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Potential“

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Table of Contents

Glossary	5
Acknowledgements	8
1. Introduction	9
2. Non-Governmental Organisations in Global Politics	14
2.1. What are NGOs? - Definition problems.....	14
2.2. The Emergence of NGOs	19
Excuse: The UN and NGOs.....	21
2.3. Explanations for the explosive number of international NGO.....	26
3. The Concept of Global Governance.....	30
3.1. Precursors of the global governance concept.....	31
3.2. Key elements of the global governance concept.....	33
3.3. Expectations on NGOs within the global governance concept.....	37
Excursus: democratic deficits	38
3.4. Criticism on the concept of global governance.....	41
4. The Convention on Biological Diversity	43
Excuse: Examples of Biopiracy	45
4.1. Early Conflicts concerning Biological diversity	47
4.2. NGOs and the pre-negotiations of the Convention on Biodiversity	51
4.3. The Biodiversity Agreement	54
4.4. Access and Benefit Sharing	57
4.5. The further development of the ABS provisions: from Bonn 2001/02 to Nagoya 2010	61
4.6. Heading to Nagoya.....	69
5. NGOs and IPOs within the CBD- positions and activities	73
5.1. Positions of NGOs and IPOs on the Access and Benefit Sharing Protocol....	75
5.1.1. Critical NGOs: realistic understanding of Biopiracy	76
5.1.2. Environmental, development- and indigenous NGOs: legalistic understanding of biopiracy.....	78
5.2. NGO- Input Activities.....	86
5.2.1. Alliances.....	87
5.2.2. Statements and Interventions	88
5.2.3. Lobbying	91

5.2.4. Public awareness	93
5.3. NGO- Output Activities	95
5.3.1. Expertise.....	95
5.3.2. Implementation and Monitoring.....	96
6. The impact of NGOs and IPOs on the Nagoya Protocol on Access and Benefit sharing	98
6.1. Scope	100
6.2. Rights of Indigenous People	104
6.3. Access and Benefit Sharing.....	105
6.4. Compliance.....	110
7. Conclusion.....	116
7.1. Democratisation of Biodiversity Policy through NGOs?.....	116
7.1.1. Input–legitimacy.....	116
7.1.2. Output legitimacy	120
7.2. What could be done to overcome democratic deficits more effectively?	122
7.3. What could be done better in future when evaluating NGOs and IPOs potential to enhance legitimacy of international negotiation?	123
8. Sources	125
8.1 Interviews.....	125
8.2. References	125
9. Appendix 1	145
9.1. Abstract English	145
9.2. Abstract German	146
9.3. Curriculum Vitae.....	148

Glossary

ABS	Access and Benefit Sharing
AIPP	Asia Indigenous Peoples Pact
ALBA	Alianza Bolivariana para los Pueblos de Nuestra Américas
ALTER-Net	A Long- Term Biodiversity, Ecosystem and Awareness Research Network
BD	Bernd Declaration
BG	Bonn Guidelines
BINGO	Business Non- Governmental Organisations
BpB	Bundeszentrale für Politische Bildung
BS	Benefit Sharing
BUKO	Bundeskoordination Internationalismus/ Federal coordination of internationalism
CBD	Convention on Biological Diversity
CBD Alliance	A global network of NGOs focusing on the CBD
CGG	Commission on Global Governance
CI	Conservation International
CSIR	South African Council for Scientific and Industrial Research
CGRFA	Commission on Genetic Resource for Food and Agriculture
COP	Conference of the Parties
CSO	Civil Society Organisation
DNR	Deutsche Naturschutzring
ECOSOC	UN Economic and Social Council
EED	Evangelischer Entwicklungsdienst
ENB	Earth Negotiation Bulletin
ETC-group	Action Group on Erosion, Technology and Concentration
FAO	UN Food and Agriculture Organisation
FED	German NGO Forum on Environment and Development/ Forum Umwelt und Entwicklung
FPCI	Fundaci3n para la Promoci3n del Conocimiento Indígena
F-PIC	Free Prior and Informed Consent
FPP	Forrest Peoples Programme
GEF	Global Environment Facility
GTLE	Groups of Technical and Legal Experts
ICTSD	International Centre for Trade and Sustainable Development

ICG	Informal Consultative Group
IGO	International Governmental Organisations
IIED	International Institute for Environment and Development
IIFB	International Indigenous Forum on Biodiversity
IMF	International Monetary Fund
INEF	Institut für Entwicklung und Frieden/ Institute for Development and Peace
ING	Interregional Negotiation Group
INGO	International Non Governmental Organisation
IPBES	Intergovernmental Platform on Biodiversity and Ecosystem Services
IPBN	Indigenous Peoples' Biodiversity Network
IPCB	Indigenous Peoples Council on Biocolonialism
IPLC	Indigenous People and Local Communities
IPO	Indigenous People Organisation
IPRs	Intellectual Property Rights
IUCN	International Union for the Conservation of Nature
IU-PGR	International Undertaking of Plant Genetic Resources
IWBN	Indigenous Women's Biodiversity Network (IWBN).
JCN-CBD	Japan Civil Network for Convention on Biological Diversity
JUSCANZ	The group of Japan, USA, Canada, Australia and New Zealand
LI-BIRD	Local Initiatives for Biodiversity Research and Development
LMMC	Like-Minded Megadiverse Countries
MarBEF	Marine Biodiversity and Ecosystem Functioning
MAT	Mutually Agreed Terms
MIA	Multilateral Agreement on Investments
MOP	Meeting of the Parties to the Cartagena Protocol on Biosafety
NAHO	National Aboriginal Health Organization
NBSAP	National Biodiversity Strategies and Action Plan
NGO	Non- Governmental Organisations
PIC	Prior Informed Consent
PIPEC	Pacific Indigenous Peoples Environmental Coalition
QUANGOS	Quasi Non- Governmental Organisations
RAFI	Rural Rural Advancement Foundation International

SBSTTA Advice	Subsidiary Body on Scientific, Technical and Technological
SEARICE	South East Asia Regional Institute for Community Education
TEEB	The Economics of Ecosystems and Biodiversity
TEBTEBBA	Indigenous Peoples' International Centre for Policy Research and Education
TNC	Transnational Corporation
TNC	The Nature Conservancy
TRIPS	Trade-Related Aspects of Intellectual Property Rights
TWN	Third World Network,
UIA	Union of International Associations
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous People
UNEP	United Nations Environmental Programme
USPTO	United States Patent Office
UPOV	International Union for the Protection of new Varieties of Plants
WG on ABS	Working Group on Access and Benefit Sharing
WHO	World Health Organisation
WSSD	World Summit on Sustainable Development
WTO	World Trade Organisation
WWF	World Wide Fund for Nature
YPA	Yiaku People's Association

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1. Introduction

The Convention on Biological Diversity is an international legally binding treaty, which was adopted at the UN Earth Summit in Rio de Janeiro in 1992 and has been in force since December 1993. With the Convention the contracting states addressed two main issues: on the one hand the worldwide advancing loss of biodiversity and on the other hand the resource and distribution conflict between northern and southern countries.

Biodiversity is broadly understood as the diversity within species, between species and of ecosystems. All three levels are currently facing losses. According to scientists the current loss rate of species, for example, is 1000 times higher than the natural extinction rate (cf. Millennium Ecosystem Assessment 2005: 3f). Similarly also the genetic diversity within species has declined worldwide, especially among domesticated plants and animals, which was a result of the “Green Revolution” of the 1960s. This reduction of genetic diversity of agricultural crops also raises the susceptibility to disease and undermines the adaptability of these plants (cf. *ibid.*: 4f). Beyond that almost all of the worldwide existing eco-systems have been influenced by and transformed through human actions. As was pointed out by Stephan, across virtually all continents more than fifty percent of the national territory has been transformed into industrial plantation forest, crop plantations or permanent grazing land (cf. Stephan 1999: 304, 308).

Since biodiversity is the basis of our lives, the loss of biodiversity basically affects all of us. The worldwide existing eco-systems provide us with various valuable resources like food, medicines, fibres, building materials and offer many free services (i.e. eco-system services) like fresh air, water, flood and landslide protection etc. These are essential for human wellbeing and the quality of our lives. If the destruction of eco-systems and the extinction of species continue, this will have dramatic consequences especially for poor people in “developing countries”, since they are more directly dependent on biodiversity and eco-system services and therefore more vulnerable to their degradation. According to Silvia Ribeiro, approximately ninety percent of the rural population in “developing countries” cover their basic needs by the utilisation of components of biological diversity that are occurring in their region (cf. Ribeiro 2002: 120). In Asia and Africa, for example,

more than eighty percent of the population are dependent on medical herbs and traditional treatment methods (cf. WHO 2008).

Now to the second problem that should be solved within the framework of the Convention on Biodiversity. Biodiversity is not equally distributed around the world. Most of the regions rich in wild and agricultural biological diversity are located in the geopolitical south. Countries like Brazil, Mexico, Peru, Madagascar, South Africa, India, China, Indonesia, Philippines and so on harbour more than two thirds of the world's biodiversity. The genetic resources contained within these plants and animals form the basis for the breeding of agricultural plants and animals, as well as for the development of new drugs, food supplements, cosmetics, pesticides etc. That is why especially northern agribusinesses and big pharmaceutical trusts have an interest in the genetic resources of these countries, since they dispose over the necessary technology in order to extract relevant active ingredients to develop new products. In 2008, the worldwide sale of botanical or plant-derived drugs reached approximately 19.5 billion dollars and is estimated to reach 32.9 billion dollars in 2013 (cf. Kim Larson 2009). However until today the countries, where the plants originated from as well as the indigenous and local communities, which have been using and improving these medical herbs and on whose traditional knowledge a not inconsiderable part of natural drugs are based on, are only in the fewest cases given a share in the company's profits. The theft of plants and animals, including their components and genes, the traditional knowledge associated with them, and the subsequent patenting of these resources through intellectual property rights (IPRs), is generally referred to as biopiracy and should have been counteracted through the establishment of the CBD. The Convention tries to limit the exploitation without compensation of biological material and associated knowledge through northern companies and private research institutes by recognising the sovereign rights of States over their natural resources, including their right to determine access to these resources, and by defining general provisions for its appropriation (prior informed consent, mutually agreed terms and benefit sharing). Over the years these provisions have been further concretised at the biennial Conferences of the Parties (COP). The negotiations on access and benefit sharing which lasted nearly two decades finally resulted in the Nagoya Protocol on Access and Benefit Sharing, which was adopted at the last COP 10 in October 2010.

The issue of biodiversity loss and biopiracy has not only been addressed to by states but also by the scientific community and NGOs. In fact, it was due to the engagement of NGOs that the states drew attention to the problem of biodiversity loss and biopiracy at all.

Since the establishment of CBD in the early nineties the number of NGOs participating in the negotiations on the further development of the CBD has increased (cf. Brühl 2001: 140; 2003: 118f.). Such an increased participation of NGOs in international negotiations cannot only be observed in biodiversity policy but also in other soft policy areas. The UN world summits of the nineties were so to say the kick-off for a greater involvement and participation of NGOs within formerly intergovernmental negotiations.

This involvement of NGOs in intergovernmental negotiations raised the hopes for a democratisation of the international political system. These positive expectations towards NGOs were also taken up within the concept of global governance. The main assumption of the global governance concept is that worldwide occurring problems, like the loss of biodiversity, cannot be effectively solved by a state alone on the national level but need to be addressed to at the international level in cooperation with other states and non state actors (e.g. NGOs, local groups, private companies etc.). Since these actors are, even though to different degrees either contributing to or affected by the problems.

According to the concept the involvement of NGOs, as main representatives of civil society interests, will lead to a democratisation of international negotiations as these actors bring a variety of interests into the political process, which would have otherwise been ignored, and also enhance the transparency of the process to non participants (input legitimacy). Furthermore, NGOs are ascribed to contribute through their expertise and problem solving competence to ameliorate the quality of international decisions, in the sense that the taken decisions also effectively reduce or solve the given problem (output legitimacy) (cf. Messner/Nuscheler 2003: 39f; Beisheim 2001: 121; Brühl 2003: 202).

At the core this thesis asks the question, whether the basic assumption of the global governance concept that NGOs can contribute to the democratisation of international policy processes, by enhancing input and output legitimacy, holds true when looking at the CBD, more specifically at the negotiations on access and benefit sharing and

the resulting Nagoya Protocol, as an example. As the political terrain of the CBD is comparatively open toward participation of civil society organisations, it is suited as case study to evaluate the contribution of NGOs to enhance the input and output quality of international decisions.

The case study draws upon a range of empirical material, including official policy documents, position papers, press releases and interviews. First, a range of existing studies on NGOs in biodiversity politics, among others the works of Ulrich Brand and Tanja Brühl, have been reviewed in order to determine the general position and interests of the different NGOs, that are active within the CBD. The interviews, which had been taken at the penultimate Conference of Parties of the CBD in Bonn 2008, were subject to a secondary content analysis, aiming to identify activities of NGOs that potentially lead to an amelioration of the input and output legitimacy of international decisions. The interviews in question were guided expert interviews which had been carried out with representatives of governments, the CBD secretariat, members of international organisations and different NGO representatives (i.e. environmental, development and critical NGOs, as well as indigenous peoples organisations (IPOs). They were conducted by a couple of university students, among others myself, as part of a research project under the guidance of Professor Dr. Ulrich Brand. The results of our study can be read about in detail in the book “Globale Umweltpolitik und die Internationalisierung des Staates.

Biodiversitätspolitik aus strategisch- relationaler Perspektive”, edited by Ulrich Brand. From the available range of interviews, all in all 15, mainly conducted with representatives of NGOs and IPOs, were used in the thesis.

In order to evaluate whether NGOs and IPOs could successfully bring their demands and expertise into the final outcome of the ABS negotiation, the position papers of the NGO and IPO community (i.e. the CBD Alliance and the International Indigenous Forum on Biodiversity (IIFB) were compared to the Nagoya Protocol on Access and Benefit Sharing.

After clarifying what is actually meant by the abbreviation NGOs, their meteoric rise especially during the nineties and reasons will be discussed. Furthermore, the second chapter gives a review of the relationship between the UN and (international) NGOs.

The global governance concept is introduced in the third chapter. The focus is put on the normative variant of the concept and its main elements. In addition, the democratising function of NGOs within international negotiations is described in more detail. The chapter concludes with a brief depiction of the main points of criticism of the global governance concept.

The background of the biodiversity agreement as well as the CBD itself is then portrayed in chapter four. This is followed by a detailed depiction of the article on access and benefit sharing and the further development of this provision.

Chapter five then describes the general position of the, within the CBD active, NGOs and IPOs, their demands regarding the ABS Protocol and the different activities of these actors, that could potentially enhance the input and/or output quality of international governance.

Subsequently, chapter six shows whether, respectively to what extent, the demands and expertise of NGOs and IPOs were considered in the final outcome of the ABS negotiations.

The conclusion finally discusses to what extent these actors could contribute to a democratisation of the CBD process. Beyond that, the concluding chapter also points out which institutional changes would be needed in order to effectively improve the legitimacy of international policy through the involvement of NGOs and IPOs. Last but not least some proposals are made on how investigations on the legitimatising potential of NGOs and IPOs could be improved in future studies.

As mentioned, the main purpose of the present thesis is to make a, albeit small, contribution to the exploration of the democratising effect of NGOs within one of the approximately 300 presently existing international regimes. In this respect, the thesis is first of all relevant for those social science communities who address the question of the democratising potential of NGOs. These are communities from the field of development studies, political ecology and global governance.

Beyond that, it is relevant for those scientific communities that are concerned with environmental conservation issues, like the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), the Long-Term Biodiversity, Ecosystem and Awareness Research Network (ALTER-Net), the Economics of Ecosystems and Biodiversity (TEEB) or the Marine Biodiversity and Ecosystem Functioning (MarBEF). The main purpose of these biodiversity networks is to

integrate the within the network generated expertise and scientific results into political decisions. In order to feed their scientific knowledge effectively into the negotiation process it is of course necessary to be well informed on the dynamics and power relation within the CBD process. So, the present thesis might be interesting for these networks as it illustrates the structure and pitfalls of the process and the chances for these scientific communities to bring their proposals into the final outcome.

2. Non-Governmental Organisations in Global Politics

During the last decade of the twentieth century NGOs advanced to important actors in national and international politics. They are especially active and of high influence in so-called “soft policy areas” like human rights-, development-, and environmental-policy. Due to their brisk participation at the UN world summits of the nineties, they increasingly gained popularity in the public and scientific discussion. This is the reason why the nineties are often called the decade of NGOs.

While the presence of NGOs in national and international politics is not necessarily new, it takes on modified forms and dimensions (cf. Hirsch 1999: 2).

Before discussing them, I want to clarify what is actually meant by the abbreviation NGO.

2.1. What are NGOs? - Definition problems

Depending on time context “civil society” is understood in quite different ways.¹ In development studies “civil society” is usually understood as arena of association between the state and the market (and the family), also referred to as “third sector” (cf. Bebbington/Hickey 2006: 418; Van Rooy 2002: 490; Frantz/Martens 2006: 18; Nohlen 2007: 358). In order to not restrict the term to a specific set of organisations, civil society can also be understood as a sphere or arena where individuals and

¹ A brief summary on different understandings of “civil society” is given among others by Van Rooy (cf. 2002: 489ff) and Edwards (cf. 2005)

groups voluntarily associate in order to advance common interest (cf. Fioramonti/Heinrich 2008: 378). The institutional core of this sphere is constituted by a variety of non-governmental and non-economic associations, ranging: “from churches, cultural associations, and academies to independent media, sport and leisure clubs, debating societies, groups of concerned citizens, and grass-roots petitioning drives, all the way to occupational associations, political parties, labour unions, and ‘alternative institutions’” (Habermas 1992: 453f).

These organisations may on the one hand provide specific services, which are neglected by state and market, and on the other hand act as a counterweight to both spheres, exercising some degree of control over them, and promoting processes of democratisation (cf. Bebbington/Hickey 2006: 418). The relationship between civil society, the state, and market sector ranges from opposition, or rather confrontation, to close cooperation.

As indicated by Habermas’ enumeration, the actors of these spheres cannot be completely separated from one another. In reality civil society is touched and shaped by the other two spheres. Professions associations and labour unions, for example, are part of both civil society and the market. Political parties otherwise may not be counted as part of civil society, as they seek to attain governmental office (cf. Van Rooy 2002: 490). Beyond that it should be kept in mind that civil society does not only consist of “morally good” actors but also of criminal organisations and violent groups.

Non- Governmental Organisations (NGOs) are indeed an important part of civil society but they are not synonymous or congruent with civil society respectively civil society organisations (CSO).

Unfortunately, until today there is no generally accepted definition of the term NGOs. The problem is that, on the one hand, there is no coherent official definition of the term, meaning that the UN has another understanding of NGOs than the World Bank or the Union of International Associations (UIA) do. On the other hand, even within the scientific discussion, there is no agreement on what kind of organisations should be subsumed under the term NGO.

In general, one can distinguish between a broad and a narrow understanding, or rather application, of the term NGO. Although the term is used quite differently

within literature there are at least four characteristics, which are constantly addressed to in order to clarify the term.

As the name already suggests NGOs are not part of government. They are formally private institutions neither founded nor under the direct control of states, and therefore considered independent from it. Beyond that they are not interested in making profits (non- profit orientation) like commercial organisations (e.g. TNC), and do not peruse criminal activities or engage in violence. Last but not least they are not constituted as a political party and are not interested in achieving government office As pointed out by Peter Willetts, these characteristics apply in general usage particularly because they match the fundamental features for recognition by the United Nations (cf. Willetts 2001; Nalinakumari/MacLean 2005: 2).

However, none of these characteristics should be considered to be absolute. NGOs cannot be considered as completely independent from the state² since most of them are financed predominantly through governmental funding and sometimes have state representatives as members. It is also possible that NGOs are established by states and instrumental to their interests. In order to distinguish “genuine” NGOs with no governmental affiliation or support from those, that are either predominantly financed by, or a creation of, governments, acronyms like QUANGOS (quasi non governmental organisations) or GONGOS (governmental organized non governmental organisations) have been established (cf. Hirsch 1999: 2; Frantz/Martens 2006: 40ff; Furtak 1997: 25; Nalinakumari/MacLean 2005: 4). A prominent QUANGO in the environmental field is the International Union for the Conservation of Nature (IUCN).

Of course there are “genuine” NGOs like Green Peace or Amnesty International, that are completely independent from state funding, but this is rather the exception than the rule (cf. Frantz/Martens 2006: 28). In reality NGOs fall into a certain dependence to the government if they receive state funding and a governmental co-determination or control cannot be excluded when using the funds. A lot of NGOs are reliant on voluntary contributions and a not inconsiderable number on public funding in order to actually be able to accomplish their job.

² See among others Ian Smillie 1999: *At Sea in a Sieve? Trends and Issues in the Relationship between Northern and NGOs and Northern Governments*, or Michael Edwards and David Hulme 1998: *Too close for Comfort? The Impact of Official Aid on NGOs*

On the international level NGOs have become partners of states and International Governmental Organisations (IGO). As actors on the international political arena, NGOs cannot only be met outside official conferences, where they try to influence the negotiations through loud and spectacular protests, but also inside where they have advanced to negotiating partners and consultants of governments (cf. Frantz/Martens 2006:17; Messner/Nuscheler 2003: 16f) Therefore critical observers, like Joachim Hirsch, raise the not entirely unfounded question, whether these actors actually are what their name alleges, namely Non Governmental Organisation or rather part of a political government and regulation complex, what Gramsci called the integral state (cf. Hirsch 1999:2).

Just like their independence towards governments, also their “non-profit orientation” may be questioned. Non-profit orientation does not mean that the organisation is not allowed to generate any surplus. However any gains must remain with the organisation, and be used to further the purposes of the organisation. The earnings may be used for example to finance projects, campaigns, equipment, research, publications and of course to pay the staff (cf. Frantz/Martens 2006: 26). The charitable, non- profit orientation of NGOs does not necessarily mean that these organisations are operating through volunteers or spare time activists. On the contrary, NGOs mostly dispose of a permanent staff of paid and qualified employees and are therefore considered as professionalized or professional organisations (cf. *ibid.* 26; also Hirsch 1999: 3). In order to keep the organisational infrastructure alive, pay the full-time staff, and continue their work, NGOs need to acquire money. Therefore NGOs definitely have an interest in generating income. The traditional sources of income in the form of annual membership fee and/or donations are often expanded through commercial activities, like professional sponsoring, merchandising or eco-labelling (cf. Brunnengräber/Walk 2001: 102). However if NGOs cooperate too close to business companies (as with governments), they risk to lose their credibility vis à vis the general public.

Although reasonable doubts can be raised regarding all four mentioned characteristics, they may be helpful in order to get a first idea of the term NGO. However the definition of NGO as any non-profit oriented and non-violent organisation, which is not seeking governmental office, is still quite unspecific and

subsumes a variety of actors ranging from churches, research institutes, professional associations, labour unions and industrial interests groups to one issue organisations such as human rights, development and environmental ones. Although all these different actors can be assigned to civil society and denominated as civil society organisations, not all of them should be referred to as NGOs in this paper.

In this thesis the term NGOs is primarily used for those organisations or networks of organisations which were established by individuals, with a common conviction, on a voluntary basis. They are not profit oriented, not violent, and financially as well as organisationally relatively independent towards state and market actors. In addition, they also have a certain degree of professionalism and organisational durability and they try to influence directly, or indirectly, international policy (cf. Hirsch 1999: 3). Beyond that they do neither promote special or profit interest of their members nor the particular interests of certain economic sectors, as professional associations, labour unions, and industrial interests groups do. But they claim to represent general or universal interests of humanity (e.g. climate or biodiversity protection, food security, peace preservation etc.) or interest of marginalised groups, such as poor people, women, indigenous people and so on (Frantz/Martens 2006: 24). In this paper the term basically denotes organisations such as human- and women's rights groups, environmental and development organisations as well as indigenous people organisations (IPO). Strictly speaking IPOs just like community based or grass roots organisations would not belong to the group of NGOs, as they directly pursue the interest of their members (cf. Hirsch 1999:3). Indeed CBOs and IPOs are established, first of all, to pursue their own interests and needs, but they are promoting likewise the interests of other people affected, who are not members of the organisation.

Therefore they belong definitively to the group of NGOs.

NGOs and social movements often work on the same thematic areas and pursue similar goals. However, the main difference between them is that NGOs develop organizational structures (cf. Nohle 2007: 358; Hirsch 1999: 4).

With regard to the NGO's scope of actions, one can distinguish between NGOs with a local, national, regional or international perspective. In this paper this distinction is not made. The term NGO is used rather as a generic term including, local (as far as they participate in international negotiations), national and international NGOs.

2.2. The Emergence of NGOs

From a historical point of view NGOs have already existed for a long time. The first precursors of NGOs, which intended to influence international issues, were mainly religious, humanitarian or social associations. This can be dated back to the end of the 18th century. The Pennsylvanian Society for Promoting the Abolition of Slavery founded in 1775 is often named to be the first single issue NGO (Brühl 2003: 46). Also the Foreign Anti Slavery Society established in 1839, was among the first precursors of NGOs as well as the World Evangelic Alliance (1846), the Order of Good Templars (1851), the Salvation Army (1865), and the International Committee of the Red Cross (1863) (Furtak 1997: 27).

It is quite difficult to make any clear statement on the exact amount of world wide existing NGOs since there are different interpretations of the term, as mentioned above. According to that, different criteria must be taken into account in order to assess the number of NGOs.

While, with regard to international NGOs, Nalinakumari and MacLean estimate the number of INGOs to 12500 during the 1980s and more than 45000 in 2000 (cf. Nalinakumari/ 2005: 4). Frantz and Martens as well as the Federal Centre for political Education ³ only count 7306 international NGOs by 2004 (cf. BpB 2009: 25; Frantz/Martens 2006: 85). Although they all used the data set from the Union of International Associations (UIA).

The UIA was established in 1907 in order to register and document all international organisations, and provides today the world's largest data set on intergovernmental as well as on international non-governmental organisations (INGOs).

According to the degree of "internationality" the UIA distinguishes between three groups of international NGOs: "Conventional International Bodies", "Other International Bodies" and "Special Types", whereby each group is composed of different types of organisations (cf. UIA 2012 a.). In order to be counted to the group of "Conventional International Bodies", NGOs must show the following characteristics: Beside of being privately initiated and independent towards the

³ Bundeszentrale für politische Bildung (BpB)

governments, the aim of the NGO needs to be genuinely international in character, meaning that the organisations are active in at least three different countries. Members must be equipped with full voting rights and from at least three different countries. Likewise the financial resources must be received from three countries. Beyond that the organisations must have a formal structure, which gives members the right to periodically elect a governing body and officers, as well as a permanent headquarter and staff (cf. UIA 2012 b.; BpB 2009: 26; Franz/Martens 2006: 38f). Other organisations, which have a lesser degree of internationality or less developed structure etc., are either assigned to the group of “Other International Bodies” or “Special Types”. Depending on the groups considered the amount of world wide existing international NGOs varies. So in case of Franz and Martens the number of international NGOs only refers to the group of “conventional international bodies”, while Nalinakumari and MacLean take all three groups of bodies, along with their various types, into account.

The following graphic illustrates the growth of international NGO from 1907 to 2004 (see Fig. 1). On the one hand it shows the growing number of non- governmental “Conventional International Bodies” (Type A to D) ⁴ alone, and on the other hand the total number of conventional international NGOs plus “other international bodies” (Type E to G) ⁵ and “Special Types” (Type H to S and U).⁶

⁴: Including: (A) federations of international organisations, (B) universal membership organisations, (C) intercontinental membership organisations and (D) regionally oriented membership organisations.

⁵ Including: (E) Organizations emanating from places, persons or other bodies, (F) Organizations of special form and (G) internationally oriented national organisations.

