

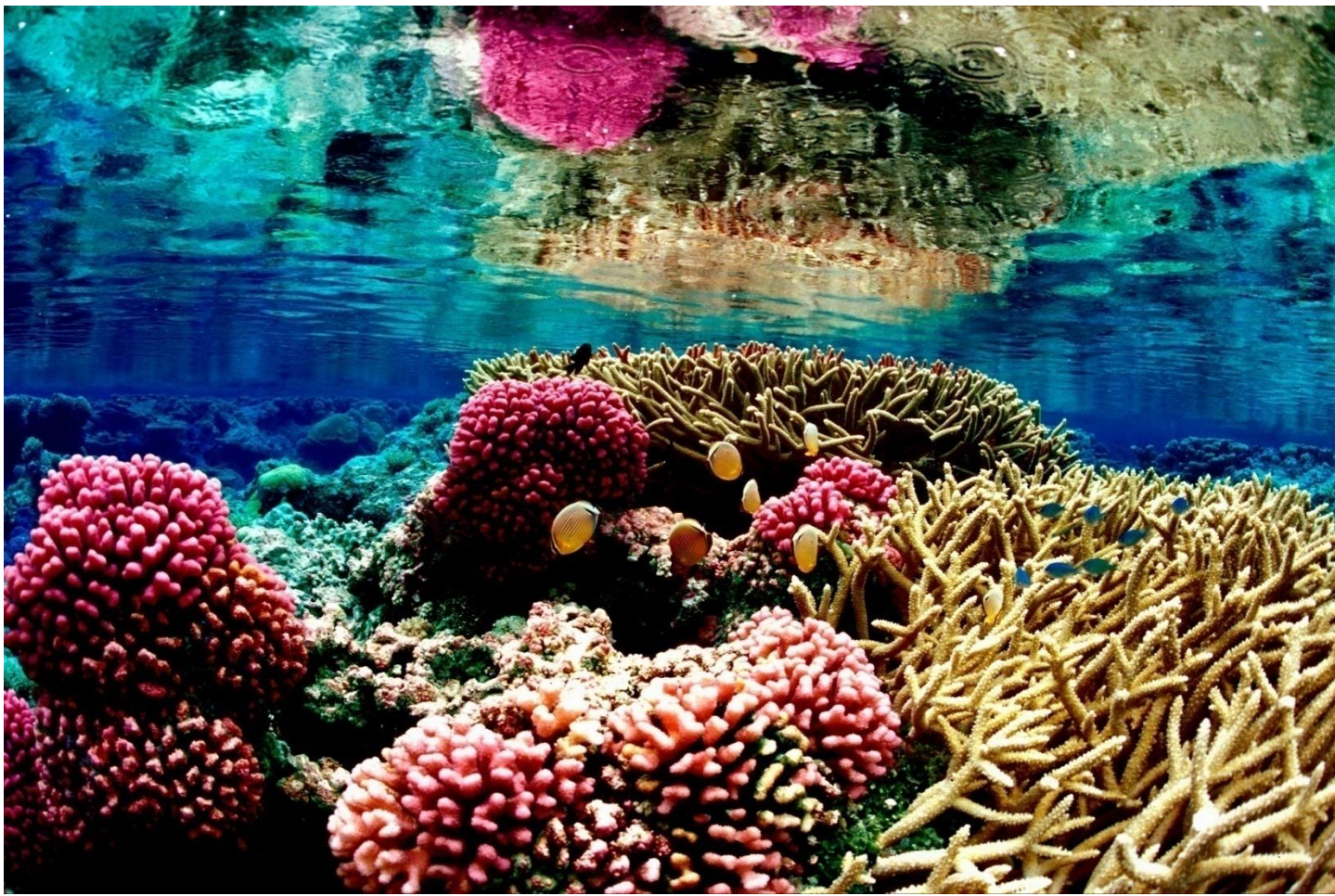
**DIRECT TREATY IMPLEMENTATION IN NATIONAL LEGAL SYSTEMS:
IMPLICATIONS FOR OPERATIONALIZATION OF THE MLS OF THE
INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD
AND AGRICULTURE**

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² This paper has been adapted and updated from a broader document prepared by the author for Biodiversity International on the implementation of the *International Treaty on Plant Genetic Resources for Food and Agriculture* and the role of national legislation. Content is the sole responsibility of the author.



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ACRONYMS

ABS:	Access and benefit-sharing
BL :	Biodiversity Laws
BS:	Benefit sharing
CBD:	Convention on Biological Diversity
COP:	Conference of the Parties of the CBD
GB:	Governing Body of the ITPGRFA
GR:	Genetic resources
ILC:	Indigenous and local communities
IPR:	Intellectual property rights
ITPGRFA or IT:	International Treaty on Plant Genetic Resources for Food and Agriculture
MAT:	Mutually agreed terms
MLS:	Multilateral System on Plant Genetic Resources for Food and Agriculture
MTA :	Material Transfer Agreement
NCA:	National Competent Authority
NFP :	National Focal Point
NP :	Nagoya Protocol on Access and Benefit-Sharing
PIC :	Prior informed consent
PGRFA:	Plant Genetic Resources for Food and Agriculture
SMTA:	Standardized Material Transfer Agreement
TK:	Traditional Knowledge

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I. INTRODUCTION.

Few countries have developed specific legal measures and procedures targeted to the implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture (IT) Multilateral System on Access and Benefit Sharing (MLS). It seems that the access and benefit sharing component of the Treaty has been put into effect through an “evolving (informal, unwritten) agreement regarding the requirements or issues that countries need to address as part of their implementation of the multilateral system”.³ It has been also suggested that this unwritten understanding or agreement is based on a common sense read of the IT text and on the practical experiences and knowledge that countries have developed and generated over the years after the IT came into force.⁴

However, an additional explanation for this common trend can be found on the thesis of the direct implementation of self-executing provisions of international conventions specially in the case of those countries that follow a monist system for the incorporation of international law. This paper will explore this idea.

A right understanding on how international law – in particular IT – is incorporated in the national or domestic legal systems could support countries in the implementation of the IT MLs. This may require also an assessment of the components or elements of the IT which could be conceptualized as self-executing- in accordance to the legal doctrine and jurisprudence- and of the legal effects of the international obligations on the preexisting (and sometimes conflicting) national legal measures (e.g. ABS legislations which is not fully compatible with the IT and no legal space or exceptions are directly provided in the text of those measures).

This paper has been structured as follows:

- a) A general overview of the two different legal systems for the incorporation of international law in national or domestic orders (monist and dualist regimes). A deeper insight of the monist systems is also introduced as well as a brief description of the some state practice⁵ in this matter.
- b) An analysis of IT MLs most relevant aspects of the IT in the light of the doctrine and jurisprudence on the self-executing provisions in international law. Introductory remarks on the implications of the CBD/NP regimes for the IT implementation is presented with the purpose to clarify the legal space provided by the NP (which should be respected by any ABS laws designed and implemented following the NP text). In this regard several issues have been identified as relevant for the direct implementation analysis such as: a) the assessment and determination of genetic resources included automatically in the MLS and the responsible authority for signing the SMTA; b) the case of the voluntary inclusions; c) the Non Annex I crops hypothesis; d) and finally,

³ Halewood, Michael, et al, *Implementing "mutually supportive" access and benefit sharing mechanisms under the Plant Treaty, the Convention on Biological Diversity and the Nagoya Protocol*, Bioversity, Rome, 2014.

⁴ Halewood, et al, op cit.

⁵ Unfortunately there is not always appropriate and accurate information (legal decisions and written studies) on this issue, specially for some developing countries which are Contracting Parties of the IT.

the existence of prior and conflicting (e.g. no space is textually provided for the MLS) legislation on ABS.

- c) Finally, some conclusions and recommendations are highlighted.

II. OVERVIEW OF THE IMPLEMENTATION OF INTERNATIONAL TREATIES IN MONIST AND DUALISTIC NATIONAL LEGAL SYSTEMS

This section begins with a brief description and analysis of the legal theories surrounding the relationship between Domestic (national) and International law (monism and dualism), especially focusing on when and how international treaties are incorporated into domestic legal systems and on the effects arising from the duty of the States to comply with these international obligations.

A) Monism and Dualism.

The relationship between domestic and international law has been an issue usually described as a clash between dualism and monism.⁶

Dualist doctrine, as exposed by Triepel in 1899⁷, considers domestic law and international law entirely distinct in nature.⁸ National law regulates within the state, the relations of its citizens with each other and with the Executive; and the latter addresses the relations between sovereign states.⁹ In essence, they come from different sources; regulate different relations and address distinct subject matters.¹⁰

Monism as exposed by Kelsen¹¹, states that this theory is scientifically established if international and domestic law are part of the same system of norms. In accordance to professor Starke for Kelsen "...two normative systems with binding force in the same field must form part of the same order".¹²

Nevertheless, there is not a single, agreed definition of these concepts. However, several particular features can be highlighted to properly distinguished these systems¹³:

- a) **The relationship between international and domestic law:** Where dualism, as mentioned above, considers that international and domestic law are different as legal systems because they both regulate a different subject matter.¹⁴ Monism instead, upholds that both systems are part of the same 'macro' system of norms.¹⁵
- b) **The description of different types of domestic legal systems:** According to this approach, dualist states are those where Constitutions do not confer any special status

⁶ Brownlie, Ian. *Principles of Public International Law*. Oxford University Press, 7th Edition. Oxford, England, 2008.

⁷ See his classic work: *Völkerrecht und Landesrecht*, 1899.

⁸ Starke J.G, 'Monism and Dualism in International Law'. Yearbook of International Law. 17 Brit. Y.B. Int'l L. 66 1936

⁹ Brownlie, Ian op cit

¹⁰ Salmon, Elizabeth, *La obligación de implementar en el marco del derecho internacional contemporáneo*.2007 Available at: - <http://international.vlex.com/vid/oacute-implementar-marco-aacute-neo-76225086>.

¹¹ See his classic work: *General Theory of Law and State*, 1945.

¹² Starke, op. Cit.

¹³ Sloss, David, 'Domestic Application of Treaties'.2011 Available at:

-<http://digitalcommons.law.scu.edu/facpubs/635->.

¹⁴ Brownlie, op. Cit

¹⁵ Sloss, op. Cit.

to treaties; which means that the rights and obligations created by them will not have effects in the domestic law unless the corresponding legislation is in force to give them effect¹⁶. Monist states on the contrary, maintain that a treaty may become part of the domestic law without any legislation, needing only to be concluded in accordance with the Constitution and entered into force internationally¹⁷.

In the words of Professor Sloss:

*“...a country has a ‘monist’ legal system if international treaty provisions are automatically converted into domestic law without the need for implementing legislation. In contrast, a country has a ‘dualist’ legal system if its law requires implementing legislation to convert international treaty obligations into domestic law”.*¹⁸

The key distinction is that whereas in a monist state a treaty can become part of the domestic legal system, without any legislation for its implementation (by self-execution); it cannot become integral part of the domestic legal system in a dualist state without the enacting of a statute created specially to incorporate the treaty in the national legal order.

