



Analysis of the Standard Material Transfer Agreement under the FAO International Treaty and the Access Contract of Andean Community Decision 391

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Acronyms

Access and Benefit Sharing	ABS
Andean Community	CAN
Convention on Biological Diversity	CBD
Decision 391 on a Common Regime on Access to Genetic Resources	Decision 391
Intellectual Property Rights	IP or IPR
International Plant Genetic Resources Institute (now Biodiversity International)	IPGRI
International Treaty on Plant Genetic Resources for Food and Agriculture	FAO IT (or IT)
International Union for the Protection of New Varieties of Plants	UPOV
National Environmental Council	CONAM
National Institute of Natural Resources	INRENA
National Agricultural Research Institute	INIA
Plant Breeders' Rights	PBR
United Nations Food and Agriculture Organization	FAO
Standard Material Transfer Agreement	SMTA

Introduction

This study is an attempt to clarify the complex relationship between Access Contracts in Andean Community Decision 391 on a Common Regime on Access to Genetic Resources¹ and the Standard Material Transfer Agreement (SMTA) of the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (FAO IT).²

The investigation provides with specific background analysis of access and benefit sharing (ABS) policy and legal developments, especially with regard to both this regional and international instrument.

The adoption of the Convention on Biological Diversity (CBD) in 1992 is a important landmark in the debates concerning control and determination of rights over genetic resources. The CBD is certainly much more, incorporating a new vision on conservation and sustainable use of biodiversity as a whole. But as its salient feature, the CBD signals a new period in which countries have agreed to invoke their sovereignty over natural resources and, as a result, have affirmed their right to regulate the conditions under which genetic resources may be accessed and utilized.

In order to materialize these rights, many countries and regions have started policy and regulatory processes, to establish access to genetic resources and benefit sharing conditions and obligations. With the enactment of Executive Order 247 of the Philippines in 1995, followed immediately by the Andean Community Decision 391 in 1996, these regulatory processes have multiplied worldwide.^{3 4} In most of them, bilateral negotiations and contracts are the preferred option and tool which these legal frameworks are utilizing to determine ABS conditions and obligations.

At the international level, policy and legal developments in ABS have also taken place. Most noticeably, the Bonn Guidelines on Access to Genetic Resources and Benefit Sharing (2002) and the FAO International Treaty in particular, are a reflection of these advances. The FAO IT and its multilateral approach to ABS is, in practice, a special access regime which is informed and guided by CDB fairness and equity principles. Furthermore, it also includes a standardized, adherence, model contract, where ABS conditions and obligations have been *a priori* agreed upon by countries (see point 1 below for details).

These developments seem logical, especially from the perspective of countries which are rich in biodiversity and have traditionally acted as providers and suppliers of biological materials and samples. For centuries, these countries have freely provided a wealth of genetic resources and biological materials which have served developed nations to improve and add value to a wide range of products in the area of medicines, cosmetics, dyes, foodstuffs, agro-industry, biotechnology, among others.⁵

This new policy and legal scenario, with a series of laws and legal instruments in place, is not free from difficulties, in terms of the actual implementation of these laws. Some difficulties include, for example, the widespread distribution of genetic resources, their informational nature,⁶ limited institutional capacities in countries to apply and enforce access laws, the status of *ex situ* collections of genetic resources outside national jurisdictions, to name a few.

This study firstly addresses the scope and coverage of the Standard Material Transfer Agreement (SMTA), the final product of intense negotiations within the FAO International Treaty. Secondly, the investigation analyzes the main features of the Access to Genetic Resources Contract (Access Contract) in Andean Community Decision 391.⁷ Both these are critical components of the existing ABS

¹ Decision 391 was adopted on July 2, 1996. It entered into force on July 16, 1996. Decision 391 is a binding, sub-regional norm for Andean Community (CAN) Member States (Bolivia, Colombia, Ecuador and Peru-Venezuela recently withdrew). The Andean Community operates more or less similarly to the European Union and its institutional structure. For the complete text of Decision 391 see: <http://www.comunidadandina.org>

² The International Treaty was adopted by the FAO Conference (31st Session), on November 3, 2001. It entered into force on June 29, 2004.

³ Even though Executive Order 247 was enacted a few weeks earlier than Decision 391, the actual policy and legal process to develop an ABS norm to respond to CBD, started earlier in the Andean Community in mid 1993.

⁴ Considerable documentation and literature has been produced over the years regarding the CBD, including analysis and reflections on access and benefit sharing processes (ABS) and implementation efforts. A recommended comprehensive text is: Carrizosa, Santiago; Brush, Stephen; Wright, Brian; McGuire, Patrick. *Assessing Biodiversity and Sharing the Benefits: Lessons from Implementing the Convention on Biological Diversity*. IUCN Environmental Policy and Law Paper No. 54. Gland, Switzerland, United Kingdom, BMZ Germany and University of California, Davis, 2004.

⁵ This is a very simple description of the "North-South debate" which includes many other issues, such as interdependency in the case of genetic resources for food and agriculture, location of *ex situ* conservation facilities and status of their collections, intellectual property rights over biological innovations, protection of indigenous peoples traditional knowledge, etc. However, it does help to describe a general perception by southern countries of their role as net providers of genetic resources throughout history. See: Pistorious, Robin. *Scientists, plants and politics. The history of the plant genetic resources movement*. IPGRI, Rome, 1997.

⁶ For further analysis of the issue of genetic resources as information and its implications, see: Pastor, Santiago y Ruiz, Manuel. *El Desarrollo de un Régimen Internacional de Acceso y Distribución de Beneficios Equitativo y Eficiente en el Contexto de Nuevos Desarrollos Tecnológicos*. Iniciativa de Prevención de la Biopiratería. Documentos de Investigación. Año III, No. 9, mayo 2008, Lima, Peru.

⁷ Both Decision 391 and the FAO IT are part of the Andean region ABS regime currently in force.

regime in the Andean Community. It finally includes a comparative analysis of both these instruments.

The main hypothesis of this investigation is that in the Andean Community there is a need to harmonize two different and potentially conflicting legal approaches to ABS - Decision 391 and the FAO IT. These instruments address similar subject matter and have similar scope and coverage: genetic resources. Support to this harmonization process will be possible by identifying the conflicts between these instruments and providing with founded legal interpretations which ensure mutual supportiveness and positive synergies between them.⁸

1. Background to the International Treaty, Decision 391 and the Multilateral System

The FAO International Treaty. The origins of the FAO IT can be traced back to the adoption of the International Undertaking on Plant Genetic Resources.^{9 10} The International Undertaking became an important international milestone regarding conservation efforts over plant genetic resources. It was also the first international agreement to directly address the problem of control and determination of rights over genetic resources – in this case, plant genetic resources.

However, it can also be argued that the International Union for the Protection of New Varieties of Plants (UPOV) was in fact, the first instrument to address and internationally regulate issues related to the control of and rights over genetic

resources (mainly improved seeds and plant varieties). It did this through granting of intellectual property rights. The UPOV Convention did not determine the legal *status* of genetic resources *per se* or their *status* in regards to the sovereign right of States over their natural resources in general.¹¹

In any case, the International Undertaking legitimized the universally accepted notion at the time that plant genetic resources (and almost by extension *all* genetic resources) were part of the patrimony and common heritage of mankind, a common good for all. Article 1 of the Undertaking states that: “*plant genetic resources are a heritage of mankind and consequently, should be available without restriction*”. Thus, plant genetic resources pertain to mankind in general and no one in particular and, therefore, in theory, everyone has the right to access these resources without restrictions.

