

4 The role of non-state actors in the Nagoya Protocol negotiations

Amandine Orsini

Introduction

The Nagoya Protocol to the Convention on Biological Diversity (CBD) adopted in October 2010 is not only the most comprehensive international environmental agreement of recent years, but the negotiations on the Protocol have also featured the particularly active and constructive involvement of non-state actors (NSAs)—compared to recent climate negotiations, for instance (Fisher 2010). The ambition of this chapter is to delineate this involvement in more detail.

The expression ‘non-state actors’ is used to refer to a broad range of international actors that are not governmental. Similar expressions are ‘major stakeholders’, used in UN parlance, or ‘private actors’. In particular, NSAs refer to business actors (being individual firms, business associations etc.), scientific stakeholders (individual experts, academia, research organizations etc.), non-profit organizations (more commonly referred to as non-governmental organizations—NGOs), indigenous and local communities (ILCs), farmers, workers, women and youth.

Two lessons to be drawn from the abounding literature on NSAs in international politics are that their number is constantly rising and that they play a crucial role at all stages of international policy making, including for agenda setting, treaty negotiations and implementation of international norms (for a synthesis, see Josselin and Wallace 2001). This is even more the case for environmental issues that often raise scientific, economic and social debates. The access and benefit sharing (ABS) issue is no exception to this rule and generated intense discussions on a broad range of international topics such as intellectual property, trade, agriculture, traditional knowledge and biodiversity conservation.

When acting on the international scene, NSAs can pursue two broad tracks. They can either follow intergovernmental processes and offer their assistance in dealing with them or they may prefer to elaborate their own private rules. Here, the focus is on the first track, as the intergovernmental agenda for ABS is progressing at great pace (see Wallbott et al., this volume). For influencing intergovernmental processes, NSAs can choose between two options. They can either try to be integrated within national delegations to follow the usual game of intergovernmental negotiations or register as observers. While government players are covered in

other chapters of this volume, the focus here is on NSAs as independent players in the negotiation game.

Moreover, there are several signs of NSAs' direct involvement in former international negotiations and in particular in the CBD negotiations. NSAs have been influential early, for instance in negotiating the scope of the CBD, advocating an extension from a conservation treaty to a convention dealing with the sustainable use of genetic resources (GR) (Bled 2010: 579–580). In particular, NGOs followed assiduously the negotiation of Article 15 of the CBD dealing with ABS yet had a rather low influence (Arts 1998: 189–196). Following the adoption of the Convention's text, NSAs also actively influenced the elaboration of the Bonn Guidelines. In this case, opponents to strong ABS regulations—including business, scientists and NGOs—were influential in drafting the text but were subsequently defeated by a second coalition—also gathering several kinds of NSAs—that managed to foster the adoption of a mandate to negotiate an ABS regime in 2002 (Bled 2010: 582–583). Analysis of NSAs' involvement in the subsequent intergovernmental ABS negotiations is rare or even nonexistent. This may be surprising since their presence during the negotiation meetings (Figure 4.1) has been rather high compared to other negotiations under the CBD, such as the negotiations on the Cartagena Protocol on biosafety (for a comparison, see Burgiel 2007: 77).

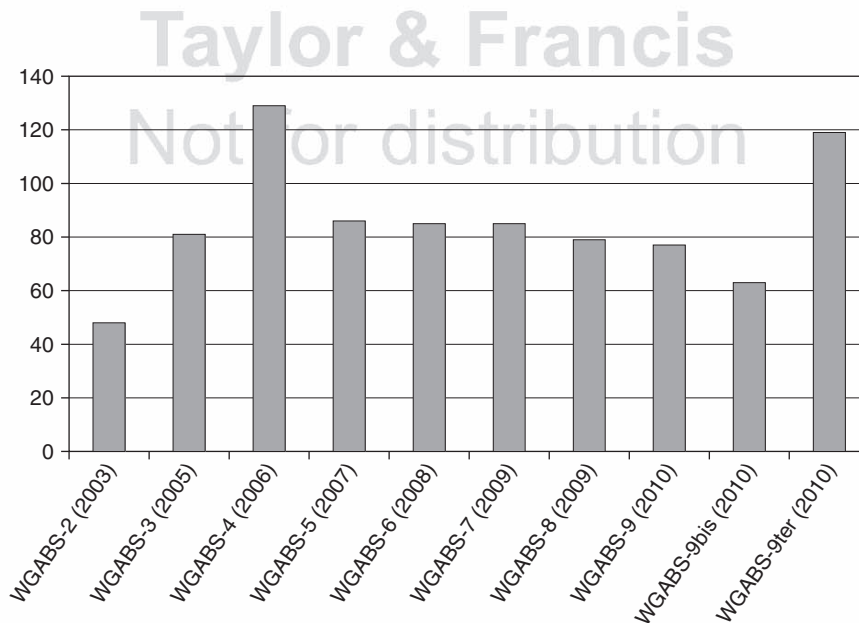


Figure 4.1 Number of NSAs participating as observers in the ABS negotiation process.

Source: Information from the CBD Secretariat.

Note: "WGABS-2" etc. denotes the meetings of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing (WGABS) that negotiated the Nagoya Protocol; see also Wallbott et al., this volume.

The CBD negotiating process is very dynamic and open to the participation of observers. Accreditation is granted by the CBD Secretariat according to precise but flexible guidelines. It gives **right** to participate in the plenary sessions and contact groups of every working session unless one third of the parties object to the presence of observers (a rule that has never been applied in the ABS case). While participating in negotiating sessions, NSAs can make statements after all interested parties have expressed their views and can propose negotiating text as long as they are supported by at least one government. Expert groups are the only negotiating format for which limits apply for the number of NSAs allowed to attend, but similar limits exist for national delegates. Also, like in every negotiating process, the very last sessions tended to be closed to observers. This was the case for the third meeting of the ninth session of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing (WGABS) (WGABS-9ter) in October 2010 and to some extent for the second meeting of the ninth session (WGABS-9bis) in July 2010, but again this limitation applied to many national delegations as well. Overall, the ABS negotiations were rather open to NSAs, in particular thanks to the co-chairs' very inclusive approach (see also Wallbott et al., this volume).