Professor Sloss effectively points out that distinction:

*“Dualist states are states in which no treaties have the status of law in the domestic legal system; all treaties require implementing legislation to have domestic legal force. Monist states are states in which some treaties have the status of law in the domestic legal system, even in the absence of implementing legislation”.*¹⁹

Now, this direct incorporation into a domestic legal system depends also of the treaty in question. There are treaties that do not require legislative implementation, others instead do require it to be able to function properly in the domestic legal system.

This clarification on both types of state’s *modus operandi* is helpful to reinforce the distinction between the systems and to draw some definitive characteristics of these systems:

- a) Monist and dualist legal systems may accept that some international law, e.g. *jus cogens*, is automatically binding without the state’s consent.²⁰
- b) Domestic legal systems may consider themselves monists for one source of international law (e.g. custom) and dualists for another (e.g. treaty law).²¹
- c) A court in a dualist state might give direct effect to international law during litigation involving transnational issues, using choice of law principles, because the other relevant legal system is a monist state.²²

¹⁶ Aust, Anthony. *Modern Treaty Law and Practice*. CUP, Cambridge, 2007.

¹⁷ Sloss, David, op. Cit.

¹⁸ Sloss, David, . ‘Non-Self-Executing Treaties: Exposing a Constitutional Fallacy’. Available at: 2002, - <http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1281&context=facpubs>-. Page: 9.

¹⁹ Sloss, (2011), op. Cit

²⁰ Shelton, Dinah, *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*. Oxford University Press. Oxford, England, 2011.

²¹ Shelton, Dinah, op. Cit.

²² Shelton, Dinah op. Cit.

- d) A state with a dualist approach to treaty incorporation may automatically apply adjustments or decisions of treaty bodies that further define the obligations set out in the treaty, as if they were monist (e.g. the amendments to a treaty of which a dualist state is already part of, the state can elect to simply apply them without further legislation).²³
- e) Monist states recognize the possibility that courts apply treaty provisions directly as domestic law; dualist states permit only indirect judicial application.^{24, 25}

As Professor Dinah Shelton points out, it's actually very rare to find a system that is entirely monist or entirely dualist.²⁶ Professor von Bogdandy goes even further as to state that "...monism and dualism should cease to exist as doctrinal and theoretical notions for discussing the relationship between international law and internal law".²⁷

B) Monist legal systems: a deeper insight into the effects of the direct implementation of treaties.

As stated in the last section, all monist legal systems have in common the fact that at least some (not necessarily all) treaties are incorporated into the domestic legal order without the need of legislative implementation.

Common features of the monist system are:

- a) **The Automatic Incorporation of Treaties:** In monist countries in principle treaties are incorporated into domestic law automatically when the state has become a party. This is especially common when the treaties concern human rights and the status of minorities (e.g. Serbia, Venezuela, Greece, Bulgaria; among others).²⁸
- b) **Publication Requirements:** In some monist countries treaties only acquire domestic legal force when the executive branch publishes the treaty domestically, even if it already has entered into force internationally (e.g. France, Chile, Japan, Egypt, Russia; among others).²⁹
- c) **The Hierarchical Rank of treaties:** Some monist countries consider treaties equivalent to statutes, which make them rank lower than the Constitution (e.g. Egypt, Austria, Germany, the U.S; among others); in others, at least some treaties rank higher than statutes but lower than the Constitution (e.g. France, Japan, Mexico, Poland, China; among others); of particular interest is South Africa, where treaties rank lower

²³ Shelton, Dinah op. Cit

²⁴ Sloss, David (2011), op. Cit.

²⁵ See Anderson, Michael and Galizzzi, *International Environmental Law in National Courts*, 2002; Ramlogan, R., *Sustainable Development: Towards a Judicial Interpretation*, Leiden: Martinus Nijhoff 2011.

²⁶ Shelton, Dinah, op. Cit

²⁷ Von Bogdandy Armin, *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law*, 2008 Available at: - http://law.huji.ac.il/upload/reading_bogdandy.pdf.

²⁸ Shelton, Dinah, op. Cit

²⁹ Sloss, David, (2011), op. Cit

than statutes; and the Netherlands, where some treaties rank higher than the Constitution.³⁰

- d) **Additional Legislation:** In some cases, monist states can enact legislation to ensure or facilitate that courts and executive officers implement the treaty.³¹ An example of this is the Netherlands, which usually converts treaties into national legislation to support the insertion of international law.³²
- e) **Direct application by National Courts:** All monist states permit judicial application of treaty provisions directly as law at least in some cases (dualist countries only permit indirect application of treaties).³³
- f) **'Self-executing and non-self-executing treaties'**³⁴: This distinction is utilized by domestic courts in the process of discerning and determining whether or not to enforce a treaty provision invoked by one party in the course of a dispute.³⁵ Specifically the courts can decide if a provision can be applied automatically (e.g. once the treaty has been published within the domestic law) or if it cannot be enforced prior to the enactment of legislation to become part of a domestic legal system.³⁶

The qualification of a treaty provision of "self-executing" is of paramount importance. In a monist legal system a treaty that is 'self-executive' if does not require need any kind of legislation to be implemented within the domestic legal system.

The theory of "self- and non-self-executive" treaties, constitutes a case by case answer to the question of which treaties are automatically applicable when they enter into force in a domestic legal system. Domestic courts ponder this dilemma on a regular basis, even to the point of not applying a treaty (considered by said court to be 'non-self-executive') that has already been incorporated into domestic law.³⁷

To determine whether a treaty provision is or not self executing in a monist state, some guidance has been developed by the tribunals and the doctrine and they influence monist domestic court's rulings in deciding if a treaty is 'self or non-self-executing':

a) The type of treaty provision:

A treaty can regulate three different kinds of relationships³⁸:

1. Horizontal relations between and among states: A domestic court rarely applies treaties that regulate horizontal relationships among states.

³⁰ Sloss, David (2011), op. Cit

³¹ Sloss, David, (2011), op. Cit.

³² Sloss, David, (2011), op. Cit.

³³ Sloss, David (2011), op. Cit.

³⁴ According to Professor Shelton, the courts of several countries (including the United States, where this doctrine has been thoroughly developed) refer to it as 'self or non-self-execution', whereas in European courts is discussed as 'direct applicability' or 'direct effect'. See Shelton, Dinah, op. Cit.

³⁵ "Self executing" condition is determined by domestic law, either through the national constitution, legal tradition, historical precedents or political institutions.

³⁶ Sloss, David (2011), op. Cit

³⁷ Sloss, David, (2011), op. Cit

³⁸ Sloss, David (2011), op, Cit.

2. Transnational relations between private actors who interact across national boundaries: Domestic courts regularly apply treaties that regulate cross-border relationships between private actors.
3. Vertical relations between states and private actors (including natural persons and corporations): Vertical treaty provisions are more frequently applied than horizontal treaty provisions. According to Professor Sloss, because in most modern legal systems domestic courts have an institutional responsibility to protect the rights of private parties, and vertical treaties create rights for private parties.³⁹

Therefore, it is important to examine the specific provisions as it is possible for a treaty to have horizontal, vertical and transnational provisions.⁴⁰ If a treaty provision creates specific rights for private parties, the court is likely to deem the provision 'self-executable'.

The courts also individually examine the provisions to determine whether or not the provision is sufficiently precise to be capable of judicial enforcement, referring to this as testing the 'self-sufficiency' of the provision.⁴¹

b) The court's approach to the judicial application of treaties: The extent to which domestic courts apply vertical treaty provisions may also depend on the court's approach to the judicial application of treaties⁴². A domestic court's approach may be:

1. Transnationalist: In which the "...decisions [of the courts] manifest the belief that the judiciary has independent responsibility to ensure that domestic government officials act in accordance with international treaty obligations".⁴³
2. Nationalist: With this approach, court's "...decisions manifest a belief that courts should not scrutinize too closely government conduct that is arguably inconsistent with international treaty obligations".⁴⁴

Thus, a domestic court is more prone to apply a vertical treaty provision if its approach to the judicial application of treaties is 'transnationalist' than if it is nationalist.

c) The intent of the Parties: The 'intent thesis', as has been called by scholars, sustains that it is the treaty maker's intent which determines whether a treaty is self-executing or non-self-executing. It was developed in the latter half of the twentieth century by courts and commentators; it's highly accepted⁴⁵.

C) A brief review of State practice.

A brief analysis of state practice will be useful to better understand monist states' practice on treaty implementation into domestic law.

³⁹ Sloss, David (2011), op. cit

⁴⁰ sloss, David (2011), op. cit

⁴¹ Shelton, Dinah, op. cit

⁴² Sloss, David (2011), op. cit

⁴³ Sloss, David (2011), op. cit

⁴⁴ Sloss, David (2011), op. cit.

⁴⁵ SLOSS, DAVID (2002). Op. Cit.: 4.

1. The United States: The United States' Constitution declares that "...all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land"⁴⁶. From this it is presumed that all treaties should have the force of law within the domestic legal system, a circumstance proposed by the Founders with the intention of preventing violations of treaties attributable to the United States.⁴⁷

Therefore, in the United States a treaty enters into force in the domestic legal system when it is approved by a two-thirds majority of the Senate and subsequently ratified and proclaimed by the President of the Nation.⁴⁸ Throughout this entire course, the Executive evaluates if the treaty needs implementing legislation; in which case the treaty goes through the full legislative process.⁴⁹

Nevertheless, doctrinal and judiciary discussions about this issue persist over time and still continue, mainly about the distinction between self and non-self-executing treaties and the lack of legal force in the domestic system of the latter without the proper implementing legislation.

The first discussion about this subject matter appeared in *Foster v. Neilson* in 1829 before the Supreme Court. In this case the plaintiffs claimed the title to a tract of land on the basis of a grant from Spain, embodied in a treaty where Spain transferred sovereignty over the land to the United States. They claimed that the Court was required to recognize their title due to the treaty's confirmation. The Court, however, decided against that argument explaining that it was necessary for the Congress to enact the proper legislation to confirm the grants.⁵⁰

The Court declared that the Supremacy Clause in the Constitution referred only to those treaties that "operate of themselves", about this Chief Justice Marshall wrote⁵¹:

"Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the Court."

The Court construed the language of the treaty to be indicative of future actions and reached the conclusion that it was necessary to enact the relevant legislation to be able to recognize the property grants.

⁴⁶Constitution of the United States of 1787, Article VI. Available at: - http://www.archives.gov/exhibits/charters/constitution_transcript.html-.

⁴⁷ Vázquez, Carlos, *The Four Doctrines of Self-Executing Treaties*. 89 Am. J. Int'l L. 695-723, Available at: <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2008&context=facpub>-. , 1995

⁴⁸ U.S. Congressional Research Service, *Treaties and other International Agreements: The Role of the United States Senate, 2001* Available at; -<http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf>

⁴⁹ U.S. Congressional Research Service, op. Cit

⁵⁰ *Foster v. Neilson*, 27 U.S. 253, 314 – 315 (1829).

⁵¹ U.S. Congressional Research Service, op. Cit

In *United States v. Percheman* (1833), a case about the same treaty, the Supreme Court overruled its previous decision and construed the language of the treaty by taking into account the Spanish version; where the language clearly pointed out immediate execution (the transfer of the property titles to the plaintiffs)⁵².

