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# **The Inefficiency of the Andean Decision on access to Genetic Resources and Benefit Sharing**

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## **Abstract**

The Convention on Biological Diversity recognized in its 2<sup>nd</sup> article the States sovereign right to exploit their resources. Four years later the countries members of the Andean Community (Bolivia, Colombia, Ecuador, Peru and Venezuela) adopted 391 Decision. This Decision establishes that genetic resources are the patrimony of the nation or the State of each country member. The decision confused sovereignty with property and established a very complex regime of access to genetic resources and benefit sharing. Ten years after its adoption only one access contract has been subscribed in Colombia.

Therefore 391 Decision on access to genetic resources is innocuous wordiness, badly conceived and ineffective. It is so confusing that many people interested in the materials of American tropic biological diversity have decided to appropriate it by undercover operations or by employing legal ruses. The only thing real is that looting of our natural patrimony continues.

## **The Andean Decision**

The difference between gene and genetic resource is the monetary value that can be given to the first one. Unfortunately the concern of some countries, like ours, to reach greater economic income for the population, leads to consider that the development is simply economic growth. In Colombia the most used indicator is the increase of the gross internal product – GIP. The indices of quality of life are almost never used. In this way the genetic resources are more important than the genes, the faunistic resources than the wild fauna, the floristic resources than the flora and the biological resources than the living beings.

Some signs are invading the world of the nature...

<p style="text-align: center;">NATURE € CON\$ERVATION RE£IES ON MON€Y</p>
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People all around the world regardless of their nationality, have over the last centuries have taken their countries, plants and animals to be domesticated, reproduced, genetically modified or simply commercialized. The countries of origin did not have the knowledge of this looting. The Convention on Biological Diversity endeavored to modify this by proclaiming that each country has sovereign rights over its biological resources and that their use generates the obligation to a share of the benefits.

The Andean Community was created in the 1960s. Nowadays it comprises five of the six countries that share the mountain range of the Andes: Venezuela, Colombia, Bolivia, Ecuador and Peru. Chile was excluded in the seventies and Venezuela has showed its intention to withdraw. The Andean Community adopted the legal mechanism by which the decisions that were adopted modified the internal legislation of the country members. In with this background that the 391 Decision on the subject of common regime for genetic resources in 1996 was established

Colombia is a country of high biological diversity. This is because it shares part of the flora and the fauna of Central America, the Caribbean region and the Amazon and the Pacific basins. Because of this location, together with the local ecological conditions, its geologic past and its relatively recent human presence,

Colombia has 10 per cent of the planet's biota with less of 1 per cent of the land territory. But to share this biota leads to low endemism. Specialists have considered being 5 per cent of the total.

Sharing biota with countries that have a different legal regime for genetic resources access makes people prefer the countries with less strict regimes for their commercial businesses. In other words, if regions that have common native flora and fauna have different legal regimes, there is no way to defend themselves in commercial negotiations.

On the other hand, the regime that was established by the 391 Andean Decision has been so complex and difficult that in Colombia, after ten years from its establishment one single access contract has been subscribed. Recently the body of the national government charged with supporting the projects of scientific research had to stop executing all projects that involved access to genetic resources because it knows beforehand that too much time for its approval will pass. But the nonexistence of contracts for access to genetic resources mean that access in our country or our region is not being done?. By all means no. In my opinion, the access to genetic resources in the Andean community takes the form of looting, as in the past, before the adoption of the Convention on Biological Diversity.

The Convention on Biological Diversity established that the countries have the sovereign right to their own natural resources and 391 Decision of the Andean Community repeated this disposition and established that the States have property rights to the genetic resources. Sovereignty and property are very different concepts, but sovereignty does not imply property. A botanical garden could be the owner of a specific biological resource but supposedly the State is the owner of the genetic resources of that biological resource, and only it can negotiate them. In Colombia the right to private property is respected but in this case the State expropriated the owners of the biological resources.

The 391 Andean Decision additionally resolved that genetic resources are a property that cannot be transferred. In these terms only a transitory use of a gene is allowed. It is evident that it is possible to establish different legal regimes for the biological resources and the genetic resources. We lawyers have the tendency to make this class of distinctions, because there is no real knowledge dialogue with the scientific world. The lawyers and the biologists must walk hand-in-hand if we really want to save our natural patrimony.