to livestock rearing and subsistence farming to secure and enhance livelihoods and societal cohesion.[132]

[126] Hussein, *supra* note 9.
[127] Interview with persons who have the traditional count of more than 100 Cattles on April 21/2017 at *Lee Wagabeta Kebele.*
[128] Ibid.
[129] Ibid.
[130] ErgogeTesfaye (2016), 'The Ancestral History and Traditional Administrative Structure of *Hadiyya* Society: an Ethnic Group in Ethiopia' *Historical Research Letter*, ISSN 2224-3178 (Paper) Vol. 32, p.1.
[131] Alebachew *supra* note 122.
[132] IFAD *supra* note 53.

7. Res Communis: Hanging in the Balance

Communal lands in *Hadiya* are governed by community norms. No state law has come up with creating new and robust rights over communal lands. The available commons are only for common use unlike Wily's definition of community land which includes individual farm lands. *Hadiya* people consider it as inherited from their forefathers. And, they believe that those communal lands are source of all livelihoods, especially for the rural poor.[133] Empirical evidence shows that perceived tenure security problems in Ethiopia relate to fear of land redistribution and expropriation.[134] In the context of communal lands, government encroachment (highlighted below in Sections 7.1 to 7.4) and private intrusions (Sections 7.5) constitute major challenges.

7.1 Res communis allocated for 'investment'

In Ethiopia, allocation of agricultural land to foreign or domestic investors is an agenda in development plans.[135] The promised benefits of investment promotion are, *inter alia*: economic development, technology transfer, job creation to locals thereby reducing joblessness, enhanced food security and export earnings.[136] Based on these promises of benefits, allocation of land for investment is a common practice in both urban and rural areas. The investment sectors in rural areas have mostly failed to meet their promises, and are on the contrary endangering small scale farming, mixed agriculture, forestry and livestock farming.

The land selection criterion for investment is usually arbitrary because the most favorite criterion is '*ownerless land'*, which in Ethiopia is unduly equated with land with no defined claimant.[137] Communal land is by default eligible to be allocated for investment. This parameter is problematic because it easily subjects communal lands to investment without the need to consider issues of compensation. Communal lands located particularity at *Halillicho, Gamojja, Ollawwa* and *Lee* and *Semen Wagabeta Kebeles* were subject to such hostile takeover. Although, the measure amounted to eviction, no compensation issues were entertained owing to the absence of community landholding title and the subsequent difficulty to prove compensable interest.

---

[133] Focus Group Discussion, held at *Lee-Wagabeta Kebele* in the presence of 11 Persons on 20 April 2017

[134] Daniel, *infra* note 153

[135] Dessalegn Rahmato (2011), 'Land To Investors: Large-Scale Land Transfers In Ethiopia', Forum For Social Studies, Addis Ababa, Ethiopia; Daniel Behailu (2015) 'Large-Scale Land Acquisitions in Ethiopia- Towards Attracting Foreign Direct Investment', *JLAEA*, Vol. 3 Issue 1.

[136] Dessalegn, Ibid.

[137] Ibid.

According to the Focus Group Discussion[138], communal lands are 'common heritage' and are used by the community in common and jointly. As a result, everyone has the right to enjoy benefits from communal lands albeit lack of recognition from the state law. The local authorities have taken a position that undermines rights over communal lands and they consider traditional cattle rearing as imprudently huge and unproductive. They consider the legacy as obsolete, and they believe that it should be replaced by modern cattle rearing system.[139] It is, however, to be noted that, such projects should be inclusive which can be conducted without evicting members of the local communities.

There are no other alternatives that are availed to communities as communal lands are taken. A greater part of the lands allocated to investors remains undeveloped. For example, more than ten investment projects were cancelled due to failure to develop the land as per the investment agreement.[140] Thus, the hostile takeover does not facilitate Ethiopia's rural poverty alleviation strategies and improve livelihoods of the rural poor.

A case that involves foreign direct investment (FDI) illustrates hostile takeovers of communal lands. In *Giba Green Helmute Fruits and Vegetables Farming* vs *some members of Ollawa Kebele Community*, (Gibe Woreda First Instance, Court File No. 03029/2005), communal lands were given for investment to produce fruits and vegetables. The local community protested against the investment project, and it was eventually violent. This has opened a *Pandora* box which can entail social crisis. The investment was destroyed by the community. Other similar incidents are quite common in SNNPRS as it is true in other parts of Ethiopia. The issue of tenure security including the recognition and protection of communal lands thus deserves due attention.

In terms of benefits that accrue from investments, there should have been agricultural technology transfer, job creation and positive contribution in the livelihood of the rural poor. On the contrary, what usually transpires is loss of communal and privately-held land and the eviction of smallholder farmers thereby worsening the livelihood of the rural poor. During interview with key informants, it was confirmed that an individual can annually earn an average of ETB 7,000 to 30,000 from the sale of cattle and dairy products by merely breeding cattle on communal lands. They confirmed that the income enhances rural livelihood.