And in 1888, in *Whitney v. Robertson*, the Supreme Court defined for the first time the term ‘self-executing’ (treaty provisions) stating that: *“If the treaty contains stipulations which are self-executing -- that is, require no legislation to make them operative -- to that extent they have the force and effect of a legislative enactment”*.⁵³

More recently, in *Medellín v. Texas* (2008), where the application of the Vienna Convention on Consular Relations was discussed, the Supreme Court reaffirmed its estimation on the issue: *“What we mean by “self-executing” is that the treaty has automatic domestic effect as federal law upon ratification. Conversely, a “non-self-executing” treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress”*⁵⁴.

To conclude, the following paragraph summarizes United States’ situation:

“Apart from instances where the terms of a treaty expressly contemplate implementing legislation or where such legislation is traditionally required owing to the nature of a particular treaty provision, whether a treaty is self-executing or not is a matter of interpretation, initially for the Executive and ultimately for the courts in the event of litigation”.⁵⁵

2. France: The 1958 Constitution of the French Republic establishes in its 53rd article that international agreements or treaties will not take effect until ratification or approval has been secured; in 55th article, the Constitution requires the publication of the treaty to be incorporated into domestic law⁵⁶.

If the treaty is self-executing the Courts can enforce it from the date of publication, but if the treaty’s terms are not clear (non-self-executing) the Courts will not⁵⁷. According to Professor Ronny Abraham, this principle is subjected only to two exceptions: *“...either the convention contains only recommendations or obligations that address States and only States; or the rules that it contains are not applicable in absence of measures that serve to define the modalities of application”*⁵⁸.

Another interesting case concerns the Convention on the Rights of the Child (1990), about which the Cour de Cassation declared that it had no direct application in a ruling of 10

⁵² *United States v. Percheman*. 32 U.S. 51, 1833.

⁵³ *Whitney v. Robertson*, 124 U.S. 190, 1888.

⁵⁴ *Medellín v. Texas*, [552 U.S. 491](#), 2008.

⁵⁵ U.S. Congressional Research Service, op. cit.

⁵⁶ Constitution of the French Republic of 1958 Available at: [-http://www.assemblee-nationale.fr/english/index.asp-](http://www.assemblee-nationale.fr/english/index.asp).

⁵⁷ Aust, Anthony . *‘Modern Treaty Law and Practice’*. CPU, 2nd Edition. Cambridge, U.K., 2007.

⁵⁸ Shelton, Dinah, op. cit.

March 1993. After that, the Conseil d'Etat adopted a case by case strategy and recognized the self-executing character of some of the treaty's clauses⁵⁹.

3. Spain: The Spanish Constitution of 1978, in its 96th article declares that all treaties duly celebrated, once officially published within the country, become part of the domestic law⁶⁰. The Parliament authorizes the treaties first and then treaty is signed by the Crown; consent of the Senate is required on political, military, territorial, financial issues or changes in the domestic law⁶¹.

The Spanish Provincial Court of Barcelona in a 2008 ruling explained Spain's position regarding the reception of international law, specifically treaties:

*"...but it can be said that the Spanish legal system is monist, according to what is provided by the Constitution's article 96.1, that situates validly celebrated treaties once they have been published officially, as part of our domestic law; and the Civil Code article 1.5, that equally establishes the direct applicability of international law from the moment they integrate into the domestic law by their official publication".*⁶²

The Provincial Court in the same ruling states that even if the system allows it, a treaty provision needs certain characteristics to be susceptible of direct application, quoting the Court: *"For this to happen, it is precise that the provision, in its form and content, be self-executing, and according to the STS Third Chamber of March 10th 1998, in addition to its international entry into force and its official domestic publication, this requires a sufficiently precise writing that consents the direct application without the necessity of an additional legal and regulatory development that represents the will of the contracting Parties. Specifically, the doctrine identifies these requisites: the norm has to contain provisions susceptible of affect directly the rights of individuals, to grant them rights or impose obligations, to them and not to Spain; the norm must written in a sufficiently precise manner that consents the direct application without the necessity of an additional legal and regulatory development that clarifies Spain's will; and it is precise that in our domestic legal system the direct applicability of the norm is recognized, without conditioning the norm to the publication of a formal provision of reception"*⁶³.

4. South Africa (non IT party) and Cameroon: South Africa's Constitution states that treaties become law in the Republic when they are enacted by national legislation, this makes South Africa mainly a dualist state; however the same constitutional article continues by stating the exception for self-executing treaties, declaring them 'law of the Republic' once they have been approved by Parliament⁶⁴.

⁵⁹ Shelton, Dinah, op. cit.

⁶⁰ Article 96. The Spanish Constitution of 1978. Available at: - <http://www.congreso.es/consti/constitucion/indice/index.htm> -.

⁶¹ Simmons, Beth., *Mobilizing Human Rights: International Law in Domestic Politics*. Cambridge University Press; 2009. Available at: - <http://scholar.harvard.edu/b Simmons/mobilizing-for-human-rights> -.

⁶² Escalante, Roberto, 'La distintividad adquirida en tratados internacionales y otras jurisdicciones'. Available at: - <http://biblio.juridicas.unam.mx/revista/pdf/DerechoPrivado/2/tci/tci16.pdf> - 2012.

⁶³ Escalante, Roberto, op cit.

⁶⁴ Constitution of the Republic of South Africa (1996). S. 231 (4): *"Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament"*.

Interestingly enough, the South African Constitutional Court is very transnationalist; which means it regularly applies international law in the construing of constitutional provisions⁶⁵. It also should be said that South African courts have yet to apply this constitutional provision⁶⁶.

The process of ratification requires the treaty to be submitted to the State Law Advisors at the Department of Justice and Constitutional Development to ensure that it is consistent with domestic law, with international law and whether or not the agreement can be considered self-executing⁶⁷. A self-executing treaty is instantly binding; if it requires national legislation, Parliament must pass a law to ratify and enact the treaty⁶⁸.

In the case of Cameroon in accordance to article 45 of the Cameroonian Constitution: "*Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implement the said treaty or agreement.*" Under Cameroonian Constitution all ratified treaties are above national laws and should be directly implemented.

5. The Netherlands: The Constitution of the Netherlands in its article 93, specifies that treaty provisions "*...that are binding on all persons by virtue of their contents shall become binding after they have been published.*"⁶⁹ Treaties need the approval of the Parliament and its publication to enter into force in the Dutch domestic legal system. As it is the practice in other mentioned monist states, the non-self-executing treaties need implementing legislation; though this does not create an unquestionable condition, the Legislature leaves it to Courts to consult the *travaux préparatoires* in order to interpret the domestic legal texts implementing a treaty⁷⁰.

The Dutch Supreme Court's criteria on self-executing and non-self-executing treaties are a mixture between international and domestic law, because of this *self-executingness* is not considered to be solely dependent on the parties' intent⁷¹.

In a case discussing the European Social Charter, the Court considered that the Charter's article 6 had direct effect "*...since neither from the text nor from its travaux préparatoires it could be inferred that such effect had been excluded. In those circumstances, according to Netherlands law, only the contents of the provision is decisive: does it oblige the Netherlands legislator to make rules of a certain content or import or is that provision of such nature that it can be applied as objective law right away*".⁷²

⁶⁵ Sloss, David(2011), op. Cit

⁶⁶ Sloss, David (2009), op. Cit.

⁶⁷ Republic of South Africa, *Ratification, Office of the Chief State Law Advisor*. Available at: - <http://www.dfa.gov.za/chiefstatelawadviser/ratification.html>-, 2014

⁶⁸ Simmons, Beth, op. Cit.

⁶⁹ Constitution of the Kingdom of the Netherlands Available at: - <http://www.legislationline.org/documents/section/constitutions/country/12->. Article 93.

⁷⁰ Alkema, E.A, *International Law in Domestic Systems*, vol. 14.3 ELECTRONIC JOURNAL OF COMPARATIVE LAW. December 2010 Available at: -<http://www.ejcl.org/143/art143-1.pdf>-.

⁷¹ Alkema, op. Cit

⁷² Alkema, op. Cit. Supreme Court HR 30 May 1986 (NS/FNV), NJ 1986, 688 § 3.2.

Dutch case law has put together a series of criteria that necessarily must be noticed when deciding if a treaty provision is self-executing or non-self-executing, Professor Alkema refers to some of this criteria as follows⁷³:

- Is the provision sufficiently concrete?
- Is gradual implementation provided for?
- Is the provision binding the State in its relations to other States only?
- Does the provision contain a 'positive' obligation?

6. Poland: By the Constitution of Poland, a treaty: "After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute"⁷⁴.

Polish case law has come to define self-executing treaty provisions as a provision that "...has been drafted in a complete manner, i.e., in a manner allowing its use as an exclusive legal basis for resolving an individual case or controversy."⁷⁵

The *Intent thesis* has also been contemplated by the Polish Supreme Court. In a decision of 1993, discussing the applicability of article 11(2) of the European Convention on Human Rights in the Polish legal system, the Court stated that the Polish State was obligated to observe international obligations contained in the duly ratified agreements and conventions; and that the international legal norms were to be applied directly, without requiring any implementing measures. But the Court did point out one condition for this to be as such: a clear or implied intention of the parties to give that effect to the agreement within domestic law⁷⁶.

7. Mexico (non-IT Party): Treaties become part of the Mexican domestic law (as "*Supreme Law of all the Union*") once they have been ratified by the Senate and/or when implementing legislation is created to that effect if it is deemed necessary⁷⁷. Publication on the Official Journal is also needed.

In what concerns to Mexican jurisprudence, the Federal Court of Fiscal and Administrative Justice resolved the '*self-executingness*' of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) on a ruling of 2007, adducing that said treaty

⁷³ Alkema, op. Cit.

⁷⁴ Article 91. Constitution of the Republic of Poland of 1997. Available at: - <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

⁷⁵ Sloss, David, op. Cit.

⁷⁶ Czaplinski, W. 'Relationship between International Law and Polish Municipal Law in the light of the 1997 Constitution and of the Jurisprudence'. *Revue Belge de Droit International*. 1998/1. Available at: - <http://rbdi.brueylant.be/public/modele/rbdi/content/files/RBDI%201998/RBDI%201998-1/Etudes/RBDI%201998.1%20-%20pp.%20259%20%C3%A0%20271%20-%20W.%20Czaplinski.pdf>.

⁷⁷ Article 76. Political Constitution of the United Mexican States of 1917. Available at: - <http://www.ordenjuridico.gob.mx/Constitucion/cn16.pdf>.

*“...constitutes a multilateral agreement on trade issues, in which basic principles are established, regulations and minimal standards for the protection of intellectual property rights”.*⁷⁸

On the same subject, the TRIPS, the Supreme Court declared that treaties relating to intellectual property rights were self-executing, by stating that these *“...are an integral part of the legal context applicable in domestic law in what concerns to intellectual property rights, and as such they represent current law that must be applied by the authorities when basing and motivating their acts...”*⁷⁹.

8. Switzerland: Switzerland recognizes the hierarchical superiority of international law and considers it part of the domestic legal order without special procedure, in a sort of automatic incorporation⁸⁰.