During this period, an interpretative resolution complementing the Undertaking also recognized that the notion of “common heritage” sanctioning free access, was not incompatible with Plant Breeders’ Rights (PBR) for new plant varieties – essentially a legally sanctioned form of privatization and limited monopoly.¹² This decision was also related to another resolution were Farmers Rights were recognized for the first time.¹³

As a result, a situation arose where free availability of genetic resources was sanctioned on one hand, but so was the possibility of appropriation or privatization through PBR – the latter in the case of seeds and plants subjected to improvement under the conditions proposed by the UPOV Convention. Furthermore, this same Resolution recognized that free access did not imply access *free of charge*. Nevertheless, the restrictions which the State could impose should be only those necessary to conform with its

⁸ It is worth to note that of the current four members of the Andean Community, Peru has ratified the Treaty. Ecuador acceded to it in 2004. Colombia signed in 2002 and is in the process of its ratification. Venezuela has also ratified the IT, but retired from the Community in 2006. However, Venezuela is still bound to some of its provisions for a transitory period of five years, according to the Andean Community legal framework (Cartagena Agreement of 1969 – articles 72 - 80). Specifically it is bound until 2011 to the Program of Liberalisation of the Cartagena Agreement, under which the flow and transit of genetic resources regulated by Decision 391 could be considered. It could be argued that Decision 391 is still, at least in theory, valid and in force in Venezuela until 2011. Venezuela has however, indicated that Decision 391 is not under the scope of the Program of Liberalisation. It should be noted that although only Peru and Venezuela are strictly bound by the IT, international doctrine determines that if a country has signed or acceded to an international convention (for example Colombia or Ecuador), it should, at the very least, not take or adopt national actions or measures which run against the convention. Bolivia is only just starting to analyze the implications of the FAOIT.

⁹ The International Undertaking was adopted by Resolution 8/83 of the 1983 FAO Conference. It is a non-binding international instrument.

¹⁰ A recent and analytical contribution to the history and background of the policy/normative debate of the International Treaty can be found in: Andersen, Regime. *Governing Agrobiodiversity. International Regimes, Plant Genetics and Developing Countries*. Aldershot, UK: Ashgate, 2008 (forthcoming, July).

¹¹ The UPOV Convention was originally adopted in Paris, on December 2, 1961. It has been subsequently modified (UPOV Act of 1972, 1978 and 1991). These modifications have basically strengthened the rights of breeders and, in contrast, limited the exemptions for research and farmers. The UPOV Convention grants exclusive rights of production, sale, import, export, etc. to breeders who develop new plant varieties which are distinctive, homogeneous and stable.

¹² Resolution 4/89 (Annex I), Agreed Interpretation of the International Undertaking.

¹³ According to Resolution 5/89 (Annex II) on Farmers Rights. These are defined as “... *rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in centres of origin/diversity. These rights are vested in the International Community, as trustee for present and future generations of farmers, for ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the International Undertaking ...*”.

national and international obligations.¹⁴ Finally, another decision by the FAO Conference, recognized that the concept of the “heritage of mankind” was subject to the sovereign right of States over their plant genetic resources.¹⁵

In 1992, the Convention on Biological Diversity (CBD) became the first binding international agreement to expressly distance itself from the “mankind heritage” and “free access” paradigms, and develop a new approach regarding the control of genetic resources. This new and explicit approach meant that States have rights over their genetic resources and, in the exercise of their sovereignty, the faculty to regulate access to and use of them.¹⁶

CBD negotiators were fully aware of and striving to overcome some of the complex policy and legal issues regarding the situation of the International Undertaking, International Agricultural Research Centers (IARCs) and their collections and, in particular, *ex situ* collections of plant genetic resources for food and agriculture collected prior to the entry into force of the CBD. As a result, the Final Act of the Nairobi Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity, in Resolution 3,¹⁷ included a reference to the interrelation between the CBD and promotion of sustainable agriculture. Resolution 3 recognized the need to find a solution to the issue of genetic resources held in *ex situ* collections acquired before the CBD entered into force, as well as to the issue of Farmers’ Rights. Finally, during the 27th Session of the FAO Conference in 1993, countries agreed to harmonize the International Undertaking with the new CBD rules and principles on access and benefit sharing.¹⁸

It is clear that with the CBD, a more intense, explicit and vocal concern regarding the legal *status* of genetic resources begins to emerge, particularly in relation to resources maintained in *ex situ* collections (including International Centres) and outside of the jurisdiction of biodiversity rich centers of origin and diversification.¹⁹

As for discussions on Farmers’ Rights, these were reframed during the Keystone Dialogues 1988 – 1991, after they had been raised in various prior FAO meetings since 1986. The entry into force of the CBD and its references to knowledge, innovations and practices of indigenous and local communities or “traditional knowledge” in short, also supported further debates on Farmers Rights in the FAO realm.²⁰

The strengthening of intellectual property rights (via the TRIPS Agreement) also become a catalyst for increased interest in the legal implications of assigning rights over genetic resources and the legal and practical consequences on farmers and communities and TK in general. Ultimately, Farmers Rights were negotiated as part of the FAO IT because of the balance required to enable a Multilateral System on ABS to be adopted and requirements set out in Resolution 3 (see above).²¹

From this moment onwards, and for almost a decade, the FAO Commission on Genetic Resources for Food and Agriculture started complex harmonization negotiations, which ended with the elaboration and adoption of the International Treaty.

The FAO IT is a binding international instrument which seeks to promote conservation and sustainable use of plant genetic resources for food and agriculture. Equally importantly, it regulates and further elaborates article 15 of the CBD (on access to genetic resources) and creates a Multilateral System for Access and Benefit Sharing, which in essence, is a regime to facilitate access to plant genetic resources included in the

¹⁴ Resolution 4/89 (Annex I): “1. A state may impose only such minimum restrictions on the free exchange of materials covered by article 2.1 (a) of the International Undertaking as are necessary for it to conform to its national and international obligations (...). 5(a). The term «free access» does not mean free of charge”.

¹⁵ Resolution 3/91 (Annex III). “The Conference, recognizing that a) the concept of mankind’s heritage, as applied in the International Undertaking on Plant Genetic Resources, is subject to the sovereignty of states over their plant genetic resources (...)”.

¹⁶ Article 15 of the CBD establishes that “Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation”. In a certain way, the CBD recognizes a right and faculty the State always had, but in relation to the specific issue of genetic resources, had not explicitly been invoked or expressed before 1991 (FAO Resolution 3/91). The CBD was adopted in Nairobi on May 22, 1992 and signed in Rio de Janeiro on June 5, 1992, as part of the United Nations Conference on Environment and Development.

¹⁷ The Act was also adopted with the CBD in Nairobi on May 22, 1992.

¹⁸ Resolution 7/93 of the FAO Conference.

¹⁹ Although maybe not an explicit, initial concern among negotiators of the CBD, as soon as national and regional efforts were commenced to develop ABS policies and laws, it became clear that many megadiverse countries were indeed very worried about biodiversity components that had historically accumulated in the worlds most important biological collections, outside of their jurisdiction and ultimate control. For an analysis of the discussion regarding *ex situ* centres in the Andean region, see: Caillaux, Jorge, Tobin, Brendan, Ruiz, Manuel. *El Régimen Andino de Acceso a los Recursos Genéticos. Lecciones y Experiencias*. SPDA, WRI, Lima, 1999. The conclusions of this paper are applicable to many other regions.

²⁰ For more information on the historical background of policy discussions on Farmers’ Rights, see: Andersen, Regine. *The Farmers Right Project – Background Study No.1: The History of Farmers Rights: A Guide to Central Documents and Literature*. FNI Report 8/2005, Lysaker, FNI, 2005, 50 p.