Overall, NSAs' involvement in the ABS negotiations has been high. But many questions remain regarding this involvement. To address them, the next section first presents the analytical framework that serves as the basis for the ensuing empirical analysis. This is followed by a discussion of the characteristics of the NSAs that followed the Nagoya Protocol negotiations and an investigation of their respective positions. Subsequently, the strategies followed by these NSAs are analysed before their overall influence is investigated. The conclusions summarize the results obtained and discuss the potential role of NSAs in the implementation of the agreement.

The analysis is based on several methodological tools. Quantitative research tools, such as statistics on the lists of participants to the negotiations of the Nagoya Protocol, help identify the key NSAs. Qualitative research tools, such as process tracing and exemplification based on archive consultation, interviews, field work (conducted from 2006 until 2008 at the CBD) and the available scientific and grey literature (in particular the CBD documents and the *Earth **Negotiation** Bulletin*) help to specify the positions and activities of the identified NSAs.

Analytical framework

As it represents a crucial question, many studies have already focused on the influence of NSAs on environmental negotiations. In particular, they help us clarify who NSAs are, what they advocate, how they try to exert influence and with which results.

Who NSAs are obviously depends on to which category they belong (NGOs, business, research etc.). But what often matters most is the resources they have at their disposal. In particular, NSAs can have material, organizational or discursive resources. Material resources are defined with respect to financial and human capacities but also as access to technology, control of rare goods or role in the

economy. In that sense, material resources are sometimes referred to as ‘economic power’ (Boström and Tamm Hallström 2010), designating the link NSAs have with national economies in terms of raw materials or employment. Economic power is often associated with business actors (Betsill and Corell 2007). Yet several transnational NGOs also have great material resources: For instance, in 2010, Greenpeace International collected more than \$226 million in grants and donations (Greenpeace International 2010: 27).

Organizational resources are defined as the capacities to network with others and refer to information on the political process. It is often a ‘must’ to network with peers (NGOs with NGOs, business with business etc.) but also with other categories of NSAs (Boström and Tamm Hallström 2010) and with policy makers. This helps developing public relations with political targets (Shawki 2011: 104). In the policy network approach, several studies have pointed to the privileged access of business to policymakers (Bernhagen 2008), while NGOs are particularly known for their capacities to network together (Botetzagias et al. 2010). In any case, organizations opt for networking since in the long run it can offer them a number of potential benefits, such as increased access, efficiency, visibility, credibility or legitimacy, reduced isolation as well as solidarity and support (Botetzagias et al. 2010). However, in practice, networks also often present some drawbacks, and power relations or problems of equal participation can undermine their efficiency (Doherty 2006; Dombrowski 2010). This helps explain why networks are often created around precise tasks and do not replace individual lobbying (Kautto 2009; Orsini 2011). Under these circumstances, maintaining access to decision makers and politicians might be a safer organizational strategy. Organizational strength is also about identifying key negotiation meetings—where to meet and network—and identifying key targets—who to network with.

Discursive resources refer to the ability to master information and expertise (i.e. grounded information based on experience) and to frame debates regarding the policy question discussed (Boström and Tamm Hallström 2010). They can take the shape of research- or expertise-based reports and papers. Discursive resources are known as the prime ‘weapon’ of advisory NGOs (Gulbrandsen and Andresen 2004; see also Raustiala 1997 and Shawki 2011). However, business has also considerable discursive strength (Bernhagen 2008). The technical information on the environmental issues discussed that firms frequently master gives them considerable leverage. Since discursive strength is not just about information as a whole but mostly about ‘unique’ information or ‘alternative’ information (Boström and Tamm Hallström 2010), business benefits from information asymmetry on a great number of issues. Information per se is not sufficient for discursive power. To have power, NSAs have to be able to frame the ongoing debates around such information and to provide for analysis, advice and policy options. Discursive resources are also tightly linked to credibility, resting both on the capabilities to propose consensus and on the reliability of information. It seems that actors are found to be trustworthy to different degrees, with NGOs scoring high while states and corporations are seen as strategic users of truth (Boström

and Tamm Hallström 2010). In order to understand who has been influential, one should carefully measure each NSA's resources.

A further crucial point is to understand what NSAs advocated or which political positions they took. In this regard, there is an increasing recognition that NSAs can act on common bases despite their diverse origins and natures. While business and NGOs had initially been juxtaposed in the literature according to their for-profit/not-for-profit characteristics, this dichotomy has been progressively abandoned. In 2002, Edwards already noted that 'most NGOs are still confused about their identity. They have always been both market-based actors, providing services at a lower price than the commercial sector, and social actors, representing particular non-market values and interests in the political process' (Berry and Gabay 2009: 345). It is now widely recognized that the so-called 'NGO community' encompasses a broad diversity of viewpoints (see among others Alcock 2008; Böstrom and Tamm Hallström 2010). Similarly, several business actors may support environmental regulation to secure their market or to obtain a competitive advantage. Overall, their position is likely to depend on their sector, their relation to technology and their level of internationalization (Falkner 2008). The 'business community' is therefore fragmented (Kautto 2009; Tienhaara et al. 2012). As a consequence, researchers have recognized the broad variety of NSAs' political positions by placing them on a 'green to grey' continuum (Vormedal 2008).

Once political positions are established, NSAs will also have to determine their strategies to pursue their interests. Four kinds of political strategies have been identified earlier in the literature on NSAs' lobbying, in particular based on environmental NGOs' strategies during the negotiations of the Cartagena Protocol on biosafety (Arts and Mack 2003). Two strategies are insider ones—that is, they imply a contact between the influencer and the 'influencees'. These are lobbying, defined as informal influence on delegates, and advocating, the formal matching of lobbying. For example, lobbying can involve bribing, threatening, and informal contacts, while advocating can be done through distributing letters, working documents, statements, draft texts or submissions in order to have once voice heard. Two other strategies are outsider ones. Again, outsider strategies can be divided according to their formal or informal character. Informal outsider strategies include exercising public pressure, organizing protests and naming and shaming campaigns. Formal outsider strategies include promotion: distributing to all participants and observers relevant reports, books, awareness-raising materials, organizing side events and so forth. Moreover, where intergovernmental negotiations take place in the context of a larger regime complex, as has been the case with respect to the Nagoya Protocol (Morin and Orsini 2011; Oberthür and Pożarowska, this volume), NSAs may be able to use strategically different negotiation fora to advance their agenda. For instance, indigenous organizations could urge the CBD to better recognize their rights by mentioning progress achieved at the WIPO negotiations on the same issue. This fifth strategy can be labelled a 'multi-fora strategy'.