A self-executing treaty can be invoked before the domestic Swiss courts, provided that is precise enough to be applied⁸¹. An example of this *self-executingness* is given by a decision of the Federal Department of Home Affairs in 1993, in which a permit for an export of 500 tons of cinders to Russia for the set up of a new recycling facility was denied⁸². On appeal, the Department based its denial on Article 4.5 of the Basel convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which prohibits the export of hazardous wastes to non-party states.

9. Malaysia: Malaysia has a dualist system for the incorporation of international law. However, it has been concluded specifically in relation to the IT MLS implementation that *“...the terms of the Treaty may also be implemented through an existing law. In the latter case, there would be no need to enact new legislation or even a new regulation under existing law to implement the Treaty. All that would be required is for the relevant authority to acknowledge an obligation to place materials in the multilateral system and direct the holder of the materials (in this case MARDI), to implement the provisions of the Treaty.*

In yet another scenario a judicial decision could incorporate an obligation under the Treaty into national law....

*In practice, if there are provisions in a existing act, they constitute the basis upon which to implement the Treaty through a simple directive issued to all bodies holding Annex 1 crops to implement the Treaty’s multilateral system of exchange”*⁸³.

Based on this interpretation the conclusion reached is that Malaysia does not require a new legal measure to implement the MLS, just to direct the holders of the materials to place them in the MLS.

10. Costa Rica: Costa Rica has a monist system for international law incorporation. It the provisions of the Treaty are self-executing is not necessary to pass legislation for their

⁷⁸ Escalante, Roberto, op. Cit.

⁷⁹ Escalante, Roberto, op. Cit.

⁸⁰ Cullet, Philippe, ‘*International Environmental Law in Domestic Courts: Switzerland*’. 1999, Available at: - <http://www.ielrc.org/content/w9901.pdf>.

⁸¹ Aust Anthony, op cit.

⁸² Cullet, Phillipe, Op. Cit.

⁸³ Singh, Gurdial, *Malaysia’s implementation of the Multilateral System of Access and Benefit-Sharing*, Bioversity International, Rome ad MARDI, Kuala Lumpur, 2012.

implementation. This has been decided by rulings in the early nineties (Votos No. 719-90 and 6240-93) and reaffirmed several times for the Constitutional Court. Also in conformity with article 7 of the Constitution duly ratified Treaty takes precedence over national legislation.

For instance, in resolution 0503-96 stated that:

*“Under the doctrine derived from Article 7 of our Constitution, **treaties or international agreements, as normative source of our legal system, are dominant to that of the ordinary law.** This implies that, given the provision of a treaty or agreement, -a name which for purposes of international law is equivalent- **yields the Internal legal rule** which is precisely the legal issue before us”.*

*“Now, once it has been signed by the Executive (President and Foreign Minister), approved by the Legislature and ratified by the Executive the treaty, **in this case, the Convention is incorporated to the domestic law of our country, prevailing over every other ordinary norm that opposes to it.**”*

In resolution No. 11598-2002 it was declared that:

*“The fundamental rule of our legal system established, with clarity, in its Article 7, paragraph 1, that ‘public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate’. In consequence, among the hierarchy of the written sources of Costa Rican administrative law **a public treaty or agreement – duly approved and enacted- posses a rank, due to their regulative power and normative resistance, above the laws....”***

D) Conclusions.

- Monism and Dualism as doctrines that describe different legal systems and their relationship with international law (in this case treaties), are not absolute concepts. States are not completely monist or entirely dualist.
- In both dualists and monists states, a treaty can be applied indirectly by the National Courts.
- In a monist legal system, treaties can be applied and enforced directly (as domestic law), without the enactment of implementing legislation. In a dualist legal system in principle treaties require implementing legislation to become part of the domestic law.
- The direct applicability or the necessity of implementing legislation for the implementation of a treaty in a monist domestic legal system is determined usually by the Executive Branch (or the courts if there is a conflict) on a case by case basis.
- When conflicts about the application of treaty provisions within the domestic legal system arise, the National Courts are called to discern if a treaty provision is ‘self-executive’ or ‘non-self-executive’. Factors such as the intent of the contracting Parties of the treaty, the type of treaty provision (vertical, horizontal or transnational) and the judiciary approach to treaty implementation (a nationalist or *transnationalist* approach) can influence the Courts rulings and decisions.

III. ANALYSIS OF THE IT RELEVANT PROVISIONS AND THEIR DIRECT IMPLEMENTATION IN DOMESTIC LAWS.

A) Introduction: ABS under the CBD and the NP. The relationships between the IT and the CBD/NP regimes

To set the scene for the analysis of the IT relevant provisions in the light of the theory of direct implementation of international law in monist states of self executing provisions, a brief analysis is required on the relationships between the IT and the CBP/NP ABS regimes. In some cases the existence of prior ABS legislation have been described as a potential difficulty for the IT implementation⁸⁴. Therefore, a clear understanding of the space provided in the NP for countries to implement IT while enacting ABS measures is needed.

One of the main global tools for regulating rights and access to genetic resources is the Convention on Biological Diversity (CBD). After the adoption of the *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Utilization of Benefits Resulting from their Utilization* (Nagoya Protocol) in October 2010,⁸⁵ and its entered into force (October 2014) the development and implementation of ABS regulatory frameworks at national level will need to ensure that legislative, administrative or policy measures taken are consistent and mutually supportive with other existing ABS instruments. Such need is particularly prominent in relation to the IT which establishes and implements a multilateral international ABS regime for some plant genetic resources for food and agriculture (PGRFA).

The ITPGRFA, adopted in 2001 and in force since 2004, is generally aimed at the conservation and sustainable use PGRFA and the fair and equitable *sharing* of the benefits arising from the utilization of these resources.⁸⁶

The it provides for a multilateral approach to access and benefit-sharing, in which sovereign rights of States over their own genetic resources are recognized and, in the exercise of these rights, they agreed to establish a multilateral system of access and benefit-sharing. The MLS covers the plant genetic resources for food and agriculture listed under Annex 1 of the treaty and which are under the management and control of Contracting Parties and in the public domain. The MLS will work on the basis of a standardized material transfer agreement (SMTA) to be used by all parties seeking access to material from the MLS. Furthermore, the MLS does not cover only PGRFA held by States. Under article 15 of the Treaty, international

⁸⁴ See Halewood, et. al, *Mutually Supportive*. op cit.

⁸⁵ Convention on Biological Diversity, Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 29 October 2010, available at: <http://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf>.

⁸⁶ Part of this section has been taken from Cabrera Medaglia, Jorge et al., *The interface between the Nagoya Protocol on ABS and the ITPGRFA at the international level*, CISDL and FNI, Norway, 2013

institutions may sign agreements to place their ex situ collections under the auspices of the International Treaty.⁸⁷

The Multilateral System of Access and Benefit Sharing was set up to address certain specific needs regarding the international collections of plant accessions for breeding, taking into account the ‘special features of plant genetic resources’.

The MLS is a core component of the ITPGRFA as it is further set out in Articles 10 to 13. Whereas the ITPGRFA as such covers all PGRFA, its’ ABS system in the MLS covers only certain crops. ITPGRFA Article 11.1 sets the scope for the MLS to “the plant genetic resources for food and agriculture listed in Annex I”, i.e. 35 food crops and 29 forage plants. Annex I crops include major staples crops, as well as a range of other plants widely used for food and agriculture. Annex I is a negotiated list of species that are pooled for particular purposes.

The next specification of the scope of the coverage of the MLS is that it covers “all plant genetic resources for food and agriculture listed in Annex I that are under the management and control of the Contracting Parties and in the public domain”.⁸⁸ A interpretation of the wording, with its triple use of the conjunction ‘and’, suggests these criteria must be present for PGR to be mandatorily included in the MLS. Thus, linguistically, the paragraph imposes three *cumulative* criteria: PGR being under the *control* of the state, *managed* by the state and recognized as being considered *public domain*. Thus, only accessions which fall under all these three criteria are mandatorily included in the MLS by the Contracting Parties⁸⁹.

This has been explained as follows:

*“According to the Treaty Annex 1 PGRFA that are ‘under the management and control of contracting parties and in the public domain’ are automatically included in the MLS..... It appears to be widely accepted that ‘under the management’ refers to a Contracting Party’s ‘capacity to determine how the material is handled’ and ‘control’ refers to the ‘legal power to dispose of the material.’ ‘Contracting Party’ refers to national governments (not to provincial or municipal governments). It also appears to have been widely accepted that ‘public domain’ refers to PGRFA that are not subject to intellectual property rights”.*⁹⁰

One main difference between the idea behind the CBD and the MLS is that benefit sharing under the ITPGRFA is linked to a specifically defined trigger point for when benefit

⁸⁷ See Nnadozie, Kent, *Informe Sobre La Condición Jurídica de Los Recursos Genéticos en la Legislación Nacional, Incluido el Derecho De Propiedad, de ser aplicable en determinados Países*, Nota del Secretario Ejecutivo, UNEP/CBD/WG-ABS/5/5, 30 de Agosto del 2007.

⁸⁸ IT art. 11.2.

⁸⁹ Cabrera Medaglia, Jorge, *The Interface...*, op cit.

⁹⁰ Halewood, Michael (ed) *Mutually supportive implementation of the Plant Treaty and the Nagoya Protocol. A primer for national focal points and other stakeholders*, Biodiversity International, Rome, 2015.

sharing shall take place. Consequently, benefit sharing is detached from the individual access situation and provider.

The Standard Material Transfer Agreement is the practical legal tool for all transfers of genetic material under the MLS. This enables rapid access as no negotiations are needed. It was adopted by the parties in 2006, and provides a standardised means by which countries can exercise their sovereign rights to a specific and limited selection of plant genetic resources for specific uses. It also implies a standardised approach to gaining prior informed consent and mutually agreed terms. Access is provided free of charge, and if a fee is charged, it shall not exceed the minimum cost involved (Art. 12.3.b). All available passport data and related information are to be provided together with the material (Art. 12.3.c).⁹¹

The ITPGRFA differs substantially from the CBD, as the treaty as a whole applies to one specific group of organisms - plant genetic resources for food and agriculture.

Although the negotiation of the Nagoya Protocol took place under the framework of the Convention on Biological Diversity, it was clear at that time that several other international instruments or processes were (and still are) relevant for the issue of access and benefit-sharing. Since the Protocol in principle applies to all types of genetic resources, it must be recognized that provisions relevant to ABS (of a different nature) also exist in a range of international instruments and processes outside the CBD.⁹² Therefore, it was considered necessary to address the relationship of the Protocol with other relevant instruments and organizations related to its objective, content and mechanisms, including the International Treaty the only existing specialised instrument on ABS.⁹³

Article 4 of the NP deals with the relationships between the Protocol and other international instruments in general, including specialized instruments on ABS. Furthermore, it includes the work and practices of relevant international organizations. Some of the language of this Article comes directly from Article 22 of the CBD. Nevertheless, the second part of the paragraph addresses an aspect not covered in CBD Article 22, but found in other MEAs: the clarification that the paragraph is not intended to create a hierarchy between the Protocol and other instruments.

In accordance with international law (the principle of *pacta sunt servanda*), a State is legally bound to comply with all the treaties to which it is a party. Some recent Multilateral Environmental Agreements (MEAs) contain a clause, sometimes referred to as a “saving clause” in the preamble or in the operative text, stating the relationship between the instrument and other related instruments, in some cases specially those related to international commerce and trade such as the World Trade Organization (WTO).