²¹ E-mail communication with Regine Andersen, FNI (April, 2008).

list under Annex 1, which includes 35 plant species and 29 forages.²²

The Treaty also establishes mechanisms for a fair and equitable distribution of benefits derived from these resources.²³

The Multilateral System on ABS under the International Treaty. The Multilateral System on ABS (which extends *only* to Annex 1 crops)²⁴ responds to the very specific features of plant genetic resources for food and agriculture. Most importantly, interdependence among countries in agriculture and food security. These two variables demand that resources are available and flow unimpaired to support conservation, breeding and research. The Multilateral System was established to guarantee a continuous flow of plant genetic resources for food and agriculture, which are especially important and critical for conservation, research and breeding.

The Multilateral System responds, nearly by opposition, to classic access regimes where direct bilateral negotiations prevail between providers and recipients. Access laws and regulations in the Andean Community, the African Union, Costa Rica, Panama, Brazil, India, Nepal, Vietnam and many other countries, all rely heavily on bilateral negotiations and contracts as the key instrument to link the State with applicants and ensure benefit sharing, on a case by case basis. These access contracts often generate high transaction costs, given the need to negotiate individual, bilateral agreements and benefit sharing over each genetic resource or sets of genetic resources.

In contrast, the Multilateral System and its Standardized Material Transfer Agreement (SMTA), seeks to facilitate access and materialize benefit sharing in terms of monetary benefits, capacity building, transfer of technology and exchange of information to all those parties and institutions participating in the system. Benefits are shared collectively by all and are not tied to a specific transfer of materials or a specific SMTA.²⁵

²⁶ At the heart of the IT, is the recognition that non-monetary benefits are to be facilitated and

shared through the Multilateral System via a mechanism which is yet to be defined and will not only benefit SMTA parties, but all those part of the Multilateral System. There is a form of intermediation of the benefits through the System and not a direct or immediate assignment as a result of specific contractual obligations between the provider and original recipient.

The SMTA is a standardized contract approved by the Governing Body of the IT which determines the rights and obligations users and providers of materials in the Multilateral System are tied to.²⁷

Ultimately, the Multilateral System seeks to make ABS equity, fairness and justice principles in the CBD, operational at a very practical level, whilst also guaranteeing continued exchange of plant genetic resources for food and agriculture.

Andean Community Decision 391. The background of Decision 391 lies in Andean, sub-regional debates in relation to the development of a common regime for the protection of the rights of breeders of new plant varieties. Discussions regarding the relationship between intellectual property and access to genetic resources, started to receive wider attention as a result of the negotiation of Decision 345 on a Common Regime on the Protection of Rights of Breeders of New Plant Varieties.²⁸

Prior to 1993, protection through intellectual property over life forms in general, was not available in the Andean sub-region. There was no legislation in force pertaining to biotechnology inventions nor rules governing the protection of plant varieties. Decision 345 changed this situation and opened a new era for the legal protection of life forms through classic intellectual property instruments.²⁹

During the process for Decision 345, which was moving parallel to the adoption and entry into force of the CBD, questions were raised regarding

²² Latin America and the Andean Region are centres of origin and diversification for important Annex 1 crops, including sweet potato (*Ipomoea*), yucca (*Manihot*), beans (*Phaseolus*), potato (*Solanum*), maize (*Zea*).

²³ For details on the policy background of international processes related to genetic resources (including the CBD and FAO – to the pre-stage of the International Treaty), see: Pistorious, 1997, *Ibid.* at 5

²⁴ Annex 1 is a list of crops and forages which are especially important for food and agriculture worldwide. As mentioned, they include a group of 35 food crops and 29 forages.

²⁵ For a detailed account of the FAO IT and the Multilateral System see: Cooper, David. *The International Treaty on Plant Genetic Resources*. In: RECIEL 11(1) 2002.

²⁶ In regards to the fair and equitable sharing of benefits, it is worth to note that in the case of economic/monetary benefits, these are specifically agreed upon when celebrating

a SMTA. In the case of non-economic/monetary benefits (exchange of information; access to and transfer of technology; and capacity-building), the SMTA encourages the recipient to share these benefits through the Multilateral System. How this will materialize in practice, will be decided by the Governing Body.

²⁷ The SMTA was approved by the Governing Body through Resolution 1/2006, of June 2006.

²⁸ An important actor during this sub-regional process was the Executive Secretariat of the International Union for the Protection of New Varieties of Plants (UPOV), which actively participated in debates. The 1978 and 1991 Acts of UPOV served as input for and provided content to Decision 345. For details regarding the history of the process for the development of Decision 391, see: Caillaux, Ruiz, Tobin. *Ibid.* at 19

²⁹ Andean Community Decision 345 on a Common Regime on the Protection of Rights of Breeders of New Plant Varieties was approved on July 21st 1993. Decision 345 was the direct result of intense lobbying by the flower export industry in Colombia and to a lesser extent in Ecuador, which also demanded legal protection for its flower varieties.

how, where and by whom, materials used in the improvement of varieties were accessed and obtained. Andean experts and officials considered that if protection was granted to breeders, similar or equivalent protection should ensure that genetic resources from the region were appropriately accessed from *in situ* and *ex situ* conditions and used according to new CBD principles and rules.

As a result, Decision 345 included a Third Transitory Provision establishing that: “*Member Countries shall, before December 31, 1994, approve common provisions governing access to biogenetic resources and guaranteeing the biosecurity of the sub-region, pursuant to the provisions of the Convention on Biodiversity adopted in Rio de Janeiro on June 5, 1992*”. This became the enabling provision which led countries in the Andean Community to develop Decision 391 on ABS.

It is important to highlight that during Decision 345 negotiations, various countries were already ratifying the CBD and focusing their attention on article 15 regarding access to genetic resources.³⁰

To initiate the process to develop a sub-regional ABS regime, in 1993 the Andean Community General Secretary, (then the Secretariat of the Cartagena Agreement or Andean Pact) and the World Conservation Union Environmental Law Centre (ELC IUCN), joined efforts to undertake a project and elaborate a regional norm regarding ABS and, therefore, comply with the mandate of the Third Transitory Provision in Decision 345.

Soon after, an ABS policy and regulatory process (the first of its kind in the world) was initiated. This included a non-governmental phase with participation of different experts and stakeholders of different countries and representing a wide range of institutions. Two regional workshops were held during this phase in Lima, Peru and Villa de Leyva, Colombia. Subsequently, an official, governmental phase took place. It consisted of six meetings of Andean Community government experts/representatives. The process ended in July 1996, when Decision 391 on a Common Regime on Access to Genetic resources was finally approved.³¹

2. Basic content of the Standard Material Transfer Agreement (SMTA)

The common element which links together the International Treaty and Decision 391, is that both have adopted contractual tools to define conditions regarding access to and use of genetic resources. The contracts differ considerably among themselves, but represent, at a basic level, a common approach in which the State expresses its sovereign rights over its resources.

³⁰ Ecuador and Peru ratified the CBD in 1993, and Bolivia, Colombia and Venezuela in 1994.

³¹ Caillaux, Ruiz, Tobin. *Ibid.* at 19

A first aspect worth considering, relates the nature, form and content of the Standard Material Transfer Agreement (SMTA) in light of its substantial content.

The original idea of a short and simple contract has given way -possibly due to the complex nature of its subject matter- to a more extensive and detailed instrument than originally anticipated. Just in comparison, the original MTA used by International Agriculture Research Centers was three quarters of a page long. The SMTA is almost sixteen pages in length.

Secondly, the SMTA governs the relationship between a provider of plant genetic resources for food and agriculture specified in Annex 1 and available related information, and an applicant (article 3 of the SMTA), as well as a third party beneficiary (see below). This agreement seeks to implement the Multilateral System in the International Treaty, in order to facilitate access to plant genetic resources which are important for food and agriculture.³²

The clauses of the SMTA also cover subsequent transfers made by the recipient to a “subsequent recipient”, even in the case of resources under development (articles 6.4 and 6.5). In the case of a transfer to a new recipient, a new standard material transfer agreement should be celebrated under the terms and conditions of the original SMTA. This is in the understanding that research, conservation and development activities related to plant genetic resources, may imply a series of actors interested in different activities throughout the research process and value adding chain.