Regarding the impact of NSAs (the final 'so what' question), Betsill and Corell have proposed an extended framework to assess the impact of NSAs on

environmental negotiations (Betsill and Corell 2007). In particular, this framework relates influence to participation and distinguishes influence on the negotiating *process* (i.e. on issue framing, agenda setting and the position of key actors) from influence on the negotiating *outcome* (including influence on the substantial issues of the adopted negotiating text). Moreover, Betsill and Corell argue that previous work has often confused correlation between NSA activities and negotiation outcome. Resources and strategies deployed do not necessarily lead to influence. Resources, strategies and goal attainment may at best be indicators of influence but do not prove such influence. Producing evidence for such influence requires careful process tracing so as to ‘assess causality by recording each element of the causal chain’ (Zürn and George and Bennett, quoted in Betsill and Corell 2007: 30). Others have shared this concern for empirical research, nuance and counter-factual reasoning, as ‘any quantitative or qualitative determination of political influence remains after all an *informed guess*’ (Arts 1998: 74). Given these requirements, a comprehensive assessment of NSA influence and impact on the Nagoya Protocol is beyond the scope of this chapter. The most that is on offer here is the investigation of some broad correlations between the level of NSA involvement and the agreed Protocol text. The results have to be considered carefully and should not be taken as a claim regarding actual NSA influence.

NSAs in the Nagoya Protocol negotiations: A small but diverse core group

Few NSAs have been able to engage in the ABS debate continuously over a longer period of time, with most of them only following one or two ABS working group meetings (see Figure 4.2). As we contend that influence is correlated to participation, the subsequent analysis focuses on the 12 NSAs most present in the negotiations. Table 4.1 contains the names of and further information about the positions of these organizations (the International Indigenous Forum on Biodiversity is not part of the group of 12 most present organizations; see below in this section). Moreover, Tebtebba is appearing twice; see also below in this and the following section). These NSAs have followed at least 8 of the 10 WGABS meetings. Several elements confirm that material and organizational resources are prerequisites for long-term participation in ABS negotiations.

Firstly, out of these 12 NSAs, 3 have their headquarters in developing countries, while 9 are based in Europe or in North America. This clear discrepancy between Northern and Southern interests can be explained by the lack of resources of developing countries’ NSAs, in particular material and organizational resources. Furthermore, some regions are not represented at all, such as Latin America. Whereas it needs to be taken into account that some of the identified NSAs are international in scope, this result is still surprising considering that Latin America is a very biodiversity-rich region.

Secondly, three of these NSAs are business organizations, three are broad-scope NGOs that seek (sustainable) development as an objective, three are indigenous

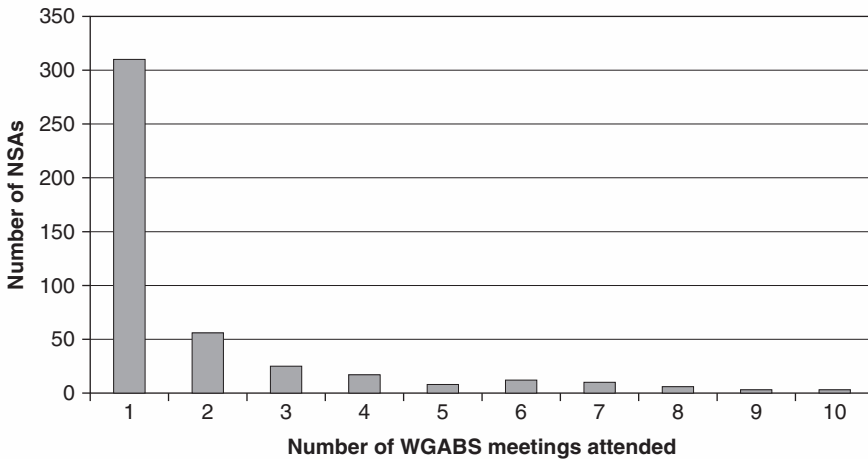


Figure 4.2 Number of WGABS meetings attended by each NSA registered as **observer**.

Source: Information from the CBD Secretariat.

organizations and three represent ILCs. These categories of stakeholders involved are the ones that are directly concerned by ABS agreements in the field (in particular business and indigenous peoples). Surprisingly, half of the key NSAs are close to indigenous peoples' interests. The CBD, relying on its Article 8(j) that addresses ILCs and the knowledge they hold, has a special fund to support the participation of ILCs. However, only three out of the six NSAs working on indigenous issues have direct links with indigenous groups, whereas the other three mostly gather Northern researchers interested in indigenous issues. Again, this finding confirms the importance of material and organizational resources to participate directly in the negotiating process.

Thirdly, the scope of membership within these 12 NSAs varies, being national, regional but also international. Yet most of them have organizations, not individuals, as members, confirming the importance of resources for long-term involvement. Moreover, the national organizations represented actually have strong links with their respective governments. For instance, Berne Declaration and the National Aboriginal Health Organization (NAHO) are heavily financed by the Swiss and Canadian governments, respectively.

Regarding expertise, none of the identified NSAs has a mission specifically related to ABS. ABS is a recent and highly technical issue that requires established expertise and experience. It is also an issue that cuts across many other topics and interacts with several NSAs' usual campaigns, including environment, trade, development, human rights or intellectual property. As a result, only the NSAs that had already established experience in one of these fields have been able to get involved in the long term.

Finally, one key element is that most of these organizations are involved in common networks with different levels of institutionalization. On a very formal basis, Tebtebba is actually a member of the Third World Network (explaining why

it appears in the indigenous peoples' group and in the NGO group; see below in this and the following section), and both organizations consequently work together and adopt very close positions. Less institutionalized (but with a strong political basis), the International Indigenous Forum on Biodiversity (IIFB) has, since the third Conference of the Parties to the CBD in November 1996, gathered many organizations close to indigenous interests, including all those included in our selection of 12. The IIFB has a website, makes statements in the name of its members and organizes side events; however, it has no legal personality and is not an NSA per se (for instance, it has not registered for meetings of the WGABS). At a more informal level than the IIFB stands the CBD Alliance, a network which, since the fifth meeting of the WGABS in October 2007, has gathered a number of NGOs and indigenous groups that are following the CBD negotiations. Berne Declaration, Third World Network and therefore Tebtebba are all part of this network. The CBD alliance does not possess a legal personality and does not have a leading political role, but it is used by its members as a platform for information exchange and regularly publishes the *ECO Newsletter* that presents summaries, reflections and positions on the CBD negotiations. Finally, the International Chamber of Commerce (ICC) has put a third informal network among some of the identified NSAs in place since the fourth meeting of the WGABS in 2006. It consists in the organization of 'industry group' meetings, gathering all representatives from the private sector at the beginning of each negotiation session. The initiative mainly serves as an information platform and ensures dialogue between the different business representatives engaged in ABS (Orsini 2011). Overall, most of these networks are informal so that participation in common actions is left to the discretion of each NSA.