⁶ Including: (H) Dissolved or apparently inactive organisations, (J) recently reported bodies- not yet confirmed, (K) subsidiary and internal bodies, (N) national organisations which’s title or activities make it appear to be international, (R) religious and secular institutes, (S) autonomous conference series, (U) Currently inactive non-conventional bodies. The Type (T) multilateral treaties, intergovernmental agreement is only important for intergovernmental organisations. For a detailed description of the differ types (A- U) (see UIA 2012 b.: Types of organisations Type I)

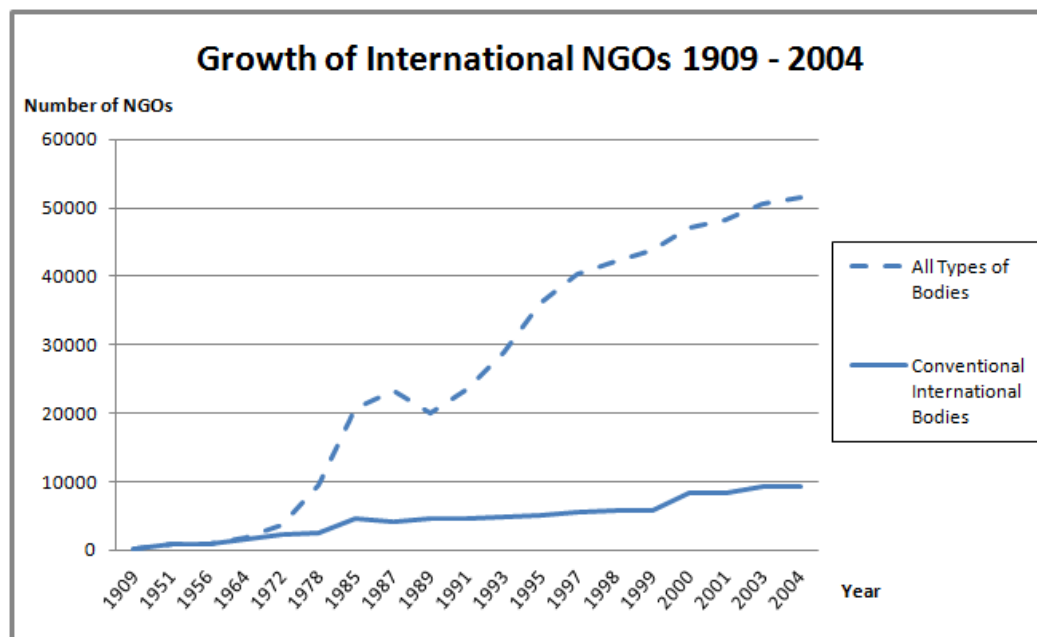


Fig. 1 Growth of International NGOs 1909-2004. Source: UIA-Union of International Association 2012 a.

Regardless of the groups one refers the result is the same, namely that there has been a constant increase in the number of international NGOs during the last century.

While in 1909 only 176 international NGOs were counted by the UIA, by 1978 there were 2.420 conventional international NGOs, or 9.521 when counting all types. The number of international NGOs doubled in the mid-eighties up to 4.676 organisations respectively 20.634, before it stagnated temporally.

The end of the cold war and the beginning of the UN world conferences marathon of the nineties again quickened the development of international NGOs (cf. BpB 2009: 26). Since 1991 the number of NGOs has again increased continuously from 4.620 (or 23.635) to 7.306 (or 51.509) by 2004. Even if one deduces the number of dissolved or apparently inactive organisations (H) as well as of currently inactive non-conventional bodies (U) an impressive number of more than 29 thousand international NGOs remains (cf. UIA 2012 a.).

Excuse: The UN and NGOs

The UN Charta adopted in 1945 stipulates in Chapter X Article 71 the possibility for NGOs to participate at the official meetings of the UN Economic and Social Council. According to Article 71:

“[t]he Economic and Social Council may make suitable arrangements for consultation with non- governmental organisations which are concerned with matter within its competence. Such arrangements may be made with international organisations and where appropriate, with national organisations after consultations with the Members of the United nations concerned” (United Nations 1985).

Hence, NGOs got the opportunity to officially take part in intergovernmental negotiations for the first time. Nevertheless, the installation of Article 71 can be just assessed, according to, as a partial success. First of all the article restricted the relationship between the UN and NGOs to the activities of ECOSOC; the participation of NGOs in other UN bodies was not intended. In comparison to the League of Nations, where NGOs had participated only unofficially but therefore in all areas, the installation of Article 71 de facto meant a restriction for the NGO participation. Furthermore the article just enabled the consultation of NGOs, while participation or observer rights were not mentioned. The third reason why Article 71 was just a partial success lies in the fact that it referred only to international NGO, national organisation should only be included in exceptional cases (cf. Brühl 2003: 50f).

Initially, the ad hoc provision on the consultation of NGOs was concretized by the ECOSOC within resolution 2/3. This first arrangement provided that NGOs were only allowed to participate in official meetings with explicit permission of the ECOSOC.

Depending on the NGOs' objectives and working fields, they were classified to one of three categories (A- C) with graduated participation rights and different privileges, which basically meant a hierarchisation of NGOs (cf. *ibid*: 52; Frantz/Martens 2006: 89ff.). Moreover a standing committee on NGOs (Council Committee on Non-Governmental Organizations, later renamed to Standing Committee on NGOs) was established with the function to decide on the NGO' classification and the allocation of participation rights (cf. Brühl 2003: 54).

This first regulation was later replaced by Resolution 288(X) from 1950, which limited slightly the participation rights of NGOs. However, the hierarchy among those remained unchanged. NGOs belonging to category A, for example, were still allowed to make proposals for the agenda, but with the restriction to coordinate the proposals with the Standing Council Committee on NGOs. Written statements were

also limited to 2000 words and no longer distributed to all ECOSOC members (cf. Brühl 2003: 55). By 1968 the participation rights were once again subject to new regulation. Besides the renaming of the three categories from A, B and Register into I, II and Roster, Resolution 1296 (XLIV) incorporated a new passage on the financial disclosure of NGOs. Additionally they were pledged to submit a working report every fourth year. (cf. *ibid*: 57)

The United Nations Conference on the Human Environment (UNCHE), which took place in Stockholm in 1972, is deemed to be the starting point of a global environmental policy. Beside states also a great number of national and international NGOs attended the conference. Officially a record number of 255 NGOs were admitted to the conference and another hundred participated in the parallel held environmental forum. Due to the good will of the general secretary of the conference Maurice Strong, not only NGOs that were accredited by ECOSOC but also NGOs that only had an observer status for UNCHE were allowed to participate and raise their voice in the plenary as well as the working group sessions (cf. Brühl 2003: 95).

Twenty years later at the United Nations Conference on Environment and Development (UNCED) the number of NGO reached again a record high of 1420 officially participating NGOs (cf. *ibid.*: 60) and about 17000 people that attended the parallel Global Forum (cf. UN 1997a.). This trend of increased NGO participation was not only limited to the UNCED. The explosive participation of NGOs could also be observed during the fourth Women's Conference in Beijing from 1995. The number of NGOs which officially participated in the Beijing conference as well as the number of NGOs which got involved in the parallel held "shadow conference" even exceeded the number of participants in Rio. The Women's Conference was attended officially by more than 5000 representatives from 2100 different NGOs; in addition another 30,000 individuals participated in the independent NGO Forum (cf. UN 1997b.).

Due to the increased participation of national and international NGOs within the world conferences of the nineties the ECOSOC once again discussed on a possible extension of the participation rights of NGOs. Admittedly the new Resolution 1996/31 which is in force until today remained below the expectations, because it

basically proceeded the requirements formulated already in Resolution 1296 (XLIV). The consultation right still remained limited formally to the ECOSOC and its subsidiary bodies, and NGOs were furthermore classified in three renamed groups with different rights and privileges (cf. Brühl 2003: 63). The application of NGOs for consultative status is generally tied to certain criteria: the organisation, for example, has to be concerned with matters falling within the competence of the ECOSOC and its subsidiary bodies and its aims shall be in conformity with the purposes and principles of the UN Charta.

Furthermore they have to fulfil certain organisational criteria to be accredited by the UN. The organisation must have a head-quarter, with an executive officer and a democratically adopted constitution, which shall provide for the determination of policy by a representative body. The NGO must also have the authority to speak for its members through its authorized representatives, and it has to be financially independent from the government (cf. UN ECOSOC 1996).

Depending on the expected support, the radius of action and the NGO's representativeness, the organisations are allocated either to the group with general or special consultative status or they are listed on the roster (cf. Brühl 2003: 63; Frantz/Martens 2006: 35).

NGOs belonging to the group with general consultative status have the most rights and privileges. Besides the possibility to participate in official ECOSOC meetings they are also allowed to orally express their views and to submit written comments up to 2000 words. Furthermore they are also allowed to make proposals for the agenda in cooperation with the Committee on NGOs. The general status is reserved for those organisations, whose working areas are widely congruent with those of the ECOSOC and its subsidiary bodies (Brühl 2003: 63f, Klein/Walk/Brunnengräber 2005: 44, Frantz/Martens 2006: 35).

The special status is granted to those NGOs that have a smaller radius of activities than the organisations with general status. They are neither allowed to add certain issues on the agenda nor to give an oral comment. Their written statements are confined to a maximum of 1500 words (Klein/Walk/Brunnengräber 2005: 44). Other organisations, which are neither fulfilling the criteria of the general nor of the special consultative status, are listed to the roster if the Council considers that the respective organisation makes useful contributions. They are allowed to attend solely meetings, which are related to their working areas and they have to be invited to make a

statement. However, the statement should not exceed 500 words (cf. Brühl 2003: 64; Klein/Walk/Brunnengräber 2005: 44; Frantz/Martens 2006: 35).

The major alteration was that the new resolution granted apart from international also national, sub-regional and regional NGOs participation rights. Besides this the resolution also specified precisely the participation rights of NGOs within international conferences. NGOs which wanted to participate at international conferences had to apply for participation at the respective secretariat. Subsequently the secretariat recommends the preparatory committee to either admit the NGO to the conference or to refuse its request. If the organisation is accepted, it has the right to participate and to speak as well as to submit written statements (cf. Brühl 2003: 65).

As mentioned above, international NGOs already supported and accompanied the establishment of the United Nations in 1945. While in 1948 only 40 international NGOs were granted consultation rights by the council, twenty years later their number increased up to 377 organisations. By 1997, their number nearly quadrupled to 1200 organisations, which were in consultative status with the ECOSOC (cf. Klein/Walk/Brunnengräber 2005: 44). This trend was continuing in the subsequent years. Due to the general NGO boom after the Earth Summit in Rio and especially because of the new Resolution 1996/31, which enhanced the possibilities for NGOs to participate at the ECOSOC, the number of NGOs accredited at ECOSOC almost doubled to 2350 organisations in 2003 compared to 1997 (cf. *ibid*).

Currently a total of 3452 NGOs are accredited at the ECOSOC. Most of them belong to the group with special consultative status all in all 2329 organisations, only 139 NGOs have general consultative status and the remaining 984 are listed on the roster (cf. United Nations

Department of Economic and Social Affairs n.d.).

It is conspicuous that most of the NGOs with consultative status at ECOSOC originated in Europe or North America (Fig. 2.)

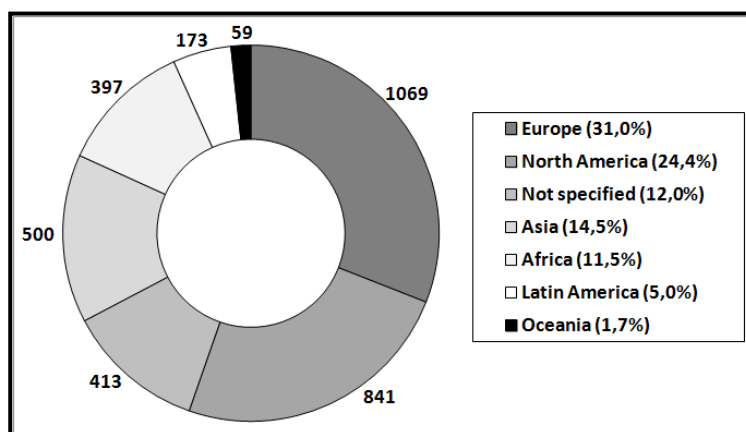


Fig. 2 NGOs accredited at UN ECOSOC by Region. Source: United Nations Department of Economic and Social Affairs (n.d.)

Even though this overbalance of European and North American NGOs has reduced slowly over the last two decades, the proportion of them is still higher than average. If we take only those NGOs into account which are assigned to a certain region (in total 3039 organisations), the European and North American organisations together make up around two-thirds (63%), while only approximately one third (37%) is allotted to Asia, Africa, Latin America and the Caribbean and Oceania.

The comparatively low level of southern NGO participants is due to the fact that these organisations have mostly marginal funds at their disposal (cf. Frantz/Martens 2006: 35, Klein/Walk/Brunnengräber 2005: 45).

NGOs are not only participating in ECOSOC meetings and UN world summits, but they are also involved in the climate, biodiversity, human rights, and development policy. As NGOs usually want to exert influence on all policy areas, they do not limit themselves only to “low politics”. Nevertheless, they have the most far-reaching participation rights exactly in these fields.

With regard to WTO meeting, the participation of NGOs is quite restricted. However most of the NGOs do not even want to actively participate in WTO negotiations since they would only lend additional legitimacy to the negotiation outcomes, without really being able to influence or modify these decisions. NGOs rather try to influence world trade policy from “outside”, through protest, campaigns, lobbying etc.

2.3. Explanations for the explosive number of international NGO

In literature there are different explanations for the cumulative foundation and the significant increase in the number of international NGOs (see fig. 1). In fact the presence of INGOs in the international system and the cooperation among themselves is not a new phenomenon. International NGOs have been active within the UN system since the end of the forties. The massive participation of NGOs in international conferences is seen as a clear proof of their political relevancy. The rise of these actors is often equated with the beginning of the global environmental policy in 1972, starting with the the United Nations Conference on Human Environment in Stockholm. Their latest conjuncture started with the UN Conference on Environment and Development in Rio de Janeiro in 1992, which was also the starting point of the

longstanding UN conference marathon during the nineties (i.e. World Conference on Human Rights in Vienna 1993; International Conference on Population and Development in Cairo 1994; World Summit for Social Development in Copenhagen 1995; World Conference on Women in Beijing 1995; Global Conference on Human Settlements in Istanbul 1996; World Food Summit in Rome 1996, and the Climate Change Conference in Kyoto 1997 etc.).

There is some dissent among experts regarding the factors which actually led to the rise of NGOs as political “new comers”. Scholars mention, among others the end of the cold war as cause for the increase of NGO activities (cf. Curbach 2003: 26; Brüh 2003: 155; Zumft Cortines 2001: 34; Frantz/Martens 2006: 86). While before the fall of the Iron Curtain economical and security policy themes (“hard issues”) had had a great importance in international politics, the end of the Bloc Confrontation brought “soft issues”, like environmental protection, human rights, and development, on the international political agenda. It may not be surprising that this shift towards political “soft issues” has also promoted the political importance of NGOs, as these actors are mainly active in these fields. The end of the Cold War also winged the collaboration between eastern and western NGOs, their contact was facilitated without mutual accusation of espionage (cf. Curbach 2003: 26).

The rapid increase of INGOs in the last decade of the 20th century is also explained to be a result of developments especially in communication- and transport-technology (cf. Curbach 2003: 25; Brühl 2003: 154f.). It seems logical, that the recent developments in information and communication technology, first of all the mobile telephone, internet-based video conferences, e-mail traffic, fax and the internet in general, make it easier for NGOs to connect with one another. The broad use of the internet allows also resource-scarce NGOs to better influence international politics. As the communication processes are getting faster and cheaper, NGOs can better and internationally organise their statements and campaigns. The often cited internet based campaign against the Multilateral Agreement on Investments (MIA) is a good example for the world wide coalition of different NGOs, which could successfully hinder the conclusion of the agreement. (cf. Brühl 2003: 155) Indeed the technological advance in the field of communication enables NGOs to transmit quickly information and to network in an affordable and flexible way over

long distances. Admittedly not all NGOs have the same chances to participate in the global communication and information processes. The networking and sharing of information through the internet is disproportionately more difficult for southern NGOs than for northern NGOs, which is due to the existent “digital divide”.⁷

Looking at the statistics on world wide internet users one can observe that out of 2.267.233.742 internet users estimated in 2011, which represent 32.7 % of the total world population (6.930.055.154), 1016.8 millions of users (44.8%) are allotted to the Asian countries, 500.7 millions (22.1%) to Europe, 273.1 millions (12.0%) to North America, 235.8 millions (10.4%) to Latin America and the Caribbean, 139.9 millions (6.2%) to Africa, 77.0 millions (3.4%) to Middle East, and 23.9 millions (1.1%) to Australia and Oceania (cf. Internet World States 2012). This on the first glance impressive and relative high percentage of Asian internet user has to be reviewed critically. If we compare the total population number of the Asian region 3,879,740,877 to the total number of internet users (vide supra) in this region, only 26.2% of Asians are actually using the internet. It may not be surprising that the percentage of North American, Australian and European internet users are, compared to their total population number, markedly higher. Up to 78.6% of the Americans, 67.5% of the Australians and 61.3 % of the Europeans make use of the internet (cf. Internet World States 2012).

Besides the technical progress in information and communication technology, from which, as already stated, not every NGO benefits equally, also the advancement in traffic technology enables NGOs to network and to be present at world summits and/or international negotiation processes.

By virtue of the technical progress in traffic it was not only possible to transcend territorial borders more easily and quickly but also costs were reduced due to routinisation in personal air traffic (cf. Curbach 2003:25).

During the last decades of the 20th century, another mega trend was observable which characterized the international system and provided further explanations for

⁷ For a more comprehensive description of the digital divide see Cullen 2001 as well as Fuchs/Horak 2008.

the explosive emergence of NGOs. This process is commonly known as globalization⁸

Usually we can distinguish between a narrow and a wide understanding of globalisation. In the first sense globalization is understood as the increasing interlacing and consolidation of economical activities, which expresses itself among others in the “world wide” increase in goods traffic and capital transactions. More generally globalisation can be understood as:

“intensification of world wide social relations through which distant places are connected with each other in such a way, that occurrences in one place are shaped by processes that happened in an other place, many miles away and vice versa” (Giddens 1997 cited in Messner 1998 : 1).

As subliminally indicated by Giddens’ definition, globalization also implies that political, social, economical and ecological problems can no longer, or just insufficiently, be handled on the local or regional level (cf. Furtak 1997: 9).

Meanwhile it is highly visible that the economical globalization process has created new respectively aggravated existing global social and ecological problems. As these problems, due to their global character, transcend the national territory where political regulations apply, governments are facing a control deficit. In order to handle global problems, such as climate change or the loss of biodiversity, states are formulating in common (more or less) binding regulations within international institutions. Such International institutions, including international organisations and international regimes (cf. Zürn 2010: 15), evolved as a direct consequence of globalisation processes. Today, there are more than 300 regimes existing that are dealing with transnational issues and problems. NGOs are integrated in these regimes or excluded from them, nevertheless these regimes constitute overall their essential and fast-growing sphere of activity (cf. Roth 2005: 108).

A large number of NGO are also concentrating their work on criticising the actual neoliberal economic globalisation and its social and ecological impact as well as the

⁸ The technical advance, within the communication- and transport technologies (see above), as well as the political decision to liberalize world trade are named to be the major causes for globalisation (cf. Weizsäcker n.d.)

international institutions (first and foremost WTO, IMF and WB) which are promoting this process.

As the activities of NGOs either refer to ameliorate the globalisation related problem areas or to criticise the economical, social, cultural and ecological impacts of globalisation, they can be considered as the“(unwanted) children of globalisation” (Roth 2005: 107).

3. The Concept of Global Governance

The impact and importance of non state actors like NGOs in international politics is assessed very differently within the theories of international politics or international relations. While according to present well- established fundamental theories of international politics, in particular the realist and neo-realist school, non-state actors do not play any role in international relations, the regime theory and even more the very heterogeneous global governance school accentuate the relevance of social actors in international politics (cf. Kohout/Mayer-Tasch 2002: 15f).

Almost every scientific paper, which deals with the role of non state actors in international politics, refers to the term “global governance”. Since the 1990’s it has advanced to a fashionable term, which is often used as an ambiguous catchword in many different ways. Generally one can distinguish between two different applications of the term global governance. On the one hand the term is used in an empirical- analytical way to describe the ascertainable changed constellation within international politics. This can be summarised as a change from international governance, where states and intergovernmental institutions have been the makers and addresses of norms and rules, for global governance, where also non- state actors are partners in the governance system (cf. Brühl 2002: 371).

On the other hand the term “global governance” is used in a more normative- prescriptive sense encompassing proposals on how governance at the international level should be. Interpreters of the global governance discourse tend to subdivide the normative view into two further variants namely an emphatic one, where global governance is understood as a guiding principle that promises possible solutions for globalisation crises; and a political- strategic one, where global governance is

constituted as a politico-strategic reform approach. The essential difference between both is that the political strategic variant focuses on political guidelines for actions and identifies the restructuring of statehood as central objective (cf. Brunnengräber/Stock 1999: 445f; Messner/Nuscheler 2003:12).

In this paper global governance is understood as a normative concept that wants to show up ways and possibilities how globalisation and its subsequent problems can be steered politically. The aims of global governance strategies are to enhance their control capability towards globally occurring economic, ecologic and social problems, and furthermore to reduce democratic deficits on the international level. Thereby NGOs are attributed an important role.

3.1. Precursors of the global governance concept

The global governance concept has many originators and protagonists, among others James Rosenau and Ernst- Otto Czempiel, the Commission on Global Governance (CGG), the Institute for Development and Peace (INEF), the Group of Lisbon etc. In the international discussion global governance gained prominence through the final report of the Commission on Global Governance (CGG) “Our Global Neighbourhood”, published in 1995.

Several reports of the different UN commissions provided important contributions to the development of the commission’s global governance concept. The final report of the Independent Commission on International Development Issues, known as the Brandt Report (1980), for example, already contained main arguments for the necessity of global governance. Also the Brundtland Report (1987) “Our Common Future”, elaborated by the World Commission on Environment and Development, developed, in order to cope with the intensifying global environmental crisis, the concept of sustainable development and stressed the importance of global and cooperative problem solving (cf. Messner/Nuscheler 2003: 4). Two more reports are worthy of mention in this gallery of forefathers of global governance: on the one hand the report of the Council of the Club of Rome “The first global revolution” (1991) and on the other hand the “Stockholm Initiative on global Security and Governance” (1991). Both reports as well as the journal “Global Governance a

review of Multilateralism and International Organisations”, released by the United Nations University, equated global governance with state-organised multilateralism. This basically meant the consolidation of international collaboration within international organisations and regimes. In their understanding the UN forms the hub of the world and of global governance (cf. ibdi:5; Nuscheler 2007: 197).

The reform of the UN system takes also the central stage within the strategic considerations of the CGG. Admittedly the strengthening of state organised multilateralism does not conform to the full essence of the concept. In the understanding of the CGG, global governance denotes a new political model, which had been developed by James Rosenau and Ernst- Otto Czepiel in their reference work “Governance without Government”, published in 1992 (cf. Nuscheler 2007: 197). Within their work they made an important distinction between government that relies on the legally defined and with the monopoly of power equipped authority and governance which is understood as a “system of rules” in the absence of a central authority (cf. Rosenau 1992: 4ff). Rosenau and Czepiel - who are the most noted representatives of an empiric-analytical understanding of global governance - dedicated their work to analyse the ongoing processes of change within the international system and to identify new actors, that exert influence on political processes in a multilevel-system. Their analysis, terms and statements also penetrated the report of the CGG. But in contrast to the CGG, Rosenau and Czepiel renounced to work out visions how a new global order could or should look like and to give political- strategic recommendations for action (cf. Messner/Nuscheler 2003: 12).

The CGG was established on the suggestion of Willy Brandt, under the umbrella of the UN, in 1991. The year before, Brandt had invited notable politicians as well as members of the Palme- Commission, Brundtland- Commission and the North- South – Commission to Königswinter. In the light of the end of the block confrontation and with regard to (new) global problems, they were asked to elaborate visions on the world’s governability. After their first results were presented in the already mentioned “Stockholm Initiative on global Security and Governance” (1991), the CGG was formally established (cf. Brand 2000: 28; Messner/Nuscheler 2003: 5)

In its final report the CGG introduced the concept of global governance as an adequate answer to solve the current and future transnational problems. It defines governance as:

“[...] the sum of the many ways individual and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operative actions may be taken. It includes formal Institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interest” (CGG 1995: 2).

Following the CGG view, global governance basically means more cooperation and coordination of state and non-state actors at all political levels and a revaluation of civil society, among others through more participation and the primacy of human rights over the rights of states (Messner/Nuscheler 2003:12).

In the German-speaking area the commission's concept was sophisticated among others by Dirk Messner and Franz Nuscheler. Shortly afterwards the political science sized the concept, but they treated it initially with reserve and used partially alternate terms like “international governance” (e.g. Rittberger) or “governance beyond the national state” (e.g. Zürn).

3.2. Key elements of the global governance concept

The starting point of the considerations for the necessity of “global governance” is simply the experience that an increasing number of problems could not be single-handedly tackled by national states. Due to globalisation processes governments have lost room for manoeuvring in a couple of policy areas.

Globalisation or “social denationalization” (Beisheim 2004; Zürn 2010: 15) is understood as a process in which an increased part of social and economical activities take place across national borders. As more and more activities of social actors transcend the national territory, though the political formulation of rules remains territorially anchored, national states lose their control capability and partially their ability to act in many policy areas. The environmental policy is a good example for this problem. As in reality the range of environmental problems, such as

climatic change or the loss of biodiversity, exceed the range of validity of national regulation, national policies are less and less in the position to bring about socially and politically desired conditions (cf. Zürn 1992 and 1998 in Beisheim 2001: 116). In other words, there is a lack of effectiveness, in terms of the ability to achieve pre-established objectives, of national regulation regarding global problems (output legitimacy see below).

Thus, when problems tend to globalise, also politics have to globalise. The isolated management of crisis is simply not enough; therefore new regulatory structures have to be developed in order to re-establish the dwindling control capability of national states. Within the concept of global governance different scholars have been discussing how governance beyond the national state could or should look like, which on the one hand enables to re-embed and politically shape the globalisation process and on the other hand facilitates handling global problems. Although there are differences regarding the suggestion how a new global political architecture could look like, all concepts to global governance are based on three main characteristics: multi-level policy, a diversity of actors and a variety of governance patterns. (cf. Messner/Nuscheler 2003:18)

In the following I am going to point out the constitutive building blocks of this new global political architecture as formulated by Dirk Messner and Franz Nuscheler.

In contrast to a couple of globalists, who envision a world state in order to shape globalisation and handle globalisation –related new economic, ecologic and social problems, the protagonists of global governance concept bet on the problem-oriented cooperation of state and non-state actors at all political levels. According to them the vision of a world state or world government, in which national sovereignty is limited to such a degree that global legal norms are directly enforceable against individuals and groups through a, the national governments, superordinate executive power, is neither a realistic nor a desirable option. Because such a bureaucratic super authority could hardly gain democratic legitimation and is far from the problems to be solved (cf. Messner/Nuscheler 2003:15; Nuscheler 2007: 196). Global governance rather means to govern the world, thus to formulate and enforce rules, in the absence of a world government in particular to rule without a ruler (cf. *ibid*). Thereby the concise formula “governance without government”, worked- out by Rosenau and Czempiel,

seems to be misleading because national states are and remain the most important governance actors. But they are supplemented by other actors namely institutions, especially intergovernmental institutions like the UN and non state actors like NGOs, associations, multinational business companies etc. (to the role of NGOs within global governance see chapter 3.3.).

Also private global players can render governance services. Examples for this are the cooperation of non state actors among each other within private, transnational governance structures, like the SA 8000, and their cooperation with states, within global policy networks like the vaccination campaign GAVI or the global Commission on Dams, in order to jointly handle specific problems. Global governance is therefore composed of different forms of governance, thus governance by, with or without government.

As global problems can just insufficiently be settled within the framework of the nation state, states should cooperate on the international or global level within international institutions⁹ in order to meet the actual range of global problems in an appropriate way. These international institutions¹⁰ include among others international organisations, which coordinate the cooperation of governments and contribute to the development of global perspectives, and international regimes. The latter translate the willingness of states to cooperate into binding regulations. Within such regimes national states commit themselves to handle common problems, which cannot be solved by national legislation, through contractual arrangements (cf.

Messner/Nuscheler 2003:15; Nuscheler 2007: 197).

Examples of such international regimes can be found in all political areas and have already been existing for a long time. In environmental policy states have increasingly agreed on multilateral treaties instead of acting unilaterally since the seventies (cf. Brühl 2002:373).

⁹ The term “international institutions denotes norms, rules, programmes and the appendant network of actors, which are influencing the repertoire of action of state and none state actors, as they forbid, allow or demand something “(Zürn 2010: 15).