Thirdly, and one of the most important points of the SMTA, is that both parties (provider and recipient) agree that FAO on behalf of the IT Governing Body is the *third party beneficiary* under this Agreement (article 4.3 of the SMTA). The concept of «third party beneficiary» is relevant, as it is responsible for control and monitoring duties and responsibilities, verification and follow-up, in accordance to procedures and guidelines to be established by the Governing Body.³³

The third party beneficiary (FAO) has the powers to: request information from the provider, request information on existing and signed SMTA's, notify

³² To understand the justification and rationale of the Multilateral System, see: Moore, Gerald; Tymowski, Witold. *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*. IUCN Environmental Policy and Law Paper No. 57, IUCN, Gland, Cambridge, Bonn, 2005. See also: De Jong, Bram, Korthals, Michiel. *Vicissitudes of Benefit Sharing of Crop Genetic Resources: Downstream and Upstream*. In: *Developing World Bioethics*, Volume 6, No. 3, 2006, pp 144 - 157

³³ Resolution 2/2006 of the FAO IT Governing Body. It is also worth to note that the International Treaty is oriented at facilitating access and also specifies that there is no need to specifically monitor or track each resource or sample that flows within the Multilateral System (article 12.3.b).

the Governing Body of any findings, request from the provider and recipient information regarding compliance of agreed obligations and request information from the recipient on the commercialization of products derived from resources accessed and on payments made (article 4.4 of the SMTA). Furthermore, the third party beneficiary can also initiate and promote dispute settlement procedures related to rights and obligations of the provider and the recipient in accordance with the SMTA (article 8.2).

Fourthly, in regards to intellectual property, the SMTA provides on one hand, that access to plant genetic resources protected by intellectual property or other rights shall be consistent with relevant international agreements and national laws (article 5.d).³⁴ At the same time, the recipient shall not claim any intellectual property or other rights that limit facilitated access to the material provided (parts or components) in the form received from the Multilateral System (article 6.2). This may be the case of patents which impose limitations and restrictions on access and use, but not to breeders' rights where limitations and restrictions are more flexible. Generally PBR systems also incorporate exceptions for research and reuse of seeds by farmers.³⁵

However, the SMTA determines that if a recipient requests intellectual property rights on a *product*³⁶ developed from plant genetic resources or its components obtained from the Multilateral System and, for example, assigns those rights to a third party, the benefit sharing obligations of the original SMTA pass on to that third party (article 6.10). Thus, the IT does not prohibit intellectual property rights – in the case of products. This specific clause relates to the idea that original

SMTA obligations should be transferred to and “follow” subsequent recipients, even in the case of intellectual property obligations.

Fifth, the SMTA also includes clauses on the participation in the fair and equitable distribution of economic benefits generated from commercializing by-products or products which incorporate accessed plant genetic resources for food and agriculture.

In the case of products not available without restrictions for research and development purposes (for example: a product protected by a patent), the recipient shall pay a set percentage of sales to the financial mechanism established by the Governing Body.³⁷ When a product is available without restrictions and is commercialized, the recipient is invited and encouraged to make these payments voluntarily.

Lastly, and depending on the circumstances, the provider and the recipient may choose the SMTA method of acceptance. This may occur by signing the SMTA or through the use of a sealed enveloped in which case the material (plant genetic resources in Annex 1) is provided conditioned to the recipients acceptance. Finally, the SMTA may also be accepted electronically, by clicking on the corresponding check-box as evidence of acceptance of the terms and conditions of the SMTA.

The SMTA is in essence, an adhesion contract where there are no possibilities to negotiate its clauses. Providers and recipients “take it or leave it”. In perspective, this makes the Multilateral System and the SMTA “simple” rather than complex, in as much as there are no real negotiations involved and benefits are shared by all those participating in the system. Furthermore, interested actors know, *a priori*, their rights and obligations.

3. Basic content of the Andean Community Access Contract

Without discussion, over the years, contracts have become the most widely used instrument to regulate the legal relationship between different actors involved in bioprospecting or access to genetic resources activities.

Various access norms and legal proposals around the world, have incorporated conventional mechanisms (contracts, agreements and licenses) as the main generators of rights and obligations between the providers and the recipients of genetic resources. Decision 391, the FAO IT, Executive Order 247, Law 7788 in Costa Rica, the African Union Model Law are some examples of

³⁴ For a review of issues relating to intellectual property over plants and new plant varieties, see: Correa, Carlos. *Mecanismos de Protección de Propiedad Intelectual*. Document presented during the Seminar on Intellectual Property in Plant Genetic Resources which took place from October 18th to 20th 2006 in Buenos Aires, sponsored by the Centro de Estudios Interdisciplinarios de Derecho Industrial y Económico de la Universidad de Buenos Aires. Another important and classic publication which addresses in detail the relationship between intellectual property, traditional knowledge and biological diversity is: Posey, Darrell and Dutfield, Graham. *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities*. IDRC, WWF, Nordan Editorial, 1999.

³⁵ However, it is also true that the UPOV Convention (1991 Act) restricts the farmers and research exceptions and that, in general, the intellectual property system overall is being strengthened in favor of the holders of rights, therefore curtailing the possibilities of researchers to continue innovating and of society of benefiting from new inventions and products in general.

³⁶ The SMTA defines “product” as “plant genetic resources for food and agriculture that incorporate the material or any of its genetic parts or components that are ready for commercialization, excluding commodities and other products used for food, feed and processing”.

³⁷ This is 1.1% of sales less 30%. Products available without restrictions, such as products already paid for or sold as a basic product, are not included.

legal instruments which make use of these tools. Some Free Trade Agreements (FTA) promoted by the United States, also make reference to contracts as one of the possibilities to regulate legal relationships between the providers of resources and recipients. An example is the Letter of Understanding on Biodiversity which is part of the FTA between USA and Peru.

In the case of Decision 391, during its elaboration it soon became obvious that contracts would become the main instrument of the sub-regional ABS regime. Furthermore, Decision 391 incorporates various types of contracts which can be celebrated: Access Contracts, Accessory Contracts, Annex (contracts that regulate access to and use of traditional knowledge), Framework Access Contracts, Administration Contracts, Intermediation Contracts and Deposit Contracts.³⁸

To understand the rationale of the contractual system in Decision 391, it is worthwhile to consider the legal *status* of genetic resources in Andean countries. Article 6 of the Decision, "...genetic resources and their derived products, of which Member States are countries of origin, are goods or the patrimony of the Nation or State, as stipulated in their respective national legislation".³⁹ This, in turn, also derives from the CBD's recognition of State's sovereign rights over their natural resources and, therefore, their right to establish access and use conditions – including in relation to genetic resources.

In simple terms, the State (or Nation represented by the State) either has domain rights over genetic resources and derivatives thereof, or these are part of the national patrimony as established by their Constitutions or laws. As a consequence of both these situations, the State has the power to establish in legislation (and contracts), conditions regarding access to and use of genetic resources.⁴⁰

But article 6 also recognizes that such resources "...are inalienable, neither subject to prescription nor seizure or similar measures, without

detriment to the property regimes applicable to the biological resources that contain those genetic resources, the land on which they are located or the associated intangible component".

This means that parallel to the States rights over genetic resources, there may be circumstances under which *other* actors may also have and invoke rights but in relation to *biological resources* that contain the genetic resources. There may also be cases in which genetic resources are located on property, land or territories over which communities, associations or individuals have rights. Finally, there may be situations in which there is traditional knowledge associated to genetic and biological resources. This diversity of potential scenarios and overlapping or concurring rights, has given place to a contractual system with different instruments regulating different rights over genetic and biological resources.

