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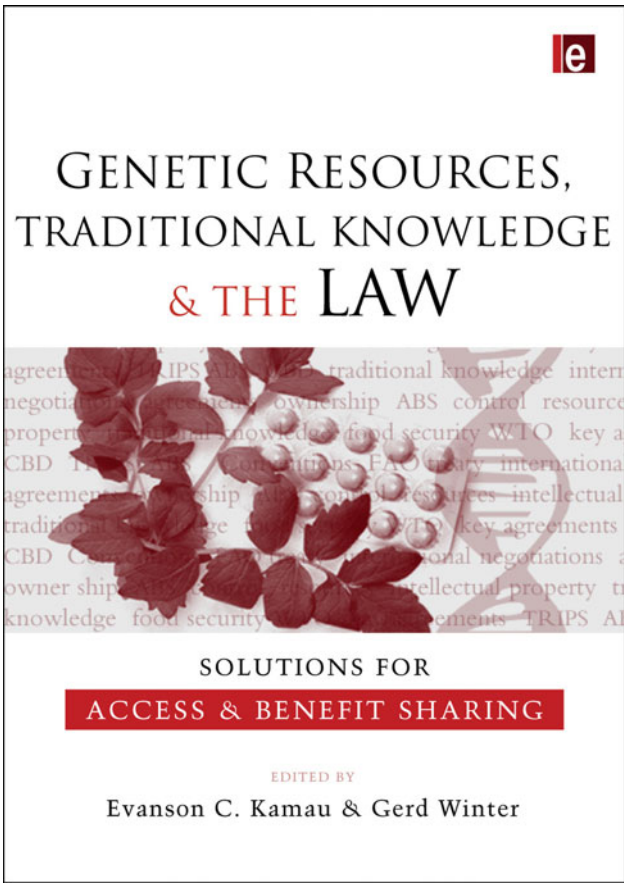
Book Review

Advancing Access and Benefit Sharing for Genetic Resources and Traditional Knowledge

Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing, Evanson C. Kamau and Gerd Winter (Editors), 2009, Earthscan



Having edited an Earthscan publication on biodiversity and the law (McManis, 2007), I was pleased to be asked to review *Genetic Resources, Traditional Knowledge and the Law: Solutions for Access and Benefit Sharing*, because it has enabled me to ascertain: (1) what, if any, progress has been made during the past 5 years to promote access and benefit sharing (ABS) in the use of genetic resources and traditional knowledge; and (2) what useful solutions this new volume offers for promoting appropriate ABS. In this review, I will identify and evaluate this multi-authored book's most salient conclusions on both points.

First, a word about the book's organization: The chapters that comprise Parts I and II offer a number of welcome theoretical reflections on the concepts of justice underlying the ABS regime. The chapters in Part I focus on genetic resources (GRs), and those in Part II focus on traditional knowledge (TK). Part III of the book examines recent ABS developments in six exemplary countries: Kenya, Brazil, South Africa, China, Costa Rica, and Australia. The chapters in Part IV identify and discuss core problems in the ABS measures in various provider-countries, whereas the chapters that comprise Part V discuss existing and potential measures to promote ABS in user countries.

The volume's chapter authors generally seem to agree that the vision embodied in the Convention on Biological Diversity (CBD), and particularly the CBD's stated objective of facilitating access and benefit sharing in the use of GRs and TK, has not been translated into reality during the 18 years that have passed since the CBD's adoption. They also seem to agree that the primary reason for this is because source country legislation implementing the CBD has more often functioned as a barrier than as a facilitator of access to GRs and TK.

Where the chapter authors diverge is in their prescriptions for how to improve the ABS regime. This may be due to the diversity of principles underlying the concept of ABS and the inherent tensions among them, as Parts I and II of the volume explain. Some chapter authors seem untroubled that existing national implementing ABS legislation or their own prescriptions for improving the same will either greatly increase the cost of access to GRs and TK or reduce the likelihood that meaningful benefits will be generated thereby. For them, the abstract goal of ensuring equity in ABS apparently trumps the practical objective of promoting ABS as such. Other chapter authors—for example in Chap. 3—stress the need to reduce the cost of obtaining access to genetic resources in provider countries, as well as the need for government policy makers to "take good notice of the benefit-sharing initiatives that are already being undertaken by different stakeholders in society and search for ways to support and facilitate them."

A comparison of ABS developments in the six exemplary countries discussed in Part III of the volume also highlights this tension. In marked contrast to the first five ABS regimes, which seem in practice to function more as barriers to than as facilitators of ABS, the ABS regime in Australia (which considers itself to be both a provider and a user country) contains a number of features designed to promote access, such as an online application process for permits that can be issued in as little as two working days and can be obtained for a nominal fee of AU $50, or if access is sought for noncommercial purposes, such as taxonomy research for no charge at all. Although a commercial permit requires submission of a benefit-sharing agreement, access for noncommercial purposes simply requires a declaration that the applicant will negotiate a benefit-sharing agreement if he or she later wishes to commercialize and will in any event offer the government a taxonomic copy of any species collected, provide a copy of research outcomes, and seek permission before transferring material to third parties.