¹⁰ Zürn mentions altogether eight types of institutions including constitutive principles, regimes, organisations and networks, which are either established by state (international) or non- state actors (transnational). Global governance is the sum of the regulations of all these institutions (cf. Zürn 1998:175 in Beisheim 2001: 117).

Admittedly the jurisdiction of the international cooperation within international environmental regimes (like ozone, the climatic and the biodiversity regimes) can only do little if states, regions and local authorities do not ensure their implementation.

Therefore, successful global governance needs to be based on sturdy substructures. On the regional level, the EU is an example for such a substructure (regional governance) (cf. Messner/Nuscheler 2003:16).

So, within this concept a multi-level policy is conceived, in which all political levels from the local to the national, regional and international, are interacting with each other. Within such a multi-level system of governance the formulation of political regulation should be located, following the “subsidiary principle”, on the political level which is objectively and organisationally most appropriate for the problem and on which it can be treated as effectively and democratically as possible (cf. *ibid.*; Beisheim 2001: 118).

Regarding cross- border problems, *inter alia* environmental issues, the formulation of proposals for regulations and political objectives would, ideally-typically, take place between the affected state and non state actors at the global level. The negotiated compromise would be fixed through the legitimate states within international agreements and implemented by national and sub-national entities. Finally, the implementation of and the compliance with international regulations would be monitored by state and non state actors, especially NGOs (cf. Beisheim 2001:118; Messner/Nuscheler 2003: 17). Particularly through the integration of NGOs at the different political levels, the exponents of the concept expect to achieve a comprehensive legitimization of the decided policy (cf. Beisheim 2001: 121; Messner/Nuscheler 2003: 39f).

The cooperation between states and with non-state actors within international institutions becomes, due to globalisation processes, increasingly necessary in more and more policy areas and demands from nation states a partial surrender of their sovereign rights (cf. Messner/Nuscheler 2003: 15). The national sovereignty (i.e. the self-determined authority of states, both internally and externally) has already been undermined by globalisation processes. Within the concept of global governance national sovereignty should be re-divided between local, regional or global

organisations and non state actors through the delegation of decision-making and responsibility.

The shared sovereignty could lead to an increased capacity to act and ability to solve problems, according to the exponent of the concept. This new principle of shared sovereignty is another central element of the concept on global governance (cf. *ibid.*; Brunnengräber/Stock 1999: 450).

As already mentioned, although:

“the nation states have lost autonomous room for manoeuvring through their involvement in international institutions, they still remain the key player in international politics or relations, as they alone can take authoritative decisions” (Messner/Nuscheler 2003: 17).

Therefore they build the supporting pillar of all the different global governance architectures. Admittedly, the nation state no longer has the power and responsibility to solve all problems. In many policy areas it is dependent on the cooperation with social groups and has to take on new tasks which are arising through its involvement within multilateral cooperation- and decision- making mechanisms (cf. *ibid.*). The state's role could be best defined as an interdependency manager, a moderator or a hinge, which connects the different political levels in order to solve the issue in question (cf. Brunnengräber/Stock 1999: 451). Beside this coordination function, states also have to represent the interests of their populations on the international level and protect them against negative influences. Furthermore they are the main actors to implement the internationally decided agreements on the national level (cf. Messner/Nuscheler 2003: 18).

3.3. Expectations on NGOs within the global governance concept

The inclusion of civil society actors, especially NGOs for policy making beyond the national state, forms a central element of all theoretical concepts of global governance.

Already the CGG accentuated that governance at the global level “must now be understood as involving, beside governments, also non- governmental organisations (NGOs) citizens' movements, multinational corporations and the global capital market” (CGG 1995: 2f).

Thereby the term “civil society” covers a multitude of institutions, networks and individuals reaching from NGOs in a narrow sense, trade unions, professional and trade associations, farming or housing co-operatives, religious based organisations, neighbourhood watch associations, enlightened elites from economics, science, politics, media and so on (cf. CGG 1995: 32; Brunnengräber/Stock 1999: 448, 453; Curbach 2003: 20).

NGOs are not only part of civil society, but they are considered to be the main representatives of an emerging “global civil society” (cf. CGG 1995: 254).

According to the global governance concept their main function is to contribute to the amelioration of the democratic deficits of the international political system.

Excursus: democratic deficits

The observation that the global community is increasingly facing global or transnational problems that cannot be effectively solved through national regulations but needed to be addressed to on the international level, is, as mentioned earlier, the starting point of the normative global governance concept. The problem is, however, that through the shifting of political decisions from national to the supranational or international levels there are certain democratic problems arising.

According to Fritz Scharpf norms and rules, or generally governance at national or international levels are considered to be legitimate i.e. accepted by people, and are democratic if they show input- and output legitimacy. Output legitimacy is given when political decisions are effective, in the sense that they are able to solve the given problem, serve the common good and conform to criteria of distributive justice. Input legitimacy, on the other hand, is given, when collective binding decisions originate from the authentic expression of the preferences of the demos (cf. Scharpf 1998 in Brühl 2002.: 375, 2003: 219; Beisheim 2001:119f, 2005:243).

Therefore the demos, or those who are affected by decisions, must have the possibility to express their preferences in particular to participate somehow in the political process (e.g. through election or de-selection of governments).

As is pointed out by several scholars, the presently existing international governance systems, which were established by states in order to regulate common affairs and problems, face democratic deficits due to both a lack of input as well as output

legitimacy (cf. Brühl 2003: 219f; Brühl 2002.:376; Beisheim 2001:119f, Messner/Nuscheler 2003: 35ff; Klein/Walk/Brunnengräber 2005: 54f).

It is quite obvious that international decisions and agreements have not proven effective enough in dealing with existing global problems, such as climatic change, and therefore have a lack of output legitimacy. There are several reasons for the ineffectiveness of international decisions. First of all it should be mentioned that within international negotiations each state pursue, obviously, their own national interests. Therefore international decisions always follow the principle of the lowest common denominator, at the expense of the problem-solving ability of decisions (cf. Brühl/Rosert 2007: 6). The effectiveness of international decisions is furthermore undermined by a so-called “jurisdictional gap”; which basically means that the political structures on the international level are too poorly developed in order to regulate transnational or global risks in an adequate way. Likewise, many policy makers and international institutions often lack relevant and necessary information in order to take optimal decisions and find suitable policy instruments to respond to the complexity of political issues. In literature this is referred to as the “operational gap”. Last but not least the output legitimacy of international decisions is undermined by an “incentive gap”, meaning that the already decided norms and rules are not at all or insufficiently implemented on the national level (cf. Brühl 2002: 376; 2003: 219f).

Through the shifting of political decisions from the national to the international level the legitimacy chain becomes notably longer. In contrast to the national level, the citizens affected by international decisions, have little possibilities, if any, to participate, influence or control political process on the international level. One of the reasons being, that there are hardly any institutionalised “channels” for their interests. Exceptions can be found within international negotiations in soft policy areas where such channels are rudimentary existing. However, the legitimacy and democratic control of the institutions is hardly given (cf. Beisheim 2001:120, Messner/Nuscheler 2003: 37).

Normally policy making within international institutions takes place between governmental representatives behind closed doors. The general public or individual stakeholders that are affected by the decisions are frequently excluded from these deliberations (cf. Brühl: 2002: 376). Beyond that, they often lack important

information in order to get actively involved in international political processes. For the national population it is often unclear how political processes are designed on the international level, how politicians have arrived at political decisions and why certain interests are asserted over others. Because of the lack of transparency of international decision making processes, decision makers cannot be called to account by the national population for their wrong decisions or for blocking decisions. Thus, citizens could not exercise their democratic controlling function in an adequate way; which is also referred to as “de-democratization” (Brühl 2003: 218). This lack of participation and representation (also referred to as “participatory gap”) as well as the lack of transparency and control undermines the input- legitimacy of international policy processes and its results (cf. Brühl 2003: 219f; Brühl 2002: 376; Beisheim 2001: 120; Messner/Nuscheler 2003: 35ff.).

According to the concept of global governance these democratic deficits of lacking input and output legitimacy can be narrowed through a greater participation of NGOs within international policy making processes.

As civil society actors, NGOs are considered to be relatively independent from state and economic actors, and are able to bring a human perspective into international negotiations, as they represent common interest or interest of marginalised groups, who are not able to voice their concern. They fulfil, so to speak, a “corrective function” (Brunnengräber/Stock 1999: 460; Messner/Nuscheler 2003: 17) towards governmental and economic interests and therewith help to compensate the lack of participation and representation, thus input legitimation, within international negotiations. NGOs do not only bring “bottom up” the interest of people most affected by the “distant” decisions into the political process, but they also inform “top down” the (national) population on the background and details of the international negotiation process and its results. Through their informative activities NGOs contribute to make the political process more transparent for the population, and therewith also enhance the accountability and control of international decisions (cf. Curbach 2003:136; Brühl 2003:218). Admittedly the watchdog function of NGOs cannot replace the democratic control by elected parliaments, but they can push the elected representatives to carry out their duties and rights more effectively (Messner/Nuscheler 2003: 17; 39).

NGOs are also ascribed to contribute to improvement of the effectiveness of international decisions and therewith out-put legitimacy. As they are predominantly active within problem areas insufficiently dealt with or which have not been taken up by states. It is alleged that they have close contact with the local population and often have more knowledge on pressing policy issues and a better understanding of local needs and problems than governmental authorities have. According to the proponents of the global governance concept, this information and expertise of NGOs can be useful in order to reach more effective decisions. Especially in so-called “soft policy areas”, like environmental, development and human rights policy, governmental representatives willingly tap expertise of NGOs. Occasionally, they also integrate NGO representatives into their national delegation (cf. Messner/Nuscheler 2003: 17). Besides, providing information and expertise, NGOs are also ascribed to contribute to an enhancement of the effectiveness of international decisions/agreements through the supervision of the operational follow-up as well as through the implementation and monitoring of projects (cf. Brühl 2003: 220f).

If states refuse, for example, to implement measures, which have been decided on the international level, NGOs can make this lack of implementation public, and therewith exert pressure on states to finally implement the already decided measures.

In the following chapter I am going to briefly introduce the main concerns and points of criticism regarding the concept of global governance and the positive assessment of NGOs.

3.4. Criticism on the concept of global governance

From the very beginning the concept of global governance has been confronted with criticism (cf. Brand et al. 2000). Most critics object that the cooperation politics between the state, market and civil society actors, which is propagated within the concept of global governance, is founded on an unrealizable normative consensus on common interests of mankind. In fact, however, varying strong actors advocate divergent and plural interests and are struggling to push their position within the negotiation process. Because of the existing power- and exploitative relationships

and the divergent interests critics do not believe that a world wide global governance architecture could be established. For them, the vision of global governance is pure utopia (cf. Brunnengräber/Stock 1999: 454; Curbach 2003: 21).

The concept is also blamed to favour technocratic, efficiency orientated and governmental “top down” reform efforts in order to solve global problems. Thereby NGOs should help to implement the international established programs in a cost-effective way on the national and local levels, especially in the social and environmental areas (cf. Brunnengräber/Stock 1999: 456; Beisheim 2001:118).

Admittedly the potential of the homogenously thought NGOs to meet the political challenges is overrated, because NGOs have different political viewpoints, values, goals, strategies and resources (cf. Curbach 2003: 22).

Within the global governance concept not only state, market and civil society actors are indistinctively juxtaposed, as if they had the same power potential, but also within the group of civil society actors little difference is made between, for example, transnational business associations and environmental organisations or indigenous organisations. Those interests which are not well established and not institutionalised are not taken into consideration by the global governance concept. The democratic potential of NGOs within international negotiations is therefore overestimated. Although they demand democratic principles like transparency, publicity and accountability through their activities, it would be misleading to deduce out of that a democratisation of the international system (Brand et al. 2000:142). Regarding their attributed potential to enhance input legitimacy of international negotiations and decision-making processes, it is important to bear in mind that NGOs are unequally equipped with resources and that their organisational ability of interests varies. Just like the other actors, also NGOs tend to build up dominance centres and to compete for resources (cf. Brand et al. 2000:141; Beisheim 2001: 122). Moreover the willingness of governmental and international institutions to cooperate with the different NGOs is quite selective. This means, that governmental actors are just cooperating with a few well-chosen partners, out of the multi-coloured bunch of NGOs. So although NGOs basically have the ability to bring their interest into the political process, a lot of actors and interests are still being ignored (cf. Seifer 2009: 74). Critics also doubt whether NGOs could actually fulfil their function as an independent controlling body, as ascribed by the concept. These critics are concerned that through the further inclusion of NGOs within international

institutions, these NGOs could lose their autonomy and ability to take criticism and in the worst case become instruments for governmental interests (Brand et al 2000: 138f, Beisheim 2001: 123).

Furthermore the potential of NGOs to enhance the efficiency of international governance is viewed with reserve, as they also have not been able to secure international standards within the environmental and human right areas.

Summarizing, it can be said that NGOs have certain weak points like their partial dependence on public financiers, no official power of self-assertion, partially ineffective working methods, lack of democratic legitimation and control, which challenge their qualifications for global governance.

Keeping these points of criticism in mind, the following section concerns the central question of my thesis, namely, whether NGOs could actually fulfil their, by the global governance concept attributed, role as providers of input-legitimacy and output-legitimacy to international biodiversity politics, more precisely to the negotiations on access and benefit sharing (ABS) under the Convention on Biodiversity (CBD).

4. The Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was signed together with the Convention on Climate Change at the United Nations Conference on Environment and Development (UNCED), also known as the Rio Summit or Earth Summit, by 154 states in June 1992 (cf. Simonis 2008: 566). The Convention, which is legally binding under international law, came into force in the subsequent year in December. Until today the CBD has been ratified, acceded, approved, or accepted¹¹ by 193 states. Only Andorra and the United States¹², which had signed the Convention after

¹¹ The legal implications of these are the same; the treaty becomes legally binding on the State or the regional economic integration organization. (CBD: Treaty state description <http://www.cbd.int/world/ratification.shtml>)

¹² As the USA had signed the CBD, it has the allowance to participate in the negotiations without being contracted to the duties arising out of the CBD. In addition the US-American interest are underpinned in the negotiation process by the JUSCANZ- group (Japan, USA, Canada, Australia and New Zealand) (Brand/Görg 2003: 58).

long hesitation but did not ratify it, and the Holy See are not Parties of the CBD (cf. CBD n.d. a.)

Article 1 of the CBD pursues three equal objectives:

“the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding [...]” (United Nations 1992: 3).

Thus, the Convention does not only aim to conserve biodiversity but also to regulate the fair use of genetic resources in order to inhibit the practice of biopiracy.

The term biopiracy is interpreted differently within the debate on plant genetic resources. Thereby two positions ¹³are especially important: a legalistic and a realistic one (Brand/Görg 2003: 85f, Ribeiro 2002: 118f).

In the view of southern countries, which harbour a great biological diversity, and of most NGOs biopiracy is simply understood as the free and illegal appropriation of biological material. According to this legalistic perspective the practice of biopiracy could be prevented through legal regulations, especially through the abidance of the provisions on PIC (prior informed consent) and benefit sharing, as required by the CBD (see chapter 5).

In the understanding of the Canadian NGO ETC group ¹⁴, which established the term in 1994, biopiracy denounce the private appropriation of biological resources- which have always been public, collective and destined for the general welfare- and traditional knowledge related to these resources by transnational corporations and/or public institutions, which are mostly situated in the northern industrialized countries (cf. Ribeiro 2002: 119).

This private appropriation happens with the help of intellectual property rights (IPR) which are granted upon application to individuals in order to protect an invention, a process or a product name. The patent holder receives so to say a kind of monopoly

¹³Beyond that a third interpretation can be distinguished, the one of transnational companies. In their understanding “biopiracy” (or product piracy) is the unauthorized utilisation or reproduction of their patented innovation, for example seeds (cf. Ribeiro 2002: 118)

¹⁴ Action Group on Erosion, Technology and Concentration, formerly RAFI Rural Advanced Foundation International

as he/she enjoys the exclusive right to dispose of the subject- matter of the patent over a period of maximum 20 years. The patent holders have the right to deny third parties access to their invention and to charge royalty payments for its use (cf. BUKO: 10, 54).

According to this second position legal regulations alone are not enough in order stop biopiracy; as long as they do not remove existing power imbalances between different actors. The crucial factor is whether weaker actors, like indigenous people and local communities, who take a central role in this process of biodiversity, are actually able to enforce their rights toward more powerful (economical) interests.

Excuse: Examples of Biopiracy

Enola- the yellow bean from Mexico

The American Larry Proctor owner of the seed company POD-NERES, L.L.C was granted a patent on a yellow bean, which initially originated from Mexico, by the US Patent Office (USPTO) in April 1999. Therewith Proctor obtained an exclusive right over an actually ancient type of bean which he named “Enola” (cf. Jo Wetter 2009; Meienberg 2002: 54f) In Mexico this type of bean, already known for centuries under the name “Mayocoba”, “Canario” or “Peruano”, is a popular and actively consumed nutrition which is also exported to the United States. But, although this bean is regarded as generally accessible seed, thousands’ of dollars, massive protests and five court decisions were needed until the US PTO finally revoked the patent in July 2009 (cf. Jo Wetter 2009).

The story began in 1994 as Larry Proctor bought a bag of yellow beans in Mexico. According to his statement, in the following two years he planted the beans and selected each with a specific shade of colour and replanted it (cf. Meienberg 2002: 54). With the 1999 granted patent Proctor was securing his monopolistic claims for all beans with this specific shade of colour. This basically meant that in the U.S. the buying, selling, importing as well as the production of “Enola” was strictly prohibited without Larry’s approval (cf. Jo Wetter 2009).

It did not take long till Proctor exercised his patent right. Already in 1999 Proctor took legal actions against two seed importers, one of them Rebecca Gilliland, for infringing his patent right. As Mrs. Gilliland, owner of the company Tutuli Produce in Arizona, has been importing “Peruano” and Mayocoba from Mexico for many

years, the claim of Mr. Proctor took her by surprise (cf. Meienberg 2002: 54). The Enola patent also had far-reaching consequences for the Mexican farmer, who, as mentioned above, exported these beans and whose ancestors had in fact been the original breeders of the yellow bean. It was not only licence fees, which add up to six cent per pound of alleged “Enola” beans, but also the intensified control of each import of Mexican beans by the American customs authorities which caused higher costs for the importers (cf. *ibid.*: 55). “As a result around 22.000 Mexican farmers and their families lost 90 per cent of their export earnings within the first year” (Jo Wetter 2009). In January 2000 ETC group raised the first objection to the Enola patent. They pointed out that Mr. Proctor’s “invention” lacked innovation, which is one of three main criteria that the patented subject has to fulfil. As “Peruano” had been the result of age long collective breeding work and of the ingenuity of Mexican farmers as well as of the indigenous population. Furthermore the bean has already been part of the publicly accessible seed stocks of the national research institute for agriculture in Mexico (INIFAP). Consequently the NGO ETC group asked US PTO to revoke the patent. As mentioned the objection was finally met in 2009 (*ibid.*9).

Hoodia- the fantastic slimming cactus

Hoodia is a cactus like plant which grows in the Kalahari Desert in southern Africa. This plant is especially valuable because of its appetite-suppressing effect. The knowledge about this effect of Hoodia has been passed on from generation to generation by the San people (living in Namibia, South Africa, Angola and Botswana) for hundreds of years and is part of their traditional knowledge (cf. Tjaronda 2006; BUKO 2005: 107). Traditionally, the San uses Hoodia in order to suppress their sensation of hunger during hunting. In course of time the habits of the San were also noticed by research institutes and pharmaceutical companies. Initially the appetite- suppressing active ingredient of Hoodia was patented by the South African Council for Scientific and Industrial Research (CSIR), which later granted a license for its further development to the British company Phytopharm. Phytopharm in turn sold additional licenses to drug company Pfizer, and later to Unilever (cf. Tjaronda 2006). All this happened at first without the information and the consent of the real discoverers of the active ingredient of Hoodia, the San people. Rather by accident they got to know that their traditional knowledge was used in order to create new diet pills. Soon after the case went public, massive criticism

followed. Thereupon the CSIR finally establish a benefit sharing agreement¹⁵ with the San Council, according to which the San are entitled to 6% of the royalties, which the CSIR is receiving from Phytopharm. In turn the San are prohibited from utilising their knowledge for any other commercial use (cf. BUKO 2005: 108).

Three years later, the Council signed a second benefit sharing agreement with the South African Hoodia Growers Pty Ltd. (cf. Tjaronda 2006).

Whether the agreement between the San and CSIR is fair or not is open to interpretation. However some things have to be considered. First of all the claiming of ownership rights in respect of plants and knowledge are completely contradictory with the traditions of the San (and other indigenous people), who not only believe in the sacredness of life but also understand their knowledge to be common knowledge, which has been handed down from generation to generation and does not belong to anybody. Hence no individual can claim the right to sell this knowledge, for itself (cf. BUKO 2005: 109). Secondly although the agreement acknowledges the San as the rightful holders of traditional knowledge associated with the Hoodia- plant, their right over the plant itself is not acknowledged (cf. *ibid.* 108). Thirdly the San only signed an agreement with the CSIR and Hoodia Growers Pty Ltd.. Through the CSIR agreement, only the license holders, Phytopharm UK and Unilever have legitimate access to the knowledge and generic resource, although currently, the license holders are not selling any Hoodia products; however others do. There are many Hoodia products that are being sold in Germany, Switzerland, France, the UK and the US, as Hoodia, Hoodia Kapsel, Hoodia Plus and Hoodia L10. Where by almost all sellers market their products with reference to the knowledge of the San. The San people however have not received any benefits form that trade (cf. Tjaronda 2006).

4.1. Early Conflicts concerning Biological diversity

The term biological diversity or biodiversity, which originates from the Greek word *bios* meaning life and the Latin word *diversitas* meaning variety or diversity, refers to the whole diversity of life on our planet. This includes genetic diversity, meaning the

¹⁵ The agreement determines that the payments flow into a “San-Hoodia fund”, with which health care, infrastructure and social protection measures should be financed (cf. BUKO 2005: 108).

variability within species, thus its characteristics: size, taste, disease resistance etc., which is especially important for the breeding of new plants and animals as well as for pharmaceutical research, the diversity of species and of ecosystems. At present all three levels of biodiversity are threatened by loss. Today species are dying out 1000 times faster than the natural rate (Millennium Ecosystem Assessment 2005: 3). Generally a high rate of biodiversity can be found “in- situ” in tropical and subtropical areas, due to the high temperatures, the humidity and the relative stable climate. Another important condition for a high level of biodiversity is the cultural diversity of a country (cf. GTZ n.d. a.; Riberio 2002: 120).

Because of these environmental conditions we find most of the centres of biodiversity in the so-called “developing countries”. As pointed out by GTZ, scientist estimate that 90 percent of the world wide known species are situated in those countries (cf. GTZ n.d. a.).

The World Conservation Monitoring Centre, an agency of the United Nations Environment Programme, has identified 17 mega diverse countries, most of them situated in the tropics, which harbour the majority of Earth’s species and are therefore considered extremely bio-divers (cf. Williams 2001). Some of these countries are part of the group of Like-Minded Megadiverse Countries (LMMC), which was founded in 2002 as a cooperation platform in order to promote the interests of the LMMC countries regarding biological diversity, including the protection of traditional knowledge, access to genetic resources and the fair and equitable sharing of benefits derived from their use. A huge part of the flora and fauna in these countries, are existing exclusively in those areas and are described as endemic.

It might be less surprising that also the major part of agricultural diversity, which represents just a fractional amount of the world’s biodiversity, can be found in situ in the southern hemisphere, in the so-called Vavilov Center of Diversity¹⁶ which

¹⁶ The Russian botanist Nikolai Iwanowitsch Vavilov differed between 8 centres of origin of cultivated plants: China; India, with a related center in Indo-Malaya; Central Asia; the Near East; the Mediterranean; Abyssinia (Ethiopia); southern Mexico and Central America; and South America (Peru, Ecuador, and Bolivia), with two lesser centers--the island of Chiloe off the coast of southern Chile, and an eastern secondary center in Brazil and Paraguay (cf. Fowler/ Moony 1990).

harbours a high diversity of wild crop relatives (cf. GTZ n.d. b.). Through breeding this genetic diversity in agricultural crops and companion animals has been created by people over centuries and is extremely important for food security. The traditional species, which have been cultivated in these centres, are not only the basis for traditional plant breeding and farming but also for the modern, industrialised agriculture in the northern hemisphere. “For instance, 98 percent of the cultivated cereals in the United States originated from other world regions” (Deutscher Bundestag 2002: 345).

As biological diversity is not equally distributed across the world, this leads to potential conflicts. On the one hand industrialized countries, thoroughly influenced by their pharmaceutical-, agricultural and cosmetic companies, have an interest in unrestricted access to the centres of biodiversity, in order to be able to use these biological resources commercially. While on the other hand developing- and emerging-countries have an interest in using their own naturally-occurring resources for their own profit. However, they often lack the necessary technologies.

Industrialised countries, on the contrary, dispose of these biotechnological processes and techniques (cf. Brühl 2005: 279; Brand/Görg 2003: 63ff, Frein/Meyer 2010 a.: 15).

The conflict regarding the access to genetic or biological resources and the sharing of the benefits arising from the use of the resources was firstly held within the United Nations Organisation for Food and Agriculture (FAO). Already during the 1960ies specialists within the FAO warned against a too narrow genetic basis for modern plant breeding. The reason for the discussion was the ongoing Green Revolution, in which newly cultivate and genetically uniformed high-yield varieties were planted and harvested mechanically on a grand scale in developing- and emerging countries (cf. Brand 2000: 179, 184f; Brühl 2003: 238f; Görg 2002:22). Southern countries met this process with criticism. The agricultural modernisation was not only implemented under certain constraints in those countries, but they led to an intensified dependence on the northern countries, as the modern high-yield varieties needed pesticides and fungicide in order to attain a high yield. Beyond that only the first generation of the modern seed delivered high yields. This meant that when planting farmers were not able to use, as usual, the seeds from their last harvest, but were forced to buy new seeds (cf. Brand 2000:179f; Brühl 2003: 238f).

The modern seeds however were prone to illnesses; so new seeds needed a great variability in traditional plant varieties this required new modes of storing and collecting plant genetic resources, ex-situ, in private and public gene banks.

At the End of the 1970ies there were the so-called “seed wars” (Görg 2002: 22). The southern countries no longer accept that they had to pay for modern seeds while at big international seed companies had free access to the traditional varieties, which were the basis of their products (cf. Brand 2000:192).

The biodiversity provider countries defended themselves against the guidelines of the International Union for the Protection of new Varieties of Plants (UPOV) agreement. The first efforts to manage this conflict between biodiversity user and provider countries were started within the FAO. The Commission on Plant Genetic Resource (today: Commission on Genetic Resource for Food and Agriculture CGRFA) was set up to work out a non- binding agreement, under international law, which took them until 1983. Within this international agreement “the International Undertaking of Plant Genetic Resources” (IU-PGR) the industrialised-, developing and emerging countries agreed that the plant genetic resources are a common heritage of humanity, to which the unrestricted access is important (cf. *ibid*). According to the biodiversity providers this free access should also be valid for newly bred cultivar. However, due to the pressure of industrialised countries an exception was made for commercial products. In 1989 the IU-PGR was extended to include the so-called “farmers rights”, which had previously been developed by the NGO RAFI/ETC group in the mid- eighties. The farmer’s rights envisioned a kind of compensation for the centuries long breeding work of traditional farmers regarding the improvement of plant genetic resources (cf. Brand: 2000: 193; BUKO 2005: 68f.).

By the end of the seventies and the beginning of eighties this conflict on access to plant genetic resources was complemented by another conflict on nature conservation.

It became clear that the already existing conservation agreements, which tended to protect single endangered animals, species or eco-systems, were insufficient to stop the erosion of biodiversity (cf. Brühl 2003: 238; 240).

Until 1992 there wasn’t any agreement existing within international environmental policy which was aimed to protect biodiversity as a whole. The “Washington Agreement on International Trade in Endangered Species of Wild Fauna and Flora”

as well as the 1975 signed “Ramsar Convention on the Protection of Wetlands”, were merely agreements to protect specific species or habitats.

Beyond that a set of regional agreements existed, like the Berne Convention on the Conservation of European Wildlife and Natural Habitats, which aimed to improve the regional protection and conservation of nature (cf. Brühl 2003: 241).

Despite numerous international-law agreements, the destruction of habitats accompanied by the extinction of species continued. Among others, this was due to the fact that the already existing agreements were not far-reaching enough and they lacked financial and technical resources (cf. Simonis 2008: 568).