Thus, a broad variety but a small number of NSAs were engaged in the negotiations. Importantly, the main NGOs, business actors and indigenous organizations came from developed countries, were organization based and were already experienced groups, showing that material, organizational and discursive resources are important prerequisites to engage in the negotiations. Also, every identified NSA is part of at least one network, suggesting that the identified NSAs had to share their resources to improve their chances of impact.

NSAs' positions in the ABS negotiations: Four directions

The analysis of the positions of the main identified NSAs in the ABS negotiations is drawn from a systematic screening of CBD documents, calendars of side events, NSAs' websites, reports of the *Earth Negotiation Bulletin* covering the whole negotiation period of the Nagoya Protocol and some archive material collected during fieldwork. Table 4.1 presents the overall positions and main claims of the 12 NSAs identified. The positions of the NSAs regarding the 'core issues' as identified by Wallbott and colleagues (this volume), such as legal nature, scope, international access standards, compliance/user measures and the relationship with other international agreements, are presented here. Moreover, a discussion on a sixth important item that was dealt with by most NSAs, the rights of ILCs, is included in this section.

Table 4.1 Positions of the main NSAs regarding the core issues of the Nagoya Protocol

Overall position	NSAs	Legal nature	Scope	Access standards	User measures	Other agreements	Rights of ILCs
Opponents	BIO CropLife International ICC	No regime	No regime	Not needed	No certificate Patents	—	Need clear definition of ILCs and traditional knowledge before any decision
ILC supporters	Tulalip tribes Tebtebba IPCB IIN NAHO RAIPON IIFB	Binding	Broad scope	PIC Customary law Ownership of traditional knowledge	—	—	Participation of ILCs and property for ILCs
ABS regime supporters	Tebtebba TWN Berne Declaration	Binding	Broad scope	—	Access to patented material Strong users responsibility	—	ILCs are main beneficiaries of ABS measures
ABS system supporter	CISDL	—	—	—	—	Integrate ABS in other policy fields	—

Source: Own assessment of various sources (see main text).
Note: '—' indicates that no element was found on this core issue.

As ABS concerns a great diversity of stakeholders, the ‘green-grey’ continuum mentioned above is of high relevance. In particular, NSAs can be gathered into four groups, from the more defensive to the more proactive ones (see Table 4.1).

Firstly, three organizations have been strong opponents to a binding and comprehensive protocol on ABS: the ICC, the Biotechnology Industry Organization (BIO) and CropLife International. The ICC, one of the broadest global industry coalitions (Orsini 2011), has often been vocal at the beginning of negotiating sessions (seven oral interventions were found) to indicate that industry was interested in the debates. However, the ICC, in all its interventions and submissions (six submissions to the CBD secretariat were found), kept a rather vague position on a number of points, questioning the utility of an international ABS regime as a main strategy and raising concerns about any new issue that was arising during the negotiations. For instance, when expressing its views on the issue of traditional knowledge protection, the ICC raised several questions to the parties, asking for a definition of traditional knowledge, an efficient way of tracing it and the rationale for considering it under special intellectual property rights (ICC 2006). At the fifth meeting of the WGABS in October 2007, the ICC was also vocal against any disclosure requirement/certificate because it would be too costly. BIO, an American industry coalition dedicated to biotechnology, has also always forcefully opposed any progress during the negotiations. BIO has advocated voluntary guidelines, not a binding protocol, to tackle the ABS issue, underlining the importance of the BIO Guidelines adopted by its members. It also questioned the involvement of the biotechnology industry in cases of biopiracy (during side events at the third and fourth meeting of the WGABS in 2005 and 2006) and argued that patents are the only way to generate benefits from GR (BIO 2007). Finally, CropLife International, a coalition of seed companies using biotechnology, has been more discrete in the negotiations but has defended the same views as the other business coalitions. Notably, BIO and CropLife have organized or co-sponsored two side events together, and during its only oral intervention made at the sixth meeting of the WGABS in January 2008, CropLife International stated that the regime should support national implementation based on the Bonn Guidelines with a view to increasing global biotrade.

A second group gathers the organizations that fight for the rights of ILCs, including the Indigenous Information Network (IIN), Tebtebba (also known as the Indigenous Peoples’ International Centre for Policy Research and Education), the Indigenous Peoples Council on Biocolonialism (IPCB), the National Aboriginal Health Organization (NAHO), the Russian Association of Indigenous People of the North (RAIPON) and the Tulalip Tribes (a federally recognized Indian tribe located on the Tulalip Reservation in Washington State). For this group of organizations, the IIFB is clearly the political voice, while the individual organizations of the network are acting as its operational arms. The IIFB organized two side events during the negotiations and made at least 29 recorded interventions during the meetings of the WGABS. Therefore, IIFB has been the most vocal NSA in the negotiations, the second most vocal being the ICC with seven interventions. Moreover, the IIFB submitted a text on the participation of indigenous peoples

at the eighth Conference of the Parties, mentioned during the sixth meeting of the WGABS (2008), and a text on the rights of ILCs and compliance with prior informed consent (PIC) at the same meeting. During the eighth meeting of the WGABS in November 2009, the IIFB submitted operative text on capacity building, traditional knowledge and the nature of the regime (during contact group meetings). Overall, IIFB fights for the rights of ILCs in terms of participation in policy processes and land property. It is a strong advocate of the UN Declaration on the Rights of Indigenous Peoples and noted that the recognition and protection of indigenous rights should be a cross-cutting issue in the negotiated text (rather than a separate element). Regarding ABS, it claimed the PIC of indigenous peoples and the recognition of customary law and ownership of traditional knowledge. On the issue of indigenous rights and traditional knowledge, IIFB supported a strong (binding) and broad international regime covering transboundary or *ex-situ* resources and shared traditional knowledge. In parallel to these political actions, Tebtebba, Tulalip, IPCB and RAIPON have individually participated in international workshops and expert groups on traditional knowledge. NAHO has also participated in awareness-raising actions, diffusing a document on the CBD negotiating process. While the actions of these organizations have been more limited than the ones of IIFB, they have advocated the same position.