⁹¹ Cabrera Medaglia, Jorge, *The interface...* op cit.

⁹² See Buck, Mathias and Hamilton, Clare, *The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Benefit Sharing Arising from Their Utilization of the Convention on Biological Diversity*, RECIEL, No. 20, UK, 2011.

⁹³ See, in general Greiber, Thomas et al., *An explanatory Guide to the Nagoya Protocol on Access and Benefit Sharing*, IUCN Legal Paper No 32, Bonn, 2012.

Paragraph 1 of article 4 of the NP is an example of this approach to international environmental law. When such a clause appears in the operative text of a treaty, it can indicate which treaty - the existing treaty or the new treaty – the Parties intended to make prevail in the case of a conflict. Article 30(2) of the Vienna Convention on the Law of Treaties provides that *“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 the other treaty prevail”*. Furthermore, under the Vienna Convention later treaties between the same parties dealing with the same subject matter supersede the provisions of earlier treaties, unless wording expressing the contrary exists in the later treaty.

Paragraph 2 reaffirms the right of Parties to develop and implement other relevant international agreements in general and, in particular, other specialized ABS agreements. It is important to note that the legal capacity of a Party to develop and implement any international instrument comes from international law directly (see Article 6 of the Vienna Convention on the Law of Treaties). The provision therefore reiterates this principle. The possibility for the development and implementation of new specialized ABS agreements (i.e. a sectoral approach) was supported by some countries. These countries suggested the option that the Nagoya Protocol could include a general provision recognizing existing or future specialized ABS sectoral approaches.

However, at the same time, there was a concern that new international agreements and their implementation, especially new ABS sectoral agreements, may run counter the objectives of the CBD and the Nagoya Protocol in particular, thus creating a loophole and making it difficult to satisfy the demand for fair and equitable benefit-sharing. Therefore, Paragraph 2 contains a safeguard clause: Parties may negotiate and implement any new international agreement to the extent that these agreements are *“supportive and do not run counter to the objectives of the Convention and this Protocol”*. This qualification applies to both general international instruments and specialized ABS agreements.

Paragraph 3 again includes the obligation of the Parties to implement the relevant international instruments and the Protocol in a mutually supportive manner. The term “mutually supportive” has taken a particular meaning in the trade and environment context and can be found in recent MEAs, such as the Cartagena Protocol on Biosafety.

Specifically, paragraph 4 of the NP states *“This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.”*

This paragraph 4 clarifies that the Protocol is the instrument for implementing the CBD provisions on ABS. Whether it was recognized that other relevant instruments coexist along with the Protocol, the Protocol is considered the implementation mechanism of the CBD ABS provisions.

The paragraph deals with a specific situation: the relationship with specialized ABS instruments. So far, the only specialized instrument is the IT. There is not, however, any mention of the ITPGRFA (except in the preamble). Prior texts had included a specific reference to the ITPGRFA, specially seeking to exclude the instrument to the Protocol Scope.

There are however, several clarifications and conditions which will govern the relationship between both instruments⁹⁴. First, the specialized instrument shall be “consistent” with and do not run counter the objectives of the CBD and the Protocol. However, the language used in this provision is weaker than the other paragraphs (which use the word “supportive”). Thus it is required that the specialized instrument be just consistent not supportive of. This is potential recognition of the fact that a specialized instrument on ABS may include different approaches and implementing mechanisms, which can depart from the CBD and Nagoya Protocol bilateral approach.

Second, the other qualification relates to the membership: if a Party is not a Party of the specialized instrument, then the Nagoya Protocol provisions will apply to all the genetic resources transactions. This is also relevant because, so far ITPGRFA has 135 Parties and the CBD 194. Therefore a number of CBD parties are not members or Parties of the ITPGRFA.

The priority given to the specialized instrument over the Nagoya Protocol is limited and qualified: only to the genetic resources covered and for the purpose of the specialized instrument. However, the first part of the sentence is not complete clear about its implications. The Scope of the ITPGRFA is all the genetic resources for food and agriculture, but the scope of the MLS is much narrower: the genetic resources included in Annex I (under the management and control and in the public domain of contracting parties and those included voluntarily by legal and juridical persons) and – in practice- the non Annex I genetic resources included for CGIAR and other centres in accordance to article 15 are transferred under the same SMTA but this is an issue under debate at least for some countries and decision makers.

In summary 4.4 is not a blanket exclusion. It applies only where and to the extent that the genetic resources in question are used for the purpose of that specialized instrument (food and agriculture).⁹⁵

It is clear that, in the context of the ITPGRFA, the exception applies only:

- a) for the resources covered by the specialized instrument;
- b) for the parties of both instruments;
- c) for the purpose set in the instrument (food and agriculture).

Therefore, if a country is not a party of the IT access to PGRFA will be governed by the CBD/NP bilateral approach (requiring essentially PIC and MAT) unless a country- based on its own national priorities and decision- provides an special treatment for PGRFA.

In conclusion, the NP- and the ABS measures to be developed following this instrument (and the CBD)- does not affect the IT MLS direct implementation in Monist

⁹⁴ See Greiber, Thomas et. al., op cit.

⁹⁵ See Buck and Hamilton, op cit.

countries as it will be explained below. ABS laws should respect and safeguard this space while they are drafted, interpreted and implemented and the legal possibilities for the direct implementation of the IT provision should not be affected by the existence of the ABS legislation (see however the discussion on point E on conflicting prior legislation).

The next section presents an analysis of the main components of the MLS in the light of their direct implementation as self-executing provisions (in the case of monist legal systems).

B) Assessment and determination of the genetic resources automatically included in the MLs and the entity responsible for signing the SMTA. Possibilities for direct implementation.

Based on the information presented earlier on the nature and characteristics of the self-executing provisions of treaties, a first question is whether the implementation of the MLS- in the case of PGRFA which are under the management and control and in the public domain- may require any kind of implementing legislation. In the opinion of the author this is not the case because these provisions are clear and precise enough. What is required is an assessment of the fulfillment of the 3 requirements set by the IT (management and control and public domain) of a particular PGRFA (ex situ or in situ). Additionally, it should be clearly established who within an entity has the authority to sign the SMTA in accordance to the internal/administrative rules of the entity⁹⁶. Countries may only need direct to guide genebank managers and other officers (protected areas heads, etc) to provide the materials using the SMTA.

This has been the legal interpretation accepted in the case of Costa Rica. It is unclear whether in other countries where the MLS is now operational. in the absence of national measures drafted for the implementation of the System, this is one of legal justifications and rational.⁹⁷ A similar interpretation has been also suggested for Malaysia (see below). This approach represents a major difference with the CBD/NP regimes when national ABS legislation is required⁹⁸ if a country want to make PIC and MAT mandatory.

It should be recall that few countries have developed specific regulations for the implementation of the IT. Several draft measures are being prepared by countries to develop positive regulations for the IT implementation specially its MLS⁹⁹.

In relation to this issue has been mentioned that:¹⁰⁰

⁹⁶ See Cabrera Medaglia, Jorge et al, *An Overview of national and regional ABS measures in the light of the Nagoya Protocol*, Third Edition, CISDL, Montreal, 2012.

⁹⁷ See also, Lapeña Isabel, Vázquez Francisco and Say, Eduardo, *El Tratado Internacional sobre Recursos Fitogenéticos para la Alimentación y la Alimentación en Guatemala*, diciembre del 2014

⁹⁸ See article 15 of the CBD and 6 of the NP.

⁹⁹ See Halewood, Michael et al, Mutually Supportive.... (2014) op cit. See also examples of national implementation of the IT SML in López Noriega, Isabel et al, *Assessment of progress to make the multilateral system functional: incentives and challenges at the country level*, in Crop Genetic Resources s Global Commons. Challenges in international law and governance, Halewood, Michael, et al (eds), Earthscan and Bioversity International, 2013.

"In most of the countries that are currently actively providing PGRFA under the multilateral system, there are no positive legal enactments empowering genebank managers (or anyone else for that matter) to be providers. It is enough in those countries that the country has ratified the Treaty and there is no law prohibiting them from acting ... and that of all the PGRFA in the country, the material in the national genebanks is the most obviously included material in the MLS. In those countries the genebank manager feels confident that she may act, and that no one can or will challenge his/her authority for having decided to provide materials pursuant to the Treaty (i.e. using the SMTA) ...

Again, the appropriate form and content of those enactments will depend upon the political and legal cultures of the countries concerned: they could range from national legislation to ministerial decrees, regulations or guidelines to simply official statements issued from a high-level political office".

Usually, countries have put in place only exceptions (Australia, Brazil, Bhutan, Peru, Ecuador, etc) in the ABS laws which makes reference to the operation of the IT and have additional some ha also provided further clarity about the IT MLS implementation in the context of ABS legislation. For instance, the Brazil Provisional Measure 2186/2001 (not in force since 2015) is complemented with a number of Decrees (around 4 *Decretos*) and Resolutions (more than 20) and Technical Guidelines (8). One of them No. 07-2009 regulates access to genetic resources for the specific purpose of plant breeding and one No. 8 of 2012 clarifies the application ABS provisions to the species listed in Annex I of the International Treaty) making the legal framework very complex.¹⁰¹

In Costa Rica a regulation in force (reglamento 33697-MINAE published in the official newspaper La Gaceta on April 18 2007) provides that unless a different norm is approved, the designated authority for the implementation of the ABS system of the IT will be the National Commission for the Biodiversity Management (CONAGEBIO)- the ABS NCA under the CBD- of the Ministry of Environment and Energy, which could benefit from the advice of the National Commission on Plant Genetic Resources (CONAREFI) (Transitorio II/ transitory provision II).

Nevertheless, the details and particular functions of that authority were never determined in the regulation. New proposals under discussion¹⁰² in the country promote that the NCA for the implementation of the whole IT not just for the SML, would be the National Seed Office instead of the CONAGEBIO. The proposed amendment of the Seed Law does not provide for specific functions assigned to the NCA¹⁰³.

However, the practical experience in the implementation of the IT, and in particular of the SML, has showed that for some countries the designation of an NCA, the development of written procedures included in a legal measure enacted for that purpose is required in order to

¹⁰⁰ Halewood, Michael, *Mutually Supportive.....* (2015) op cit.

¹⁰¹ For further information see www.mma.gov.br/cgen.

¹⁰² See Cabrera Medaglia, Jorge, *La implementación del Tratado Internacional de Recursos Fitogenéticos....* op cit.

¹⁰³ See Cabrera Medaglia, Jorge, *Identificación del perfil y de las posibles autoridades nacionales competentes para la promoción de la implementación del Tratado Internacional sobre Recursos Fitogenéticos para la Alimentación y la Agricultura en Costa Rica*, CONAREFI/Bioversity, San José, 2014.

put into effect the provisions of the IT. Several drafts developed for the implementation of the whole IT or the SML have provided for the appointment of a NCA and for the assignment of specific tasks and mandates to further develop policy or legal measures to facilitate and promote the operationalization of the IT (Madagascar, Burkina Faso, Peru, Ivory Coast, Nepal, Model Law on the Management of Plant Genetic Resources for Food and Agriculture, etc).