Because of the advancing destruction of eco-systems and the increasing erosion of biological diversity industrialised countries demanded that developing-and emerging countries should implement comprehensive conservation measures within their territories.

The southern countries basically shared the worries of the industrialised countries regarding the increasing loss of biodiversity but they suspected that with reference to environmental protection, the northern countries wanted to suppress economic competition. After all such countries as Brazil, China, Mexico and South Africa, which belong to the emerging economies, are rated among the ten richest biodiversity countries.

These two developments led to the emergence of the Convention on Biological Diversity (CBD).

4.2. NGOs and the pre-negotiations of the Convention on Biodiversity

Due to the unsolved conflict regarding the access to plant genetic resources within the FAO and the lack of already existing effective international environmental agreements, some experts pushed for the establishment of a broad convention to protect biodiversity. The World Charta of Nature of 1982 as well as the 1987 published Brundtland report already accentuated that greater efforts have to be made regarding the preservation of biodiversity (cf. Brühl 2003: 241).

In 1982 the hybrid international environmental NGO IUCN¹⁷ summoned the states to expedite the protection of biodiversity. During the eighties environmental lawyers and experts were drafting a submittal for a convention on nature conservation under the umbrella of IUCN. This draft was finalized in 1989, and contained three main principles for the preservation of biodiversity (cf. Görg 2002: 21). According to the draft each country should protect their biological diversity and ensure access to their genetic resources. The arising costs of conservation were supposed to be settled up by a conservation fund, in which all contracting states had to pay contributions (cf. Brühl 2003: 242). Beside IUCN also other environmental NGOs, like WWF¹⁸, which has a particular interest in the loss of exotic animals and plants, and Greenpeace warned governments against the drastic loss of biodiversity (cf. Brühl 2005: 281). The draft agreement presented by IUCN, represented clearly the idea of nature conservation, with focus on in-situ conservation. Distributional conflicts and their regulation, which included technology transfer and the sharing of the benefits arising out of the use of genetic resources, did not play a role (Brand 2000: 207; Görg 2002: 21).

The draft agreement of IUCN fell, so to say on fertile soil, since the United Nations Environmental Program (UNEP) had shortly before installed an international negotiating body for the protection of biodiversity, in order to check whether an international convention should be elaborated.

The ad-hoc working group of experts on biological diversity met altogether three times, the first time in November 1989. By that time only 25 states sent their experts to the conference which was attended by a handful of primarily environmental NGOs like IUCN and WWF as well as by several agents of the FAO. The US delegation, was one of the strongest supporters of an comprehensive convention on nature conservation and during the second meeting of the working group they brought in the draft of IUCN (cf. Brühl 2003:242).

In 1990 the working group presented its final report to the administrative council of UNEP, in which they express that an new international convention for the protection of biodiversity is needed. At this time UNEP setup another ad- hoc working group of legal and technical experts which was renamed “International negotiation

¹⁷ International Union for Nature and the Conservation of Natural Resources

¹⁸ World Wide Fund For Nature

Committee” in June 1991. After seven more negotiation rounds the draft for the Biodiversity Convention was submitted and accepted in May 1992 (cf. Brühl 2003: 245; Brand/Görg 2003:58).

During the negotiations the Convention developed from a conservation oriented umbrella convention, as planned by the US and IUCN, to an all-embracing convention which tried to regulate beside the ecological problem also economical and social problems (cf. Brand/Görg 2003: 52, Görg 2002:21).

This (further) development of the Convention from a nature conservation agreement to a comprehensive agreement that also included trade related aspects and development policy issues, did not proceed without conflicts. As indicated above, the negotiations were characterized by a polarisation between industrialised and developing countries.

On the one hand, the industrialised countries had a strong interest to bind developing countries under international law to protect and conserve their biological diversity and to secure free access to genetic resources, which they understood to be “common heritage of humankind” as determined by the FAO. The developing countries, on the other hand, considered the on their territory located biodiversity, including genetic resources, to be national resources, over which they could dispose freely. Beyond that they did not understand why they should protect the world’s remaining biodiversity, at the expense of their own development (cf. Frein/Meyer 2010 a.: 7).

It was their view that industrialised countries were, due to the agrarian and industrial revolution, mainly responsible for the loss of biodiversity within the last hundred years, so they should provide developing countries with the necessary budgetary means for the conservation of the remaining biodiversity. Aside from their requirement for financial resources for the direct conservation of biodiversity, developing countries also call for a compensation for their missing out of industrialisation, thus of catch-up development, which would have meant further loss of biodiversity as the example of industrialised countries has shown. On the contrary, industrialised refused to put more money on the table for the biodiversity protection. In order to solve this problem the architects of the Convention elaborated a kind of magical formula named “fair and equitable benefit sharing”. Through the inclusion of benefit sharing within the objectives of the Convention a win-win situation was seemingly established. On the one hand developing countries could enforce their

right to participate in the profit, which arose out of the utilisation of their genetic resources; on the other hand industrialised countries were able to commit developing countries to engage more strongly in environmental protection, without being directly requested to pay (cf. Frein/Meyer 2010 a.: 8).

4.3. The Biodiversity Agreement

With regard to natural resources, the Convention on Biological Diversity made a crucial modification by replacing the until then applicable principle of the FAO which understood plant genetic resources as “common heritage of humankind” with the principle of national sovereign over natural (not only genetic) resources within the preamble as well as in Article 3 and 15 (cf. United Nations1992: 1, 4, 9).

Therewith the Convention replaced the, until then, applicable principle of the FAO which understood plant genetic resources as “common heritage of humankind” with free access. Within the preamble of the CBD the conservation of biodiversity is identified as a “common concern of humankind” (United Nations1992:1; Simonis 2008: 567; Brand 2000: 196, 2008: 13).

The complete 42 articles of the CBD determine, on the one hand, how the three objectives should be transform into concrete actions (see Article 6 to 20) and on the other hand identifies different institutions which should help to attain the objectives of the Convention (see Article 21 to 42).

According to Article 6 the contracting Parties should elaborate general measures like, for example, national strategies, plans and programmes for the conservation and sustainable use of biodiversity (cf. United Nations1992: 5). They should identify and monitor the components of biodiversity (Article 7) and take appropriate measures to conserve biological diversity in-situ (Article 8) as well as ex-situ (cf. Article 9) and make sure that that these components are used in a sustainable way (cf. *ibid.*: 5ff).

Thereby Article 10 (c) determines that Parties should protect and encourage customary use of biodiversity (cf. United Nations1992: 8). Article 11 and 13 furthermore determine that states should also elaborate social and political incentive measures for the conservation and sustainable use of biodiversity, and promote public education and awareness (cf. *ibid.*: 8f).

The Convention emphasises the importance of indigenous knowledge and indigenous and local communities. However, the term “indigenous people” is avoided in official documents, in order not to strengthen eventual sovereignty claims. Article 8(j) demands from the contracting Parties to respect, preserve and maintain biodiversity relevant knowledge and practices of indigenous and local communities and to involve them in benefit sharing mechanisms (cf. United Nations 1992 : 6).

This “revaluation” of the role of indigenous people is overshadowed by the principle of national sovereignty, which grants national governments, and not indigenous people, the right of disposing over their biological diversity. Although Article 8(j) acknowledges, albeit only weakly, the rights of indigenous and local communities on their traditional knowledge related to biological resources, and also envisions benefit sharing when this knowledge is used, these vaguely formulated rights, are subject to national legislation (cf. *ibid.*). Although the participation of indigenous people and rural communities in international and national policy processes and the negotiations of bio prospecting agreements is generally welcomed, the CBD does not formulate any legally enforceable rights (cf. Brand 2008: 19).

Within Article 20.2 the contracting Parties agreed that the industrialised countries should provide new and additional financial resources for the developing countries to enable them to meet the obligations of the Convention (cf. United Nations 1992: 13). Moreover Article 12 determines that industrialised countries should promote the research and the scientific and technical education and training in developing countries (cf. United Nations 1992: 8). According to Article 16, they should also facilitate the access to and transfer of technologies, including biotechnologies, without violating existing patents or intellectual property rights (cf. United Nations 1992: 10f.). Conversely Article 15.2 of the CBD demands that Parties (particularly southern biodiversity rich countries) should facilitate the access to genetic resources within their territories (cf. *ibid.*). In order to exchange experiences and information and to facilitate technical and scientific cooperation, the contracting Parties agreed with Article 18.3 to install a clearing house mechanism (cf. *ibid.*: 12).

Since the CBD is an umbrella convention, it has to be incorporated into national legislation, and its further design, on the international level, is component of continuing negotiations. In order to meet the obligations of the CBD and to push the Convention ahead, the CBD has installed different institutions. The most important being the biennial Conference of the Parties (COP), established by Article 23, on

which the implementation of the CBD is constantly reviewed and further modifications and new protocols are decided (cf. *ibid.*: 15)..

Beside the contracting states also representatives of the different UN organisations as well as non-Parties, like the United States, and NGOs are allowed to participate at the different COPs. As it is comparatively easy for civil society actors, like NGOs to gain access to the COPs, it may not be surprising that the number of participating NGOs has increased constantly over the years¹⁹. While at the beginning of the CBD process primarily nature conservation NGOs, like the World Conservation Union (IUCN), the World Wildlife Fund for Nature (WWF) and the World Resource Institute (WRI) (an environmental think tank), were present at the first COPs, this changed over time. Nowadays a huge variety of NGOs, with quite different interests, are participating in the negotiations. These can be differentiated according to their focal area in: environmental NGOs, development policy NGOs, seed- NGOs, indigenous organisations and last but not least industrial/business organisations, called grey -in contrast to green- NGOs (cf. Brand 2000: 205 ;Brühl 2005: 267; 285f).

In contrast to other international fora, NGOs are enjoying relatively extensive “participation rights” within the CBD. Among others, they are allowed to make statements on their own behalf, and not just group statements, at a self- chosen point in time (cf. Brühl 2005: 287). While NGOs are allowed to take part and raise their voices in the plenum, the two main working groups and the smaller contact groups, they are not allowed to participate in the “friends of the chair” group as well as within expert panels, unless by invitation (cf. Brand/Görg 2003: 59).

The conferences are prepared by a small Secretariat (see Article 24), which is situated in Montreal, Canada. This secretariat also coordinates the collaboration with other international organisations and decides on the admission of the different NGOs to the conference (cf. United Nations 1992: 16). According to Article 25 the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) is jointly responsible for the contentual preparation of the COPs. Here, single questions are pre- discussed and recommendations are elaborated, which are then submitted to the contracting Parties (cf. United Nations 1992: 17).

¹⁹ See the quantitative analysis of Tanja Brühl 2003: 114ff

Typically, the negotiations during the COPs take place within two working groups and if necessary (i.e. by lack of consensus) in small contact groups. If the negotiations grind to a halt smaller friends of the chair groups are formed to develop a compromise between the conflicting states.

In addition there are also specific fora which are installed for the clarification and development of compromise proposals, like workshops, expert panels, so-called ad-hoc working groups and ad-hoc open ended working groups. The main difference between working groups and expert panels exists in the fact that only hand-picked participants are allowed to participate in the latter (cf. Brand/Görg 2003:59).

The Global Environment Facility (GEF) is not only the financing mechanism for the Convention on Biological Diversity (CBD) but also for a number of other multilateral environmental agreements (MEAs). The GEF, which has been established by the World Bank, the UNDP and UNEP, helps to fund initiatives to assist developing countries in meeting the objectives of the Conventions. Its funds are contributed by donor countries. For the fifth funding period, which started in July 2010 and will pass out in June 2014 the GEF Trust Fund disposes over 4.34 billion dollars (cf. GEF n.d.).

After this general introduction to the CBD I will concentrate on the regulation on access and benefit sharing in the Convention. This is followed by a discussion of the “Bonn Guidelines on Access to Genetic Resource and Fair and Equitable Sharing of the Benefits Arising out of their utilization”, which had been adopted, with Decision VI/24, at the sixth COP in Den Haag in 2002 (cf. CBD 2002).

4.4. Access and Benefit Sharing

As mentioned above, the handling of biological diversity in the range of agriculturally useful plants was firstly regulated under the aegis of the FAO within the IU-PGR in 1983. This treaty set out that the agricultural biological resources are to be considered as common heritage of humankind, whose use is open to everyone. This principle was heavily criticised by southern countries and many NGOs, because it automatically conceded advantages to those actors who have the financial and technical means to make plant genetic resources commercially useful. The installation of the World Trade Organisation (WTO) and the strengthening of

intellectual property rights, through patents, led finally to the fact that formal publicly available biological resources were transferred, with the help of international patent rights, into the private property of a hand full of pharmaceutical, agricultural and cosmetic companies and research institutes. As noted above, this unjust and illegal appropriation of genetic resources (and traditional knowledge) is stigmatized as biopiracy.

In order to inhibit this practice of unregulated and free appropriation of genetic resources, the CBD stipulates that states have, due to their sovereign rights over their natural resources, the authority to determine access to these resources, and that benefits which arise out of the utilisation of the genetic resource should be shared in a fair and equitable way with the respective provider country (mostly southern countries). However, it is not only the in-situ existing genetic resources, which are covered by the ABS-provisions, but also ex-situ stored resources. The latter had already been collected before the Convention came into force in 1993.

Regarding access to genetic resources and benefit sharing, the CBD gives a first framework within Article 15 and 19.

Article 15.1 first of all determines irrefutably and clearly the state's absolute rights over their genetic resources. The formulation of precise conditions for the access to genetic resources remains in the national legislation. Thereby the access to genetic resources for environmentally sound use should be facilitated and not disproportionally aggravated (cf. United Nations 1992: 9f). In general the CBD attaches three conditions regarding the access to genetic resources. Firstly, the access to genetic resources is dependent on prior informed consent (PIC), based on full knowledge of the circumstances of the contracting Party which provides the resource (cf. United Nations 1992: 10). This means that the potential user (mostly pharmaceutical and agricultural corporations or scientific institutes of industrialised countries) of the genetic resource has to inform the provider country which resource is used for which purpose. The information alone is not enough; genetic resources may be accessed only with the expressed permission of the provider country (cf. Frein/Meyer 2010 a.: 15). Thereby the providing country could be the country of origin, which harbours the genetic resource in-situ, or any other Party that has acquired the genetic resources in accordance with the Convention (cf. United Nations 1992: 10). Secondly, the conditions for access and use of genetic resources should be mutually negotiated among the contracting Parties (on mutually agreed terms) (cf.

ibid.). Thirdly, the access to biological resources should be accompanied by a fair and equitable benefit sharing. According to Article 15.7 the contracting Parties are urged to share “the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources, [in a fair and equitable way]” (United Nations 1992: 10). This means that the providing country are entitled to participate in the results of the research, by receiving, for example, preferential conditions (including the necessary technologies) for the licensed production of medicines or cosmetics. Beyond that the providing country should also be involved in the profits, which result from the product marketing. The question relating to how much technical, financial means and other benefits the providing country should obtain is a matter of further negotiations between the contracting Parties.

So, regarding the regulations to access and benefit sharing, the CBD first of all privileges a bilateral approach; the formally unregulated and free appropriation of genetic resources should be replaced by bilateral agreements between provider and user countries. Fundamentally, the idea is that the contracting parties sit together around the same table and negotiate the conditions for access and benefit sharing. However, in order to meet the demand of an “equitable and fair benefit sharing”, the power relations between the contracting parties must of course be balanced to some extent (cf. Frein/Meyer 2010 a.: 15). With regard to existing ABS-contracts, which were mainly concluded in the pharmaceutical sector, critical voices have repeatedly emphasized that, in most cases, bilateral agreements give advantage to the already stronger party. So, in order not to benefit the stronger party and not to increase the chance for users to play the providing countries off against each other, multilateral principles have to be formulated, as so to say minimum standards. This would make bilateral agreements more acceptable (cf. Brand/Görg 2003: 87).

For all those cases where the genetic resource is not just sold but used for further research and development, the CBD stipulates in Article 19.2 that the providing countries should get “priority access [...] to the results and benefits arising from biotechnologies based upon genetic resources provides by those [...]” (United Nations 1992: 12).

Under “access to technologies” (see Article 16), the CBD understands access to those biotechnologies, which are protected by intellectual property rights (i.e. patents or plant variety property rights) (cf. United Nations 1992: 10f.). Therewith article 19 on

“Handling Biodiversity and Distribution of its Benefits” (ibid.: 12) does not refer to the distribution of the profits, but to the promotion and facilitation of priority access for developing countries to the protected biotechnologies, which have their resources as a basis (cf. Frein/Meyer 2010 a: 15).

With Article 16, the CBD indeed encourages the contracting Parties to provide or facilitate the access and transfer of protected technologies, and consequently, to at least, theoretically create the possibility for biodiversity rich southern countries to participate in the biotechnological development. However, there are also certain constraints. Article 1 already expresses that the objectives of the Convention should be achieved in consideration of all rights over those resources and technologies (cf. United Nations 1992). Beyond that, in Article 16 paragraph 2 it is added that the access and transfer of technologies, which are subject to patents or other intellectual property rights, shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights (cf. ibid.). With regard to the by southern countries expected technology transfer, this means significant restrictions particularly through the TRIPS agreement of the WTO (Brand/Görg 2003: 60).

With the enshrining of national sovereignty over genetic resources the respective states also have the right of disposal of those resources which are located on territories inhabited by indigenous people and local communities. Indigenous people and local communities have not only been using these resources for self-subsistence and health care over centuries, but they have also contributed to maintain biodiversity. Despite this fact, Article 15, which regulates the access to genetic resources, makes no mention of any right of indigenous people and local communities over genetic resources (cf. United Nations 1992: 9f.).

As mentioned above and according to the CBD, the providing country is responsible to decide whether access to the respective genetic resources is granted or not.

Although the special role of indigenous people and local communities is formally recognized in the preambles, in Article 8(j) as well in Article 10 (c) of the CBD, their rights are only strengthened in so far as they serve for conservation and sustainable use. Within the CBD the “rights” of indigenous people and local communities are not

adduce independently as an own article but as a sub-paragraph of the provision regarding the in- situ conservation. Beyond that their right are subject to national legislation, which tends to weaken them as the national governments are not obliges to implement those rights (cf. Brand 2008: 19). Article 8(j) reads:

“Each contracting Party shall as far as possible and as appropriated, subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices” (United Nations 1992: 6).

From a legal point of view, Article 8(j) is weak as it contains a number of exit clauses. By using such phrases like “shall as far as possible and as appropriated, subject to its national legislation” the contracting states weaken their obligations towards the rights of indigenous and local communities and limit any inroads into national sovereignty (cf. Bavikatte/Robinson 2011: 41).

Article 8(j) makes no mention of the mandatory nature of the “prior informed consent” (PIC) and benefit (BS) sharing when traditional knowledge, innovations or practices are used. However, these terms are required for the access to genetic resources (cf. *ibid.*: 10).

4.5. The further development of the ABS provisions: from Bonn 2001/02 to Nagoya 2010

In order to finally fulfil the third objective of the CBD, the Bonn Guidelines (cf. CBD 2002) adopted on the 6th COP in Den Haag in 2002, constitute an important first step in responding to the unanswered questions regarding access and benefit sharing through a regulatory framework,

The history of the Bonn Guidelines began with a survey among Swiss companies and research institutes in 1997/98. The results of the survey were translated into a first draft of voluntary guidelines regarding access and benefit sharing, known as the

“Swiss Draft Guidelines on ABS”. The Guidelines were introduced, discussed and modified during COP 4 in Bratislava 1998 and COP5 in Nairobi 2000 as well as on two expert panels, which were set up by the COPs. (cf. Brand/Görg 2003: 87ff; Frein/Meyer 2010 a.: 20f) Furthermore COP5 also set up an “Ad Hoc Open- ended Working Group on Access and Benefit Sharing” (WG on ABS). The initial mandate of the WG on ABS was to develop guidelines and other approaches to assist Parties and stakeholders with the implementation of the access and benefit sharing provisions of the Convention (cf. CBD 2000). At their first meeting in Bonn in October 2001, on the basis of the Swiss draft, the ABS WG developed the “Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilisation”. At the following COP6 in Den Haag 2002, the contracting Parties hold a final debate on the Bonn Guidelines and adopted them with Decision VI/24.

Although the southern countries succeed in achieving some point scoring, among others, the recommendation to extend the scope of benefit sharing also on the utilization of biochemical components of the acquired genetic resources, or the implementation of the responsibility for user of genetic resources to seek new prior informed consent (PIC) and renegotiate the conditions for utilisations when the purpose of use is changing. They were, however, not able to persuade the northern governments to also discuss binding minimum standards for access and benefit sharing (cf. Frein/Meyer 2010 a.: 21).

The Bonn Guidelines are as the name already suggests, just guidelines. They are voluntary and should help the contracting states to develop national ABS legislation. Furthermore they should be regarded as a guiding principle when contractual agreements are being negotiated with pharmaceutical enterprise or research institutes etc. (cf. CBD 2002). The Guidelines are considered to be “a useful first step of an evolutionary process in the implementation of relevant provisions [...] related to access to genetic resources and benefit sharing” (CBD 2002) and their implementation should be kept under review (cf. *ibid.*).

The Guidelines are presented in the Annex of the Decision VI/24. At the very beginning the key features of the Guidelines, like their voluntary nature, easiness of use, practicality, acceptability, their complementary to other international instruments, flexibility and transparency, are explicitly outlined (cf. *ibid.*). Several

parts of the Guidelines describe in great detail how national ABS strategies could be developed. They point out what roles and responsibilities genetic resources providers and users have and how relevant stakeholders, such as IPLC, could be involved as well as which basic principles and elements of a prior informed consent (PIC) system may be include. Beyond that the Guidelines include also proposals which basic requirements could be considered when establishing national provision on mutually agreed terms (MAT) (cf. CBD 2002). Furthermore the Guidelines lay down in Appendix I how contracts with the purpose of transferring biomaterials for research, “Material Transfer Agreement” (MTA), could look like and in Appendix II what kind of benefits are conceivable (cf. *ibid.*). Furthermore the subject of the development of an action plan for capacity building for access and benefit sharing is given a central place in the Guidelines.

The roles and rights of indigenous people and local communities are referred to in a couple of passages of the guidelines. Under the heading “basic principles of a prior informed consent system” the Bonn Guidelines provide that in addition to the consent of the competent national authorities of the genetic resource providing country, the consent of relevant stakeholders, such as IPLC should also be obtained, when accessing genetic resources. This is of course subject to domestic law (cf. CBD 2002). According to the Bonn Guidelines the prior informed consent of indigenous and local communities or the approval of the holder of traditional knowledge, should be obtained when their traditional knowledge, and where they have established legal rights, their genetic resources are being accessed. Such access needs to be in accordance with their traditional practices, national access policies and is subject to domestic law (cf. CBD 2002). Furthermore the guidelines demand that: “benefits should be shared fairly and equitably with all those who have been identified as having contributed to the resources management, scientific and/or commercial process. [This] may include governmental, non-governmental or academic institutions and indigenous and local communities [...]” (CBD 2002).

The establishment and utilisation of the Bonn Guidelines led to the fact that PIC and BS requirements have gradually become an established norm when traditional knowledge, innovations and practices are used (cf. Bavikatte/Robinson 2011: 41). However, they had a big weakness namely their voluntary nature. From the very beginning the voluntary nature of the Guidelines, through which dominant actors,

like biotechnology companies and northern research institutes, were strengthened, was criticised by the African Group, the Group of Like Minded Megadiverse Countries (LMMC) as well as by different NGOs. Instead of voluntary guide lines these actors pleaded for legally binding ABS regulations (cf. ENB 2002, BUKO 2005: 98; Brand/Görg 2003: 90).

Indigenous representatives criticised the Bonn Guidelines:

“as too weak and as providing insufficient protection for the knowledge and natural wealth of local people. [...] national governments rather than indigenous peoples would benefit from the commercial exploitation of [traditional knowledge]” (ICTSD 2002: 8).

Indeed, the Bonn Guidelines encourage Parties to obtain PIC from indigenous and local communities, when genetic resources situated in their territories are accessed or their traditional knowledge is used. However, this only applies if the respective countries have anchored these rights into national legislation. Indigenous representatives continually emphasise that they are not just stakeholders, like NGOs or research institutes, but holders of certain rights, and therefore “right-holder”. These rights have to be taken into mandatory account. The majority of indigenous organisations, which observed the 6th COP, refused to participate actively on the development of the Bonn Guidelines, as those would just enable biopiracy of their resources and knowledge (cf. BUKO 2005: 104).

In order to review the implementation of the Guidelines and further examine outstanding issues, including, use of terms, other approaches, measures to support compliance with PIC and MAT, and capacity building needs, the Ad Hoc Open-ended Working Group on ABS was reconvened by Decision VI/24 (cf. CBD 2002).

The southern countries missed their original aim to entrench a legally binding international ABS Protocol within the CBD. In the first instance this would have obligated the user countries to take effective measures in order to meet the Convention’s third objective the “fair and equitable benefit sharing” and to penalise infringements of ABS regulations through national legislation. So, in order to achieve their aim they pressed for further negotiations.

The World Summit on Sustainable Development (WSSD), which took place in Johannesburg from the 26th August until 4th September 2002, was used by the Like-Minded Megadiversity Countries (LMMC)²⁰, which had jointed together a couple of months before, as a platform to call attention to their concern regarding a legally binding international instrument for fair benefit sharing (cf. BUKO 2005: 98; ICTSD 2005: 6; Brand/Görg 2003: 89f).

At the WSSD, the heads of state and government finally met the desire of the LMMC. They called the international community for action to: “negotiate, within the framework of the [Convention], and bearing in mind the Bonn Guidelines, on an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources” (Frein/Meyer 2010 a.: 22).

The decision of the WSSD had been prepared at the second meeting of the WG on ABS in Montreal, Canada 2003 and made confirmed on the next COP 7 in Kuala Lumpur 2004.

At the 7th COP, it became clear that the implementation process of BG lagged behind. The voluntary regulations foster the fact that the misappropriation of genetic resources (biopiracy) went on without a legal framework, or rather with one which was unsatisfactory with regard to the third objective of the CBD (cf. Brand/Görg 2003: 89).

Due to pressure of the LMMC and following the call for action by governments at the WSSD, the contracting Parties decide, within Decision VII/19, at the 7th Conference

“[...] to elaborate and negotiate an international regime on access to genetic resources and benefit sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and 8(j) of the Convention and the three objectives of the Convention”(CBD 2004 b.).

²⁰ Initially the LMMC negotiating group consisted of 15 countries, now 19 countries, including: Bolivia, Brazil, China, Colombia, Costa Rica, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, the Philippines, South Africa and Venezuela. These countries harbour about 70% of the world's biodiversity (cf. BUKO 2005: 98; ICTSD 2005: 6).

Parties also agreed on the terms of reference for the Working Group, including the process, nature, scope and elements for consideration in the elaboration of an international regime on ABS. Decision VII/19 also included a list of 23 possible elements of an international regime on ABS. Under the heading “nature”, the decision stipulated that the international regime could be composed of legally binding and non-binding elements (cf. CBD 2004 b.).

One of the few positive elements of the mandate was the commitment to also incorporate the access to traditional knowledge and the fair sharing of benefits arising of the utilization of this knowledge into a future ABS regime. Since the Convention itself leaves the regulations on access and usage of traditional knowledge open to national legislation, this was seen as a chance to also expand the mandatory principles of PIC, MAT, and BS on traditional knowledge (cf. Frein/Meyer 2010 a.: 24).

The 3rd meeting of the WG on ABS in Bangkok 2005 heralded the start of a long period of debating, as there was very little agreement amongst Parties on even the primary elements of an international regime on ABS. During the 3rd meeting of the WG on ABS, Parties managed to translate the 23 possible elements, formulated at COP 7 in Kula Lumpur, into a table like matrix, which was then translated into text format at the 4th meeting of the WG on ABS in Granada in 2006. The Granada text did not only include a lot of brackets but was itself placed in brackets, which was actually a sign for the extreme controversy on the status of the text. While the southern countries understood the Granada text as a first draft for an international regime, most of the northern countries saw it just as text with outstanding function (cf. Frein/Meyer 2010 a.: 26).

A compromise on this controversy was finally reached at the 8th COP in Curitiba, Brazil in 2006, when Parties agreed that the Granada text was one basis, but not the only basis, for further negotiations (cf. *ibid*).