Making a distinction between rights over genetic resources and biological resources, has influenced the development of a contractual and administrative system defined by an Access Contract regulating access to genetic resources and an Accessory Contract regulating access to *biological* resources.⁴¹

Indeed, one of the contentious areas in the interpretation of Decision 391 is the sometimes blurred distinction between what is a *biological* resources and what is a *genetic* resource. A seed for example is certainly both. A seed would be covered by Decision 391 in as much as it is the specific use (using the seed as a source of genetic information) which determines its coverage by the Decision. Seeds as a commodity for consumption, processing or even cultivation, would not be covered by Decision 391. However, opinions vary in this regard, which adds to some of the uncertainties which over the years have surrounded implementation of Decision 391.

Article 32 of Decision 391 establishes that the parties to the Access Contract are: the State (represented by the Competent National Authority) and the applicant

³⁸ For an analysis and assessment of Decision 391 and the difficulties regarding its implementation, in the light of the number of contracts included (among other factors) see: Ruiz, Manuel. *Is a new legal framework necessary for bioprospecting in the Andean region?* Policy and Environmental Law Series. SPDA, No. 14, February 2003. Lima, Peru. Available at <http://www.spda.org.pe>. Also see: Torres, Ricardo; Macías, Fernando; Chaves, Juanita. *Hacia un Régimen de Acceso a los Recursos Genéticos Eficiente y Aplicable para Colombia*. Instituto de Investigación de Recursos Biológicos Alexander von Humboldt, Bogotá, February 2004.

³⁹ Decision 391 extends its scope to derived products which include molecules, combination or mixture of molecules, raw extracts of living organisms of biological origin, derived from the metabolism of living organisms (see definition of "derived product" in article 1).

⁴⁰ Under the theory of «*eminent domain*» the State exercises, in practice, all of the faculties conferred by a property right: the right to dispose of (sell, concede, assign, transfer), claim

or use natural resources under its jurisdiction. Its sovereignty allows it to define (through the Constitution or laws) the mechanisms under which this eminent domain will be expressed (for example, through a concession, an authorization, a sale, an access contract, or other legal instruments).

⁴¹ This is both a contractual and an administrative regime. The negotiation process is undertaken within the framework of an administrative procedure led by a competent national authority. It follows formal administrative requirements, access conditions, phases, timeframes, etc. According to article 38, the access procedure is finalized when the authority emits a Resolution - once the Access Contract is concluded and signed. Andean countries in some cases have enacted implementing regulations (for example Bolivia). Others such as Peru and Ecuador, are in the process of doing so and Colombia applies Decision 391 directly with no need of a regulation – as did Venezuela until it resigned to the Andean Community.

requesting access. On the other hand, article 41 specifies that parties to the Accessory Contracts are the applicant and the owner, possessor or manager of the land where the *biological* resource containing the genetic resource is located; *ex situ* conservation centers; the owner, possessor or manager of the biological resource containing the genetic resource; or the national support institution, with regard to activities it will undertake and are not part of the Access Contract.

The Access Contract and Accessory Contracts include the specific conditions negotiated between the State and applicant, and the applicant with other actors, respectively. In relation to these access conditions, article 17 of Decision 391 identifies some of the clauses and conditions that may be incorporated in the Access Contract, the Accessory Contract or the Access Application, depending on the characteristics of the specific access project.

These conditions include:

- a) The participation of nationals in research on genetic resources and their derived products and on the associated intangible component;
- b) Supporting research in the jurisdiction of the country of origin of the genetic resource or in any Member State, that contributes to the conservation and sustainable use of biodiversity;
- c) Strengthening mechanisms for the transfer of know-how and technology, including biotechnology, that is culturally, socially and environmentally healthy and safe;
- d) Supplying of information about the background, science advances and other matters that may contribute to better understanding the situation of the genetic resource that originated in the Member State, its derived or synthesized product and its associated intangible component;
- e) Strengthening and development of the institutional capacity of the country or the sub-region in regards to genetic resources and derived products;
- f) Strengthening and development of the capacities of native, Afro-American and local communities with relation to the associated intangible component, genetic resources and their derived products;
- g) Compulsory deposit of duplicates of all material collected, in institutions designated by the Competent National Authority;
- h) The obligation to inform the Competent National Authority about the results of the research carried out; and
- i) The terms for the transfer of the material to third parties.

Resolutions 414 (Model Access Application) and 415 (Access Contract), derive from Decision 391. These are referential models which countries and interested parties may use to facilitate negotiations and access procedures in general.

The model Access Contract is much more detailed than article 17 (see above) of the Decision and includes specific elements for contractual clauses. For example, it includes references to safeguards and guarantees; references to contractual and civil liability; and suggested elements regarding the solution of controversies in case of non compliance with the applicable law; references to competent judge and choice of jurisdiction, among others.

Finally, the main point in relation to the Access Contract is that it implies a direct negotiation “face to face” between the applicant and the national competent authority.

4. Synergies or conflicts between legal regimes, the SMTA and the Access Contract

The main argument for this research is that there are considerable and substantial conflicts between the International Treaty ABS regime and that of Decision 391. Furthermore, it also suggests that there are differences and potential conflicts between the SMTA and the Access Contract. As a result, there is need for policy and legal adjustments which ensure these regimes and tools gradually become complementary among themselves and are mutually supportive at the same time.

4.1 Two regimes, one subject matter

One area of analysis involves evaluating the potential incompatibilities between the *legal regime* of Decision 391 and the IT, as this will determine the applicability of their different instruments and mechanisms – including the application of an Access Contract or the SMTA to specific circumstances. The question is, therefore, what legal rules apply in Peru (and by extension to other Andean Community States) to access and benefit sharing pertaining to plant genetic resources for food and agriculture included in Annex 1 of the International Treaty.

This in turn, relates to the relation between the IT (and the Multilateral System in particular) and Decision 391. Clearly, as Box 1 (see below) demonstrates, both cover similar subject matter, albeit the IT and the Multilateral System address a sub set of genetic resources: those for food and agriculture and under the control and administration of the State and in public domain.⁴² This involves a smaller, but critically important subgroup of resources, which are used for conservation, research and capacity building activities in the area of food and agriculture.

Box 1. Scope and coverage of the Multilateral System of the IT and Decision 391

The Multilateral System of the IT covers:	Andean Decision 391 covers:
<p>“plant genetic resources for food and agriculture” (article 3)</p> <p>“listed in Annex 1, according to criteria of food security and interdependence” (article 11.1)</p> <p>«that are under management and control of the Contracting parties and in the public domain” (article 11.2)</p> <p>and</p> <p>“plant genetic resources for food and agriculture listed in Annex 1 and held in <i>ex situ</i> collections of the International Agricultural Research Centers of the Consultative Group on International Agricultural Research (CGIAR) ...” (article 11.5)</p>	<p>“genetic resources of which Member States are countries of origin, their derived products, their intangible components and genetic resources of migratory species which for natural causes are in the territory of a Member State”. (article 3)</p> <p>Note: the definition of “access” in Decision 391 also helps understand its scope and coverage: “obtaining and utilizing genetic resources conserved in <i>ex situ</i> and <i>in situ</i> conditions, their derived products or, if it be the case, their intangible components, with a view to research, biological prospecting, conservation, industrial application or commercial use, among others”. (article 1)</p>

As a starting point, Decision 391 is not a treaty or international agreement *per se*, in terms of the definition of a “treaty” in the 1969 Convention of Vienna on the Law of Treaties. A Decision is part of a group of legal norms which some refer to as “secondary sources of law”; they are not formed by treaties nor conventions, but by norms that derive from regional or community bodies in the exercise of their competences, recognized by their founding or creation instruments.⁴³ In this particular case, Decision 391 derives from the 1969 Cartagena Accord (today the Andean Community). This Agreement is clearly a treaty in terms of the general definition proposed by the Convention of Vienna.