The rationale behind the drafting of these type of measures seems to be the necessity (or at least the convenience) to designate an entity tasked with the mandate- backed up in some form of legal measure- to put in operation mechanisms and instruments (of legal and policy nature) to implement the IT MLS. This also provides the NCA with the required legal and institutional legitimacy to develop policies or regulations to support the IT effectiveness in the country.

This interpretation also applies to in situ PGRFA which fulfils the criteria set for the IT. No particular legislation is in principle required. However, the reference in article 12.3.h of " in accordance to national legislation" may created some concerns. This has been interpreted in some countries (Costa Rica) as to allow the application of the ABS regimes (the Biodiversity Law and access regulations¹⁰⁴) even if the content of this legislation is not compatible with the MLS. Article 12.3. h is straightforward in the sense that this situation is " without prejudice" of the conditions set forth in the prior paragraphs.

The Ad Hoc Advisory Committee on the SMTA and the MLS created by the GB of the IT has issued 2 different opinions on the case of in situ PGRFA in response to these concerns:

"Some authorities are uncertain as to whether additional specific national standards need now to be developed. The Committee noted that this was not the case and the many Contracting Parties already have the capacity with their domestic frameworks to allow access in accordance to the Treaty... For these materials national legislation is not a pre-condition in order to facilitate access in accordance with the provisions of article 12".¹⁰⁵

Therefore, some countries may only require to apply existing rules for the collecting of biological resources or enact minor amendments or guidance to accommodate the functioning of the MLS and their basic principles.

C) Voluntary inclusions

The IT requires countries to "encourage" the voluntary inclusions of Annex I crops by their natural or legal persons. Therefore an interpretation derived from this obligation is that they cannot constrain such practice for natural or legal persons for Annex I inclusions. In principle, the legal basis for the right of such natural and legal persons to do so is the text of the IT (based on the thesis of the direct implementation in monist states).

¹⁰⁴ Cabrera Medaglia, Jorge, *La implementación del Tratado...*, op cit.

¹⁰⁵ See IT Secretariat, *Opinion and Advice of the Ad Hoc Technical Advisory Committee on the MLS and the SMTA*, Rome, 2015.

In the light of the direct implementation theory (unless there is a particular rule requiring a prior authorization which can be seen as a control mechanism to prevent the transfers of other materials rather than Annex I materials), natural and legal persons can put directly the Annex I materials into the MLS (e. g. by send a notification to the GB, signing- on a case by case basis- the SMTA or depositing the materials in a collection already included in the MLS without any further restrictions for the recipient).

Crops not being on the list in the Annex fall under the general scope of the CBD and NP when it comes to ABS. From a legal perspective, Article 11.1 in combination with the Annex sets a limit for the mandatory material included under the MLS. This does not prevent collections applying the SMTA and the same terms and conditions for a wider number of species and subspecies to the extent that there is not ABS legislation impeding this action.¹⁰⁶ Countries and collections are free to include more species under the same regulatory regime as those PGRs being mandatory under the MLS if no ABS prohibits such behavior.

However, since the treaty only makes an express reference to Annex I crops and if the country has ABS legislation subjecting all the GR to the ABS rules- including to get a permit from a NCA- a natural or legal person cannot include non-Annex I materials (unless it follows the ABS procedures and to the extent that he is authorized for an NCA).

When there is not ABS legislation or- as a rare case- if the ABS legislation gives a different treatment to a all agriculture GR (e.g. exempting all of them from the access procedures and requirements), a natural or legal personal may be entitled to proceed with such inclusion. This is the case of some European Countries since the IT does not prohibit such inclusion.

However, this approach may raise 2 concerns: a) the issue of the ownerships of the PRGFA under the national laws; b) the existence of ABS legislation preventing such inclusions by the establishment of legal requirements (permits) before an individual can transfer (as a provider) PGRFA to an user. The latter issue will be explored under the heading e below.

This could be linked to the issue of ownership of GR under the legal system of countries specially if there is declaration public ownership under the countries legal systems. This may raise question as to whether an approval is required for the voluntary inclusions.

The issue of property rights is one of the most complex. The concept of sovereignty is different from those of heritage and property; the latter is not addressed by the CBD leaving each State free to decide if genetic resources are private or public property and under what circumstances. This issue is not fully clear in comparative law, because, in general, the property systems and the Constitutions, with few exceptions, have not made reference to genetic resources. In the same manner, some legal systems make the difference between the property of biologic resources and the property of genetic resources.¹⁰⁷

¹⁰⁶ Such wider application has been a topic for e.g. the Nordic Gene Bank.

¹⁰⁷ United States is an exception, where the owner of the land is equally the owner of the genetic resources located on it.

Based on each Country's own legal cultural traditions, biodiversity rich countries exhibit a mixture of ownership arrangements that range from traditional common tenure to state-enforced private rights to land and resources, including biodiversity.

Basically, the English Common Law Systems natural resources are viewed as private property with some limited powers of the State to regulate them and those systems found on Roman Law usually grants property to the State, holding natural resources as patrimony. However, the mix approaches between Countries exists. In the case of the Roman-Napoleonic Systems genetic resources are sometimes considered public property and in the domain of the State.¹⁰⁸

In the case of some Countries the legislation declares genetic and biochemical resources as goods of public domain. Characteristics of the goods of public domain are three: (1) ownership to a public body; (2) public utility purposes; and (3) under a special administrative regime of protection and use of goods.

As summarized by Nnadozie:

"It is evident that countries have had difficulties in developing workable legal frameworks for ABS that clarifies ownership of genetic resources. It is noted that because their definition of 'genetic resources' is sometimes ambiguous, it has been hard to legislatively determine who has rights to dispose of, give access to, or receive benefits from such resources. As a result, many countries apparently rely on the physical entity (i.e., organism, its parts or land where it is found) to define the legal status of their genetic (and biochemical) resources..."

"Furthermore, there are typically no problems with certain categories of biological and genetic resources, especially those found in certain public areas – ex situ collections, national parks or reserves, and protected or conservation areas. These are usually held by the State or public authority on behalf of the constituents, usually citizens of that state. Authority to control and grant access is usually vested in a specific authority or agency, which also receives benefits on behalf of the people. But the questions arise in regard to genetic resources found or located in private property, including land, plants and animals. Many legal systems recognize and protect private ownership of biological resources – plants and animals – but what is not clear is the extent of ownership of genetic resources. In most jurisdictions, including common law and civil code, the ownership of, and rights to, natural resources follow the land on which they are found. This conception is often reinforced, primarily by implication, through the constitutional assurance of the right to ownership of private property. In this case, in the absence of specific legislation to the contrary, ownership of the biological material would, plausibly, connote ownership of the genetic components.... However, in some countries, the Andean Community for instance, all genetic resources are stated to be owned or controlled by the State, even where private ownership of biological resources is recognized. In this case, a distinction is made between genetic resources (owned by the State) and biological resources (owned by private parties) which contain the genetic resources or components".¹⁰⁹

As Nnadozie, continues:

¹⁰⁸ Cfr Pérez, Efrain, *Access in Roman-Napoleonic Legal Systems*, en Access to Genetic Resources. Strategies for sharing benefits, Mugabe, John et al (eds), ACTS Press, Kenya, 1997

¹⁰⁹ Cabrera Medaglia, Jorge and Lopez Silva Christian, *Addressing the Problems of Access: Protecting Sources, While Giving Users Certainty*. IUCN, Bonn, 2006.

“Even though the Treaty recognizes the sovereignty of parties over the genetic resources in the MLS, it is silent on the issue of ownership or property over the resources it covers. It is noteworthy that MLS is limited to PGRFA that are in the public domain and under the management and control of Contracting Parties or are placed voluntarily in the MLS by their holders, for the purposes of research, breeding and training for food and agriculture.”

Since the IT does not address the issue of ownership this can not be conceptualized as an obstacle for a natural or legal person to include Annex I crops following the thesis of the direct implementation of the Treaties.

The interpretation of the meaning of control in the context of governmental entities may also shed some light on this issue:

“The interpretative question is what is meant by ‘control’. Practical control of the Contracting Parties could be understood as that it refers to the possession or holding of the accessions where the plant genetic resources are found.Control does not necessarily mean having a property right to a certain material. It easy to agree with Correa when he states that: ‘distinction must be established between rights over a physical entity as such (physical property) and over the genetic information contained in these resources (intangible property)’.”¹¹⁰

Correa suggests that control ‘call for the capacity to exercise physical acts over the resources’.¹¹¹ This would lead the ‘control’ criterion in the direction of meaning that holding the accession by the government is sufficient and required to meet this criterion. Correa concludes that ‘holding the resources is sufficient’

D) Non Annex I Crops situation

For annex I crops accessions which do not meet these criteria and non-Annex I crops, countries retain their sovereign rights and discretion to decide whether a certain PGR shall be included in the MLS. Thus, PGRFA not qualifying accordingly, are not mandatory governed by the MLS.

Some problems may arise in the case of non-Annex I materials held by international and other centres in accordance to article 15. Since the GB has declared that for their transfer the same SMTA applies, whether countries are obliged (as part of their international obligations under the IT) to allow these transfers under their legal systems is not fully clear. This could be linked to the issue of the legal effects of COPs or similar body decisions in

¹¹⁰ Correa, Carlos “Plant Genetic Resources under the Management and Control of the Contracting Parties and in the Public Domain: How Rich Is the ITPGRFA's Multilateral System?”, 2013.

¹¹¹ Correa, Carlos op cit.

international law.¹¹² It has been suggested that in the light of article 31 of the Vienna Convention on the Law of the Treaties these resolutions have a legal value¹¹³.

Some doubts also arose regarding the legal space provided by some ABS measures to implement the Multilateral System under the International Treaty. Peru, for instance, only excludes Annex I crops and forages from the scope of their domestic ABS measures, but not non-Annex I crops (native from Peru).¹¹⁴ Ecuador has similar provisions included in its ABS regulations¹¹⁵.

In the case of Costa Rica it has been interpreted as covered also the Non Annex I crops as mandated by the GB in the application of article 15 of the IT.

E). Existence of prior-conflicting legislation

As it was mentioned before, some countries appear to implement the Treaty directly (under their international law systems) without the development of specific measures or amendments of existing ones. However, this is not always clear when a country has ABS legislation (national or regional) which does not provide some form of recognition to the IT MLS (most likely because of chronological reasons) for instance by creating an exception to the ABS regime (which is the most common approach in countries with ABS laws enacted after the IT entered into force such as Buthan, Australia, Norway, Peru, Ecuador and others).

One of the reasons mentioned for the lack of ratification of the ITPGRFA in Colombia has been the apparent contradiction between the ITPGRFA ABS provisions and another international obligation: the Decision 391 which is part of the communitarian law of the Andean Community. However, the author was not able to identify any specific written legal opinion stating these concerns and providing some legal explanation for the interpretation of alleged legal conflict between the instruments. It however, illustrates the existence of opinions which consider that there is a potential contradiction between the

¹¹² See on this particular topic Wiersema, Annecoos, *The New International Law-Makers: Conference of the Parties to Multilateral Environmental Agreements*, 2009, available at: <http://ssrn.com> The author suggested that “...other activity by the COPs does not require the consent of every state party to the treaty in order to come into effect and does not provide for any form of opt-out for dissenting states; it is agreed on by consensus or, failing consensus, some form of majority voting.... Through this consensus-based activity, COPs frequently pass agreements that alter the application and scope of the treaties”. See also the book *International Environmental Law and Governance*, Fitzmaurice, Malgosia and French, Duncan (eds), Brill/Nijhoff, 2015.