[138] FGD, *supra* note 133.
[139] Interview with an Expert at *Hadiyya Zone* of the office of Investment.
[140] Ibid.

According to Dessalegn Rahmato, it is easy for the government to allocate community lands for investment by using austere clause like ownerless test.[141] Unless due care is taken against taking the lands of the rural poor, it may end up in sustaining poverty.[142] Karol Boudreaux observes:

> When land tenure is secure, land can be a cornerstone for economic growth and an incentive for investment, but when land rights are insecure, this can lead to conflicts, instability and the exclusion of vulnerable groups, such as women, indigenous people and the poor.[143]

The facts gathered from vulnerable groups via interview and which is confirmed during Focus Group Discussion reveals that the rural poor, especially women, the elderly and the disabled were the most disadvantaged. They claimed that they are robbed of their communal grazing lands.

In another case, at *Semen Wagebetta Kebele*, located at *Duna Woreda*, a local investor appropriated 68 hectares of communal land for agricultural farming. However, more than 16,000 households were using this land for livestock grazing and mixed farming. The public resented and protested against such measure. Even if there was public consultation to persuade the community, the investment could not be operational. [144]

7.2 Encroachment on *res communis* and sale

The *Haa–wagebetta* and *Lee-Waggebetta Kebeles* are two of the 30 rural grass-root level administration units in *Duna Woreda*, which are endowed with rich community lands. It was claimed that communal lands in these neighbouring *Kebeles* constituted more than 4,700 hectares before three decades. The local people use these lands for the purpose of agricultural diversification. Nowadays, it has been continuously shrinking. However, over 2,600 households live in the locality and above 16,000 individuals depend on subsistence farming through mixed agriculture.[145] Owing to rapid population growth and the unavailability of land to the rural youth and the landless, communal land is very crucial.[146]

However, more than 45 hectares of the communal lands were given as a *Kebele's* contribution for the 'Grand Ethiopian Renaissance Dam' construction since 2017. The land was sold *via* informal land deals by officials to raise fund for developmental projects including the GERD. The *de facto* informal land transactions and the sale of community lands are rampant and such transactions

---

[141] Dessalegn, *supra* note 135.
[142] Daniel, *supra* note 135.
[143] Karol Boudreaux, USAID, 'What is Land Tenure?' available September, 18 2017 <https://www.land-links.org/what-is-land-tenure/> accessed on 6 July 2017.
[144] *Hadiyya* Zone Investment Unit is re-structured into *Hadiyya* Zone Office of Investment.
[145] Interview held with *Kebele* Administrators at *Lewgabeta and Haa Wagebeta Kebeles*.
[146] Ibid.

at times involve corrupt practices.[147] This act also contravenes Article 40(3) of the FDRE Constitution which forbids the sale of land or other means of exchange. Based on the reading of this provision in conjunction with Article 1678(b) of the Civil Code, contract of sale with unlawful object is *of no effect*. The transaction is thus void from its very outset, and the land can be taken back.

7. 3 The impact of urbanization and rural small-scale enterprises on communal lands

At different times, over 52 hectares of land have been allocated to farmers evicted from peri-urban areas due to urban expansion. Moreover, at *Semen Wagebetta Kebele*, over 70 hectares of the communal lands were taken to establish a new urban center. Both local residents and others had access to land in the new urban center. However, persons with disabilities, the youth and the rural poor were unable to pay lease price. Moreover, the new urban center does not fulfill the minimum threshold of urban structure, and no compensation was paid to the community whose land was taken.

One of the development and poverty alleviation strategies in rural Ethiopia (including SNNPRS) encourages the formation of rural small-scale enterprises or cooperatives that can be engaged in activities such as mixed agriculture, environmental rehabilitation and livestock farming.[148] The eligible persons to access and use the enterprises are the landless youth (aged 15-34), farmers who possesses less than 0.25 hectares of cultivable land and unemployed persons.[149] These small enterprises or associations are given communal lands. Such allocation of land has continued even though the objectives of these enterprises are hampered by different factors such as lack of adequate credit, facilities, knowledge and skills.[150]

More than 75 hectares of community lands in *Hadiya* Zone are occupied by small-scale enterprises. The enclosed land for the enterprises are not efficiently developed, and members of the enterprises merely cut down and sell grass from the lands, contrary to the rationale stated to justify the takeover of community lands. There are also instances that involve renting out these lands, and even worse, there are plots that are sold to individuals through informal deals in collaboration with *Kebele* officials. According to respondents, the youth and

[147] FGD, *supra* note 133.

[148] SNNPRS, Rural Youth Job Opportunity and Development Package Manual (in Amharic 2009); SNNPRS, Rural Job Opportunity and Development Agency Establishment Regulation No. 105/2013; *see also,* SNNPRS Revised Executives Organs Re-establishment Proclamation No.131/2015.