In terms of applicable law, the Justice Tribunal of the Andean Community - a judicial body within the organizational structure of the Andean Community⁴⁴ has reaffirmed in its jurisprudence that when conflict arises between an Andean Decision and *national* legislation, the Andean norm should prevail.⁴⁵ Decisions have a supranational feature which has been recognized by the Tribunal. In this regard, the Andean Community is not only an agreement on integration and collaboration.

Rather, it subordinates specific national interests of each country to those of the Community as a whole. As a result, countries have delegated authority to the Community in certain areas, which implies at the same time, that certain functions of the national State have been replaced.

The Tribunal has also described a special feature in regards to the prevalent nature of Andean Decisions. Andean Community countries should adopt measures to ensure that the implementation of an Andean norm takes place effectively and should avoid the adoption and use of measures that affect this implementation.⁴⁶ In this regard, it could be argued that the adoption and ratification of the International Treaty is, in practice, a measure that affects the implementation of the legal framework provided for in Decision 391. However, the FAO IT is an *international* treaty and *not* a national norm even though it may form part of the national legal system. The supra-nationality principle would not be applicable in this case.

Countries have different mechanisms to “incorporate” international agreements into national legal frameworks. In some cases, once international treaties enter into force, they are automatically incorporated into the national legal framework or system of the countries that have ratified it, without the need of a formal act by the State. From this

⁴² According to the First Report on the State of the World’s Plant Genetic Resources for Food and Agriculture, almost 90% of plant genetic resources maintained in *ex situ* collections are conserved in public institutions and collections, which the State administrates and over which it exercises its control and which, in general, are in the public domain.

⁴³ Novak, Fabián. *La Comunidad Andina y su Ordenamiento Jurídico*. En: Derecho Comunitario Andino. Pontificia Universidad Católica del Perú. Lima, Perú.

⁴⁴ The Andean Community is the main institutional framework of the Andean Integration System and is formed by the Andean Presidential Council, the Andean Council of Ministers of Foreign Affairs, the Commission of the Andean Community, the General Secretariat of the Andean Community, the Andean Tribunal of the Andean Community, the Andean Parliament, the Andean Development Corporation, Latin American Reserve Fund,

the Labor Advisory Council, the Business Advisory Council, Simón Rodríguez Agreement, Simón Bolívar Andean University and Hipólito Unanue Institute.

⁴⁵ See: Resolution of the Andean Tribunal of Justice of December 3rd 1987, published in the Official Gazette of the Andean Community No. 28 of February 15th 1988. This Resolution determines that: “the Andean integration legal framework prevails over national norms, given the essential characteristic of Community Law, as a basic pre-requisite for integration efforts”.

⁴⁶ See: Resolution of the Andean Tribunal of October 26th, 1986 and Resolutions No. 2_IP-90 y 10-IP-93.

moment onwards it has legal effects which generate obligations for those countries. In simple terms, countries become internationally responsible as a result of the treaty and liable internationally. In all cases – whatever the mechanism for “incorporation” – it will be necessary for countries do adjust and modify existing laws and regulations to comply with international obligations or adopt new laws altogether if these were required for implementation.

In the case of the relationship between Decision 391 and the International Treaty, these are two legal instruments of different nature which are incompatible with one another, in terms of their content and hierarchy in national legal structures, and with very different approaches to access in relation to similar subject matter: genetic resources, as shown in Box 2.

As a result of this situation, another possibility is to argue that Decision 391 actually *prevails* over the Treaty and its Multilateral System and should be preferred given that the Treaty is, in reality, part of national legislation. Generally, once international agreements are incorporated into national legislation, they have a similar hierarchy to national laws, but with additional international obligations.

In exceptional cases, which are recognized by some Constitutions, treaties (for example concerning Human Rights) may even prevail over national laws. In this regard, countries like Peru and Venezuela⁴⁷ who have ratified the FAO IT, would need to respond internationally for failing to comply with obligations emanated from this Treaty. If its obligations are not complied with at the national level, countries shall have to respond internationally and respond to their liability.⁴⁸

One second possibility is to consider that Decision 391 and the International Treaty are, *a priori*, compatible with one another and that none of them prevails over the other. Under this scenario, the SMTA is a *Framework Access Contract* under article 36 of Decision 391,⁴⁹ which could be applied to a certain group of genetic resources (those included in Annex 1 of the Treaty). These special access contracts were designed to facilitate access to genetic resources by institutions that are regularly accessing, using and transferring genetic resources. They are applicable to international *ex situ* conservation centers such as the International Potato Center in Peru and International Institute of Tropical Agriculture in Colombia, and even

Box 2. Tools and mechanisms for ABS in the FAO IT – Multilateral System and Decision 391

Item	FAO IT/Multilateral System	Decision 391
Instrument	SMTA	Access Contract + Accessory Contract (+ Annex if applicable)
Process	Standard, adhesion contract	Contract clauses subject to negotiation (there is a reference, model – Resolution 414)
Scope	Plant genetic resources for food and agriculture in Annex 1 in the public domain and under the control of the Parties	All genetic resources from <i>in situ</i> and <i>ex situ</i> conditions of which Member States are countries of origin
Timing	Acceptance and immediate access to resources	Application, review process, negotiation of contracts, authorization
Level of authority	Multilateral System with FAO acting as Third Party Beneficiary	Bilateral system subject to national competent ABS authorities Member States
Actors	Applicant, providing institution, third party beneficiary	National competent authority, access applicant, national support institution, indigenous communities (if it be the case)
Ex situ centers	Covered by SMTA	Framework access agreement/contract or Access Contract depending on whether they are defined as <i>research</i> centers

⁴⁷ As mentioned, Venezuela retired from the Andean Community in 2006 but still has rights and obligations related to the Program of Liberalisation of the Cartagena Agreement of 1969 and Decision 391 in particular (see footnote 8).

⁴⁸ This may be case if, for example, if a national authority in Peru decided to apply certain Decision 391 provisions to collections held in the International Potato Centre in Peru and covered by the FAO IT Multilateral System . Or if for

example, an access contract was requested by a national authority for accessing a seed held in CIP and under the Multilateral System.

⁴⁹ Article 36 of Decision 391 establishes that: “*The Competent National Authority may enter into framework access contracts with universities, research centers or well-known researchers to support the execution of several projects, as provided for in this Decision and in accordance with national legislation of each Member State*”.

national gene banks.⁵⁰ This interpretation may solve a problem for Andean countries in terms of undertaking complex and long lasting revisions or modifications to Decision 391 to harmonize it with the FAO IT, but it does present considerable conceptual and legal limitations. Most importantly, these include already existing inconsistencies in Decision 391 with regard to its rules and principles covering *ex situ* centers in general (see points above and footnotes 50 and 51).

A third possible scenario, with totally different consequences, is to discuss incompatibility, but between the International Treaty and the Cartagena Agreement of 1969 from which Decision 391 derives. The Cartagena Agreement is an international convention under the definition and parameters of the Convention of Vienna. In this regard, the International Treaty is more recent and definitely more specific than the Agreement. Applying basic principles of Public International Law in relation to conflicts between treaties and their interpretation, the FAO International Treaty will be preferred (more recent and specific), and in any case, countries will also have to respond before the Andean Community for not complying with community legislation.⁵¹

Finally, a fourth scenario may be discussed as a result of the incompatibility and conflict between the International Treaty and Decision 391. Under this scenario, it may be proposed that a *new* Decision is elaborated and approved which expressly states that genetic resources included in Annex 1 of the Treaty (present and future) are ruled by principles of the Multilateral System and the SMTA. This explicit exception to the general ABS regime of Decision 391, would guarantee a

definitive solution to some of the questions and uncertainties previously presented and, most importantly, ensure a degree of legal certainty for all potential stakeholders.