¹¹³ Carmezulli, Louise, *The development of international environmental law at the Multilateral Environmental Agreements Conference of the Parties and its validity*, IUCN, 2006.

¹¹⁴ Written procedures still not made official in Peru established to implement the MLS follows the same interpretation.

¹¹⁵ See also the “transitorio Quinto” of the Peruvian regulations; the provisions of the ABS regulations have created some uncertainty regarding the compatibility between the national legal framework and the IT and its related decisions; see Lapeña, Isabel et al, *Incentivos y desincentivos para la participación del Perú en el Sistema Multilateral del Tratado Internacional sobre Recursos Fitogenéticos para la Alimentación y la Agricultura*; Bioversity, Rome, 2010. Ecuador, National Regulations for the implementation of CAN Decision 391 on ABS of 2011, article 2.3.

regional ABS legislation and the ITPGRFA, thus requiring an amendment of the regional Decision in order to allow the ratification of the ITPGRFA¹¹⁶.

In respect to this has been said¹¹⁷:

“The entry level question in this case is: ‘Which legal obligation takes precedence? The older national law or the more recently ratified international agreement?’ The answer depends upon the political and legal systems of the countries concerned. In some countries, domestic legal obligations pursuant to ratification of international agreements are automatically in force, and take precedence over pre-existing domestic laws concerning the same subject matter. In such countries, national authorities are obliged to act in conformity with those international obligations, and to encourage/allow/require constituents to do the same ... even if there is no positive legal enactment associated with the implementation of those international agreements.

In other countries, the situation is the opposite, with pre-existing national laws taking precedence over more recent international commitments if the latter have not been domesticated through various forms of positive legal enactment.”

In some countries it has been interpreted that the international commitment prevails over the national law and the national law should be interpreted as allowing legal space to comply with the IT obligations even without an express amendment of the law, by accommodating both obligations (mutually supportive interpretation). This theory is the prevalent in international courts and tribunals and also in some national courts practice. This has been the case in Costa Rica¹¹⁸.

International and national jurisprudence usually gives priority and precedence to the international obligations and requires the countries to modify or amend their own laws to be in conformity with the Treaty or under some legal systems the Treaty (as *lex posteriori* and because its higher hierarchy) takes precedence over the national laws or at the very least requires and interpretation that aims to achieve a synergistic and mutually supportive implementation of the international law and the national laws. See jurisprudence in annex of this paper.

In other countries this conflicting issue has been resolved by providing an specific exception. This has been the case of India¹¹⁹:

“However, since India’s Biological Diversity Act predates to the ITPGRFA there is not such provision. Notwithstanding this, there is a general exemption clause, Article 40, which states that’s the Central Government may, in consultation with the National Biodiversity Authority, by notification in the official Gazette, declare that the provisions of this Act shall no apply to any items, including biological resources normally traded as commodities. So far, this clause has been made use of only to exempt “ biological resources that are normally traded as commodities”. In the event that the Ministry of Agriculture develops a domestic mechanism for ensuring ABS for Annex I of the crops of the ITPGRFA, there is a possibility to exempt such

¹¹⁶ Nieto, Jimena, *personal communication*, 2012.

¹¹⁷ Halewood, Michael (ed) *Mutually supportive implementation of the Plant Treaty and the Nagoya Protocol. A primer for national focal points and other stakeholders*, Biodiversity International, Rome, 2015.

¹¹⁸ See Cabrera Medaglia, Jorge, *La implementación...*, op cit.

¹¹⁹ This seems to be the current case in Kenya, see Halwood et al, *Mutually Supportive* 2013, op cit.

*crops from the provisions of the Biological Diversity Act, with qualifiers as appropriate. This would provide the requisite legal space for the implementation of the multilateral system. It merits mention here that PGRFA other than Annex I crops would still need to be covered by the Biological Diversity Act....”*¹²⁰

In similar terms has been expressed that:

“For example, if there is already an access and benefit-sharing law in force (as is the case of India) it may need to be amended, or a ministry may need to issue an executive order to create the political and legal space required for the implementation of the multilateral system. Similarly, when it comes to accessing in situ, most countries already have in place permits systems for accessing and collecting materials from protected areas. Authorities responsible for issuing the permits for such areas need to be involved in the establishment of mechanisms related to the multilateral system for in situ materials”.¹²¹

This debate led to the issuance of a Notification excepting crops listed under Annex I of the IT from seeking approval from the NBA- under articles 3 and 4 of the Biological Diversity Act of 2002, of December 17, 2014.¹²²

Similar concerns (in terms of the existing of conflicting legislation in this case between the IT and a regional legal decision enacted in accordance to the Andean Community Legal Framework) have been raised in the context of the Decision 391 of the Andean Community in the opinion of Ruiz¹²³.

As concluded: *“In the longer run, it will be necessary specially to increase legal certainty to make amendments to the national ABS law (including by providing exemptions, etc) , or develop other forms of legal enactment that will create space for providers to act pursuant to the ITPGRFA. One option is to revise the national ABS law. In Uganda, a multi-agency meeting headed by the competent national authority for both agreements has decided that the solution in this case is for a ministerial declaration to create space for Treaty implementation, where the national ABS law otherwise applies to PGRFA”*.¹²⁴

¹²⁰ Agrawal, R.C, et. al. *A note on the state of implementation of the multilateral system of access and benefit sharing in India*, in A road map for implementing the multilateral system of access and benefit-sharing in India, Halewood, Michael et al (eds), Biodiversity International Rome and ICAR and NBPGR New Delhi, 2013.

¹²¹ Halewood, et al, *A road map for implementing the multilateral system of access and benefit sharing in India*, Halewood, in A road map for implementing the multilateral system of access and benefit-sharing in India, Halewood, Michael et al (eds), Biodiversity International Rome and ICAR and NBPGR New Delhi, 2013,

¹²² http://nbaindia.org/uploaded/pdf/Gazette_Notificaiton_on_exemption_of_crops_listed_in%20the_Annex-I_of_the_ITPGRFA.pdf

¹²³ Ruiz, Manuel, *Un lectura crítica de la Decisión 391 de la Comunidad Andina y su puesta en práctica en relación con el Tratado Internacional*, en Revista Recursos Naturales y Ambiente, No 53, abril del 2008, CATIE, edición especial dedica al Sistema multilateral de acceso y distribución de beneficios del TIRFAA.

¹²⁴ Halewood et al, *Mutually Supportive (2015)*... op cit.

IV. CONCLUSIONS AND RECOMMENDATIONS.

Key conclusions and recommendations are:

- **Understanding the role of direct implementation theories and practices in domestic systems in the assessment and determination of the PGRFA automatically included (both ex situ and situ).**

Most of the IT MLS components and provisions could be conceptualized as self executing, thus under monist legal systems there is no need for implementing legislation. This includes the assessment and decision on the ex situ and in situ PGRFA included automatically and the entity responsible for signing the SMTA.

In the case of in situ GR some doubts can arise from the use of the term " in accordance to... " and maybe some clear guidance or small amendments to the current legal frameworks in place for collection of PGRFA are needed to secure the compatibility of these norms with the IT MLS principles.

The coordination and clarification of the legal procedures (collection rules) and roles, for instance, of the environmental authorities in charge of the management of protected areas (national parks) when wild relatives of Annex I crops are found is critical for the appropriate implementation of both the NP and the IT (to avoid lack of certainty regarding the competence and treatment of the request from the environmental authorities).

- **Lack of studies, decisions and jurisprudence at the national level**

Few studies and jurisprudence at the national level have been identified in relation to the direct implementation of the IT. Some State seemed to follow this path given the fact that very few countries are providing implementing legislation for the IT and are using IT directly to implement the MLS.

- **Voluntary inclusions.**

In the case of voluntary inclusions since the IT obliges countries to "encourage" these inclusions it could be interpreted that a measure preventing or making difficulty for the natural and legal persons the voluntary inclusions could run counter the IT. If the countries have a clear obligation to encourage this should be read as a duty to avoid the imposition of restrictions for Annex I crops, in conformity with the direct implementation theory. being the IT the source of legal authorization to the countries. However, in countries where PGRFA are public property or ABS laws exist these facts may rise additional questions and concerns. In principle the ownership issue could not interfere with the voluntary inclusions since the IT does not refer to ownership only to control of PGRFA. In countries seeking to regulate the MLS provisions could be included to secure this right, subject to a simple authorization of a country authority with the only purpose to verify that the resources to be included are of those listed in Annex I (unless the country using its sovereign rights have decided to allow voluntary inclusions of other crops or for all the GR for food and agriculture)

- **Non Annex I hypothesis**

Non Annex I crops of the CGIAR's other centres may benefit from the same direct incorporation theory. More clarity is needed in relation to the legal effects and implications of decisions of the COP's or the GB's required to implement a Treaty. State understanding and practice is diverse in this aspect, specially since in the case of ABS laws already in place, the exception included for the operation of the IT, only covers Annex I and not non Annex I hold by CGGIAR and other centres under article 15. In the case of countries like Peru this decision has been taken purposely with the aim of not allowing the transfers of non Annex I native crops.

- **Conflicting issues with prior ABS laws.**

Where they are conflicting ABS regimes the precedence of the IT could be supported by the jurisprudence in international and national courts and tribunals. However, in some countries an amendment of the existing laws may be required in order to implement the IT provisions specially to provide adequate safeguards to the decision-makers and avoid doubt, concerns and fears including the possibility of breaking of the ABS laws and the attached legal sanctions.

- **CBD/NP regimes do not affect the implementation of the IT. Convenience of the development of positive measures targeted to implement the IT MLS.**

The NP does not affect the direct implementation of the IT. ABS measures enacted to implement Nagoya (or the CBD but this issue has been less explored) should provide enough legal space for the IT MLS implementation whether by a creating an exception of the scope of the ABS measure or by the development of positive regulations for the MLS operationalization. These provisions may take part of an ABS law to be enacted to put into effect both the CBD/NP or the NP or be a stand alone measure directed only to implement the IT MLS.

ANNEX

Selected jurisprudence on the cases of conflicting national laws and international treaty obligations.

1. International Court of Justice:

Advisory Opinion, April 26th 1988, Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947.

Extracts:

1. *"It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law. This principle was endorsed by judicial decision as long ago as the arbitral award of 14 September 1872 in the Alabama case between Great Britain and the United States, and has frequently been recalled since, for example in the case concerning the Greco-Bulgarian "Communities" in which the Permanent Court of International Justice laid it down that...**"it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty"** (P.C.I.J., Series B, No. 17, p. 32)". -Paragraph 57 (bold and emphasis are not from the original).*

2. *"It is axiomatic that, on the international legal plane, **national law cannot derogate from international law**, that a State cannot avoid its international responsibility **by the enactment of domestic legislation which conflicts with its international obligations**. It is evident that a party to an agreement containing an obligation to arbitrate any dispute over its interpretation or application cannot legally avoid that obligation by denying the existence of a dispute or by maintaining that arbitration of it would not serve a useful purpose. It is accepted that a provision of a treaty (or a contract) prescribing the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies". -Separate Opinion from Judge Schwebel (bold and emphasis are not from the original).*

2. The Inter-American Court of Human Rights:

"The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile". Judgment of February 5, 2001.