At the 5th meeting of the WG on ABS in Montreal 2007, the negotiations were at first hampered by the Australian delegation, backed by the industry and non-Party USA as well as Canada, Japan and New Zealand. This was because they refused to negotiate on any legally binding international instrument on ABS, especially on the basis of the Granada text (cf. Frein/ Meyer 2010 a.: 27). The European Union, Switzerland and Norway, on the other hand, were more open towards serious

negotiation and expressed themselves in favour of an international regime on access and benefit sharing. However, they refused to discuss patent issues within the framework of the CBD. The southern countries jointly called for the beginning of serious negotiations based on the Granada text (cf. *ibid.*).

At the 6th meeting of the WG on ABS held in Geneva in January 2008, the JUSCANZ group acted more moderately, although they repeatedly expressed concerns, they did not hamper the negotiations. A real breakthrough was achieved by indigenous people's organisations (IPOs), supported by Haiti and the Philippines they managed to introduce some text, at least in brackets, referring to the right of IPLC over genetic resources, into the objectives of the draft text of the ABS protocol. It states: "[...] [taking into account all rights over those resources, including the rights of indigenous and local communities, and ensuring compliance with PIC]" (WG on ABS 2008: 14).

The main reason for this sudden consideration of indigenous people and local community's interests was the adoption of United Nations Declaration on the Rights of Indigenous People by the General Assembly some months before. With this declaration the UN incorporated into the catalogue of human rights, the rights of indigenous people over their genetic resources and over their traditional knowledge associated with these resources.²¹

During the Geneva meeting Parties could also agree to extend the matrix of 23 possible ABS by some more elements and divide them into a group of "bricks" and a group of "bullets". The former included elements that Parties aimed to incorporate into the international regime, but which still needed further elaboration. The latter included possible elements which required further consideration (cf. Frein/Meyer 2010 a.: 28).

21 Article 31 of the UNDRIP determines that: 1. "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions" (UN 2008: 11f).

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights" (UN 2008: 12f).

With regard to the development of an international regime on ABS, a real breakthrough was reached by the 9th Conference of the Parties in Bonn Germany in May 2008. With the Decision IX/12, the CBD Parties agreed on four significant points (cf. Bavikatte/Robinson 2011: 42).

First of all, the Parties agreed that Annex I, which provided the framework and main elements of an ABS regime, was the basis for further elaboration and negotiations of the international regime (cf. CBD 2008 a.).

Secondly, the COP agreed to begin text based negotiations by inviting Parties and other governments, inter-governmental organisations, IPLC, and relevant stakeholders to submit their views and proposals, including operational text in respect to the elements listed in Annex I (cf. *ibid.*).

Thirdly, the COP reiterated its instruction to the Working Group on ABS to complete the elaboration and negotiation of the international regime at the earliest possible time. Furthermore they decided that WG should meet three times, for an extended period of seven days, prior to COP10 in Nagoya (cf. *ibid.*). Thereby, the three meeting should serve exclusively for negotiations. The mandate for the WG sessions was made clear by the COP within paragraph 7(a) to (c) and 8. The COP advised the WG on ABS to finalize the international regime and to submit, for further consideration and adoption by the COP 10, an instrument to effectively implement the provisions in Article 15 and 8(j) of the Convention and its three objectives. In order to secure that the further negotiations within the WG on ABS were not hampered by the disagreements amongst Parties on the legal character of the international regime, the WG was instructed to not prejudge or preclude any outcome regarding the nature of the regime. (cf. *ibid.*).

Fourthly, in order to assist the WG on ABS, the COP decided to establish three distinct Groups of Technical and Legal Experts (GTLE) to further examine the issues of (i) compliance, (ii) concepts, terms, working definition and sectorial approaches, and (iii) traditional knowledge associated with genetic resources (cf. *ibid.*).

In Annex II, the COP laid down in detail which open questions the expert groups should address and how the three groups should be composed (cf. *ibid.*: Annex II).

The installation of the three expert groups nearly broke down the negotiations, when the LMMC threat to leave the room. The group of LMMC stressed that the setting up of expert groups were just a time wasting tactic by the developed countries.

However, the African Group accepted the establishment of the expert groups, on the

condition that expert views would be sought on the issues that were deadlocked (cf. Bavikatte/Robinson 2011: 42).

The agreement on a concrete plan from Bonn to Nagoya was interpreted by many delegates as a real breakthrough and was also one of the main results of COP 9 in Bonn, Germany.

4.6. Heading to Nagoya

The negotiation marathon on the way to Nagoya began with the meeting of the “Group of Technical and Legal Experts (GLTE) on Concepts, Terms, Working Definition and Sectorial Approaches” held in Windhoek Namibia in September 2008. As laid down by the Annex II of Decision IX/12, the GLTE should have been regionally balanced and composed of thirty experts, nominated by the Parties, and fifteen observers from industry, research institutes/academia, botanical gardens and other ex-situ collection holders. Additionally, it should have also included representatives from international organisations and NGOs and three representatives from indigenous people and local communities, nominated by them (cf. CBD 2008 a.: Annex II B). In fact, however, out of the thirty nominated experts eight, mainly from Africa and Asia, could not attend the meeting. The same was true for the three representatives of indigenous people and one of the two nominated NGO-observers²² (cf. Meyer 2009:1).

Few months later, by the end of January 2009, the second expert group came together in Tokyo, Japan. As mentioned before the second Group of Legal and Technical Experts had been set up by the 9th COP in order to further examine the issue of compliance, and through that assist the WG on ABS. In comparison to the other expert meetings, the second meeting had a smaller number of participants. Beside the thirty experts, only ten observers were allowed to attend the meeting, and at least three of them had to be nominated by indigenous people (CBD 2008 a.: Annex II A).

²² The two NGO-observers, one from EED Germany and the other from Friend of the Earth Togo who missed the meeting, were nominated by the NGO Network CBD Alliance (cf. Meyer 2009:1).

The negotiations on an international regime continued on the 7th meeting of the WG on ABS, which took place in Paris in April 2009.

On this 7th meeting, the European Union, supported by industry and non-Party USA, set a new hurdle on the way to complete a draft protocol till COP 10 in Nagoya, called “pathogens”. While northern countries argued that pathogens should not be part of the international regime, the southern countries emphasised, with reference to Indonesia’s experience with the avian influenza, that pathogens must be included. Regarding the issues of indigenous peoples and local communities rights, most of the southern countries were in favour to take the right of indigenous people over genetic resources and traditional knowledge into the objectives of the ABS regime. Even Canada, which had not agreed on the UNDRIP, opened their position. Solely India and Indonesia argued that there were no indigenous people living on their territories. With regard to the issues of compliance, access and benefit sharing, the WG on ABS failed to take the discussion forward (cf. Frein/Meyer 2010 a.: 32).

The next stop on the way to Nagoya was the meeting of the “Group of Technical and Legal Experts (GLTE) on Traditional Knowledge associated with Genetic Resources”, which took place in Hyderabad in July 2009. In comparison to the other two expert meetings, IPLC were allowed to nominate seven observers. Parties were also encouraged to nominate experts from indigenous and local communities (cf. CBD 2008 a.: Annex II C).

The WG on ABS convened its eighth meeting in Montreal Canada in November 2009. During the meeting it was possible to observe that, with regard to the nature of the ABS regime, the EU, Australia and Japan slowly drew closer to the position of the southern countries. The latter were calling for a legally binding protocol. Only Canada, Great Britain and the USA expressed their reservations on an internationally binding protocol.

With regard to the rights of indigenous people and local communities, Parties disagreed whether their rights should be subject to national law or apply irrespectively of national legislation. With reference to the UNDRIP, representatives of the indigenous people and local communities argued, that it was the duty of states to facilitate the rights of indigenous people, because these rights are human rights.

Furthermore they demanded to adopt the provisions on PIC and BS for accessing genetic resources, likewise for traditional knowledge (cf. Frein/Meyer 2010 a.: 33).

On the ninth meeting of the WG on ABS in Cali, Columbia in March 2010, the co-chairs Fernando Casas (Colombia) and Tim Hodges (Canada) provided the Parties with a “co-chairs’ text” that balanced the interest of the different Parties. The WG accepted the draft protocol tabled by the co-chair as the basis for further negotiations. Regarding the rights of indigenous people, the text was quite minimalist. Although it ensured PIC and BS provisions towards communities when their knowledge is used, and also required Parties to ensure that such consent and benefit sharing is in accordance with community’s customary law and protocols. However, the text was completely silent on compliance provisions, which would have obligated Parties to prevent the misappropriation of traditional knowledge. Furthermore it did not say a word on the rights of communities over genetic resources, which had been written down in Article 31 paragraph 1 of the UNDRIP (cf. Bavikatte/Robinson 2011: 44). Since the Working Group could not finalize the negotiations on the draft protocol at this session, Parties decided to resume the 9th meeting of the WG.

The 1st session of the resumed 9th meeting of the WG on ABS took place in Montreal Canada in July 2010. During the meeting, Parties were able to agree on three out of the 32 articles of the co-chairs’ text. These were the articles on the objectives of the ABS Protocol, on contribution to conservation and sustainable use and on trans-boundary cooperation. Regarding the objectives of the draft protocol, it is striking that the passage referring to the protection and enforcement of indigenous people rights, which had been one of the few positive results of the 7th and 8th meeting of the WG on ABS, was removed (cf. Frein/Meyer 2010 a.: 32, 34).

The main contents of the ABS Protocol remained contentious. The EU, Australia and Canada underlined that they would not agree on any passages of the co-chairs’ text that impose explicit duties on them. Other contentious issues were the temporal as well as the substantial scope of Protocol. Regarding the inclusion of pathogenic genetic resources into the ABS Protocol, the positions of the northern and southern countries were irreconcilable (cf. *ibid.* 34).

As the WG was once more unable to finalize the text the co-chairs proposed to reconvene the Interregional Negotiation Group (ING)²³. They did so, in order to continue negotiations and be able to meet the working groups' objective to submit a draft protocol for adoption by the 10th COP in Nagoya. The WG agreed on this proposal and decided to resume its 9th meeting once again prior to COP 10 in order to endorse the work of the ING and forward recommendations to Parties (cf. CBD n.d. b.)

The ING met from 18 to 21 September 2010 in Montreal, Canada, and one month later from the 13th to 15th October in Nagoya. During the ING meeting, the co-chairs' text was fiercely negotiated. One of the controversies was whether the country of origin or the providing country of genetic resources should be considered as addressee of the benefits which arise out of the utilization of genetic resources. The biodiversity rich countries (mostly "developing countries" and emerging economies) feared that the industrial countries would be rewarded in the end with the benefits which arise out of the utilisation of the genetic resources, which originally derived from southern countries. Since they had been collecting genetic resources from southern countries and "stored" these resources in zoological and botanical gardens as well as in gene banks for quite some time (cf. Frein/Meyer 2010 a.:35).

Another contentious issue was whether the access to genetic resources should be facilitated for those cases where the resources are not commercially used. With regard to this, Brazil and Malaysia pointed out that facilitated access did not mean free access (cf. ibidi.). During the September meeting of the ING in 2010, two smaller negotiation groups were also set up to address the open question on access and benefit sharing when using traditional knowledge, and on compliance.

Regarding the issue of traditional knowledge China and India emphasized that in their countries traditional knowledge is held in the state's hand. They succeeded in reintroducing the term "subject to national law" into the provisions, which require PIC of indigenous people and local communities before accessing traditional knowledge. Furthermore, the references to customary law and community protocols

²³ The ING comprised of five representatives from each UN region as well as of two representatives of indigenous and local communities, civil society, industry and public research. Furthermore the ING also comprised representatives of the current and upcoming COP Presidencies, which were Germany and Japan. Within the ING the spokespersons and representatives could change freely, and discussions were opened to the attendance of all WG participants. Like the WG on ABS, the ING was co-chaired by Timothy Hodges and Fernando Casas (cf. IISD 2010).

were bracketed by the EU acting on behalf of France (Bavikatte/Robinson 2011: 44). During the ING, representatives of indigenous people, backed by the Philippines, tried to reintroduce references to the UNDRIP into the preambles of the Protocol, which was admittedly bracketed by Canada. Moreover they also introduced a provision on the rights of IPLC over genetic resources, which were transformed by the Parties into three possible text options and immediately bracketed by other Parties. Because of the extreme controversy on the provisions regarding the rights of indigenous people over genetic resources, Parties suggested to drop all three options. This resulted in a walk out by the IIFB, who is the main representation mechanism for indigenous people and local communities within the CBD. For the IIFB the rights of local communities and indigenous people over their genetic resources were a red light issue. As this was the only possible option, in the seemingly inevitable face of continuing privatisation of biodiversity, to resist the dominant state and corporate control, which had led to so many cases of biopiracy (cf. Bavikatte/Robinson 2011: 44).

The WG on ABS held its second session of its resumed 9th meeting, in-between the second meeting of the ING and the COP 10 in Nagoya, on 16th of October 2010. During this last meeting, the WG on ABS endorsed the work of the NIG and forwarded a draft protocol on ABS for the consideration of the Parties at COP 10. At the 10th COP in Nagoya, Japan, which was held from 18th to 29th of October, Parties finally adopted, with the Decision X/1, the “Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefit arising from their Utilization” (cf. CBD n.d. b.).

5. NGOs and IPOs within the CBD- positions and activities

As mentioned in chapter 3.3., according to Fritz Scharpf the formulation of norms and rules, or more general governance on the national and international level is deemed to be legitimate, i.e. accepted, by the population, and democratic if it shows input and output legitimacy. Output legitimacy is given when political decisions are effective, serve the community and contribute to distributive justice. Input legitimacy, on the other hand, is given when collectively binding decisions reflect the preferences of the demos (cf. Zürn in Brühl 2002.: 375, 2003: 219). This means, that

those who govern must take the interest of the governed, especially of those who are most affected by the decisions, adequately into account. On the international level this demos²⁴ is not territorially fixed, but evolve in issue areas, like biodiversity, and comprise all those affected by, or with a stake in the decision (stakeholders) (Beisheim 2004: 28). So in order to have input legitimacy, international decision must reflect the preferences of this sectoral demo. Therefore, all the different stakeholders must be enabled to participate (directly or indirectly) in the negotiation process, in order to have their views reflected in the outcome of the process.

Scholars often ascertained that policy making on the international level suffer under legitimacy deficits (cf. Brühl 2002.: 376; Beisheim 2001:119). Since there is a lack of participation, especially of those groups which are directly affected by decisions, and interest intermediation, international decision making processes are suffering under a deficit of input legitimacy. Beyond that, since international regulation have proven, in most of the cases, as ineffective, they are also suffering on a deficit of output legitimacy.

Within the concept of global governance, researchers and policy makers tried to solve this problem by promoting a greater participation of non-state actors, especially NGOs, within international policy making processes. They assume that a broad participation of NGOs will contribute to the democratisation of international negotiations and enhance the legitimacy of the resulting decisions. Since NGOs bring a variety of different perspectives and interests into the negotiations and increase the transparency of the process to non-participants, and therewith also advance the accountability of governments to the public.

In this chapter I am going to address the questions whether and how NGOs can actually fulfil their adjudicated role as providers of input and output legitimacy to international policy processes.

In order to be able to make accurate statements on the NGOs potential to increase input legitimacy, I will evaluate whether NGOs could successfully bring their

²⁴Although most scholars agree that on the international there is currently no common we-identity and therewith no transnational respectively global demos existing, they disagree on its future emergence. Optimistic scholars, argue that either such a transnational demos is evolving (Zürn) or several sectoral demoi come into existence (Abromeit, Schmidt, Breitmeier/ Wolf) (Beisheim 2004: 28; Brühl 2002: 376).

interests/demands²⁵ into the final outcome of the ABS negotiations, the Nagoya Protocol.

Therefore I will first outline which interests the within the CBD active NGOs generally advocate and which demands they have toward the international ABS regime. Subsequently, I will point out different activities, taken by NGOs, which potentially led to an amelioration of the input and output legitimacy of the ABS regulations.

Accordingly, the analysis is based on different kinds of documents, among others: official policy documents (the Nagoya Protocol on ABS), official civil society policy documents (position papers), secondary sources, including research works of Ulrich Brand, Tanja Brühl and a common research work of Alexandra König, Matthias Galan and myself, and on interviews with NGO and IPO participants, taken at COP 9 in Bonn 2008.

5.1. Positions of NGOs and IPOs on the Access and Benefit Sharing Protocol

As mentioned earlier, beside “grey NGOs”, which were mainly established by pharmaceutical, agrarian or cosmetics companies or their associations, also “green NGOs” are engaging within the CBD and participating on the biennial Conferences of the Parties, as well as on the meetings of the different Working Groups²⁶.

Within the group of green NGOs we can further distinguish, according to their working field, between nature conservation NGOs, development NGOs, seed NGOs and indigenous people’s organisations (IPOs) (cf. Brand 2000:205).

The various NGOs, which had been following the ABS negotiations since the first meeting of the WG in Bonn 2001, have developed quite different positions regarding the question, whether the international ABS regime will actually serve the aim to prevent biopiracy. Depending on their definition of biopiracy, two groups can be roughly distinguished. More critical NGOs (i.e. Grain, ETC-group, La Via

²⁵, Or rather, the demands and interest of their constituency/clientele, particularly of those who are underrepresented or marginalised and especially affected by the decisions taken.

²⁶ Until the 10 COP in Nagoya there were four Working Groups one on the Review of Implementation, a second on Article 8(j), a third on Protected Areas and a fourth on Access and Benefit Sharing

Campesina, BUKO) which understand biopiracy as privatisation and monopolisation of genetic resources and traditional knowledge. According to them, an international binding ABS regime will not prevent biopiracy but offer a legal framework for the access to genetic resources, and therewith simply legalise it (realistic understanding of biopiracy). The second group (i.e. environmental, development and most of the indigenous NGOs) understands biopiracy, primarily, as unlawful appropriation of genetic resources and traditional knowledge without fulfilling requirements of PIC (or F-PIC) and without benefit sharing (legalistic understanding of biopiracy) (cf. Brand/Görg 2003: 86). The latter expect that an international binding and stringent ABS regime will prevent or at least hamper biopiracy.

5.1.1. Critical NGOs: realistic understanding of Biopiracy

The “seed NGOs” Grain and ETC- Group²⁷ as well as the international peasant movement La Via Campesina and the German umbrella organisation BUKO²⁸ belong to the group of critical civil society actors (cf. BUKO 2005: 135; Brand 2008: 37). Within the CBD negotiation they generally attempt to bring social and ecological questions together and are primary representing the interests of local people, especially indigenous people and peasant communities, in biodiversity rich countries (cf. Brand 2000:210f.). They point out that there is a close correlation between biological and cultural diversity, and stress that the erosion of the one will inevitably lead to the erosion of the other and vice versa (cf. Ribeiro 2002:120; Galan/König/Moldovan 2010: 159). According to them, indigenous people and rural communities do not only play an eminent role for the preservation and evolution of biodiversity, but are also the original custodians and owners of most of the world’s biodiversity and the therewith associated traditional knowledge (cf. Ribeiro 2002: 120f). Consequently critical NGOs question the principle of national sovereignty over genetic resources (established by the CBD) and advocate the rights of indigenous people and local peasants, to effectively control and freely dispose over their ancestral land, the (plant) genetic resources (including seeds) in their territories

²⁷ Both NGOs have been initially active within the FAO, before they get involved within the CBD (cf. Brand 2000: 209).

²⁸ Federal coordination of internationalism

and their traditional knowledge. Accordingly, they are strictly against patents on life and genetic resources, especially seeds, as well as the privatisation of traditional knowledge through any kind of intellectual property rights. (cf. Brand 2000:210; Galan/König/Moldovan 2010: 159). As after their logic resources, which have been part of the common heritage of communities and people, and have always been public, collective and designated to the general welfare, are turned into private property, become alienable and solely serve the profit of a hand full of companies and institutions (cf. Ribeiro 2002:119). Furthermore through the patenting of genetic resources and traditional knowledge, indigenous people are hindered to freely dispose over and control their own resources and knowledge. In the eyes of critical NGOs as well as critical indigenous organisations, this private appropriation and monopolisation of genetic resources and traditional knowledge is nothing else than biopiracy. According to critical actors the biggest weakness of the CBD is, that nowhere in its articles, it pronounced itself against patents on components of biodiversity and on associated traditional knowledge (cf. Galan/König/Moldovan 2010: 160). On the contrary, the CBD, and the ABS Protocol respectively, formulates requirements for the access to genetic resources and associated traditional knowledge, which are then protected by intellectual property rights. Due to this perspective, the ABS Protocol will just offer a legal framework for biopiracy (Interview ETC group; BUKO, Gen-ethic Network).

As the substantial framework of the ABS negotiations is not changeable, critical NGOs wonder if their participation would be wise, as this would only provide additional legitimacy to the negotiation process and its outcome. Therefore critical actors like ETC group avoid getting involved within the ABS negotiations: “[...] we are not involved [...] because we have given priority to other things and we feel that even if we were inside the negotiations we cannot change the framework and cannot achieve point things that are good [...]” (Interview ETC group).

They are rather critically accompanying the negotiation in order to prevent the worst (cf. Galan/König/Moldovan 2010: 160).

5.1.2. Environmental, development- and indigenous NGOs: legalistic understanding of biopiracy

Environmental NGOs

The positions of the environmental NGOs, active within the CBD, are stretching from “conservative hard liners” like CI and TNC, rather sensitised organisations like WWF and IUCN, to progressive civil society actors like Green Peace or Friends of the Earth (cf. Interview German NGO Forum on Environment and Development (FED); Galan/König/Moldovan 2010: 156; Brand 2008: 37). The main interest of conservative environmental NGOs is the conservation respectively maintenance of nature, especially through the designation of protected areas, which is often accompanied by the displacement of people living there (cf. BUKO: 132; Brand 2008: 37; Galan/König/Moldovan 2010: 156). As a result conflicts have been continually arising between indigenous people, local communities and nature conservation NGOs, on the local level (cf. Interview Forum on Environment and Development, FPP; EED; Tebtebba). Especially CI has often been blamed to actively promote biopiracy by supporting bio-prospecting projects within the areas protected by them, without involving local groups²⁹ (cf. Brand 2008:37). In comparison to the local level, on the international level most of the environmental NGOs have been opening up towards the concerns of indigenous people (cf. Interview IUCN; FED). For example, WWF as well as IUCN underline, even though to different degrees, the importance of the “Declaration on the Rights of Indigenous People” for the ABS regime (cf. IUCN 2008, 2010; WWF 2008, 2010).

In contrast to critical NGOs, environmental organisations are accepting the premise of national sovereignty over genetic resources and they are generally not opposed to the patenting of life (forms), especially genetic resources (exceptions are Green Peace and Friends of the Earth). On the contrary they see the economic value of plant genetic resources, especially in the pharmaceutical field, as important stimulus for the further protection of biodiversity (cf. Brand 2000:208; Galan/König/Moldovan

²⁹ Under the guise of biodiversity protection, CI provided multinational companies with unrestricted access to the biological resources of the nature reserve Monte Azules, in Mexico, which is managed by CI. Thereby, the local population was not involved in the bio-prospecting agreements between CI and various multinational pharmaceutical companies. Neither was their PIC sought, nor did they receive any benefits (cf. Berne Declaration 2004).

2010: 156). Thereby the monetary benefits, arising out of the utilisation of genetic resources and associated traditional knowledge, could be used for the further conservation of biodiversity (cf. Interview WWF, IUNC 2010). As the ABS issue is not seen as typical environmental issue, but rather as classical distribution problem between northern and southern countries, environmental organisations are less active within the negotiation. They rather try to keep in step with, and support the position of NGOs working intensively on the ABS issue, and of developing countries (cf. Interview WWF; Galan/König/Moldovan 2010: 156).

Development NGOs

NGOs working on development issues primarily support the concerns of local people living in the geopolitical South, but also of southern governments. A prominent development NGO is the Third World Network, which is based in Malaysia and does not only work on biodiversity policy, but also on development, world trade and financial policy. The TWN is a rather scientifically working NGOs and its members are mostly intellectuals from the Asian region³⁰, which are also active in other NGOs (cf. Brühl 2005: 285). Besides TWN also the British Intermediate Technology Development Group (now Practical Action), the Swiss Berne Declaration, the German Church Development Service EED³¹ and the catholic organisation MISEREOR have been active within the CBD for quite some time (cf. Brand 2008: 37; BUKO 2005: 133). Similarly to critical NGOs, also development NGOs point out the eminent role of indigenous people and peasants for the maintenance and further development of biodiversity. Furthermore they underline the importance of biological diversity, especially plants, as source of livelihood for the indigenous people and local communities. Therefore they generally promote the strengthening of the rights of peasants and indigenous people over their resources. Development NGOs are basically also critical towards patents on life and therewith also towards the patenting and privatisation of genetic resources (cf. BUKO 2005: 134; Interview MISEREOR, EED). However, as mentioned above, they follow a more legalistic understanding of biopiracy, according to which biopiracy is not generally the privatisation and monopolisation of genetic resources and traditional knowledge

³⁰ Vandana Shiva, for instance, has been long time working on biodiversity policy within the TWN (cf. Brand 2000: 212; Brühl 2005: 285).

³¹ Evangelischer Entwicklungsdienst

through IPRs, but the unlawful appropriation of genetic resources and traditional knowledge; which basically means accessing those resources without the consent of the country of origin or of indigenous people (PIC or F-PIC) and without the conclusion of a contract, that includes beside the conditions of usage, also benefit sharing arrangements (cf. Meienberg 2002: 53). So according to the view of development NGOs, a legally binding and stringent ABS regime, which meets certain minimum requirements (see below), can at least hamper and mitigate the praxis of biopiracy (cf. Galan/König/Moldovan 2010:158; Interview EED; Forrest Peoples Programme (FPP); MISEREOR). The question is, whether these requirements can be implemented into the final ABS Protocol. Although development NGOs are sceptical towards the actual outcome of the ABS negotiations, they are, in contrast to critical NGOs, actively participating and trying to fully exploit the existing scopes of flexibility within the negotiations, in order to improve its outcome (cf. Galan/König/Moldovan 2010:157). They try to counteract and complicate the further patenting of genetic resources and traditional knowledge by calling for binding regulations, which enable indigenous people to effectively control the access to genetic resources on their territories and on related traditional knowledge, also including the right to forbid the access to these resources and knowledge (cf. Interview FPP; MISEREOR, EED; Forum Umwelt und Entwicklung/DNR 2010; Galan/König/Moldovan 2010:158).

The different NGOs working on CBD issues network and coordinate on the international level mainly through the CBD Alliance, which was established in 2002 as an informal alliance of civil society actors.

Over the years the environmental and development NGOs, active within the CBD Alliance, especially those groups with a legalistic understanding of bio-piracy, have approached their positions and developed quite similar demands with regard to the ABS Protocol. The “Top 10 for Cop 10”³² briefing papers produced by the CBD Alliance provide, among others, a summary of the main viewpoints and demands of civil society organisations with regard to the Nagoya Protocol. Thereby the demands

³² The “Top 10 for Cop 10” briefing papers were developed by more than 30 civil society and indigenous peoples organisations and reviewed through the CBD Alliance list servers - which reaches more than 300 members - , before they were published (cf. CBD Alliance/ Kalpavriksh 2010:5).

are not at all new, but have already been posed in previous statements³³. All in all, the CBD Alliance had following nine key demands towards Parties regarding the ABS Protocol:

First, given the fact that the voluntary Bonn Guidelines from 2002 have proven ineffective to stop biopiracy, the NGO community demanded that the Nagoya Protocol has to be legally binding (cf. CBD Alliance 2010 a.).

Secondly, the ABS Protocol must recognise the UN Declaration on the Rights of Indigenous People from 2007 and protect the rights of indigenous people and local communities, especially their rights:

“to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression, as well as the manifestation of their sciences, technologies and culture, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora” (CBD Alliance 2010a.).

Thirdly, against the background of the UNDRIP, the right of indigenous peoples and local communities, to determine over access to and use of their genetic resources and associated traditional knowledge, must be recognised in the ABS Protocol (i.e. international law) and not entirely left subject to national legislation (cf. CBD Alliance 2010 b.). Therefore the Protocol should require the (free and) prior informed consent (F-PIC) of indigenous people and local communities, to access their traditional knowledge and related genetic resources, and equitable benefit-sharing with these communities.

Fourthly, in order to ensure that the utilisation of associated traditional knowledge does not occur without the (free and) prior informed consent (F-PIC) of IPLC and the arrangement of mutually agreed terms (MAT), including provision on benefit sharing, Parties need to include traditional knowledge into the sections of the Protocol referring to compliance, tracking and monitoring (cf. CBD Alliance 2010 a., 2010 b.).