Underlying the Australian ABS regime is the sensible notion that, instead of imposing burdensome and costly "check in" procedures as a condition for allowing researchers access to GRs and TK, it may make better policy sense to streamline the check-in process and adopt legally enforceable "check out" procedures, particularly where access is initially being sought for noncommercial research. The wisdom of this approach is quantifiable; applications for permits in Australia have reportedly grown from 1 in 2006 (the first year of operation) to 14 in 2007 to 28 in 2008—and are currently being received at the rate of one per week.

One of the book's coeditors (Winter) has contributed Chap. 2 in Part I of the book, arguing that neither provider state measures nor user state measures can provide an efficient and just ABS regime, thus suggesting the need to introduce regional common pools that could bundle the negotiating and enforcement powers of resource states, facilitate user countries' regulation of benefit sharing, and ensure justice among multiple owners of GRs. The volume's other coeditor (Kamau), in Chap. 21 of Part V of the volume, offers a critical appraisal of the obligation of user-country members of the CBD to ensure equitable benefit sharing, arguing that Article 15.7 of the CBD imposes an international obligation on members to introduce national legislation effectively ensuring ABS, and focusing in particular on certain disclosure of origin provisions adopted in the European Union.

As Kamau notes, the value of a disclosure of origin requirement depends on whether and how effectively it can be enforced. The problem with current disclosure requirements included as a part of the patent application process, Kamau points out, is that they tend to favor noncompliant users of GRs and/or TK and place compliant users at a disadvantage, because users who access GRs or TK illegally and declare the origin unknown will save on access expenses and escape the obligation to share any resulting benefits. A more workable solution would be to require the disclosure of the direct source of GRs or TK, not as a condition for *applying* for a patent (although any such disclosure will in fact occur during the patent application process) but as a condition for *enforcing* an otherwise valid patent (Carvalho, 2003). Such a requirement would diminish the potentially crushing burden that a disclosure of origin requirement would otherwise impose on the patent system,[1] and would narrow the focus of legal attention to those (relatively few) patent applications that result not only in the grant of a patent but a sufficiently valuable patent to justify the cost of enforcing it in a court of law (Moore, 2005)—in short, precisely the sort of patent that should be subject to a benefit sharing obligation.

[1]The burden on the patent system would be crushing for two reasons. First, although patent examiners have expertise in various technology fields, they are not currently trained to evaluate the adequacy of disclosures of the source or origin of GRs or TK. Second, the disclosure requirement would be highly inefficient, because not all applications will result in patents and most issued patents turn out to be worthless (see Moore, 2005).

Perhaps this volume's two most encouraging chapters, in terms of identifying practical solutions for promoting access and benefit sharing, are Chap. 20, which reports on the Dutch-German ABS Capacity Development Initiative for Africa, and Chap. 13, which reports on ABS developments in Costa Rica. To date, the former initiative discussed in Chap. 20 has established three subregional forums for exchanges on ABS issues that take into account peculiarities of languages in Africa and the diversity of legal systems. The objectives of the initiative are to: (1) increase awareness of African policy makers and legislators on ABS matters, especially their cross-sectoral nature and their potential for poverty alleviation; (2) foster meaningful participation of all relevant stakeholders at all stages of the negotiation, development, and implementation of ABS regulations—at the international, national, and local level; (3) improve regional cooperation on ABS issues among African countries; and (4) support the development of partnerships for business opportunities. The Initiative is thus promoting the very kind of regional cooperation that Winter advocates in Chap. 2.

The chapter on Costa Rica, in turn, not only critiques Costa Rica's 1998 ABS legislation, but also reports on the continuing role of Costa Rica's National Biodiversity Institute (INBio) in promoting the use of Costa Rica's biodiversity for sustainable development. INBio's basic strategy has been to facilitate access by adding value to Costa Rica's GRs through the creation of easily accessible ex situ collections of its GRs and licensing commercial access to those collections. Included in the chapter description of the research activities of INBio is a long list of research collaborations that INBio's ex situ collections have stimulated.

Perhaps the single most encouraging aspect of this report of the activities of INBio is the news that INBio is now receiving royalties from two patented products: a phytomedicine generated from a collaboration with Lisan Laboratories (a Costa Rican generic pharmaceutical company); and an industrial enzyme (Cottonase) for textile processing for cotton (an environmentally friendly alternative for chemical scouring in cotton preparation) developed through a collaboration with a company originally called Diversa (now Verenium). To observers (such as this reviewer) who have long believed that the best way to conserve and make sustainable use of GRs and TK is to improve the ability of holders of these resources to access existing intellectual property mechanisms and to adopt a carefully crafted disclosure of source or origin requirement as condition for enforcing an otherwise valid patent derived from GRs or TK) (McManis, 2003), this is welcome news indeed.

As the Costa Rican experience demonstrates, source countries and user countries alike must recognize that ABS is a two-way street: without cost-efficient access to GRs and TK, there will be no benefits to share; but without legally enforceable means for ensuring that benefits will be shared there will be little incentive for source countries to facilitate access to, or even to conserve, potentially valuable genetic resources and traditional knowledge.

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