This case involved the judicial censorship of the screening of the movie "The Last Temptation of Christ" in detriment of the Chilean society and the claimants based on Chilean constitutional and legal provisions. The Inter-American Commission on Human Rights filed the case for the Court to decide whether Chile had violated Articles 13 (Freedom of Thought and Expression) and 12 (Freedom of Conscience and Religion) of the Convention; and that as a result of the alleged violations of said articles, Chile had failed to fulfill Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) of the Convention.

The Court ruled in their favor and determined that Chile violated the right to freedom of thought and expression and Article 1 of the Convention. The Court declared that the State had to amend its domestic law regarding censorship and to allow the exhibition of the film.

Extract:

“In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights that it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of effet utile). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention’s rules on protection”.-Paragraph 87 (bold and emphasis are not from the original).

“Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago”. Judgment of June 21, 2002.

This ruling is the result of the joiner of Hilaire, Constantine et al., and Benjamin et al. Cases. They were first presented separately by the Commission; however the Court considered that the purpose of the action was virtually the same and based on Article 28 on its Rules of Procedure, ordered the joiner.

The Commission submitted the case requesting that the Court declared international responsibility of Trinidad & Tobago due to the violation of several articles of the American Convention.

The main allegations were made concerning the following issues: the "mandatory nature of the death penalty"; the process for granting amnesty, pardon or commutation of sentence in Trinidad and Tobago; the delays in certain alleged victims' criminal proceedings; the deficiencies in the treatment and conditions of detention of certain alleged victims; the due process violations during some of the alleged victims' pre-trial, trial and appeal phases; and finally, for certain alleged victims, the denial of access to legal aid for the purpose of pursuing domestic remedies for the violations of their rights (as appears summarized by the Commission in the ruling emitted by the Court) .

Apart from granting the majority of the allegations, the Court declared that the State should abstain from applying the *Offences Against the Person Act of 1925* (the law with which the State based its actions) and within a reasonable period of time should modify said Act to comply with international norms of human rights protection.

Extract:

*“Based on the above provision, the Court has consistently held that the American Convention establishes **the general obligation of States Parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein. The provisions of domestic law that are adopted must be effective (principle of effet utile). That is to say that the State has the obligation to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice”.- Paragraph 112 (bold and emphasis are not from the original).***

“Case of Almonacid-Arellano et al v. Chile”. Judgment of September 26, 2006.

Extracts:

1. *“The above mentioned legislative obligation established by Article 2 of the Convention is also aimed at facilitating the work of the Judiciary so that the law enforcement authority may have a clear option in order to solve a particular case. However, when the Legislative Power fails to set aside and / or adopts laws which are contrary to the American Convention, the Judiciary is bound to honor the obligation to respect rights as stated in Article 1(1) of the said Convention, and consequently, it must refrain from enforcing any laws contrary to such Convention. The observance by State agents or officials of a law which violates the*

Convention gives rise to the international liability of such State, as contemplated in International Human Rights Law, in the sense that every State is internationally responsible for the acts or omissions of any of its powers or bodies for the violation of internationally protected rights, pursuant to Article 1(1) of the American Convention". - Paragraph 123 (bold and emphasis are not from the original).

2. *"The Court is aware that domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the provisions in force within the legal system. **But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention. This forces them to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception.** In other words, the Judiciary must exercise a sort of 'conventionality control' between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights. To perform this task, the Judiciary has to take into account not only the treaty, but also the interpretation thereof made by the Inter-American Court, which is the ultimate interpreter of the American Convention".- Paragraph 124 (bold and emphasis are not from the original).*

3. European Court of Justice:

"Costa v. ENEL" (1964). Case 6/64.

In this case, the claimant sought to determine if the recently implemented law that nationalized the production and distribution of energy in Italy was incompatible with the Treaty establishing the European Economic Community (TEEC). The question was referred to the ECJ by the local Court for a preliminary ruling, where the Court was asked to interpret several articles of the Treaty regarding the new Italian law.

Extract:

*"It follows from all these observations that **the law stemming from the Treaty, an independent source of law could not, because of its special and original nature, be overridden by domestic legal provisions,** however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.*

The transfer by the states from their domestic legal system to the Community legal system of rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail" (bold and emphasis are not from the original).

4. European Court of Human Rights:

"Maestri v. Italy". App No 39748/98. 17 February 2004.

Angelo Maestri, an Italian judge was sanctioned by the Italian Government for being a Freemason. Maestri alleged the violation of his right to freedom of thought, conscience and religion, his right to freedom of expression and his right to freedom of peaceful assembly and association; based on articles 9, 10 and 11 of the European Convention on Human Rights.

The Court determined the violation of article 11 of the Convention, considering that there was interference from the Italian Government in the applicant's right to freedom of association.

Extract:

*“Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting **States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed.***

In the instant case, it is for the Italian Government to take appropriate measures to redress the effects of any past or future damage to the applicant's career as a result of the disciplinary sanction against him which the Court has found to be in breach of the Convention”. - Paragraph 47 (bold and emphasis are not from the original).

Germany

National Courts:

Costa Rica

Resolution No. 09469-2007: SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA. San José, a las diez horas y cero minutos del tres de julio del dos mil siete.

Advisory opinion about the constitutionality of the DR-CAFTA (Dominican Republic-Central America Free Trade Agreement).

Extract:

*“Any definition in a Treaty can be considered insufficient and it is precisely because of this that the same instrument refers to the domestic law of the parties and prohibits the elimination of environmental provisions to promote trade. **The Ombudsman is mistaken in its assessment that everything that it's not expressly included in the Treaty is repealed in domestic law, which is only valid to the extent that opposes the provisions of the trade agreement.** However, as it is provided in the Treaty the possibility that every Party maintains its own parameters of environmental protection and that free trade cannot be promoted through deregulation on this subject, all the laws governing our country are safe”. - Voto No. 09469-2007, Considerando XV (author's translation, bold and emphasis are not from the original).*

Resolution No. 4192-2014: SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA. San José, a las catorce horas treinta minutos del veintiséis de marzo de dos mil catorce.

Advisory opinion about the constitutionality of the Free Trade Agreement between the Government of the Republic of Costa Rica and the Government of the Republic of Colombia.

Extracts:

1. *“Furthermore, the principle of international law effect utile demands that the State, in the interpretation and application of treaties, and of **those non self-executing**, the obligation of stimulating every organ of the State apparatus in order to generate long lasting effects among the domestic order in accordance with the international obligations acquired, **thus the necessary measures must be taken as a whole, to ensure the terms of an international agreement produce effects in harmony with the domestic law...***

In the same direction, international law principles pacta sunt servanda and bona fides determine that treaties must be fulfilled as such as they are subscribed in good faith, because the obligatory nature of the treaty between parties provides the establishment of policies aimed to its proper compliance.

*The aforementioned principles compel to an interpretation of the domestic law, including of course the Constitution and the provisions of the treaties subscribed by Costa Rica, in light of **the principle of coherence, by which, before***

two provisions, one from an international treaty and one from the domestic law, insofar as possible, a significance that produces incompatibility between them should not be attributed. The requirement for coherence is a logic consequence of the principles pacta sunt servanda, bona fides y effet utile which we have already mentioned. If States are engaged in the international order is because they have the will to fulfill their obligations and is duty of States and its institutions to adopt every measure, included those of interpretative nature, to adapt the domestic law in a way by which the pursued aim is reached". -Voto No. 4192-2014, Considerando XI (author's translation, bold and emphasis are not from the original).

Colombia:

Argentina:

Corte Suprema de Justicia de la Nación:

"Ekmekdjian, Miguel Ángel v. Sofovich, Gerardo y otros". July 7th, 1992.

Extract:

*"The necessary application of Article 27 of the Vienna Convention on the Law of Treaties **requires the organs of the Argentinean State to assign supremacy to the treaty before a possible conflict against an opposing internal provision or to neglect the enacting of provisions** that, in their effects are equivalent to non-compliance of the international treaty by the terms stated in said article 27".-Considerando 19 (author's translation, bold and emphasis are not from the original).*

Australia

High Court of Australia:

"Project Blue Sky Inc. v. Australian Broadcasting Authority". 28 April 1998. S41/1997

The appellants, Project Blue Sky considered that the Australian Content Standard (1995) determined by the Australian Broadcasting Authority (ABA), was contrary to Australia's obligations under the Protocol on Trade in Services to the Australia New Zealand Closer Economic Relations Trade Agreement (1989). Given the fact that the Protocol required equality of treatment and access to markets in television making, they considered the Australian Content Standard Act to be invalid because it gave television programs made by Australians preferential treatment over programs made by New Zealand nationals.

In the end, the Court determined that the standard was in breach of the Protocol, but that it was not invalid because there was never a legislative purpose to in breach of any statutory provision.

Extract:

*"If, by reason of an obligation under a convention or agreement with a foreign country, it is impossible to make an Australian content standard that is consistent with that obligation, the ABA is precluded by s 160 from making the standard, notwithstanding the literal command of s 122(1) and (2). **Accordingly, in making the Australian Content Standard in December 1995, the ABA was under an obligation to ensure that the Standard was not inconsistent with the Trade Agreement or the Protocol**". - Paragraph 80 (bold and emphasis are not from the original).*

Federal Constitutional Court of Germany (*Bundesverfassungsgericht*)

Constitutional Complaint Procedure. Order of 14 October 2004 - 2 BvR 1481/04.

In the Görgülü decision, the Federal Constitutional Court discussed the role of the European Convention and the rulings of the ECHR in the domestic legal order and the German domestic courts. The applicant, Mr. Görgülü had been denied the right to visit his son, who was living with foster parents after being given up for adoption by his mother without the father's knowledge about the existence of the child.

Because of this decision, made by the competent Regional Court of Appeal, the applicant submitted his case to the ECHR arguing the violation of Article 8 of the Convention, right to a private and family life. The Court decided that the decision of the Regional Court was contrary to the Convention's provisions. The Regional Court maintained its position, arguing that the judgments of the ECHR had no direct effect in the domestic legal order.

Following this decision the father interposed a constitutional complaint procedure where the Federal Constitutional Court analyzed the effects of the Convention and the rulings of the ECHR.

Extract:

*"If the ECHR has **declared a domestic provision to be contrary to the Convention**, either this provision may be interpreted in conformity with public international law when applied in practice, or the legislature has the possibility of altering this domestic provision that is incompatible with the Convention. If the violation of the Convention consists in effecting a specific administrative act, the authority responsible has the possibility of cancelling this act under the provisions of the law of administrative procedure (§ 48 of the Administrative Procedure Act (*Verwaltungsverfahrensgesetz – VwVfG*)). Administrative practice that is in violation of the Convention can be amended, and courts may establish the duty to do this".-*
Paragraph 51.