³³ see NGO statement on International ABS Regime, Montreal, 8th October 2007 supported by African Center for Biosafety (South Africa), Erklärung von Bern (CH), EED (D), Ecoropa, Edmonds Institute (USA), Forum Umwelt und Entwicklung (D), Global Forest Coalition, Global Justice Ecology Project (USA), Misereor (D), Research & Action in Natural Wealth Administration (Indien), Sobre Vivencia (Paraguay), Third World Network (Malaysia), World Wide Fund for Nature (cf. Bern Declaration 2007).

Fifthly, with regard to the technical scope of the ABS Protocol, NGOs demanded that it must be broad enough to include all those cases, which are regarded by a majority as typical ABS-relevant utilisation forms of genetic resources and associated traditional knowledge. This means, that beside the direct utilisation of the genetic material (DNA) of the genetic resource³⁴, for instance for the breeding of new plant varieties or extraction of DNA etc., also the utilisation of plant extracts or of other organisms, for the production of nutraceuticals, and biochemical components (derivatives) of the genetic resources for the development of new drugs and cosmetics, need to be covered by the Protocol. Beyond that also pathogens, for the development of vaccines, which are a subset of genetic resources, need to be included in the scope of the Protocol. Thereby the Protocol might allow for specific access rules in emergency situations, for instance when human life is endangered through epidemics or pandemics (e.g. avian influenza), but must at the same time secure the benefit sharing obligation (cf. CBD Alliance 2010a.).

Sixthly, taking into account that the commitment to implement rules for access and fair benefit sharing had already been anchored within the text of the CBD, which is in force since 1993 and binding under international law, NGOs demanded that the ABS Protocol has to enter into force retrospectively. This means that any new use of genetic resources and associated traditional knowledge, which had been accessed since the entry into force of the CBD in 1993, need to be in accordance with the PIC and benefit sharing provisions of the Protocol (cf. CBD Alliance 2010a.). The problem is, that any restriction of the temporal scope of the Protocol to the date of the 50th ratification, as stipulated by northern countries, will allow bio piracy to continue for many more years and also act as incentive to carry as much resources as possible out of the country of origin till D-Day (cf. Frein/Meyer 2010c:25).

Seventhly, “the geographical scope of the Protocol must cover all territories of its Parties” (Alliance 2010a.). ABS rules for genetic resources from extra- territorial

34

According to Article 2 of the CBD genetic resources means genetic material- in terms of any material of plant, animal, microbial or other origin containing functional units of heredity- of actual or potential value.

areas, like the high sea or the Antarctica, need to be in accordance with the ABS Protocol (cf. *ibid.*).³⁵

Eighthly, with regard to the compliance mechanisms, NGOs called for clear and binding rules that make it possible for countries of origin and other right holders of genetic resources and traditional knowledge, to enforce their rights in the user countries. In this respect they ask for two main things: a comprehensive certificate of compliance, which proves the using Party has acquired the genetic resources and associated traditional knowledge in accordance with the regulations of the Protocol, and a list of mandatory checkpoints, including intellectual property examination offices, plant variety offices, authorities dealing with product registration and approval etc., where the certificate of compliance must be presented (cf. CBD Alliance 2010 a.). The underlying idea is that without the submission of such a certificate the further research, patenting, market admission or any other use should not be allowed. Thereby the certificate shall include information on the origin of the genetic resources and associated traditional knowledge, on the existing benefit sharing agreements and on the mutually agreed conditions for the further utilisation of the resource (MAT) (cf. Forum Umwelt und Entwicklung/DNR 2010).

And last but not least, the NGO community asked Parties to ensure that the ABS activities and transactions between CBD Parties and non-Parties, such as the United States which is one of the biggest users of genetic resources, including the users and providers in territory of non-Parties, are consistent with ABS Protocol (cf. CBD Alliance 2010 a.).

Indigenous People Organisations

The CBD is especially important for indigenous people and local communities, as these actors are directly affected by the decision taken within the different COPs. Since the mid- nineties indigenous people from all over the world participate in the CBD negotiations. Beside “southern” indigenous organisations, like Tebtebba³⁶,

³⁵ The German NGO Forum on Environment and Development (FED), for example, recommended to establish a multilateral fund to distribute the benefits that arise out of the utilisation of genetic resources and associated traditional knowledge that stem from more than one country or from outside of national territories (cf. Forum Umwelt und Entwicklung/ DNR 2010).

³⁶ Indigenous Peoples’ International Centre for Policy Research and Education

FPCI³⁷, YPA³⁸, AIPP³⁹ etc., also indigenous organisations from Canada, like NAHO⁴⁰, and the United States, like IPCB⁴¹, are engaging within the CBD. Indigenous people representatives have constantly emphasised that biological diversity and cultural diversity are dependent on each other. The richest ecosystems and the largest biological respectively genetic diversity are usually located on indigenous territories. Indigenous people and local communities are reliant on this richness and on intact ecosystem as basis of their existence. Therefore the maintenance of biological diversity is inseparably linked with the protection of indigenous people's rights (cf. Brand 2000:212). According to this, representatives of indigenous people have stressed out again and again, that the Parties of the Convention must accept and respect that indigenous people have sovereign right over their land and resources. Unfortunately Parties have failed to recognise these rights by determining in Article 15 that the right to grant access to and determine appropriate utilisation of genetic resources rests with the national governments (cf. Harry/Kanehe 2005: 81f.; Kanehe 2008: 3). Although the CBD provides that the approval of indigenous people and local communities is needed when their traditional knowledge is used and that benefits which arise out of the utilisation of such knowledge should be shared with them, this is subject to national legislation and therefore implemented quite cautiously.

Just like critical and development NGOs also IPOs are strongly opposed to the patenting and co-modification of life, as this is against their fundamental values and beliefs regarding the sacredness of life and life processes and the reciprocal relationship which they maintain with all creation (cf. IPCB 2007, BUKO 2005: 100ff.).

Accordingly, they are also against patents on traditional knowledge related to the use of genetic resources. However, as indigenous people often belonged to the most marginalized and impoverished groups, IPOs can fully understand that some indigenous communities, attracted by benefit sharing, make their traditional knowledge available to the biotechnology industry. Nevertheless they ask indigenous people to consider, that once they agreed on benefit sharing agreement they must

³⁷ Fundaci3n para la Promoci3n del Conocimiento Indigena

³⁸ Yiaku People's Association

³⁹ Asia Indigenous Peoples Pact

⁴⁰ The National Aboriginal Health Organization

⁴¹ Indigenous Peoples Council on Biocolonialism

accept, that patent law will govern the ownership of the products derived from their genetic resources and their ancestral knowledge (cf. Harry/Kanehe 2005: 89; IPCB 2007).

With regard to the international ABS regime indigenous people fear that if their rights to own, control access to and determine appropriate utilisation of genetic resources and traditional knowledge, is not recognised in the ABS regime than biopiracy respectively bio colonialism would simply go on (cf. Kanehe 2008: 3). As it is unclear whether these minimum standards will be implemented in the future ABS Protocol, IPOs have reserved commitment to support either a binding or non binding protocol. The dilemma is that a non binding protocol, like the Bonn Guideline, would favour the illegal appropriation of genetic resources and traditional knowledge. While a binding one with poor content would simply legalise the expropriation of the original owner of genetic resources. In both cases biopiracy would simply continue (cf. Harry/Kanehe 2005: 86).

Despite this difficult initial situation, indigenous people engage within the ABS negotiations in order to exploit the existing space for contestation, although there are also critical voices within the indigenous community which call for boycotting of the negotiations (cf. IPCB 2007). In order to synchronize their actions, exchange ideas and develop common positions and so give a strong voice to the concerns of indigenous peoples within the international negotiations, IPOs have developed different networks like the Indigenous Peoples' Biodiversity Network (IPBN) or the Indigenous Women's Biodiversity Network (IWBN). Since its establishment at the 3rd COP in 1996, the International Indigenous Forum on Biodiversity (IIFB) is the key forum for indigenous lobbying of the CBD. During the 5th COP in Nairobi the forum was officially acknowledged with decision V/16 to be a formal advisory body to the CBD (cf. Oldham/Stout/Hardison n.d.).

With regard to the ABS Protocol the IIFB had elaborated five minimum and necessary requirements in order to have a satisfactory outcome that actually prevents biopiracy and not legalizes it.

First of all, the future ABS Protocol shall state in its preambles that the right of indigenous people and local communities, as formulated by the UN Declaration on the Rights of Indigenous People in 2007, are respected (cf. IIFB 2010; Bavikatte/Robinson 2011: 45).

Secondly, when traditional knowledge and genetic resources on indigenous territories are being accessed, then the (free) prior and informed ⁴²consent of indigenous people and local communities must be obtained, and this shall not be subject to national legislation (cf. IIFB 2010; Bavikatte/Robinson 2011: 44).

Thirdly, in order to secure the rights of indigenous people and local communities over the genetic resources in their territories, the IIFB demands that the preamble of the ABS Protocol shall recognise this right (cf. IIFB 2010; Bavikatte/Robinson 2011: 45).

Fourthly, “[t]he importance and relevance of traditional knowledge shall be fully integrated through out the [P]rotocol, especially in the Compliance section” (IIFB 2010).

And Last but not least, the Protocol should include references to compliance with customary law and community protocols of indigenous peoples in order to ensure that States are committed to respect community systems of governance (cf. Bavikatte/Robinson 2011: 45; IIFB 2010).

5.2. NGO- Input Activities

As mentioned earlier, a central assumption of the global governance concept is that NGOs can contribute to mitigate democratic deficits which arise from governance at the international level (lack of input- and output legitimacy). The participation of NGOs shall led to an amelioration of the input legitimacy of international negotiations, as these actors bring different societal interest into the political process, which otherwise would remain unnoticed and therewith widen the basis for decision making.

⁴²F-PIC means that all members of the communities affected consent to the decision and that the consent is determined in accordance with customary laws, rights and practices. Furthermore the consent must happen in freedom from external manipulation, interference or coercion and the intent and scope of the activity must be fully disclosed. The decisions must be made in a language and process understandable to the communities and indigenous peoples, customary institutions and representative organizations must be involved at all stages of the consent process. Last but not least the right of Indigenous Peoples to say NO, must be respected (BUKO 2005 106; FFP n.d.).

After having shown the central interests and viewpoints of NGOs and IPOs with regard to the ABS Protocol above; I want to point out in the following, how (i.e. through which activities) NGOs brought their demands into the CBD negotiation process.

5.2.1. Alliances

In order to effectively advocate their interests towards more powerful actors, like nation states and business representatives, it is essential for NGOs to build up networks. The above mentioned CBD Alliance, as well as the IIFB, are the main networks for NGOs and indigenous representatives to coordinate, share information, exchange positions and aggregate various interests, in order to speak with one strong common voice on the international stage.

The CBD Alliance basically pursues the aim to bring the different views, concerns and demands of civil society into the CBD process, especially of those who are most impacted by the policies themselves (cf. CBD Alliance/Kalpavriksh 2010: 1f).

Therefore the Alliance supports, among others, indigenous representatives as well southern NGOs and community based organisations financially, in order to facilitate their participation in CBD meetings and therewith enable them to represent their interests by themselves (cf. *ibid.*:12ff). Although the Alliance endeavours to enhance the participation and involvement of southern NGOs and indigenous representatives in the negotiations, the process is unsurprisingly dominated by northern NGOs, as they have more financial resources at their disposal. This dominance was also evident at the NGO pre-meeting to the ninth COP in Bonn, which was organised by the CBD Alliance and the German NGO Forum on Environment and Development. Apart from the fact that the attendance of northern NGOs was higher than the one of southern NGOs, individual actors of the hosting forum claimed a leading role within the NGO pre-meeting for themselves; which triggered a heated debate on the legitimate representation of civil society towards the public and the Parties at the conference. Some southern and also northern development NGOs perceived this proceeding as paternalistic (cf. Interview ETC group, BUKO, EED; Galan/König/Moldovan 2010: 171).

Just like the CBD Alliance also the IIFB uses the weekend prior to the conferences to clarify and exchange positions, write out common opening statements, and generally

prepare for the conferences. These capacity building and strategy sessions prior to the COP are especially important for CBD rookies in order to get relevant information on the CBD process. During the COPs, and other important CBD meetings, such as Working Groups and SBSTTA meetings, the Alliance, as well as the IIFB, also hold daily briefing sessions to facilitate the coordination of the different position of NGOs and IPOs and the planning of interventions on specific agenda items.

In the periods between the CBD sessions, the communication among NGOs is maintained through the CBD Alliance's general and ABS specific list servers, which reach more than 300 respectively 92 subscribers (cf. CBD Alliance/Kalpavriksh 2010: 8).

The CBD Alliance also works closely together with the IIFB, they hold, for example, joint meetings; collaborate on statements (e.g. TOP 10 for COP10) and press work etc.

As described by an indigenous representative, the NGO forum and the IIFB usually develop their position on a certain issue independently from each other. Then they try to have matching notes, to see where it is possible to support and generally try to make sure that nothing they are doing is contradictory (cf. Interview NAHO). But the coordination of the positions, statements and interventions of IPO and NGOs are not always easy or possible and basically dependent on the thematic area (cf. Galan/König/Moldovan 2010: 172). With regard to the issue of protected areas, the positions of bigger nature conservation NGOs which promote the expansion of protected areas, and IPOs, seem to be unbridgeable. The latter are strictly against a further expansion of protected areas, especially in their territories (cf. Interview Tebtebba, FPP; Galan/König/Moldovan 2010:171f.).

5.2.2. Statements and Interventions

As the negotiations of the Convention are generally open for civil society groups and representatives of indigenous people, these actors have the possibility to call attention to their concerns from "inside", by sitting directly at the negotiation table with the contracting states, and from "outside", in the sense of outside the negotiation rooms by organising e.g. demonstrations.

Like mentioned in chapter 4.3 the negotiations within the COP take place in differently sized negotiation groups which are opened for NGO and IPO participation to various degrees. Typically, the COP starts with a plenary, which is then transformed into a committee of the whole and reconvenes at the end to adopt the decisions. In the opening and closing plenary, NGOs and IPOs normally have the possibility to read out a common statement. Admittedly this opportunity was denied to them in the opening, as well as in the closing plenary of the COP10 in Nagoya (cf. CBD Alliance 2010 d.; UKabc 2010). During the twelve days lasting conference, the different agenda items are, first of all, discussed within two parallel running Working Groups, where also NGOs and IPOs are allowed to participate and to speak out interventions, either in their own name or on behalf of a specific group (cf. Brand/Görg 2003: 59; Brühl 2005: 287). Admittedly, observer organisations are not always allowed to speak on agenda items and their speaking time is strictly limited to one-minute interventions. But, at least they can submit written comments (cf. Peterman 2010). Due to the complexity of subjects, antagonistic interests and the large number of participants, it is very difficult to reach a consensus within the “big” working groups. Therefore smaller negotiation groups, like contact groups and “friends of the chair” groups, are built up to discuss contentious issues. While NGOs and IPOs are allowed to observe contact group meetings and sometimes also give statement, they are not allowed to attend “friend of the chair” meetings (cf. Brand/Görg 2003: 59).

At the COP 10 in Nagoya, from 18 to 29 October 2010, the ABS Protocol was further negotiated within the open-ended Informal Consultative Group (ICG), which was working in parallel with working group I and II. In general, NGOs and IPOs were allowed to participate within the ICG and to make proposals towards the Protocol, but as non-Party, they needed the explicit support of a Party for any text that they wanted to introduce or retain. Due to the high controversy on key issues of the Protocol, the ICG set up several “small groups” and later in the course of negotiation “closed groups” and a “facilitating group” in order to reach consensus. (cf. ENB 2010b.) The observation of the negotiations within these groups was not

allowed for non-Parties, which was viewed with a great deal of suspicion by IPOs and NGOs⁴³.

So although NGOs and IPOs generally have the possibility to participate and raise their voice in the negotiations, they are facing certain restrictions (cf. Galan/König/Moldovan 2010: 165ff). As the CBD is first of all an intergovernmental process, IPOs and NGOs on the one hand, and governments on the other, are not equal in terms of negotiations. Even if IPOs and NGOs put in their views, those will be negotiated by Parties (cf. Interview Tebtebba).

As pointed out by a representative of IUCN: “the dialogue, is taking place fundamentally among the holders of the power in each part of the world, the governments [...] while NGOs and IPOs do not have any decision making power” (Interview IUCN).

Critical observers even assess the involvement of NGOs and IPOs just as a formality, with little political weight. According to an indigenous representative, “[...] the countries are absolute rigid about keeping control of the process and not letting civil society, whether the indigenous people, whether the local communities or the NGOs, have any real saying” (Interview PIPEC⁴⁴).

Another considerable hurdle that undermines especially the active participation of non-anglophone NGO and IPO representatives (and delegations) is the official negotiation language English. During the COP, translation services are basically available, but these services decrease in relation to shrinking negotiation groups. As pointed out by a NGO representative: “sometimes documents of contact groups or friends of the chair groups [...] are either not available in other languages than English or they come very late” (Interview Forest People Program). This circumstances lead to the fact, that those people with another mother tongue than English are put under disadvantage in terms of negotiations (cf. Interview FPP). So in order to actively play a part in CBD negotiations and also influence them, it is important for NGOs and IPOs to have certain English skills, technical knowledge on CBD issues (expertise), as well as knowledge on the political process, which is basically gained through experience (cf. Interview EED; Galan/König/Moldovan 2010: 168).

⁴³ At the ICG meeting on Wednesday 27 of October 2010, the IIFB expressed their concern regarding their exclusion from the negotiations on traditional knowledge (cf. ENB2010a.: 3).

⁴⁴ Pacific Indigenous Peoples Environmental Coalition

“Clearly, the less knowledgeable and less experienced you are, then the whole thing is completely un-penetrable” (Interview Tebtebba).

5.2.3. Lobbying

Another way to bring their viewpoints into the CBD negotiations is lobbying. Outside the negotiation rooms NGOs and IPOs try to establish contacts to governmental representatives, talk to them on specific issues and convince them to reconsider and change their positions. As the contacting and the subsequent conversations usually take place on the corridors, in cafeterias or in the hotel lobbies, the term “lobbying” has become established (cf. Brühl 2005: 269). Thereby NGOs and IPOs not only attempt to talk to their own national delegation, but also to governments with similar and opposing perspectives. Especially with regard to those Parties with similar perspectives, lobbying is, according to a representative of the FPP “a very good strategy for getting text into the official documents, because governments usually accept government text more widely than text coming from civil society or indigenous and local communities” (Interview FPP).

Deeply founded knowledge as well as political knowledge, such as the knowledge about the positions of Parties and the right argument to influence them, are important prerequisites for effective lobbying work. Personal contacts to delegation members are also quite helpful, but not of central importance as delegations need to be continually contacted and convinced, due to personnel rotations (cf. Interview EED; Galan/König/Moldovan 2010: 168). Those NGOs with good personal relations to their national delegations, like MISEREOR and EED, uses these relations to establish contacts between their partner organisations and delegates (cf. Interview EED; MISEREOR). In preparation for and during the COP10, also the CBD Alliance initiated meetings between civil society representatives and officials, like various CBD co-chairs, the SBSTTA Bureau, and between (blocks of) governments, like the European Union and the Japanese government (cf. CBD Alliance/Kalpavriksh 2010: 3, 6f).

Beside corridors and cafeterias, numerous events on the fringes of the Conference are typical places for lobbying. Side Events are used by NGOs and IPOs to generally disseminate information and to outline their viewpoints and claims on certain issues and therewith, so the hope, make Parties to change their positions. In most of the

cases, side events are visited by sympathizers of the organizers. They are also attended by delegation members in order to obtain/acquire relevant information, but this basically depends on their time availability (cf. Galan/König/Moldovan 2010: 169). During the COP10 more than three hundred side events were held, most of them organised by business representatives and international organisations, but some also by NGOs and IPOs (cf. CBD 2010 b.). From civil society perspective, one of the most relevant side events was the “Top 10 for Cop 10”, organised by the CBD alliance. This event was held on the opening day of the Conference and crucially important for NGOs, in order to make their positions on the major issues for the 10th COP clear to the attending Parties and media representatives from the very beginning.

The circumstance, that more and more business actors are actively involved within the CBD process and use side events in order to promote their interest, is viewed very critically by NGOs and IPOs. As companies and their associations usually have a large amount of resources, “they are able to put on any number of side events that they want to put out their position” (Interview NAHO). Due to that, business representatives have a considerable advantage over NGOs/IPOs, whose financial resources are limited, within the battle for attention of states. Beyond that they also face favourable conditions with regard to the awarding of rooms for side events. During the ninth Conference in Bonn, for example, the plenary hall was given for the first time to an multinational food company the “Charoen Pokphand Group” to hold their side event (cf. interview FPP; Galan/König/Moldovan 2010: 169; CBD 2008 b.).

NGOs and IPOs do not only lobby for their interest at the international, but also at the national level they try to get into conversation with their governments. The interviews show that not every NGO and IPO has the same opportunity to get in contact or to discuss with its government at the national level (see Galan/König/Moldovan 2010: 170). German NGOs, for example, that coordinate within the Forum on Environment and Development, maintain good contact to their national delegation and are also invited to round table discussions with the Ministry of Environment prior to Conferences (cf. Interview EED, MISEREOR, FED). An indigenous representative, on the other hand, notices that he gets more time and advertency from his national delegation at the conference, than at home (cf. Interview NAHO).

The effectiveness and relevance of lobbying work is assessed quite differently by NGOs and IPO (see Galan/König/Moldovan 2010: 169). While some actors suppose that, due to the compromise character of international negotiations, it is quite difficult to introduce wide-ranging agendas into the political process by lobbying (cf. Interview BUKO); others believe that lobbying is one of the most effective strategies to get involved in the process (cf. Interview Tebtebba; NAHO).

5.2.4. Public awareness

With regard to input legitimacy, it is also important that NGOs and IPOs are not only addressing their concerns to the negotiating Parties, but also to a broader public. As pointed out by an NGO representative, in order to generate political pressure on the Conference, it is important to gain somehow public attention, which is basically done through media (cf. Interview FED).

NGOs and IPOs can exert public pressure on decision makers by generally informing the public on the problems of biodiversity loss or of biopiracy and the need for regulation, as well as by disclosing that certain problems are not processed in terms of public interest, or in the interest of the people affected within the negotiations.

Therewith NGOs and IPOs try to make Parties to consider civil society, indigenous people and local communities' concerns respectively to change their positions.

The high media presence at the COP 10 was first of all used by NGOs to conduct daily press conferences, while IPOs organised only few media meetings (cf. CBD 2010 c.). On the opening day of the COP the CBD Alliances held a press conference on the "TOP10 for COP10", in order to convey the main concerns of the NGO community to a broad public. After the first half of the Conference, the CBD Alliance together with the Japan Civil Network for Convention on Biological Diversity (JCN-CBD) were able to attract media's attention by presenting the first "Dodo" Awards. This is an inglorious prize, awarded to Parties who were "leading the world to extinction" by blocking progress at Cop10 (CBD Alliance/Kalpavriksh 2010: 6). The "winners" of the Dodo Awards 2010 were the European Union and Canada, mostly because of their blocking attitude during ABS negotiations. Canada was chosen especially because it was the only country that blocked references to the UNDRIP within the Protocol (cf. *ibid.*; CBD Alliance 2010 c.). Later on the same

day also a press conference on the status of the ABS negotiations were held by the EED, ECOROPA, Tebtebba and Third World Network (cf. Frein/Meyer 2010 d.). During COPs, the CBD Alliance is also editing and distributing the ECO, a newsletter for civil society, where different groups, organisations or individuals can put forward their reports on the negotiation process and their analyses on substantive issues under negotiation. Beyond that, the CBD Alliance also produces, together with the CBD Secretariat, the newsletter “[square brackets]”, which is meant as a tool to facilitate and enhance the dialogue between NGOs and CBD Parties on key biodiversity issues. A similar newsletter “Pachamama” is also produced by the IIFB in co-operation with the CBD Secretariat.

The mentioned newsletters, as well as other relevant information on CBD meetings, are posed on the CBD Alliance’s respectively the IIFB’s website. In order to disseminate information and analysis of the negotiations, the Alliance also created the Undercover COP website and set up a face book and twitter account (cf. CBD Alliance/Kalpavriksh 2010: 8).

By reporting on the conferences, NGOs and IPOs can potentially contribute to make the negotiation process more transparent for the national population and therewith also enable them, respectively their parliaments, to keep a closer eye on their national delegation when taking international decisions.

During conferences, NGOs and IPOs also try to draw media’s and state’s attention to specific problems by eye catching actions and protests.

Similarly to meetings of the International Monetary Fund, the World Bank or the WTO, also CBD meetings have been accompanied, even if in a lesser degree, by protest activities and counter summits in the past.

With regard to the COP 9 in Bonn, a couple of events, protest actions and demonstrations were organised by a coalition of social movements and activist⁴⁵. The aim of these protest and counter evens was to spread general criticism on the predominantly economic orientation of the CBD, as well as the increasing commercialisation and privatisation of biological diversity and nature. Under the motto “Nature for people, not for business!”, activist groups organised, among

⁴⁵ Including La Via Campesina, BUKO Kampagne gegen Biopiraterie, A SEED Europe, Aktionsnetzwerk Globale Landwirtschaft, Bonner AK gegen Gentechnologie, Corporate Europe Observatory, Grüne Jugend, Netzwerk freies Wissen (cf. Schweigler/ Riekeberg 2008; Activism Network COP9 2008).

others, a discussion forum, film evenings, a demonstration against gen modified organisms (GMO), 'terminator technology' and patents, and a second one against biopiracy and the privatisation of seeds, a campaign on agrofuels and street theatres on traditional knowledge etc.(cf. BUKO 2008).

With regard to the COP 10 in Nagoya, the final negotiations on the ABS Protocol against biopiracy took place without noticeable resistance (cf. Schattenblick 2010). There was only one “small demonstration” held at the opening-day of the 10th Conference. Right at the entrance of the conference centre some members of the CBD Alliance⁴⁶ were protesting under the motto: “mother nature is not for sale!” against the commodification of life and the market based conservation of biodiversity (cf. Global Justice Ecology Project 2010).

5.3. NGO- Output Activities

Within global governance concepts, NGOs are not only ascribed to contribute to an improvement of the input legitimacy of international governance, but also to an enhancement of the effectiveness of international decisions, and therewith to output legitimacy.

Also within the scope of the Convention on Biological Diversity NGOs and IPOs provide different “resources” that could help to improve the effectiveness of the decisions itself, meaning that regulations are formulated in such a way as to actually solve the given problem, as well as the implementation of the decisions.

5.3.1. Expertise

As NGOs and IPOs have been specialising on certain CBD issues over years, partially conduct their own scientific research or reprocess scientific knowledge, and also have good contact to and experience in the cooperation with the local

⁴⁶ Amongst others the ETC- group, Global Forrest Coalition, Ecorop, EcoNexus etc.

population, they have a more comprehensive knowledge on specific problems, their causes and appropriate ways to solve them, than state representative do. This expertise is also appreciated by CBD Parties (cf. et al. interview Malaysian delegate), as they often lack policy relevant and necessary information (and even more often the intention), in order to take effective decisions. So by providing expertise, NGOs and IPOs can potentially contribute to reduce this information deficit and therewith help Parties to take measures that actually solve the problem.

Their expertise is one of the main reasons why NGO and IPOs are accepted as observers within international negotiation and also invited to discussion rounds and seminars on national level, prior to the conference (cf. Müller 2008: 293). Due to their high expertise, they are sometimes also taken into the national delegation. A representative of the development NGO “Berne Declaration”, for example, was member of the Swiss delegation at COP9 as well as at COP10 (cf. Interview Berne Declaration; Banz 2010). Also southern countries, as for example Brazil, include representatives of NGOs and IPOs into their delegation. But as pointed out by a representative of the Brazilian NGO “Terra de Direitos”, whose organisation was part of the Brazilian Delegation at MOP 4⁴⁷, the inclusion of NGO/IPO representatives is more appearance than substance, as there is no real dialog (cf. Interview Terra de Direitos).

5.3.2. Implementation and Monitoring

Besides providing information on the interests of the people affected and high expertise, which could potentially led to an improvement of the quality of the decisions, NGOs and IPOs also assist Parties to implement the different provisions of the CBD on the national level. Moreover their monitoring activities help governments to better meet CBD commitments.