The third group gathers the supporters of a strong ABS international regime in every aspect and therefore beyond the mere recognition of indigenous rights. Three organizations have been supporters of a binding and comprehensive Protocol: Berne Declaration (a Swiss non-governmental organization promoting more equitable, sustainable and democratic North-South relations), the Third World Network (TWN) and, as a member of TWN, Tebtebba. Regarding scope, they asked that GR and their utilization be covered by the international regime (Berne Declaration et al. 2005a) and supported an extended temporal scope. Furthermore, these organizations have emphasized the need to establish strong international mechanisms including user measures to impede misappropriation. They have also been particularly active in asking for affordable access to patented GR (Berne Declaration et al. 2005b). These organizations have also forcefully recalled that first of all, ILCs needed to benefit from ABS regulations. For instance, the Berne Declaration has extensively publicized the case of the cactus *Hoodia* as an illustration of the misappropriation of GR taking place in developing countries. Indeed, while *Hoodia* is now widely commercialized and distributed as an appetite suppressant, the San communities, who discovered these interesting properties of the plant in the first place, were left without any ABS agreement. Regarding compliance, these organizations have asked for strong user responsibility (Berne Declaration and Biowatch 2005), with the possibility to use a system of disclosure of origin in patent applications, to develop mechanisms to prevent the sale of biopiracy products or to take already-sold biopiracy products out of the market and to fine their producers (Berne Declaration et al. 2009).

Finally, the Center for International Sustainable Development Law (CISDL) represents a category on its own. The CISDL has been active in diffusing information on existing ABS laws, in writing reports about current national, international

and non-state initiatives on ABS and in raising awareness among delegations—in particular African delegations—concerning the CBD negotiations. However, CISDL has not focused so much on the content of the CBD international regime but has rather advocated the integration of ABS provisions in trade agreements: ‘this sort of recognition of ABS issues in international trade agreements is what is required if sustainable development is going to be put into practice’ (CISDL 2003: 13). Moreover, it is the only organization that fought for environmental provisions. During the **eight** meeting of the WGABS in November 2009, it organized a side event to show that ABS should also be integrated in international agreements on forests. Finally, with respect to other groups, the CISDL is closer to the UN organizations such as the United Nations Environment Programme and to the CBD secretariat and supported a more systemic vision of ABS across all these institutions.

The positions held by NSAs have been varied, also due to the high number of sub-issues addressed in the negotiations. In particular, most NSAs have focused on specific negotiated points—intellectual property, indigenous rights or the relation to other agreements—to the detriment of a broader political agenda for ABS. Another striking feature is the compartmentalization of positions according to the categories of actors: Business actors, for instance, had a very different position than NGOs. Indeed, the most involved NSAs advocated strong, radical views. Differences of positions are also visible between the group of NGOs identified and the indigenous organizations. Both categories followed different core issues and, apart from Tebtebba, never produced common submissions. Finally, it appears that intellectual property rights and indigenous rights have had particularly strong advocacy coalitions, due to strong economic and developmental interests, while support for environmental conservation remained weak, with only the CISDL bridging ABS with environmental concerns. Other studies have demonstrated a similar trend in biodiversity governance (Rosendal 2006: 442–443), which is likely to be detrimental to the environmental objectives of the CBD.

NSAs’ strategies: Privileging formal channels with advocacy and promotion

In the analytical framework, five strategies that NSAs can mobilize in order to influence the negotiations have been identified: lobbying, advocating, exercising public pressure, undertaking promotion activities and exercising multi-fora strategies. Based on the screening of available documents, on the fieldwork and interviews conducted and on archive material, four interesting features arise regarding the main strategies used by NSAs during the negotiations.

Firstly, NSAs pursued few informal strategies and in particular, as far as the author knows, no public pressure strategies. This can be explained by the low degree of awareness of the ABS issue by government officials but also by the wider public. Lobbying was the only informal strategy mobilized, which was mainly directed at agenda setting. In particular, the TWN has been very efficient at launching the negotiation process, by proposing—through an informal partnership with

the African group and the Malaysian delegation (one member of the TWN then became Malaysian delegate)—the first draft of the protocol at the fourth meeting of the WGABS in 2006, the so-called ‘African Group proposal’ (see Wallbott, this volume). Opponents to the adoption of such a binding protocol, in particular BIO and ICC, were very surprised by the draft text and tried to get it off the table by counter-lobbying target delegations during the same meeting (own observation). The African text was turned into an annex, but business failed in its attempt to delay substantial negotiations on the Nagoya Protocol (see also Wallbott and Wallbott et al., this volume).

Secondly, advocacy has been the main strategy used by NSAs, which tried to cooperate with national delegations, privileging insider strategies. Business and ILCs have favoured oral interventions (as mentioned, 29 by IIFB and 7 by ICC) and CBD submissions (6 by ICC, 4 by IIFB and 3 by BIO) to demonstrate their will to cooperate with delegations. Business and NGOs have also circulated position papers during the negotiations (ICC six, Berne Declaration four, TWN three and Tebtebba two). NGOs may have favoured this type of documents (and not oral interventions or CBD submissions) in order to circulate their ideas to a wider audience (see also discussion on promotion). To the contrary, no position papers of the IIFB could be identified, likely due to its status as an ad hoc coalition. Overall, indigenous peoples have been very successful at obtaining endorsements of their drafts by national delegations. IIFB’s proposals were, for example, endorsed by Norway and Haiti during the sixth meeting of the WGABS in 2008; by Norway, Haiti and the African Group during the eighth meeting of the WGABS in 2009; and by the Philippines and Australia, among others, at the resumed ninth meeting of the WGABS in July 2010. Industry was less successful at having its positions heard by governments, even though Japan supported an ICC proposal on the need to conduct a study regarding the costs related to an international certificate at the fifth meeting of the WGABS in 2007, while Canada endorsed a BIO proposal on the protection of confidential information at the eighth meeting of the WGABS in 2009. This can be explained by the fact that business, being opposed to a binding international agreement, formulated fewer text proposals than other NSAs.

