

DISCUSSION PAPER

A Simple Solution Using Certificates of Legal Provenance as a Workable Component of a Functional Regime on ABS

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The concept of a certificate of legal provenance (CLP)² has undergone a major evolution over the past 10 years. The newer extended versions of the certificate concept - which proposed comprehensive 'international tracking' systems - raise many expenses and uncertainties. For this reason, it is useful to re-consider the original proposals, which were simpler solutions - 'international registration' systems. Initially, the CLP was conceived as a simple, elegant tool. It created both a registration system and an incentive to use that system:

- For the provider country, the system could:
 - provide an increase in the user's desire and to comply fully with national ABS requirements, setting appropriate measurable standards for 'registerable compliance'; and
 - create a legal basis for future oversight and enforcement in both user and provider countries.

- For the user, the CLP could provide several benefits:
 - streamlining their ability to get certain approvals; and
 - especially providing a measurable basis for recognising 'good' (compliant) users (helping the provider country and providers to recognise the importance of directed strongest enforcement against those who do not make efforts to comply with ABS - true "biopirates").

This is a voluntary exchange. A certificate of legal provenance (CLP) would give the user 'legal certainty' - that is, protection against a later claim that he did not obtain relevant legal permissions. In exchange for this certainty, the user would rigorously comply with requirements and processes necessary to get the certificate.

¹ This paper presents the views and 'expert input' of the author only. It does not, in any way, represent the views or policy of IUCN, its members, commissions, or secretariat.

² Originally called a "certificate of origin," and promoted in the late 1990s by, inter alia, Jose-Carlos Fernandez-Ugalde and Brendan Tobin.

The underlying mandates compelling use of the 'registration-type' system are clearer than those under the tracing proposals. It is not enough simply to agree on forms and documentation. Those documents will not be used, unless the user is motivated to do so. A certification system can be developed **only** in the context of new law:

- User countries must adopt legislation requiring proof of a legal source/provenance, upon commercialisation (including patenting, but also other commercialisation processes) of products that incorporate (or were created by using) GR; and
- Source countries must adopt laws that (i) cover the issuance and contents of the certificate, and the specific minimum standards³ that will be used to by the certificate issuer, and (ii) provide that, the country will support properly issued CLPs against challenges based on PIC and the validity of MAT (but not excusing violation of the MAT).

Third, registration-type systems need not to trace all movements of biological materials. A tracing-type (comprehensive tracking) certification system would have to track all biological materials, because all biological materials contain the 'functional units of heredity.' It will always be possible to extract genetic material from any biological material. Hence, even if a practical definition of 'genetic resources' is ultimately adopted, a tracing-type system would have to track all movements of any biological specimen, in order to address the chance of GR extraction and use in future. This would be virtually impossible. The adoption of exceptions from a comprehensive tracing-type system would serve as 'loopholes' allowing undocumented movement.

By contrast, in a registration-type certification system the incentive to use the system arises out of governmental action. Specifically if (i) the government requires proof of legal source/provenance prerequisites to marketing, introduction, patenting or other desired activities relating to interim, final or derivative products developed from the genetic resources; or (ii) if the law states that a formally issued certificate constitutes such proof, then the user will have an incentive to acquire a certificate, at some point in the use process (in protecting his rights in new inventions, in product development, at the time of introduction, testing or marketing and at other times).

Unlike bar-coding and other broad scale tracing systems, the original certification concept would create a system that is not very expensive, and could be funded primarily from license fees, since it would not require tracking/coding of quantities of biological specimens. The elegance of this system is that compliance would be largely self-motivated. The user will know that his ultimate commercialisation will be simplified if he takes the required actions to obtain a CLP.

³ Developing these standards is not a simple matter. However, it may be much simpler than addressing some of the problems identified in the discussion of current "international tracking system" proposals.

If he does not have a CLP, a user will have to 'prove' legal provenance. This may mean that the user must give (and the issuer must adjudicate) evidence showing that resources are either (i) not covered by the CBD,⁴ or (ii) legally obtained. Where the original specimen was collected or acquired 'informally' or where it came from a collection that does not maintain CLPs for its specimens, it may be difficult to *prove* this for the specimen. Consequently, users may actually prefer to obtain a certificate from a source country, instead of the uncertainties of using insufficiently documented specimens from ex-situ collections.

Over time, the CLP tool can be tied to other systemic incentives - they may be required in applications to commercialise the product in other countries, for example. It may also be possible to tie the CLP to eligibility for tax benefits for R&D or for other legal benefits to users of GR. This could enhance the preference for resources obtained from developing countries over those obtained from ex-situ collections or other sources.

Final Point

It is important to decide exactly what the certificate is supposed to do, before attempting to develop it. CITES provides a useful example of how a certificate can be developed in international law. The specific provisions of CITES set forth both general and specific objectives, on the basis of which they describe a comprehensive certificate system designed to implement it. Even with such a process:

- CITES permits and certificates have been 'adapted' by many Member Countries (so are not entirely uniform); and the Convention is
- still being refined and adjusted by the CITES COPs to enable it not only to better suit its specific objectives but also to help the system to more effectively promote its long term objectives.

Conclusion

Certainly, the broader 'international tracking system' approach gives some satisfaction at a conceptual level. It is important not to overburden the concept, or try to use it to solve all of the problems of ABS. A more simplified, incentive based CLP system may be a quicker and more effective tool of enabling ABS.

⁴ See Article 15.3, removing from Article 15, certain (essentially pre-convention) specimens.