Environmental NGOs, for example, provide different data sets and biodiversity indicators, which can be useful for CBD Parties when developing their National Biodiversity Strategies and Action Plans (NBSAPs) to implement the Convention on the national level, or when elaborating their national or thematic reports, to report to

⁴⁷ 4th Meetings of the Parties to the Cartagena Protocol on Bio-safety

the COP on the status and trends of the national biodiversity, on the measures taken within the NBSAP and their effectiveness in achieving the objectives of the Convention. The WWF, for example, has developed, as part of his “Living Planet Report”, the “living planet index” which shows the state of the world’s natural ecosystems (cf. CBD n.d. c.). The annually published report also provides, in contrast to national reports, so to say an independent assessment on the state of biodiversity.

NGOs and IPOs also help to implement the objectives and provisions of the Convention by running their own projects. Especially environmental NGOs, like Bird Life International, Conservation International, Nature Conservancy, WWF etc. are supporting governments to implement the program of work on protected areas by providing funds for the establishment of protected areas, or by initiating and managing conservation programs and projects (cf. *ibid.*).

Within the framework of ABS capacity building projects, NGOs/IPOs especially support authorities of southern countries in developing relevant measures on ABS and traditional knowledge and to implement them. The NGO LI-BIRD⁴⁸, for example, is running an ABS project in Nepal, with the aim to contribute to the institutionalization of mechanisms, in order to effectively implement fair access to and benefit sharing from the sustainable use of genetic resources and associated knowledge (cf. CBD n.d. d.). The Philippine NGO SEARICE⁴⁹ launched anti-biopiracy programmes in Indonesia, Malaysia and the Philippines, where it worked closely together with indigenous peoples and local communities in order to spread information on the issue of biopiracy, prevent illegal bio prospecting (biopiracy) and elaborate balanced and fair access and benefit sharing agreements (cf. CBD n.d. e.). Especially development NGOs, like the EED or Berne Declaration, and critical NGOs, such as ETC group and GRAIN, contribute to monitor compliance with CBD provisions on ABS by investigating biopiracy cases, making them public and taking, within the scope of possibilities, legal actions. The ETC- group, for example, uses the high media presence at the COP to award the “Captain Hook Awards” and therewith make the shadiest biopiracy cases globally public (cf. ETC group n.d.). Furthermore, NGOs also try to topple patent applications based on biological

⁴⁸ Local Initiatives for Biodiversity Research and Development

⁴⁹ South East Asia Regional Institute for Community Education

resources and associated traditional knowledge, when those resource were accessed without fulfilling ABS provisions.

The difficulty here is, that compliance with ABS provisions is no prerequisite for the granting of patents, so in order to raise an objection against biopiracy at the European Patent Office, one has to demonstrate that the patent contravenes public order and morality, or that the requirement of novelty, the inventive step, is not met (cf. Frein/Meyer 2010 b.: 14; BUKO 2005: 127). Therefore, one of the main claims of NGOs was to include patent offices as mandatory check point, where the certificate of compliance needs to be presented.

6. The impact of NGOs and IPOs on the Nagoya Protocol on Access and Benefit sharing

In the following it will be shown whether NGOs and IPOs could ultimately bring their concerns, and therewith also their expertise, into the Nagoya Protocol on ABS. Therefore the main demands of NGOs and IPOs with regard to the ABS Protocol (see chapter 5) will be compared with the actual outcome in Nagoya.

At the end of the two weeks lasting COP 10 in Nagoya the 193 contracting states agreed on more than 40 decisions, whereby three of them were especially important and treated as an all-or nothing package. These were the decisions on the new strategic plan and the 20 Aichi targets to stem biodiversity loss, the decision on the scheme to increase the mobilisation of financial resources to support the achievement of the CBD objectives and the decision on the ABS Protocol to combat biopiracy (cf. TWN 2010).

The final adoption of the “Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilisation” took years of preparation, two and a half weeks of intense, partially post-midnight negotiations and long lasting deliberations at the final plenary session which ended at past 2 am in the morning of 30th of October 2010 (cf. Normile 2010: 742).

As mentioned, during the COP10 the negotiations of the ABS Protocol took place within the Informal Consultative Group (ICG) which was established on behalf of Fernando Casas and Timothy Hodges (who co-chaired the WG on ABS) in order to negotiate and finalize the ABS Protocol by 22nd of October 2010. The dead-line was extended to the 28th of October 2010, but negotiations reached a deadlock.

Thereupon, the COP 10 presidency, Japan set up a “facilitating group”, which consisted of the European Union, Namibia (for the African Group), Brazil (on behalf of the LMMC) and Norway (representing a bridging viewpoint), to prepare a compromise text on the unresolved issues. A key negotiator of the Asian- Pacific region was not invited to this negotiation group (cf. TWN 2010). During the penultimate day of the COP, negotiations took place behind closed doors. Informal consultations were held between the head of delegations and a compromise text was suggested but no agreement was reached. In order to conclude the negotiations on ABS Protocol successfully, the host country Japan took over the negotiations and elaborated with guidance of the co-chairs Hodges and Casas a compromise text on scope and compliance during the night. On the morning of 29th of October 2010 Japan’s draft was distributed and regional groups met with the Japanese Environmental Minister Ryu Masumoto, who basically persuaded all Parties to accept this text (cf. *ibid.*).

The fact that northern and southern countries could finally agree on a legally binding ABS Protocol, that seeks an equitable share of the benefits which arise out of the utilisation of generic resources, was basically estimated as success. However, caution was mingled with the celebration.

Most delegates and observers assessed the Protocol as a starting point, a useful basis for future work. Whereby it’s effectiveness will basically depend on its implementation by the Parties, especially of user countries (cf. EED 2010a.; ICTSD 2010).

Doubts towards the new Protocol prevail on the part of the African group, which called the protocol imperfect but stated that they could live with it, and of the ALBA⁵⁰ group, which heavily criticized the Nagoya Protocol and stated that they

⁵⁰ The “Alianza Bolivariana para los Pueblos de Nuestra América” consists of, among others, Bolivia, Cuba, Equator, Venezuela etc.

could not accept it but will not stand in the way of all the Parties that agreed to adopt it (cf. TWN 2010).

6.1. Scope

With regard to the scope of the ABS Protocol NGOs wanted to achieve several things (see Chapter 5.1.2).

As most of the known biopiracy cases do not relate to the direct utilisation of the genetic information of the genetic material itself but rather to its biochemical compounds (for example for screening medically active compounds to develop new drugs), NGOs and especially southern countries were keen to ensure that the access and benefit sharing provisions do not only apply to genetic resources but also to the direct products of the genes themselves, for example proteins, metabolites and other so-called derivatives of genetic resources.

The problem is that a literal interpretation of the CBD's definition of genetic resources, as "genetic material [i.e. any material of plant, animal, microbial or other origin containing functional units of heredity] of actual or potential value" (United Nations 1992: 3), would in effect exclude biochemical compounds, which do not contain functional units of heredity (i.e. genes, DNA-segments), from the scope of the Protocol (cf. Bavikatte/Tobin 2010: 3; Nijar 2011: 13).

Within the Nagoya Protocol this problem was solved by the definition of "utilisation of genetic resources" in Article 2(c), as "to conduct research and development on the genetic and/ or biochemical composition of genetic resources, including through the application of biotechnology⁵¹" (Secretariat of the CBD 2011:4). Article 2(e), as well gives a definition of derivatives of genetic resources that also refers to biochemical compounds, which could be seen to complete the definition of "utilisation of genetic resources". They are defined as "a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic

⁵¹ Biotechnology is defined in Article 2 (d) as: "any technological application that uses biological systems, living organisms or derivatives thereof to make or modify products or processes for specific use" (Secretariat of the CBD 2011: 4).

resources, even if it does not contain functional units of heredity” (Secretariat of the CBD 2011: 5).

Biochemical derivatives were not explicitly included within the scope of the Nagoya Protocol, which is set out by Article 3 and refers to:

“genetic resources within the scope of the Article 15 of the Convention and to the benefits arising from the utilisation of such resources”, as well as to, “[...] traditional knowledge associated with genetic resources within the scope of the Convention and to the benefits arising from the utilisation of such knowledge” (Secretariat of the CBD 2011: 5).

But they were implicitly included within the scope of the Protocol by the term ‘utilisation of genetic resources’, which is defined, see above, in such a way as to include biochemical composition of genetic resources. This makes ABS rules applicable to the utilisation of the genes, as well as the biochemicals contained in the genetic resources. Accordingly, the main source of benefits, i.e. the utilisation of biochemical compounds for the development of drugs or cosmetics, is covered by the ABS Protocol (cf. Frein/Meyer 2011: 11). In order to have a strong Protocol against biopiracy, NGOs also request Parties to take pathogens, i.e. viruses which are used to develop vaccines, into the scope of the Protocol. They pointed out, that in emergency situations Parties could indeed allowed for specific and appropriated access, but benefit sharing obligations must be secured.

This demand was especially supported by southern countries while northern countries to various degrees wanted all these to be excluded from the Protocol (cf. Ling 2011: 8).

Although Article 3 on the scope of the Protocol does not directly refer to pathogens, they are, according to TWN, covered by the Protocol “as evidenced by a specific reference in preamble 16 [...]” (TWN 2011). According to the TWN a cumulative reading of paragraphs 3 and 4 of Article 4, on the relationship with other international agreements and instruments, and Article 8(b), on special considerations, suggests that Parties can develop national legislation that deals with pathogens as a genetic resource and subject it to ABS requirements (cf. *ibid.*). Article 8(b) stipulates that Parties shall pay due regards to emergency situations, when for instance human, animal or plant health are threatened or damaged, when developing and implementing their national access and benefit sharing legislation. In those cases,

they may take into consideration the need for expeditious access to genetic resources. However, if access to viruses is to be expeditious then also the fair and equitable sharing of the benefits arising out of the utilisation of these viruses⁵², needs to be expeditious (cf. Secretariat of the CBD 2011: 8).

With regard to the temporal scope the main interest of NGOs and southern countries was to secure that the provisions of the ABS Protocol not only apply to genetic resources and traditional knowledge acquired after the entry into force of the Protocol, but also to any on-going and new use of resources and knowledge that have already been collected, and stored ex-situ in gene banks or botanical gardens, since the entry into force of the CBD in 1993. (cf. Ling 2011: 8; Meienberg/Weizsäcker 2011: 12; Frein/Meyer 2010c.: 24f)

In the final version of the agreement the issue on temporal scope is left open to interpretation. As mentioned, Article 3 on the scope of the Protocol states that the Protocol applies to genetic resources and to traditional knowledge associated with these resources within the scope of the CBD (cf. Secretariat of the CBD 2011: 5). This could mean that any new use of genetic resources and associated traditional knowledge that have been collected since the entry into force of the CBD in 1993, falls within the provision of the Protocol (cf. Swiderska 2010). Article 33 on the entry into force of the agreement, on the other hand, states that the Protocol shall enter into force on the 90th day of the date of the 50th signature of a CBD Party (cf. Nagoya Protocol 2010 Article 33 paragraph 1). This could be interpreted to mean that the provisions of the Protocol apply to new collections. In other words the temporal scope of the Protocol is far from clear. According to the interpretation of Christine von Weizsäcker and Francois Meineberg, any new utilisation of genetic resources held ex-situ are covered by the Protocol, as all wordings, which would have restricted the scope of the agreement to genetic resources and associated knowledge acquired after the entry of the Protocol, have fortunately been deleted in the final version (cf. Meienberg/Weizsäcker 2011: 12).

With regard to the geographical scope of the ABS-Protocol, the CBD Alliance stressed that the Protocol generally needs to cover all territories of its Parties and that

⁵² This includes access to affordable treatments by those most in need, especially in developing countries.

the utilisation of genetic resources collected from extra-territorial areas has to be in accordance with the ABS Protocol. In addition, the German NGO Forum suggested to establish a multilateral solution for the fair sharing of the benefits that arise from the utilisation of genetic resources from extra-territorial areas or from the utilisation of resources and traditional knowledge of more than one country or indigenous community (cf. Forum Umwelt und Entwicklung/DNR 2010).

Such a multilateral solution was also suggested by the African Group, which proposed to establish a multilateral fund, under the CBD, for the benefits that cannot be linked to a specific country of origin or providing country (cf. Ling 2011: 8) .

In the final version of the Nagoya Protocol the geographical scope is clarified by Article 3 which stipulates that the Protocol applies to genetic resources within the scope of CBD Article 15, which covers the area under national jurisdiction of the Parties (cf. United Nations 1992: 9f.). In addition the proposal of the African group was also considered, so that the Protocol now includes a provision to set up a mechanism to share the benefits of genetic resources that occur in trans-boundary situations or for which it is not possible to grant or obtain a PIC.

Article 10 states that:

“Parties shall consider the need for and modalities of a global multilateral benefit-sharing mechanism to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The benefits shared by users of genetic resources and traditional knowledge associated with genetic resources through this mechanism shall be used to support the conservation of biological diversity and the sustainable use of its components globally” (Secretariat of the CBD 2011: 8).

As was pointed out by François Meienberg and Christine von Weizsäcker the provisions of Article 10 could also be applicable in those cases where genetic resources are used that had left the country of origin (hundreds of) years ago and have been kept ex-situ, e.g. in botanical gardens, so that the country of origin is not identifiable any more (cf. Meienberg/Weizsäcker 2011: 12). However, Article 10 remains quite vague, as no time frame is given to establish this mechanism, and is potentially illusionary (cf. Ling 2011: 8).

With regard to the utilisation of genetic resources and associated traditional knowledge within the territories of countries that are not Parties of the CBD, such as the USA, the CBD alliance wanted to achieve that the Protocols ensure that ABS activities and transactions between CBD Parties and non-Parties are consistent with the Protocol. Finally Article 24 which deals with non-Parties remained quite vague. It states that: “[...] Parties shall encourage non-Parties to adhere to [the] Protocol and to contribute appropriate information to the Access and Benefit-sharing Clearing-House” (Secretariat of the CBD 2011: 18).

6.2. Rights of Indigenous People

With regard to the rights of indigenous people and local communities, NGOs and IPOs basically wanted to ensure that the ABS Protocol recognise and protect their right to dispose of their traditional knowledge and of genetic resources located in their territories, as had been stipulated by the UN Declaration on the Rights of Indigenous People (UNDRIP) in 2007.

According to that especially IPOs but also NGOs called for clear references to the UNDRIP in the preamble of the ABS Protocol. At the resumed ninth meeting of the WG on ABS in July 2010, the IIFB had made the following text proposal for the preambles of the Protocol: “[n]oting the significance of the UN Declaration on the Rights of Indigenous People as regards this Protocol”(CBD 2010 a.: 3).

During the negotiations at COP10 Canada ended up in being the only Party that refused to accept any references to the UNDRIP in the preambular text (cf. Bavikatte/Robinson 2011: 47). In order to make Canada agree to this provision, Canadian IPOs published a flood of media release, held press conferences and undertook fierce lobbying. In addition the preambular text was made more agreeable by phrasing it as follows: “[n]oting the United Nation Declaration on the Rights of Indigenous People” (Secretariat of the CBD 2011: 4).

The inclusion of references to the UNDRIP in the preamble of the Protocol was an important step, as it is the first time that an international treaty explicitly refers to the UNDRIP adopted in 2007 (cf. Koutouki 2011: 11), and even more important as it

gives the jurisprudential opportunity to interpret the provisions of the Protocol from the perspective of the UNDRIP (cf. Bavikatte/Robinson 2011: 45).

It should be noted that the IIFB also called on Parties to ensure that the preambles to the Protocol recognise the rights of indigenous people and local communities to genetic resources. Although the interrelationship between genetic resources and traditional knowledge and their inseparable nature for IPLC was referred to in the preamble 21 of the Protocol, the right of IPLC to genetic resources was not recognised, whereas the right of IPLC to traditional knowledge associated with genetic resources was.

6.3. Access and Benefit Sharing

With regard to access to traditional knowledge and related genetic resources, NGOs and IPOs demanded that the right of indigenous people and local communities to determine over access to and utilisation of their genetic resources and associated traditional knowledge should be recognised in the Protocol, and not just subjected to national law. The wording “subject to national law” means, that it lies within the discretion of governments whether they apply these rights or not (cf. Frein/Meyer 2011: 13). Basically, access to such knowledge and resources and benefit sharing has to be dealt at the same level as access to genetic resources held by states (cf. CBD Alliance 2010a.). Therefore the Protocol should require the free and prior informed consent (F-PIC) of indigenous people and local communities for access to and utilisation of their resources and knowledge, as well as equitably benefit sharing with the providing community.

In the final version of the Protocol these concerns were at least partially taken into account. First of all, it should be mentioned that the Nagoya Protocol deals separately with access to genetic resources and access to associated traditional knowledge in Article 6 and Article 7. Thereby the access provisions cover three cases: access to genetic resources of the providing Parties (Article 6.1), access to genetic resources of IPLC (Article 6.2) and access to traditional knowledge held by IPLC (Article 7) (cf. Secretariat of the CBD 2011: 6f).

Article 6.1 basically reiterates the principle of the sovereign rights of states over their natural resources and states that:

“[...] access to genetic resources for their utilisation shall be subject to the [PIC] of the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention, unless otherwise determined [...]” (Secretariat of the CBD 2011: 6).

Furthermore Article 6.3 contains a set of international access standards and also provides suggestions for provisions in mutually agreed terms (MAT), among others, terms on subsequent third party use and terms on change of intent (cf. *ibid.*: 7). These provisions basically enable Parties to include also regulations, when establishing national rules and procedures for MAT, which require the initiation of new proceedings for PIC when the user or the intent of use is changed. The inclusion of provisions on change of user or intent, was also a main demand of the German NGO Forum on Environment and Development, which should have likewise also applied to traditional knowledge (cf. Forum Umwelt und Entwicklung/DNR 2010). However there is no evidence that such minimum provisions for MAT also apply to traditional knowledge yet. Article 12 of the Nagoya Protocol, which refers to the implementation of provisions on traditional knowledge associated with genetic resources, only stipulated in paragraph 3(b) that:

“Parties shall endeavour to support, as appropriate, the development by indigenous and local communities [...] of: [m]inimum requirements for mutually agreed terms to secure the fair and equitable sharing of benefits arising from the utilization of traditional knowledge associated with genetic resources” (Secretariat of the CBD 2011: 9).

As mentioned above, access to genetic resources of indigenous people and local communities is referred to in Article 6.2 of the Protocol. The main demand of IPOs and NGOs to include clear references to IPLC rights over genetic resources in the Protocol and therewith secure these rights in international law, could in the end not be reached, at least not to that extent. Especially northern countries argued that since there were no obligations in the CBD to recognise IPLC rights over genetic resources, the granting of these rights had to be strictly restricted to national discretion, which was rejected by IPOs and NGOs (cf. Bavikatte/Robinson 2011: 46).

In the end the Protocol only requires Parties to develop national measures for PIC and benefit sharing (see below) for the use of genetic resources held by indigenous people. Article 6.2 reads as follows:

“In accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that the prior informed consent or approval and involvement of indigenous and local communities is obtained for access to genetic resources where they have the established right to grant access to such resources” (Secretariat of the CBD 2011: 6f).

The wording at the beginning of the paragraph “in accordance with domestic law”, which was introduced by the African group as a new legal term of art and used also in other parts of the Protocol, replaced the former phrase “subject to national law”, and basically affirms that the right of IPLC under this article are not dependent on the discretion of states, but rather that the states have the obligation to ensure that these rights are firmly established through national legislation (cf.

Bavikatte/Robinson 2011:45). As the obligation in Article 6.2 is a shall-obligation, it is mandatory for states to implement it, but this will take however some time.

Basically Article 6.2 provides that the PIC of IPLC are sought by users when accessing and using their genetic resources. However, this provision seems to apply only in those cases where IPLC have already been granted their ownership rights (cf. Frein/Meyer 2011: 12), as indicated by the phrase “where they have the established right to grant access to such resources” (Secretariat of the CBD 2011: 7). As the words “established rights” are not concretely specified, it leaves it open to interpretation whether these rights are established in national or international law (cf. Bavikatte/Robinson 2011: 47).

With regard to access to traditional knowledge associated with genetic resources, the respective Article 7, just as the afore mentioned Article 6.2, only requires countries to develop national measures to ensure the PIC of and MAT with IPLC for access to traditional knowledge. Article 7 only consists of one paragraph and states that:

“[i]n accordance with domestic law, each Party shall take measures, as appropriate, with the aim of ensuring that traditional knowledge associated with genetic resources that is held by indigenous and local communities is accessed with the prior and informed consent or approval and involvement of these indigenous and local

communities, and that mutually agreed terms have been established” (Secretariat of the CBD 2011: 7).

As can be seen Article 6.2 as well as Article 7 do neither maintain the standard of F-PIC nor a provision that allows IPLC or Parties to deny access to genetic resources and traditional knowledge when these resources are not used in a sustainable way, as demanded by IPOs and NGOs (cf. Forum Umwelt und Entwicklung/DNR 2010; CBD Alliance 2010 b.). Nevertheless these provisions under the Nagoya Protocol are a big step forward compared to the provisions of the CBD, as they establish at least the need for PIC and MAT with communities for the use of their traditional knowledge and related genetic resources. With Article 12, which refers to traditional knowledge, the Nagoya Protocol also stipulates that Parties shall take IPLC’s customary law, community protocols and procedures into account when implementing their obligations under the Protocol (cf. Secretariat of the CBD 2011: 9). This was also a main demand of IPOs, whereby they also wanted to include references to “indigenous and local community laws”. During the negotiations at COP10 especially France, and thus also the rest of the EU which had to back France’s position, rejected at first any reference to “customary laws and community protocols” as well as to “indigenous and local community laws” (cf. Bavikatte/Robinson 2011: 46). In the end a compromise was found between France, the African Group, which supported the position of IPOs, and the IIFB in the corridors. The deal was to retain references to customary law and community protocols, in exchange for the removal of “indigenous and local community laws” (cf. *ibid*: 17).

In order to ensure that all benefits which arise out of the utilisation of genetic resources and traditional knowledge are shared in a fair and equitable way, with the providing country or indigenous community, and can be covered by (bi-lateral) ABS agreements, NGOs and especially southern countries emphasised that the benefit sharing requirements of the Nagoya Protocol had to include any benefits which arise from the utilisation (research and development) and commercialisation of these resources and knowledge, derivatives and products utilising them (cf. EED 2010 b).

The Nagoya Protocol addresses the issue of fair and equitable benefit sharing in Article 5 and distinguishes, between benefit which arise out of the utilisation of genetic resources, benefits arising from genetic resources held by IPLC, and benefits which arise out of the utilisation of traditional knowledge.

To begin with, Article 5.1. determines that:

“[i]n accordance with Article 15, paragraphs 3 and 7 of the Convention, benefits arising from the utilization of genetic resources as well as subsequent applications and commercialization shall be shared in a fair and equitable way with the Party providing such resources that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the Convention” (Secretariat of the CBD 2011: 6).

Reading Article 5.1 together with Article 2(c) of the Protocol, it is obvious that the benefits which arise out of the utilisation of biochemical compounds, which are derived from the accessed genetic resources, are also included in the benefit sharing provision, and therefore will also fall under (bi-lateral) ABS agreements. This provision basically reflects the demand of southern countries as well as of NGOs (cf. Frein/Meyer 2011: 12).

It should be pointed out, that the provisions of 5.1 to share the benefits which arise from the commercialisation of genetic resources or biochemical compounds, as the most lucrative phase in the product development chain, are lacking in Article 5.2 and Article 5.5. The former deals with benefit arising from the utilisation of genetic resources held by IPLC, the latter with benefits arising from the utilisation of traditional knowledge.

Article 5.2 only obliges Parties to:

“[...] take legislative, administrative or policy measures, as appropriate, with the aim of ensuring that benefits arising from the utilization of genetic resources that are held by indigenous and local communities, in accordance with domestic legislation regarding the established rights of these indigenous and local communities over these genetic resources, are shared in a fair and equitable way with the communities concerned [...]” (Secretariat of the CBD 2011: 6)

Similarly, Article 5.5 only stipulates that:

“[e]ach Party shall take legislative, administrative or policy measures, as appropriate, in order that the benefits arising from the utilization of traditional knowledge associated with genetic resources are shared in a fair and equitable way with indigenous and local communities holding such knowledge[...]” (ibid.).

The exclusion of benefits arising from the phase of commercialisation within Articles 5.2 and 5.5 is obviously discriminating and need to be rectified in national ABS legislation (cf. Frein/Meyer 2011:12). The question is whether governments are willing to do that.

In accordance with CBD all benefit sharing shall be upon mutually agreed terms (MAT) and may include monetary and non-monetary benefits, as listed in the Annex of the Protocol, whereby the benefits are not limited to those listed (cf. Secretariat of the CBD 2011: 6, 24f.).

6.4. Compliance

Although the CBD, which has been in force since 1993, includes the objectives to equitable share the benefits which arise out of the utilisation of genetic resources (cf. United Nations 1992:3) and also requires obtaining PIC of, and establishing MAT with, the providing country⁵³ when their genetic resources are accessed (ibid.:9f.). It is to be noted that there has been little benefit sharing with these countries (mostly “developing countries”) until today. The problem is that although the CBD is legally binding, it first of all requires Parties of the Convention to develop national legislation to implement it. While most of the biodiversity rich southern countries took great efforts to develop and implement national ABS legislation, northern countries, where the genetic resources are used in most of the cases, have done little. A positive exception in this respect is Norway (cf. IIED 2010). With the result that the actual users of genetic resources and associated traditional knowledge, i.e. research institutes and companies, have had no legal obligation to share any benefits.

⁵³ This is the country of origin or any Party that has acquired the resources in accordance with the CBD.

Furthermore, providing countries have had no possibility to monitor or control the compliance of foreign users with national ABS rules, and where necessary prosecute breaches, when the genetic resources and the associated traditional knowledge had left the providing country (cf. Frein/Meyer 2010 b.: 14).

Against this background southern countries, as well as NGOs, wanted to achieve that especially northern countries were obliged to ensure that only legally acquired genetic resources and traditional knowledge are being used in their territories. In order to be able to monitor whether the genetic resources and traditional knowledge were acquired in accordance with ABS provisions, NGOs argued for the establishment of a comprehensive certificate of compliance that includes minimum information on PIC and MAT, and for the inclusion of mandatory checkpoints that capture any stage of research, development and commercialisation, (for example Intellectual property offices or authorities dealing with product registration and approvals etc.), where the mentioned certificate must be submitted. Without such a certificate any research, the granting of patents or the release of products, based on genetic resources or biochemical derivatives thereof, should not be allowed. NGOs also demanded that the protocol has to determine that a breach of ABS rules will be punished by the withdrawal of patents or marketing authorisation. (cf. Forum Umwelt und Entwicklung/DNR 2010; CBD Alliance 2010 a.)

The issue of compliance was addressed to in the Articles 15, 16 and 18 of the Nagoya Protocol.

Article 15 of the Protocol, dealing with compliance with domestic legislation or regulatory requirements on ABS, is almost identical with Article 16, dealing with compliance with domestic legislation or regulatory requirements on ABS for traditional knowledge, and requires Parties to take:

“[...] appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources [and traditional knowledge associated with genetic resources] utilized within its jurisdiction have been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party [where such IPLC are located]” (Secretariat of the CBD 2011: 12).

In addition Articles 15 and 16, paragraph 2 and 3 also require Parties to take measures to address situations of non- compliance and to cooperate in cases of alleged violation of domestic ABS legislation or regulatory requirements (cf. *ibid.*). The wording of the both articles implies that the obligation to ensure that genetic resources and traditional knowledge are legally acquired, rests first of all on the side of industrialised countries. Furthermore the articles also provide that the genetic resources and associated traditional knowledge, which are used in national jurisdiction of Parties, needs to comply with the national legislation of provider countries (cf. Swiderska 2010).

Article 18 of the Protocol, which deals with compliance with mutually agreed terms, also obliges Parties to ensure that disputes which arise out of private ABS agreements between users and providers can be brought to national court (cf. Secretariat of the CBD 2011: 14).

With regard to the issue of monitoring the utilisation of genetic resources, the negotiating Parties could in the end agree to designate one or more checkpoints to monitor and to enhance transparency about the utilisation of genetic resources. Thereby the Protocol leaves it basically open to Parties to choose the right checkpoint/s, it only requires that:

“Checkpoints must be effective and should have functions relevant to implementation of this subparagraph (a). They should be relevant to the utilization of genetic resources, or to the collection of relevant information at, inter alia, any stage of research, development, innovation, pre- commercialization or commercialization” (Secretariat of the CBD 2011: 13).