Thirdly, promotion has been an important strategy as well, in particular for business and to a lesser extent for NGOs. The ICC organized 6, BIO 3 and CropLife International 2 side events during the whole negotiation period (bringing the total for industry to 11). Moreover, both ICC and BIO produced position papers (ICC seven and BIO one) that were circulated to delegates but also to a wider public. Business thus wanted to communicate widely its positions, reaching a broader audience. NGOs also conducted promotion activities, not so much by organizing side events (one each by TWN and Berne Declaration but four by CISDL) but by circulating position papers (three by TWN, four by Berne Declaration). In particular, Berne Declaration circulated some ABS case studies with examples of the misappropriation of GR. NGOs also actively distributed the *ECO Newsletter*. Finally, indigenous people also organized side events (two by IIFB) in order to present their claims to a wider public and probably to reach delegates and stakeholders that are not usually confronted with indigenous rights issues.

Fourthly, all of the mentioned NSAs have also pursued their interests in other institutional settings than the CBD. For instance, the TWN organized side events on intellectual property issues at the CBD, the World Trade Organization (WTO) and the World Intellectual Property Organization (WIPO). The Tulalip made a submission to WIPO on the protection of traditional knowledge and Tebtebba to WTO on the importance of customary law (of ILCs). Industry has warned the negotiators in both these arenas (WIPO and WTO) that a strong Nagoya Protocol could represent a threat to trade and innovation. Finally, the TWN has also informed the members of the World Health Organization (WHO) of the usefulness of the CBD agreement for ABS regarding pathogens and vaccines.

In addition to common obstacles, this last point makes the evaluation of influence even more complicated, as one should look at several negotiating processes to obtain a full picture. Overall, the influence of NSAs on the CBD negotiation process is hard to evaluate, but general correlations between some of the points they fought for and the adopted text can be identified.

An agreement more favourable to ILCs and NGOs than to business

While testimonies have to be considered with caution, NSAs have expressed views demonstrating that indigenous groups were rather satisfied by the agreement, while industry was more cautious. Tulalip representative Preston Hardison announced that the protocol was ‘a fairly big win and is pretty good overall’. Gurdial Singh Nijar, former TWN representative, qualified the Nagoya Protocol as ‘a magnificent treaty’, noting that it was a milestone in history (Ryser 2010). In contrast, industry has been rather discreet after the adoption of the agreement, noting that ‘*if implemented appropriately*, it can provide a solid framework for CBD parties and businesses to act as partners’ (ICC 2010b, author’s emphasis).

While a full assessment requires more elements than the ones gathered here, it is still possible to discuss the accuracy of these claims and, in particular, the apparent satisfaction of indigenous groups and NGOs compared to the cautious stance of business with **regards** to the adopted text. Such a discussion can be done regarding the format of the agreement and regarding its content.

With **regards** to the format, it appears that business interests have lost their battle against any additional, binding international agreement on ABS. While they were advocating applying the voluntary Bonn Guidelines (see section on ‘NSAs’ positions in the ABS negotiations’ above), the Nagoya Protocol creates some legal constraints on its future parties. At the same time, most provisions of the Protocol are subject to national legislation and therefore do not have an international scope per se (which has to be kept in mind when considering the content of the text, as developed below in this section). Indeed, business actors might benefit from the interpretation that national governments and in particular developed countries will have of the text. Yet the final agreement is international and binding and—judging from the experience with the twin sister of the Nagoya Protocol, the 2000 Cartagena Protocol—it is likely that the Nagoya Protocol will have a strong normative impact on ABS governance and will raise international

concern for ABS (just as the Cartagena Protocol did for genetically modified organisms).

As regards the content of the Protocol, some general parallels can be drawn between NSAs' involvement and their successes or failures. Before doing so, it is important to note that the vagueness of the adopted text complicates any assessment of its content but is also a sign of the antagonistic forces that shaped the Nagoya Protocol as adopted. It is nevertheless possible to correlate the relatively strong representation of ILCs' interests in the Nagoya Protocol negotiations with the relatively successful outcome for them regarding the formulation of their rights. Article 6.2 on access mentions the need to obtain PIC by ILCs. The same provisions are contained in Article 7 for access to traditional knowledge. Regarding benefit sharing, Article 7.2 mentions the need to share benefits with ILCs. Finally, Article 12 suggests several measures to be implemented by providers in order to improve awareness and negotiating conditions of ILCs regarding ABS. However, all these articles are, as mentioned earlier, subject to domestic legislation, and some core elements of the text do not extend to traditional knowledge (Art. 17). Even though admittedly rather hortatory in character, the preamble of the Protocol contains further general considerations in referring to the need to identify the 'rightful holders' of the traditional knowledge associated with GR and mentions the UN Declaration on the Rights of Indigenous Peoples as well as existing rights of ILCs (as advocated by the IIFB; see section on 'NSAs' positions in the ABS negotiations' above).

Furthermore, there seems to be a correlation between the lack of environmental interest groups in the negotiations on the Nagoya Protocol and the absence of concrete commitments for biodiversity conservation (see also Oberthür and Rosendal, this volume). As mentioned previously, the CISDL was the only organization to have the environmental dimension of ABS on its agenda. Moreover, the environment was only one of the many dimensions it was fighting for (together with development, equitable trade or ILCs' rights).

Finally, it is particularly difficult to assess the results obtained by industry in terms of the content of the text, especially because industry was mostly opposed to any Nagoya Protocol. Just prior to the final negotiations on the Protocol, the ICC expressed concerns about the draft Protocol text in October 2010. In particular, the ICC asked for the deletion of several provisions, including on disclosure or checkpoint requirements for patents and other intellectual property rights, on the retroactive effect and on the relationship of the agreement with other existing treaties (advocating a subordination of the Nagoya Protocol under existing international agreements; ICC 2010a). Some of these requests of industry are reflected in the Nagoya Protocol (no mention of patents or intellectual property rights), but not all are (the retroactive effect and the hierarchy issue remain unclarified). Moreover, the Protocol covers a relatively broad scope (including derivatives; see Tvedt, this volume), which, as indicated earlier, was strongly opposed by industry. Finally, compliance mechanisms, including a certificate, have been adopted. Article 17 requires the issuance of an internationally recognized certificate of compliance that will travel with the GR as a passport. While such a certificate shall

be established ‘without prejudice to the protection of confidential information’ (a provision most likely proposed by industry) and is non-mandatory, it opens the possibility for developing countries to adopt national legislation linking the certificate to the patent system or to pursue a hardening of this requirement by linking it to patenting at the WTO and WIPO (Oberthür and Pożarowska, this volume), which goes against the interests of BIO, the ICC and CropLife. In contrast, the broad scope of the adopted agreement and the proposed compliance mechanisms play in favour of NGOs (Berne Declaration and the TWN).