4.2 Two contractual instruments (SMTA and the Access Contract), many differences

The FAO IT Standard Material Transfer Agreement and the Andean Decision 391 Access Contract share common elements. On one hand, both types of agreements derive directly or indirectly from the CBD and are informed by its general principles. Both reflect mutually agreed terms, prior informed consent (PIC) and benefit sharing, although at different levels and in different ways, including different forms of State intervention.

It should be stressed that under the SMTA and the Multilateral System, there is really no prior informed consent involved, unless this is very broadly considered what parties to the IT expressed when they internationally agreed to develop and create a SMTA and put certain genetic resources under the Multilateral System. But PIC is a much more specific process/act which usually involves the State, providers and indigenous peoples, deciding on access to and use of their resources or traditional knowledge in a more direct and immediate manner.

The Access Contract is, of course, directly related to Decision 391 and articles 32 – 37), whilst the SMTA derives from the IT (article 12.4).⁵²

They both serve to ensure, though through different means, future fair and equitable distribution of benefits.

⁵⁰ It should be noted that this article is in conflict with article 37, which explicitly states that *ex situ* centers should negotiate access contracts with the Competent National Authority. Article 37 of Decision 391 states that: “*Ex-situ conservation centers or other institutions that undertake activities involving access to genetic resources or their derived products and, if it be the case, the associated intangible component, should enter into access contracts with the Competent National Authority, pursuant to this Decision. The Authority may likewise sign access contracts with third parties in regard to genetic resources of which the Member State is the country of origin and which have been deposited in these centers, with due consideration to the rights and interests referred to in article 34*”. Here, there is a clear intervention of the State authority (through an Access Contract), with regard to collections and materials which may need to be transferred to a third party.

⁵¹ Article 30 of the Convention of Vienna on the Law of Treaties states: “Application of successive treaties relating to the same subject-matter”.

1. *Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.*
2. *When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.*

3. *When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies to the extent that its provisions are compatible with those of the later treaty.*

4. *When the parties to the later treaty do not include all the parties to the earlier one: (a) as between two parties, each of which is a party to both treaties, the same rule applies as in paragraph 3; (b) as between a party to both treaties and a party to only one of the treaties, the treaty to which both are parties governs their mutual rights and obligations.*

5. *Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards a State or an organization under another treaty.*

⁵² For a detailed analysis of PIC and its implications in the context of ABS see: Kuei-Jung, Ni. 2008. *Legal Aspects of Prior Informed Consent on Access to Genetic Resources: An Analysis of Global and Local Implications Towards and Optimal Normative Construction*. Available at: http://works.bepress.com/kuei_jung_ni/1

Secondly, both contracts reflect the States authority in terms of its sovereign faculties to regulate access to genetic resources and explicitly determine the conditions to utilize these resources, based on two very different approaches (a multilateral negotiation and a direct agreement) and legal instruments.

Thirdly, and most obviously, both the Access Contract and the SMTA reaffirm a *contractual* approach to regulating access of genetic resources. In one case through an Access Contract, which calls for an immediate and direct bilateral negotiation between the State and the applicant. In the case of the SMTA, there is an *indirect* linkage with the State, in as much as there is an intermediation where the FAO, authorized by the Governing Body, acts in representation of the States in the provider/applicant contractual arrangement. The FAO is what the SMTA defines as a “third party beneficiary”, which seeks to safeguard all States interests in regards to plant genetic resources placed in the Multilateral System.

However, there are also considerable and important differences between the Access Contract of Decision 391 and the SMTA under the International Treaty.

First, the Access Contract allows for a direct negotiation between the competent authority and the applicant, in the case of an access project or a specific bioprospecting activity. An access applicant (for example a university or a company) will present the national ABS authority with a formal application and, subsequently, negotiate the terms and conditions of the Access Contract with that authority. Furthermore, the Access Contract undergoes a regulated administrative/bureaucratic procedure.

The SMTA on the other hand, is a standardized contract approved by the State as a Contracting Party to the FAO IT. It is not subject to negotiation but rather, to acceptance as is. In essence, it is an agreement whose effects in each case do not lead to specific benefit sharing once signed – except for an obligation to share monetary benefits which may be generated at some point of commercialization. Parties will decide how these monetary benefits are eventually used. The SMTA was approved as part of an international, intergovernmental legal/policy process and is not a “contractual” negotiation *per se*. Plus, a “third party beneficiary” (FAO) has the responsibility for monitoring whether recipients of materials from the Multilateral System comply with their commitments regarding benefit sharing.

Secondly, in the case of an Access Contract, conditions regarding the distribution of benefits are actually *negotiated* as part of an administrative process. Decision 391 establishes the steps of this procedure and some minimum

conditions, but parties are free to adjust these or incorporate new conditions according to specific circumstances. The beneficiary of the benefits is clearly identifiable and is a party to the agreement.

Under the SMTA, clauses regarding the fair and equitable distribution of benefits derived from the use of plant genetic resources covered by the Multilateral System are set *a priori*.

Furthermore, benefit sharing is a result of being a Contracting Party to the FAO IT and is not materialized as a direct result of signing the specific, individual SMTA. The beneficiary is not necessarily, a party to the actual SMTA.

If monetary benefits *are* generated, the SMTA determines that a percentage of the economic benefits produced from access to and use of genetic resources under the Multilateral System will accrue to a financial mechanism which will be established by the Governing Body.⁵³

Furthermore, the Treaty also provides that the benefits arising from access to and use of plant genetic resources under the Multilateral System will be basically channeled directly or indirectly to farmers, especially in developing countries who have conserved and maintained these resources over time. (article 13.3).

Thirdly, the rationale and content of the Access Agreement under Decision 391 is to *control* the flow or genetic resources originating in the Andean Community. Even if the objectives of Decision 391, specifically refer to conserving biodiversity, promoting benefit sharing, promoting technology transfer, valuing, genetic resources, etc., the subsequent procedural and substantive content of the regime – including the operational instrument which the Access Contract is – reveals an effort by Member States to control how resources originated in the sub-region are accessed and subsequently used.

In the case of the Multilateral System, its stated objective is to facilitate access to a set of resources and promote benefit sharing. Even if the SMTA is a relatively complex instrument, it is still an adherence contract which clearly indicates the legal options for potential interested parties. Rights and obligations “are there” to see, and thus the “take it or leave it” approach. Its hoped effect is to allow the continued and unimpaired flow of plant genetic resources, particularly important for food and agriculture under a standard set of rights and obligations.

Fourthly, both the Access Contract and Standard Material Transfer Agreement originate in different

⁵³ Payments will be made to the financial mechanism established by the Governing Body (or encouraged), according to the availability with or without restrictions of the plant genetic resources transferred (Clauses 6.7 and 6.8 of the SMTA).

legal instruments (Decision 391 and the IT respectively), but address similar subject matter: genetic resources. However, the Access Contract applies to *all* genetic resources and derived products of which Member States are countries of origin. These derived products include those which result from the metabolism of living plants, animals and microorganisms (for example, an extract, a molecule, DNA, etc.). The Access Contract ultimately, covers all plant, animal and microbial genetic resources.

The Multilateral System and consequently the SMTA, have a different coverage and only include plant genetic resources (and related non confidential, descriptive related information) which are important for food and agriculture, are under the administration and control of States and are listed in Annex 1.⁵⁴ However, the IT also refers to “component parts” of genetic resources and determines that no IP may be invoked over both genetic resources and component parts “in the form received from the Multilateral System.”

Fifth, in the case of the Access Contract, it applies to a wide range of providers which may include: individuals, *ex situ* centers, public lands (such as protected areas) and indigenous communities.

