

## ABS Certificate System

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In ABS discussions under the CBD, the concept of certificates of legal provenance/source/origin have been proposed by some as an important element of ABS monitoring and enforcement for genetic resources transported across national borders.

It seems evident that such a system of certificates may include some aspects of various certificate/labeling systems related to international trade, property rights and environmental regulation. There are likely elements of certificate systems governing international trade in products and services (e.g. phytosanitary rules) that may be adaptable to an ABS certificate system. Perhaps, the design and enforcement of certificate systems governing international trade in cultural heritage may provide some insights into how best to design an ABS certificate system. This paper will focus on aspects of certificates that may be modeled on intellectual property rights or the regulation of trade for environmental purposes.

An analysis of the elements of various IP systems may provide some useful concepts for the ABS discussion on certificates. For the most part, enforcement under the intellectual property system is by the IP owner through civil court proceedings. A recent trend in some countries (e.g. United States) has been to increase government involvement in the enforcement of IPRs (e.g. border enforcement, drug approval processes).

The patent system may provide some insights into elements for an ABS certificate system. Patents are granted for inventions at the national level. There is no international patent right nor fully harmonized patent standard between national jurisdictions. The WIPO Patent Cooperation Treaty (PCT) may provide some lessons for international co-operation in making an international ABS certificate system operational, as well as, minimizing regulatory costs. Adapting the PCT model, standard classification systems (taxonomy/genomics), cooperatively developed rules and procedures and electronically searchable databases (e.g. genetic resources, PIC numbers) may be potentially desirable aspects of an ABS certificate system.

Under many national patent systems, patentees of biotechnology inventions are allowed to include the accession number of deposits of biological material to support the public disclosure of the invention. The rationale for allowing deposits of biological material is that access to this material is necessary for generic manufacturers to reduce the invention to practice upon the expiration of the patent. The deposit system under the patent system is of interest for two reasons. Firstly, there may be aspects of design and administration of the patent deposits of biological material that may be applicable to an ABS certification; for example, certain restrictions on access to and use of deposits by experts only. Secondly, it

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<sup>1</sup> The views expressed are solely those of the author.

may be appropriate to link such an ABS certificate system to the patent disclosure procedures and associated deposits of biological materials.

An effectively designed ABS certificate system could assist in monitoring and regulating trade in biological resources. It would seem that a goal of such a certificate system would be to achieve administrative and enforcement efficiencies with other environmental regulation. Thus, the certificate system should be forward looking in attempting to integrate trade in ABS-related material with the regulation of international trade in endangered species (CITES), regulation of trade in genetically modified organisms (Biosafety Protocol), phytosanitary regulation of trade in biological material and international efforts related to invasive species. On a practical level, the same border officials are likely to be responsible for overseeing trade in all these types of biological materials. Simplifying any import/export certificate procedures, and facilitating the use of searchable electronic taxonomic databases covering the gamut of regulatory regimes governing trade in biological resources, would seem to be a desirable objective.

With respect to adapting aspects of certificate systems used for environmental regulation purposes, the Convention on International Trade in Endangered Species (CITES) would seem to be the most applicable model. Some preliminary thoughts on CITES/ABS follow.

It is interesting to note that CITES includes monitoring and enforcement at several points in the trade pathway - the source country, borders and the marketplace (e.g. natural products stores). A key element is the use of export and import permits. The CITES model of monitoring and enforcement throughout the market chain would seem to support calls for ABS enforcement measures not only in "provider" countries but also in "user" countries. All countries are both providers and users of genetic resources so all countries will need to take measures to monitor and enforce access to biodiversity, to enforce at borders and to enforce in the marketplace. Therefore, it is in the interests of all countries that the monitoring and enforcement system using certificates needs to be designed in order to achieve system-wide efficiencies.

For several reasons, the monitoring and enforcement of trade in ABS-related biological resources is likely to be more challenging than under CITES.

There are approximately 250,000 species currently on the CITES lists. In comparison, estimates suggest that there are more than 14 million species world-wide and only approximately 10 percent of these species are known. ABS-related trade will involve many more millions of biological materials to regulate than under CITES.

Enforcement of unauthorized exporting of small soil samples containing microorganisms is much more difficult to monitor and enforce against than the smuggling of elephant tusks and ivory carvings. The mailing of seeds in a letter and the e-mailing of taxonomic/genomic/proteomic information are additional enforcement challenges beyond those encountered under CITES.

There are also some lessons from CITES that may be useful in designing and administering an ABS certificate system. First, the use of different lists of endangered species with different permit requirements may be usefully applied to deal with scientific/commercial uses, different sectors, endemic versus species that range across borders, etc. Experiences by CITES with the use of taxonomic descriptions and searchable electronic databases should be analyzed for applicable uses under an ABS system. CITES monitoring and enforcement strategies targeting different marketplace actors (e.g. organized smugglers, collectors of exotic species, tourists, etc.), as well as, certain problematic areas (e.g. ivory, bushmeat, shark/bear parts) may have some relevance for the design and administration of an ABS certificate system.