However, as indicated before, the eventual meaning of the Protocol will be shaped to a large degree in the future implementation, in particular as many provisions of the Protocol are vague and/or subject to national legislation. NSAs have different kinds of relationships with national governments that will be mainly in charge of implementation. Industry members may frequently have strong links with governmental representatives, not least because business controls much of the expertise and information regarding the use of GR at the national level. In contrast, the national level has traditionally been detrimental to the recognition of the rights of ILCs.

Conclusion

This chapter undertook to assess the resources, positions, strategies and, to a limited extent, impact of the main NSAs that participated in the negotiations on the Nagoya Protocol. The study demonstrates imbalances in representation by these NSAs, with most of them coming from developed countries and no group focusing particularly on environmental issues. It also found that material, organizational and discursive resources were crucial prerequisites in order for NSAs to participate in the long term. NSAs were therefore often part of collaborative informal networks in which they could join their forces when needed. Overall, the positions of the stakeholders involved have been varied, with most of them focusing on specific negotiating points that were of particular interest to them and their general objectives. There has been a clear compartmentalization of the positions of NSAs according to different categories. The analysis also showed that the ABS negotiations have been characterized mostly by formal and insider strategies, such as advocacy. The available evidence suggests that lobbying was practiced mostly for agenda setting. Promotion, as a formal-outsider strategy, was also used in an attempt to mobilize a wider audience, and multi-fora strategies were pursued by several NSAs. In the end, the negotiating outcome suggests that proponents of a binding and comprehensive Protocol may have been more skilled at influencing the process than the opponents. ILCs have been particularly vocal in the negotiations. Yet opponents have had substantial impact on the negotiations, including by ensuring that much of the agreement is subject to national legislation.

The tendencies observed at the international level are likely to be reversed at the national level—business having significantly more influence on implementation than NGOs and ILCs. As a reaction to a future weakening of ABS provisions on ILCs’ rights, indigenous groups are in the process of developing roots in a

high number of fertile grounds, being close to numerous local claims. Implementation is where the executive arms of the IIFB will be particularly active. For instance, RAIPON, like most indigenous organizations, follows implementation issues closely, conducting awareness-raising and capacity-building activities and advocating strong compliance (RAIPON 2011). NAHO, a Canadian group, also organizes enforcement workshops on ABS. While provisions on ILCs' rights might not be countered by business, which so far has demonstrated a low interest in this issue, ILCs' support for strong ABS legislation, taken over by NGOs, will face industry's resistance. The recent discussions between the ICC and the European Commission on the ABS agreement illustrate the mobilization of business at the implementation level (ICC 2012). In addition, one may need to keep an eye on other negotiating fora than the Nagoya Protocol as well in order to assess the influence of different NSAs in global ABS governance, including in particular WIPO for traditional knowledge and WTO for disclosure (Oberthür and Pożarowska, this volume).

Bibliography

- Alcock, F. (2008) 'Conflicts and Coalitions Within and Across the ENGO Community', *Global Environmental Politics* 8(4): 66–91.
- Arts, B. (1998) *The Political Influence of Global NGOs?: Case Studies on the Climate and Biodiversity Conventions*, Utrecht: International Books.
- Arts, B. and Mack, S. (2003) 'Environmental NGOs and the Biosafety Protocol: A Case Study on Political Influence', *European Environment* 13(1): 19–33.
- Berne Declaration and Biowatch (2005) *Briefing Paper: Responsibilities of User Countries Regarding the Sale of Biopirated Resources or Traditional Knowledge*, prepared for WGABS-3, Bangkok, 14–18 February 2005, http://www.evb.ch/cm_data/public/Responsibilities_of_user_countries_regarding_the_sale_of_biopirated_resources_or_traditional_0.pdf (accessed 14 December 2012).
- Berne Declaration, Biowatch, eed, German NGO Forum on Environment and Development, Tebtebba and TWN (2005a) *Briefing paper on the scope of an International ABS regime*, prepared for WGABS-3, Bangkok, 14–18 February 2005, http://www.evb.ch/cm_data/public/On%20the%20Scope%20of%20an%20International%20ABS%20Regime.pdf (accessed June 2013).
- Berne Declaration, Biowatch, eed, German NGO Forum on Environment and Development, Tebtebba and TWN (2005b) *Briefing Paper: Patents on Genetic Resources Contradict 'Facilitated Access'*, prepared for WGABS-3, Bangkok, 14–18 February 2005, http://www.evb.ch/cm_data/public/Patents_on_genetic_resources.pdf (accessed 14 March 2013).
- Berne Declaration, Ecoropa, eed and TWN (2009) *The International ABS Regime: Suggestions to Ensure the Enforcement of Provider Rights*, prepared for WGABS-7, Paris, 2–8 April 2009, http://www.evb.ch/cm_data/ABSWG-7-NGO-Enforcement.pdf (accessed 14 December 2012).
- Bernhagen, P. (2008) 'Business and International Environmental Agreements: Domestic Sources of Participation and Compliance by Advanced Industrialized Democracies', *Global Environmental Politics* 8(1): 78–110.
- Berry, C. and Gabay, C. (2009) 'Transnational Political Action and 'Global Civil Society' in Practice: the Case of Oxfam', *Global Networks* 9(3): 339–358.