The demand of southern countries and NGOs to include a concrete list of checkpoints in the Protocol, including patent and other intellectual property offices as minimum mandatory checkpoints, to control compliance with the provision of the Protocol regarding PIC and MAT, was highly resisted by northern countries, except of Norway (cf. Ling 2011: 8). Also the inclusion of an incentive list of possible

checkpoints⁵⁴ was rejected by northern Countries. Furthermore the controlling function of checkpoints was reduced to monitoring and enhancing transparency (cf. Frein/Meyer 2010 e.: 36).

With Article 17.3 the negotiating Parties agreed to establish an internationally recognized certificate of compliance to show that:

“the genetic resource which it covers has been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic [ABS] legislation or regulatory requirements of the Party providing prior informed consent” (Secretariat of the CBD 2011: 13).

Furthermore they agreed on nine minimum information points that shall be mentioned in the compliance certificate, including: issuing authority and the date of issuance, the provider of the resource and the unique identifier of the certificate, the person or entity to whom PIC was granted, the subject-matter or the genetic resources covered by the certificate, a confirmation that MAT were established and that PIC was obtained, and finally information on the commercial and/or non-commercial use (cf. Secretariat of the CBD 2011: 14). It is, however, worrying that all these mentioned points can also be kept confidential. Apart from that, another major deficit of the monitoring provisions is that they do not cover traditional knowledge related to genetic resources of indigenous people and local communities (cf. Frein/Meyer 2011: 14; Ling 2011: 8; Bavikatte/Robinson 2011: 48).

The following table 1 provides an overview of the main demands of the NGO- and IPO-community and of their impact with regard to the Nagoya Protocol on ABS.

⁵⁴ The non- exhaustive list would have included following authorities: “competent national authorities in the user country; research institutions subject to public funding; entities publishing research results relation to the utilisation of genetic resource; intellectual property examination-, patent-, and plant variety-offices; authorities providing regulatory or marketing approval of products derived from genetic resources, resulting from the use of genetic resources or its derivatives; indigenous and local communities, including their relevant competent authorities, that may grant access to traditional knowledge” (TWN 2010).

	Demands	Outcome/Impact
CBD Alliance	Adoption of a legally binding ABS Protocol under the CBD.	<i>Successful:</i> Parties agreed on a legally binding treaty.
	Recognition of the UN Declaration on the Rights of Indigenous People.	<i>Successful:</i> The penultimate preamble of the Protocol clearly refers to the UN DRIP.
	Recognition of IPLC right to determine over access to and use of their genetic resources and associated traditional knowledge in international law.	<i>Not successful:</i> The Protocol only requires Parties to develop, in accordance with domestic law, national measures to ensure that traditional knowledge and, where they have the established rights to grant access, genetic resources have been accessed with PIC of IPLC and the establishment of MAT, including provisions on benefit sharing.
	Access to traditional knowledge and benefit sharing must be dealt with at the same level as that related to genetic resources. Compliance with the provisions of the Protocol on associated traditional knowledge must be ensured.	<i>Not successful:</i> Traditional knowledge and genetic resources were not treated in the same way. The provisions on benefit sharing for the utilisation of traditional knowledge, do not cover benefits which are arising from commercialisation. Article 16 only requires Parties to develop national measures to ensure that traditional knowledge utilized within their jurisdiction has been accessed in accordance with the PIC and MAT provisions of the Party where such indigenous people are located. The provisions of Article 17 regarding the monitoring of compliance do not refer to traditional knowledge.
	Inclusion of the utilisation of extracts and biochemical components of genetic resources (derivatives), as well as pathogens into the technical scope of the Protocol.	<i>Partially successful:</i> Derivatives of genetic resources were not explicitly included in the scope of the Protocol. But they were defined as biochemicals and referred to in the definition of “utilisation of genetic resources”, which extends the scope of the Protocol to biochemical components of genetic resources. A cumulative reading of paragraphs 3 and 4 of Article 4 and 8 (b) and the specific reference in preamble 16 suggests, that pathogens are covered by the Protocol.
	The Protocol should apply to any new use of genetic resources and associated traditional knowledge that have already been collected since the entry into force of the CBD 1993.	<i>Partially successful:</i> The temporal scope of the Protocol is left open for interpretation. While Article 3 on scope could be interpreted to cover all resources collected since the entry into force of the CBD in 1993. Article 33 on the entry into force of the Protocol, however states, that the Protocol shall enter into force on the 90th day after the date of the 50th signature of a Party. Which means that only new collections are covered.

CBD Alliance	The geographical scope of the Protocol must cover all territories of its Parties. Access and benefit sharing rules for genetic resources outside of national territories must be in accordance with the ABS Protocol.	<i>Successful:</i> The Protocol basically covers all territories of its Parties. For those situations where it is not possible to grant or obtain PIC for the access to genetic resources (and traditional knowledge), this includes resources from extra-territorial areas, Article 10 provides, that Parties shall consider the need for and modalities of a global multilateral benefit sharing mechanism.
	Establishment of a list of mandatory checkpoints where a certificate of compliance, to prove the legal appropriation of the genetic resource and associated traditional knowledge, and the existence of a benefit-sharing agreement, must be submitted.	<i>Not successful:</i> The monitoring provisions of Article 17 only apply to the utilisation of genetic resources and exclude traditional knowledge. Parties could only agree to establish one or more unspecific check points. Furthermore, the nine minimum information points of the certificate of compliance can also be kept confidential.
	The Protocol needs to ensure that ABS activities and transactions of Parties and non-Parties, including the users and providers in the territory of the latter, are consistent with ABS Protocol.	<i>Not successful:</i> Article 24 on non-Parties only provides, that CBD Parties shall encourage non-Parties to adhere to the Protocol and provide information related to access and benefit-sharing to the ABS Clearing-House.
IIFB	The preambles of the Protocol shall respect the rights of IPLC as formulated by UN DRIP.	<i>Successful:</i> See above.
	For the access to traditional knowledge and genetic resources within indigenous territories the (free) PIC of IPLC must be obtained and this should not be subject to national legislation.	Not successful: See above.
	The preambles of the Protocol shall recognise the right of IPLC over the genetic resources within their territories.	<i>Not successful:</i> The preambles notice the interrelationship between genetic resources and traditional knowledge and also recognize the diversity of circumstances where traditional knowledge is held by IPLC, but they do not refer to genetic resources held by IPLC.
	Integrate traditional knowledge fully into the compliance section.	Not successful: See above.
	Ensure references to compliance with customary law and community protocols in the text of the Protocol.	<i>Successful:</i> Article 12 on traditional knowledge associated with genetic resources states that Parties shall, in accordance with domestic law, take into consideration IPLC' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge when implementing their obligation under the Protocol.

Tab. 1: Demands of the CBD Alliance and the IIFB and their impact on the Nagoya Protocol on ABS. Source: CBD Alliance 2010 a.; CBD Alliance 2010 b.; IIFB 2010; Bavikatte/Robinson 2011: 44f.)

7. Conclusion

7.1. Democratisation of Biodiversity Policy through NGOs?

As mentioned earlier, within the concept of global governance, NGOs and IPOs are ascribed to contribute to the democratisation of international governance structures, when they are included in international negotiations. As main representatives of “(global) civil society” they are supposed to bring, bottom-up, local interests or the interests of the most marginalised and affected groups, into the political process and therewith countervail the democratic deficits of lacking participation and representation in international negotiations (input legitimacy). Furthermore they are also ascribed to ameliorate, top-down, the accountability and control of international political decisions, by distributing information on the political process and therewith enhance the transparency of the process for the population. Finally NGOs are also supposed to ameliorate the effectiveness of international decisions (output legitimacy), by helping in the implementation through the realisation of projects or external monitoring etc.

As shown in Chapter 5, also within the framework of the CBD, NGOs and IPOs have made some positive contributions to enhance the input and the output legitimacy of international negotiations. At the same time my research suggests that under present conditions there are several limits for NGOs and IPOs to contribute to the democratisation of the international biodiversity policy.

7.1.1. Input–legitimacy

Compared to other international fora, like for example the conference on climate change, the CBD is seen as relatively open toward the participation of NGOs and IPOs, with far-reaching “participation possibilities” (cf. Brühl 2005: 287).

Thereby NGOs and IPOs are of course not the only non-state actors that try to influence the negotiation process. With regard to financial resources and political influence, industrial interest groups (e.g. the international Chamber of Commerce (ICC), the International Federation of Pharmaceutical Manufacturers and Associations (IFPMA) are much more powerful than NGOs or IPOs. Within the

negotiations NGOs and IPOs compete with these BINGOs (Business NGOs) for political influence.

Dominance of northern NGOs

Interviews, observations and side talks, during the 9th COP in Bonn, have shown that diverse NGOs and IPOs can neither equally participate within the CBD nor do they have the same chances to bring their interest into the negotiation process. In comparison with northern NGOs it is much harder for southern organisations to get the necessary financial resources in order to attend the negotiations. Furthermore they cannot afford to line up a large delegation for the conference, as big northern environmental NGOs do.

Although the CBD Alliance endeavours to bring the interest of the most marginalised and affected groups into the negotiation process and also financially supports southern NGO and IPO representatives to participate in the negotiations, it is obvious that the NGO-community within the CBD is dominated by northern NGOs. Beyond that many key actors like farmers or fishers are not at all or hardly represented at the COP, as was pointed out by a NGO representative (cf. Interview ETC- group). Also the fact that the dominant negotiation language during the COPs as well as NGO and IPO preparatory and strategy meetings is English, generally puts less experienced and less organised actors with another mother tongue under disadvantage in terms of effective participation (cf. Interview FPP similarly also Interview BD and Terra de Direitos). This is especially important since these preparatory meetings serve different organisations to elaborate common positions and demands, which are then represented vis-à-vis the Parties. As the discussions are mainly held in English it is much harder for non-English-speaking representatives of organisations to actively take part in the (co-)determination of these demands. The same is also true for CBD rookies, as they often lack the necessary experience and knowledge in order to be able to effectively participate in the discussion.

As mentioned in chapter 5 some NGOs/IPOs even assess their involvement in intergovernmental negotiations just as a formality, without having a real saying (cf. Interview PIPEC, IUCN, ETC group, Tebtebba). Putting aside the fact that NGOs and IPOs are not allowed to raise their voice during decisive negotiation rounds, they

also need the support of CBD Parties in order to have their demands included in the outcome of the negotiation.

As pointed out by several interview partners during the COP 9 the demands and proposals of NGOs and IPOs, not to mention BINGOs, are not taken equally into account by governmental representatives.

The concerns and proposals of those NGOs and IPOs which are inline with the dominant perception of problems and with existing political interests are rather considered by CBD Parties than critical voices, which are strictly opposed to the economic appropriation of biological diversity and also critical towards the sovereign rights of states over genetic resources (cf. Interview BUKO, Interview ETC- group, Interview EED). This observation was also made by Ulrich Brand (cf. Brand 2008: 39).

However, as the analysis in chapter 6 shows, also rather moderate positions, which resign themselves with the economic appropriation of genetic resources, have little prospect of success to make it up into the final outcome. As indicated by Table 1 in chapter 6 the NGO and IPO communities were hardly able to get their demands entirely through the ABS negotiations.

Most of their demands were either ignored or only partially taken into consideration, whereas their partial success was based upon the fact that the ABS Protocol has left core points, such as the scope, open for interpretation. Accordingly the joy of the NGO and IPO community regarding the adopted Nagoya Protocol was restrained. Despite remarkable achievements, for example the implementation of a “broad” definition of genetic resources, the inclusion of pathogens into the scope, or the extensions of IPLC rights in comparison to the Convention’s text from 1992, they could not push through their main demand for mandatory checkpoints and a certificate of compliance with which the effectiveness of the Protocol in the fight against biopiracy stands and falls.

In summary, it can be said that although the political terrain of the CBD may seem open and neutral towards the participation and concerns of civil society organisations at first glance, in fact it is not. Because it only integrates certain actors and perspectives into the process, while it ignores or marginalises others. With regard to input legitimacy this means that although different NGOs and IPOs basically have

the ability to bring a variety of interest into the process, their potential to do so is undermined by the nature and selectivity of the process.

However, the negative consequence of this selective involvement is that those civil society groups which are working within the framework of CBD therewith also concede authority to this political terrain. This is also critically reflected by the ETC group (cf. Brand 2008: 39).

Transparency and control

During CBD sessions the newsletter of civil society ECO as well as the information bulletin ENB (Earth Negotiation Bulletin), which has a more official character, are both important sources of information for governments, civil society groups as well as for interested outsiders. Thereby especially the ECO does not only review the course of negotiations but also critically analyses the process, gives important background information and “translates” complex issues into a language which is also understandable for non-experts. However, the ECO as well as the ENB are only available in English.

In order to inform the interested public on the current status of, and the sticking points in, the negotiations as well as on the positions and arguments of NGOs and IPOs, these actors use different mediums. Beside social networks, like face book and twitter, the CBD Alliance as well as the IIFB also use the daily press conferences during the COPs to inform the various print media, TV and radio representatives on details and the course of the negotiations.

Although NGOs and IPOs are basically able to make the negotiation process more transparent for non-participants and therewith also reassert control to the population, through their information and media work. Transparency is only possible to a certain degree, so caution is advisable. Since NGOs and IPOs are excluded from those negotiation rounds where the final compromise finding takes place, they are not able to report on these closed doors meetings. Furthermore, it is not possible to make any concrete statement regarding the question how many people were in fact reached by the information and media work of NGOs and IPOs. But it may be assumed that the first to receive the provided information is the national clientele of NGOs/IPOs and at best an innately interested public.

7.1.2. Output legitimacy

As shown in chapter 5., NGOs and IPOs also provide certain resources (e.g. expertise, project realization, monitoring) that can potentially help to enhance the effectiveness of international decisions taken within the CBD.

The expertise and advocacy of NGOs and IPOs may indeed help politicians to make decisions that better satisfy the expectations of affected people, but it depends, however, on Parties of the Convention, whether their expertise or their advocated interests are reflected in the decisions or not. Furthermore even if certain Parties, as for example the African Group, open towards the demands of NGOs and IPOs and support them to introduce text proposals into the negotiation text, this is no guarantee that their proposals make it up into the final decision.

Since an international consensus is necessary in order to turn internationally binding multilateral agreements into applicable law and already a single veto of a Party is sufficient to skip proposals/demands of NGOs and IPOs. It is very likely that on the way to the final compromise, first of all the concerns of NGOs and IPOs get lost as collateral damage.

The call of NGOs and southern biodiversity rich countries, for a strong compliance regime with mandatory checkpoints, such as patent offices, and a comprehensive certificate of compliance, with which the legal appropriation (adherence to PIC and MAT) of the genetic resources and associated traditional knowledge could have been proved, was highly resisted by northern countries, on behalf of their national pharmaceutical and agricultural industry. In the final Protocol the mention of patent offices as designated checkpoints could not be retained. This is especially disappointing, as such an inclusion would have helped to increase pressure to the WTO TRIPs Council toward the adoption of a mandatory requirement to disclose the origin of genetic resources for patent applications and helped to mitigate the many cases of patent-related biopiracy (cf. Bavikatte/Robinson 2011: 48).

Moreover, although NGOs are able to contribute through the initiation and implementation of projects to a better implementation of internationally agreed measures and goals and therewith enhance the output legitimacy of international political decisions. This might not always be the case as the example of Conservation International shows.

The conservative environmental NGO Conservation International is beside the WWF and TNC one of “the big three” of the international environmental NGO scene, which has by far the most money available for nature conservation projects (cf. Brand 2008: 37). The problem is, that due to the within CI dominated understanding of nature conservation, indigenous people and local communities living in areas, which are considered to be worth protecting, are forced back. CI may pride itself on its homepage on broadly involving the rural population in nature conservation projects by creating new job opportunities, such as national park rangers, gardeners or tourist guides. But in fact it ignores the concerns and rights of indigenous people and local communities living in CI administrated districts and forces them to follow environmental protection methods that are opposed to their own needs. In the case of the bio- reserve Monte Azules CI was blamed of actively promoting biopiracy, by allowing pharmaceutical companies to carry out scientific studies on the biological diversity harboured in the by CI administrated territory and by arranging bio-prospecting agreements without involving and equitably sharing the benefits with the local communities (cf. Berne Declaration 2004). Therewith CI clearly undermines the third objective of the Convention and does not contribute to enhance the effectiveness of internationally decided minimum standards on the utilisation of genetic resources but rather causes the opposite effect.

In conclusion, the assumption of the global governance concept that mere participation of NGOs in international negotiations inevitably leads to a democratisation of these processes is not tenable. Although NGOs basically have the ability to contribute to an enhancement of the input- and output- legitimacy of international decisions, their potential to do so is diminished by the nature of the process. The political power of northern industrialised countries and economic actors is too strong so that NGOs and IPOs cannot act as an effective counterbalance to these powerful interests. This can also be seen in the poor results of the ABS negotiations.

So, in order to make optimum use of the potential of NGOs and IPOs to enhance the legitimacy of CBD processes appropriate measures need to be adopted to encourage the active participation of weaker actors.

7.2. What could be done to overcome democratic deficits more effectively?

Although the CBD, from a technical point of view, enables all actors likewise to formally participate and influence international negotiations, in fact the process is dominated by northern governments, well equipped research institutes, and big corporations and their interest groups, as these actors dispose over the most financial and informational resources and instruments of power (cf. Brand 2008: 35).

Accordingly, the CBD process is dominated by the orientation towards the commercialisation of natural resources particularly of genetic resources. The concerns of weaker actors who stand against the commercialisation of biodiversity (i.e. critical NGOs, IPOs, some development NGOs and southern governments) or advocate the rights of indigenous people and farming communities to self-determination are not at all or insufficiently considered. So in order to reach more balanced compromises, effective policies and consequently greater legitimacy of the CBD, the concerns of weaker actors must be more strongly taken into account.

Therefore, it is first of all necessary to ensure that financially weaker southern NGOs and representatives of indigenous and local communities have the same chances to participate in and influence CBD relevant meetings like financially strong northern NGOs and business representatives. The establishment of a fund for travel expenses, for example, could encourage the participation of these disadvantaged actors.

Although such a fund has already been created within the CBD⁵⁵ in 2004 up until now only a couple of indigenous representatives could be supported. As the fund is just voluntary and has only limited financial resources. At the 9th Conference in Bonn 25 representatives of IPOs were granted financial support for their participation (cf. Djoghlaflaf 2008). At the 10th Conference in Nagoya there were 31 of them (cf. Djoghlaflaf 2010).

Another important issue with regard to equal conditions for NGO and IPO participation is, as mentioned, language. In order to ensure that all participants are likewise able to follow and actively participate in the negotiations it is essential that

⁵⁵ On the 7th Conference the Parties of the CBD decided to establish a voluntary fund to facilitate the participation of indigenous and local communities, especially of those from southern countries (cf. CBD 2004a.). At the following Conference the Parties adopted draft criteria for the operation of such a fund (cf. CBD 2006).

simultaneous translation services are provided in all six UN languages - i.e. Arabic, Chinese, French, Russian, Spanish and English- during the whole negotiation processes and not only during Plenary and Working Group sessions. Likewise all relevant (draft) documents and compromise texts, that are emerging within smaller negotiation rounds, have to be translated in all six languages to make it easier for non-English speaking NGOs and IPOs to react and prepare proposals for alternative texts.

Moreover, it is important that the participation opportunities for NGOs and IPOs are extended, in the sense that they are enabled to fully participate and raise their voice throughout the whole negotiation process. This means also within smaller negotiation groups, closed groups and facilitating groups. Where necessary, they should also have the possibility to enforce their right to participate and speak. In principle, it would also be conceivable that the IPOs and NGOs are granted the right to take part in the voting process. But, since non state actors are, unlike governmental representatives, not authorised by the demos (i.e. through elections) to take binding decisions, they should not be given any decision making power in order to not worsen democratic problems on the international level (cf. Beisheim 2001: 124). Admittedly the Parties of the Convention could, for example, bindingly commit themselves to consider the concerns of the NGO and IPO community in the final decision making process.

7.3. What could be done better in future when evaluating NGOs and IPOs potential to enhance legitimacy of international negotiation?

One of the main points of criticism regarding the assumption of the global governance concept that NGOs can serve as source of legitimacy for international political processes is that these actors suffer themselves from legitimacy deficits. Consequently it is also questionable whether they can enhance the legitimacy of international politics at all (cf. Eberlei 2001: 170). Critical voices have attested that NGOs are lacking an overall societal as well as an internal legitimization. The latter is seen in the fact, that the members of the NGOs, not to mention the NGO's "clients", have only in the fewest cases the possibility to co-determine the organisations policy on particular issues or elect the NGO board (cf. Beisheim 2001:122; 2005: 242,

Curbach 2003: 144). This lacking possibility to co-determine the organisation's position on certain issues has of course negative consequences for the representativeness of the NGO and also undermines its potential to enhance the input legitimacy of international political processes.

As the main focus of the thesis was to show to what extent the, within the CBD Alliance and IIFB cooperating, NGOs and IPOs could influence the ABS negotiation process and anchor their demands in the Nagoya Protocol. The question whether their demands actually reflected the concerns and viewpoints of their constituency was not addressed to. In order to examine whether the demands of the, within the CBD active, NGOs and IPOs were in line with the viewpoint of their member or clients one could for example carry out interviews with the organisation's base. With regard to the potential of NGOs and IPOs to contribute to more transparency, it was not possible to determine how many people were actually reached by their information work and reporting. A possible way to measure the amount of people that were reached by information provided by NGOs or IPOs, is by carrying out a media resonance analysis.

As the thesis primarily focuses on the final phase of the ABS negotiation process, from COP9 in Bonn 2008 to COP10 in Nagoya 2010, and the demands of NGOs and IPOs with regard to the Nagoya Protocol on Access and Benefit Sharing the dynamics within their positions and demands were not addressed. In order to also show the dynamics within the positions and demands of these actors over the time the observation period needs to be extended.

Within chapter 5.3 "NGOs Output activities" some examples were given how NGOs can increase the effectiveness of international decisions. In particular, it was shown to what extent the expertise of NGOs and IPOs, which is reflected in their demands, was included within the final decisions on the ABS Protocol. However the potential of NGOs or IPOs to contribute to the effectiveness on international decisions by providing technical support for national implementation has only been addressed to rudimentarily. In order to make comprehensive statements on NGO's/IPO's potential to enhance the effectiveness of international decisions by supporting states in national implementation a case study on a specific country could be carried out.

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9. Appendix 1

9.1. Abstract English

The following paper seeks to answer the question whether, and to what extent, non-governmental organisations (NGOs) can contribute to the democratisation of international biodiversity politics. According to proponents of the global governance concept, NGOs do have the ability to contribute to the democratisation of global politics, as they strengthen the fragile legitimacy of international policy. The latter is seen in the lacking effectiveness of international decisions, the insufficient participation possibilities of the general public or particular stakeholders in international deliberations, and the poor transparency and control of international political processes. NGOs are ascribed to ameliorate the input legitimacy of international decisions, as they are not only enhancing the transparency of the process to non-participants, but also introducing a variety of interests in the negotiation process which would have otherwise been ignored by state representatives. Accordingly, the hope is that through the involvement of NGOs in international negotiation processes, presently existing imbalances regarding the representation of interests could be compensated. Beyond that, NGOs are ascribed to enhance the effectiveness of international decisions (i.e. out-put legitimacy) by providing, among others, expertise which is essential to take appropriate decisions, by realising projects or by monitoring the implementation of international decisions. Whether, and to what extent, the expectations regarding the democratising effects of NGOs prove right or not, is illustrated by the example of the international negotiations on the access and benefit sharing (ABS) agreement of the Convention on Biological Diversity (CBD).

Thereby, the intention of the negotiations was to adopt a protocol that effectively prevents biopiracy, which is generally understood as the unlawful appropriation of plants, animals or their genes. After many years of negotiations the Parties of the Convention finally agreed to adopt a legally binding ABS Protocol under the CBD at their 10th meeting in October 2010 in Nagoya.

With regard to the initial question, the result shows that although NGOs basically have the potential to improve the input and output quality of international decisions, and therewith contribute to a democratisation of the international biodiversity

politics, their potential to do so is undermined by the structures and selectivities of the process.

9.2. Abstract German

Die vorliegende Arbeit beschäftigt sich mit der Frage ob und inwieweit Nicht-Regierungs-Organisationen (NRO bzw. NGO) zu einer Demokratisierung internationaler Biodiversitätspolitik beitragen können. Dass NGOs zu einer Demokratisierung zwischenstaatlicher Politik beitragen, wird insbesondere von VerfechterInnen des Global Governance Konzepts angenommen. Ihre demokratisierende Wirkung wird vor allem darin gesehen, dass diese Akteure helfen bestehende Legitimationsdefizite internationaler Politik - u.a. mangelnde Effektivität internationaler Entscheidungen, ungenügende Teilhabe und Mitbestimmung der Bevölkerung bzw. betroffener „stakeholder“ sowie fehlende Transparenz und Kontrolle- auszugleichen. NGOs wird zugeschrieben zu einer Verbesserung der Input-Legitimität internationaler Beschlüsse beitragen zu können, da sie nicht nur die Transparenz internationaler Verhandlungen verbessern sondern auch eine Vielzahl unterschiedlicher Interessen und Meinungen in den Verhandlungsprozess hineinbringen, die von staatlichen und privatwirtschaftlichen Akteuren nicht wahrgenommen werden, und sonst ausgeblendet blieben. Durch ihre Beleidigung können, so die Annahme, bestehende Asymmetrien in der Interessensvertretung behoben werden. Ebenso wird ihnen zugeschrieben, durch die Bereitstellung von Expertise, direkte Projektarbeit oder externes Monitoring zu einer Verbesserung der Effektivität internationaler Beschlüsse (Output-Legitimität) beitragen zu können. Ob bzw. in wieweit sich die Hoffnung auf die demokratisierenden Wirkung von NGOs erfüllt, wird am Beispiel der internationalen Verhandlungen zum „Access and Benefit Sharing (ABS)“-Abkommen, die im Zuge der Weiterentwicklung der Biodiversitätskonvention (CBD) stattfanden, aufgezeigt. Dabei war das angedachte Ziel der Verhandlungen ein Protokoll zu verabschieden, das die Praxis der Biopiraterie - also die unrechtmäßige Aneignung von Pflanzen, Tieren und deren Gene- effektiv verhindert. Nach mehrjährigen Verhandlungen wurde schließlich auf der zehnten Vertragsstaatenkonferenz in Nagoya im Oktober 2010 ein verbindliches ABS-Protokoll verabschiedet.

Mit Blick auf die ursprüngliche Fragestellung zeigt sich, dass NGOs zwar das Potential haben die Input- und Output-Qualität internationaler Verhandlungen bzw. deren Ergebnisse zu verbessern und dadurch zu einer Demokratisierung der internationalen Biodiversitätspolitik beizutragen, dieses Potential aufgrund der vorhandenen Rahmenbedingungen allerdings geschwächt wird.

9.3. Curriculum Vitae

Personal Information

Name: Lida Moldovan
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Education

2007 - Bachelor study of Economics and Socio- Economics, University of Economic, Vienna
2004 - 2012 Diploma study of International Development, University of Vienna Focuses: Environmental and development policy, racism and xenophobia, cultural studies
2005 - 2007 Bachelor study of Landscapeplanning and Landscapearchitecture, University of Natural Resources and Applied Life Sciences, Vienna
2003 - 2005 Diploma study of Law, University of Vienna
2000 - 2003 High School Rainergasse 39, 1050 Vienna
1995 - 2000 High School Franklinstraße 21, Vienna

Practical Experiences

02/2012 - Assisten for restauration work, Rückersdorf
01/2010 - 02/2010 Traineeship at the Information Office of the European Parliament for Austria, Vienna
03/2007- 02/ 2008 Tutor at the Institute for International Developments, Vienna
07/2006- 09/ 2006 Internship at the NGO Each one Teach one in Mumbai, India
Summer 2004/2005/2007 Employee at the archaeological excavations in Hallstatt

Scientific Publication

2010

Matthias Galan/ Alexandra König/ Lida Moldovan (2010): Strategisch- relationales Handeln im erweiterten internationalisierten Staat. Zivilgesellschaftliche Akteure und die Konvention über biologische Vielfalt. In Ulrich Brand (Hrsg.): Globale Umweltpolitik und Internationalisierung des Staates. Münster: Westfälisches Dampfboot

Language Skills

Romanian: mother tongue

German: excellent in writing and speaking

English: fluent in writing and speaking

French: good in writing and speaking

Spanish: basic knowledge