[149] Ibid.

[150] Interview held with Small Scale Enterprises and Cooperatives.

local poor are protesting against new allocations because of the former allocated lands have not been utilized based on the objectives they were meant to serve. The program that merely targets at haphazardly taking communal lands in the guise of small-scale enterprises should thus be revisited because genuine and value adding economic pursuits need shades with modest size and not community lands.

7.4 Public institutions and community land

The majority of public institutions are established on community lands. More often, evicted smallholder farmers (due to expropriation) are relocated to community lands. Such encroachments by public institutions are indeed widespread. In an interview held with a public official in charge of land administration and use core business process, the response was as follows:

> Communal lands are under public domain or state ownership. The local government has no financial capacity to compensate in case private holdings are expropriated. Hence, communal lands under the *Woreda's* jurisdiction are subject to allocation for any development project and as replacement of expropriated private holdings.[151]

After such intrusions, the size of new holdings usually increases continuously if it is adjacent to community land that has no defined owner. Often than not, the encroachment is done with the collaboration of corrupt local officials.

7.5 Private Intrusions on communal lands

Both federal and regional rural land laws in Ethiopia recognize private, state and communal rural holdings.[152] Smallholder farmers have the right to use land in their possession, and illegal appropriation for personal use or trespass to lands under state or community holdings is prohibited. However, private appropriation or illegal intrusion on communal lands for personal benefit is rampant. According to the respondents in this study, more than 85 hectares of community lands are appropriated by private intruders, within this past two decades. The respondents revealed that *Kebele* officials facilitate such intrusion (often for money) and legalize (formalize) the occupation later on.[153] Hence, private intruders, public officials and persons who conspire with them should have been rendered liable under criminal law. However, law enforcement is weak in the *Hadiya* Zone (as in the nation at large) thereby encouraging encroachment throughout Ethiopia.

---

[151] Interview with expert from Rural Land Administration and Use Core Business Process, 23 April 2017.

[152] The Federal Rural Land Law, Article 2, Sub-articles (13, 14 and 15): *see also* SNNPRS rural land law, Article 2 sub articles (13,14 and 15).

[153] FGD, *supra* note 133.

Conclusions

The conception of communal land varies under the federal and regional laws. Communal holdings are lands which are neither state nor private holding. These lands may be government creation/entitlements based on the federal rural land law, regional laws, or they may be considered as communal lands by the custom of a given community. In Ethiopia, the land regime has been exploitative during the periods of absolute monarchy, and it has been often used as instrument of control since 1975. Both federal and regional rural land laws uphold government ownership of land, and communal land is subject to different sorts of encroachments. Therefore, Ethiopian rural land laws do not sufficiently recognize communal holdings and these lands cannot be used for the ultimate benefit of residents in rural communities. This is contrary to the experience in various African countries such as Tanzania, Botswana and Ghana.

Most of the rural poor in Ethiopia are smallholder farmers, and landlessness of the youth is becoming a serious problem. The daily income of the dwellers in the study area is less than USD 0.50. Hence, there is a strong nexus between communal lands and livelihood security for the rural poor in *Hadiya* Zone. Tenure security of communal land enables the rural poor to practice agricultural diversification such as livestock rearing. Mixed farming is indeed a way of life and cattle rearing or keeping small ruminants is a source of livelihood for the landless or rural poor.

In spite of these benefits of communal lands, encroachments on community lands are common as a result of government intrusions and illegal private appropriations. Government intrusions include appropriation to development projects and land allocation for different purposes. In case of private illegal appropriation, corruption facilitates the intrusions. As a result, tenure insecurity of communal lands adversely affects the livelihoods of the rural poor thereby eroding social security the economic welfare of the rural poor.

Land laws that subsume communal lands into the state-owned domain should be reexamined, in addition to which the definition of public purpose should be clearly restricted in such a manner that it shall not be abused in the guise of allocating land to ‘investments’ in economic activities. To this end, the local community should be given legal personality (as an entity) as in the case of other countries highlighted in the preceding sections. This facilitates the respect and fulfillment of the human rights of the rural poor in accordance with Ethiopia’s obligations under its domestic laws and the international conventions it has ratified.

Moreover any decision that affects communal lands should involve the full and free consent of the people in the community. Communal lands should not be regarded as *res nullius*, and any allocation of land for various purposes should

be based on empirical studies and impact assessment including its impact on the rural poor's livelihood. Such caution and prudence should apply to all forms of community land conversions including the relocation of community lands as a result of urban expansion. Decisions that relate to community lands should also consider and protect the spiritual and social aspect of communal lands. Actors in land transactions should be accountable. Void transactions like sale contracts of communal lands for development projects and other social affairs should be *of no effect*. Such measures towards nurturing and entrenching accountability can indeed start with the return of misappropriated communal lands to their legitimate holders. ■