The Multilateral System and its facilitated access regime, which materializes through the SMTA, applies basically to *ex situ* centers which maintain resources which are under control and administration of the State. The SMTA does not apply necessarily to *in situ* collection of plant genetic resources for food and agriculture under Annex 1.⁵⁵

Finally, the Access Contract is submitted to and remains under the control of a national competent authority who will keep an original for future monitoring, compliance, verification, etc. In this regard, the applicant responds directly and is liable to the national authority.

⁵⁴ The reference to “control and administration” involves a legal and practical qualification. It implies the State should have a real and physical control over the resources in question. The reference to the “public domain”, basically implies that the resources should not be subject to any form of intellectual property and, therefore, to access restrictions nor should limitations on their utilization be in place. For more details see: Moore, Gerald; Tymowski, Witold. *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*. IUCN Environmental Policy and Law Paper No. 57, IUCN, Gland, Cambridge, Bonn, 2005. Also see: Correa, Carlos. *Recursos Fitogenéticos bajo la Administración y el Control de las Partes Contratantes y en el Dominio Público: ¿Cuán Rica es la Canasta del Sistema Multilateral del Tratado Internacional?* Document to be published soon by CATIE and Biodiversity International.

⁵⁵ Article 12.3. h) of the IT establishes that: “Without prejudice to other provisions under this Article, the Contracting Parties agree that access to plant genetic resources for food and agriculture found in *in situ* conditions will be provided according to national legislation or, in the absence of such legislation, in accordance with such standards as may be set by the Governing Body”.

In the case of the SMTA, the Governing Body administrates the contract through a third party beneficiary (FAO) and the responsibility of the applicant and recipient is to FAO (as the third party beneficiary, in representation of the State, through the Governing Body).

Concluding remarks and recommendations

Legal uncertainty in particular, is often a key deterring factor for the development of projects and undertaking of activities. Decision 391 has proved to have had over the years (at least based on initial information from Andean countries), a deterring effect on scientists and institutions seeking to access and undertake research and development in biodiversity and genetic resources. The underlying reasons for this vary, but it can safely be concluded that a very complex and often contradictory norm, with limited guidance from national authorities, will actually act as a disincentive for its compliance. Or as in the specific case of Decision 391 a prolonged “stand by” situation in Andean countries seeking to develop national implementing regulations, generates uncertainty among all relevant stakeholders.

The International Treaty –with its procedures and principles, the guidance of the Governing Body, the list in Annex 1 and the SMTA- will hopefully contribute to facilitate much needed access to a defined set of resources (Annex 1). Initial evidence seems to suggest that the SMTA is having a positive effect in streamlining the flows of resources around the world and generating positive responses from interested actors.⁵⁶

For Andean countries, challenges still lie ahead in effectively applying *both* the FAO IT and Decision 391, simultaneously and effectively. This research paper has, hopefully, highlighted some of the areas of potential conflicts which may arise in the near future in the implementation of these two instruments. It has also hopefully contributed to proposing some alternatives and options.

- a) A way to clarify some of the uncertainties which arise with regard to conflicts between the FAO IT and Decision 391, and consequently the application of the Access Contract or the SMTA, would be to adopt a new Andean Decision which expressly *excludes* from its scope resources in Annex 1 and covered by the Multilateral System. The request to initiate this process must originate in a public authority in an Andean country. In the case of Peru, the formal request may be made by the Ministry of the Environment, the Ministry of Foreign Affairs or the National Agricultural Research Institute (INIA).

⁵⁶ Personal conversation with Shakeel Bhatti, Secretary of the FAO IT (November, 2007).

- b) *Ex situ* centers play two roles. They act as *collectors* of genetic resources and as *providers* of these. Clearly the SMTA applies to materials which are held under the administration and control of the State in these centers and those in IARC's, when they are *transferred* from the centers to an applicant. Article 12.3. h) of the FAO IT refers to national ABS legislation applying to *in situ* collecting activities. Thus, in the case of the Andean Community, *ex situ* centers, including IARC's, are bound by Decision 391 rules and the Access Contract when acting as collectors/recipients from *in situ* sources.⁵⁷ But they are bound by the Multilateral System rules and the SMTA, when acting as providers of plant genetic resources.
- c) Researchers, institutions, public officials and farmers in Andean countries have only limitedly awareness regarding the nature of ABS regimes and of the rules and principles of the International Treaty and even Decision 391. They need to understand the complexities and new rules which relate to access, management and use of plant genetic resources under Annex 1 of the IT – and all other resources for that matter. This could be undertaken using IPGRI/ISNAR Training Module for Managers of Plant Genetic Resources and other tools already developed, and by producing and distributing explanatory manuals on ABS which summarize the often complex content of the IT and Decision 391.⁵⁸
- d) In the case of Bolivia and Ecuador there is further need for intense awareness raising among a wide range of stakeholders regarding Decision 391 and, especially, the International Treaty. Ecuador has only acceded to the Treaty and Bolivia has not signed nor acceded yet. Both these countries, in terms of plant genetic resources managers, farmers and national public officials, require information regarding the advantages and potential of the International Treaty to support their conservation and sustainable use efforts in regards to plant genetic resources for food and agriculture. Furthermore, with a very important and influential indigenous and farming population, Farmers Rights may be a positive element of discussion for approaching the FAO IT in general and incorporating it into national agendas.
- e) Discussing and finding alternatives to solve some of the issues raised in the research paper is especially important for Colombia and Peru which host the International Center for Tropical Agriculture (CIAT) and the International Potato Centre (CIP), respectively. Regional meetings with relevant officials and actors, sponsored by these centers and organizations such as Bioversity International and the International Treaty Secretariat, may be a good way to streamline debates and identify the best options to promote the IT.
- f) Compliance with and enforcement of the Standard Material Transfer Agreement and Access Contracts are two important issues for countries of origin in particular, which have also been discussed by the Government Body at its Second Meeting. Especially in the context of the ongoing negotiation of an International Regime on ABS, there is a need to explore how best to ensure that SMTA and access to genetic contracts in general, are effectively complied and legal recourse is available for interested parties, particularly in the case of countries of origin and those providing genetic resources. *Bona fide* relationships among providers and users of genetic resources should be the guiding principle for all contractual partnerships. However, at some point there is need to undertake a verification of compliance of these contractual terms. Whether this occurs randomly or on a regular basis; upon request from the “third party beneficiary” or a third party to an agreement altogether; based on specific reporting requirements or other means, is an operational issue which should also be discussed.⁵⁹

⁵⁷ This situation is still problematic for plant genetic resources which are important for food and agriculture and are in *in situ* conditions. It has already been mentioned that Decision 391 is a complex norm in terms of its procedures and contractual instruments it has developed. This may have an important bearing on *in situ* collecting and the continued flow of new materials to *ex situ* centers.

⁵⁸ See for example: Ruiz, Manuel. 2008. *Guía Explicativa de la Decisión 391 y una Propuesta Alternativa para Regular el Acceso a los Recursos Genéticos en la Región Andina*. GTZ, SPDA, Lima, Perú.

⁵⁹ Some suggestions and ideas in regards to enforcement and compliance in the context of ABS frameworks may be found in: Lapeña, Isabel and Ruiz, Manuel. *A Moving Target: Tracking and Monitoring the Flows of Genetic Resources*. IUCN Environmental Law Centre, SPDA, BMZ, March 2008.

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- CAN Decision 391 on a Common Regime on Access to Genetic Resources (<http://www.comunidadandina.org>).
- Resolution 2/2006 of the FAO IT Governing Body (<http://www.planttreaty.org>)
- FAO International Treaty on Plant Genetic Resources for Food and Agriculture (<http://www.planttreaty.org>).

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