- Betsill, M.M. and Corell, E. (eds.) (2007) *NGO Diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations*, Cambridge, MA: MIT Press.
- BIO (2007) *Letter to His Excellency Ahmed Djoghla*, 30 November 2007, Washington, DC: Biotechnology Industry Organization, <http://test.bio.org/ip/international/20071130.pdf> (accessed 14 December 2012).
- Bled, A.J. (2010) 'Technological Choices in International Environmental Negotiations: An Actor-Network Analysis', *Business & Society* 49(4): 570–590.
- Boström, M. and Tamm Hallström, K. (2010) 'NGO Power in Global Social and Environmental Standard-Setting', *Global Environmental Politics* 10(4): 36–59.
- Botetzagias, I., Robinson, P. and Venizelos, L. (2010) 'Accounting for Difficulties Faced in Materializing a Transnational ENGO Conservation Network: A Case-Study from the Mediterranean', *Global Environmental Politics* 10(1): 115–151.
- Burgiel, S. (2007) 'Non-state Actors and the Cartagena Protocol on Biosafety', in Betsill, M.M. and Corell, E. (eds.) *NGO diplomacy: The Influence of Nongovernmental Organizations in International Environmental Negotiations*, Cambridge, MA: MIT Press, 67–100.
- CISDL (2003) *A New Regime on Access to Genetic Resources and Benefit-Sharing?*, 14 March 2003, Montréal: Centre for International Sustainable Development Law, http://cisdl.org/public/docs/news/brief_biodiv.pdf (accessed 14 March 2013).
- Doherty, B. (2006) 'Friends of the Earth International: Negotiating a Transnational Identity', *Environmental Politics* 15(5): 860–880.
- Dombrowski, K. (2010) 'Filling the Gap? An Analysis of Non-Governmental Organizations Responses to Participation and Representation Deficits in Global Climate Governance', *Taylor & Francis International Environmental Agreements: Politics, Law and Economics* 10(4): 397–416.
- Falkner, R. (2008) *Business Power and Conflict in International Environmental Politics*, Houndmills, UK: Palgrave Macmillan.
- Fisher, D.R. (2010) 'COP-15 in Copenhagen: How the Merging of Movements Left Civil Society Out in the Cold', *Global Environmental Politics* 10(2): 11–17.
- Greenpeace International (2010) *Annual Report 2010*, Amsterdam: Greenpeace International, http://www.greenpeace.org/international/Global/international/publications/greenpeace/2011/GPI_Annual_Report_2010.pdf (accessed 14 December 2012).
- Gulbrandsen, L.H. and Andresen, S. (2004) 'NGO Influence in the Implementation of the Kyoto Protocol: Compliance, Flexibility Mechanisms, and Sinks', *Global Environmental Politics* 4(4): 54–75.
- ICC (2006) *Discussion Paper: Protecting Traditional Knowledge*, ICC Doc. No. 450/2009, 12 January 2006, Paris: International Chamber of Commerce, <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2006/Protecting-traditional-knowledge/> (accessed 14 December 2012).
- ICC (2010a) *Priority Areas of Concern for Business*, for Interregional Negotiating Group, 18–21 September 2010, Montreal, ICC Doc. No. 450/1058, 9 September 2010, Paris, France: International Chamber of Commerce, [http://www.iccwbo.org/Data/Documents/Intellectual-property/Convention-on-Biological-Diversity/Priority-Areas-of-Concern-for-Business-\(for-Interregional-Negotiating-Group,-18-21-September-2010-Montreal\)/](http://www.iccwbo.org/Data/Documents/Intellectual-property/Convention-on-Biological-Diversity/Priority-Areas-of-Concern-for-Business-(for-Interregional-Negotiating-Group,-18-21-September-2010-Montreal)/) (accessed 14 December 2012).
- ICC (2010b) *Nagoya Protocol Requires Legal Certainty*, ICC says, Nagoya, Japan, 2 November 2010, ICC News section, International Chamber of Commerce, <http://www.iccwbo.org/News/Articles/2010/Nagoya-Protocol-requires-legal-certainty,-ICC-says/> (accessed 14 December 2012).

- ICC (2012) *Nagoya Protocol Implementation in the EU: Comments on a Possible Due Diligence System and the EU Timber Regulation*, International Chamber of Commerce, ICC Doc. No. 450/1075, 18 June 2012, <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/Nagoya-Protocol-Implementation-in-the-EU-Comments-on-a-possible-due-diligence-system-and-the-EU-Timber-Regulation/> (accessed 14 December 2012).
- Josselin, D. and Wallace, W. (eds.) (2001) *Non-State Actors in World Politics*, Houndmills, UK: Palgrave Macmillan.
- Kautto, P. (2009) 'Nokia as an Environmental Policy Actor: Evolution of Collaborative Corporate Political Activity in a Multinational Company', *Journal of Common Market Studies* 47(1): 103–125.
- Morin, J.-F. and Orsini, A. (2011) 'Linking Regime Complexity to Policy Coherency: The Case of Genetic Resources', *GR:EEN Working Paper Series* 15/ 2011.
- Orsini, A. (2011) 'Thinking Transnationally, Acting Individually: Business Lobby Coalitions in International Environmental Negotiations', *Global Society* 25(3): 311–329.
- RAIPON (2011) *To the Secretariat of the Convention on Biological Diversity*, submission by the Russian Association of Indigenous Peoples of the North, 29 August 2011, <http://www.cbd.int/abs/submissions/em-compliance/raipon-en.pdf> (accessed 14 December 2012).
- Raustiala, K. (1997) 'States, NGOs, and International Environmental Institutions', *International Studies Quarterly* 41(4): 719–740.
- Rosendal, G.K. (2006) 'Balancing Access and Benefit-Sharing and Legal Protection of Innovations from Bioprospecting: Impacts on Conservation of Biodiversity', *Journal of Environment and Development* 15(4): 428–447.
- Ryser, R.C. (2010) 'Access & Benefit: Genes', *Fourth World Eye Blog*, 3 November 2010, <http://cwis.org/FWE/2010/11/03/council-of-the-creeconvention-on-biodiversitynagoya-protocolindigenous-peoples/> (accessed 14 March 2013).
- Shawki, N. (2011) 'Organizational Structure and Strength and Transnational Campaign Outcomes: A Comparison of Two Transnational Advocacy Networks', *Global Networks* 11(1): 97–117.
- Tienhaara, K., Orsini, A. and Falkner, R. (2012) 'Global Corporations', in Biermann, F. and Pattberg, P. (eds.) *Global Environmental Governance Reconsidered*, Cambridge, MA: MIT Press, 45–68.
- Vormedal, I. (2008). 'The Influence of Business and Industry NGOs in the Negotiation of the Kyoto Mechanisms: The Case of Carbon Capture and Storage in the CDM'. *Global Environmental Politics* 8(4): 36–65.