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### From logics to procedures: arguing within international environmental negotiations

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## From logics to procedures: arguing within international environmental negotiations

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Mainstream literature in international relations understands negotiations in terms of power politics and/or bargaining processes between rival national interests to account for states' negotiating stands. Using definitions and questions initially defined by Thomas Risse, this study of processes at work in the biodiversity regime underlines instead their deliberative dimension and its contribution to positive negotiation outcomes. However, the article also challenges the dominant understanding of deliberation in global environmental politics that focuses on the participation of non-governmental organizations and other interest groups in the 'public space'. Instead it identifies deliberative elements in the negotiation process proper, stressing in particular the importance of the relationships developed between governmental delegations through series of closed meetings of selected participants. This contribution uses for illustration the negotiations leading to the Cartagena Protocol on Biosafety and to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.

**Keywords:** deliberation; international negotiations; biodiversity; NGOs; biosafety; access and benefit sharing

### 1. Introduction

Although many multilateral environmental agreements (MEAs) deal with the global commons (Vogler 1995), that is resources and public goods beyond the jurisdiction of a state or a group of states, international environmental negotiations are not immune to the logic of power politics and endless bargaining between competing and partly incompatible national interests (Victor 2001, 2006), which remains a dominant characteristic of international 'anarchy'. However, successive United Nations (UN) summits – from Stockholm in 1972 to Johannesburg in 2002 – and the Conferences of the Parties (COPs) of the various MEAs that came into force over the last 40 years nevertheless display some deliberative dimensions.

Firstly, increasing numbers of diverse non-state actors attend these meetings, including some activists from non-governmental organizations (NGOs) (Princen and Finger 1994, Princen *et al.* 1995), experts from universities and think tanks, representatives from private interest groups and the international media. Yet environmental NGOs' actual influence on the formation and development of international regimes<sup>1</sup> remains strongly debated (Arts 1998, Arts and Verschuren 1999, Corell and Betsill 2001, Arts and Mack 2003, Skodvin

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and Andresen 2003, Gulbrandsen and Andresen 2004). Their controversial exclusion from the last days of the COP15 at the Copenhagen Climate Convention in December 2009 – allegedly for lack of room but in practice to shield the heads of state present for the closing conference from popular wrath – highlights the fragility of their legally-defined ‘observer status’. To what extent the emerging global environmental regimes remain the preserve of inter-state bargaining or are shaped significantly by the spokespersons of public opinion remains a hotly debated issue.

Secondly, as Thomas Risse (2000) argues, bargaining – for instance over the text of a new treaty or a final declaration at a conference – is by no means the only form of interaction between the actors involved. In parallel with the two well-known dimensions of the rational, utility-maximizing action and the rule-guided behavior driven by norms seen as legitimate (such as international law) labeled logic of ‘appropriateness’ – a term borrowed from March and Olsen<sup>2</sup> – the recurrent social interaction that takes place at such conferences is also shaped by truth-seeking arguing: discursive strategies deployed to persuade others in order to reach a reasoned consensus – the very goal of any deliberative approach. Thus international relations (IR) scholars can usefully borrow from Habermas and other normative thinking on deliberative democracy.

Whereas the literature on the role of NGOs focuses on what develops at the margins of inter-state negotiations, such as NGO counter-summits, public demonstrations and other conference side-events – the *public spaces* in Dryzek’s typology presented below – we are interested here in the deliberative dimensions of the actual negotiation process. We argue that even when the actors involved are government delegation members, their apparently formal and strictly codified interactions can contain a deliberative dimension. This idea runs against the received wisdom of normative deliberation theory, both its definition of a deliberative process and its understanding of the means of transmission between the public space and the empowered space. Using IR literature and data collected on various negotiation processes within the Convention on Biological Diversity (CBD) regime, this article strives to document the link between deliberative dimensions and the negotiations’ success. We argue that the dominant logic of bargaining between competing interests can explain the respective positions of most state actors at the onset of negotiations, but that ad hoc working procedures and repeated interactions produce a dynamic of deliberation that is crucial to obtain a positive outcome.

We readily admit that some other regimes could have been useful to discuss to add some comparative perspectives. In this respect, it could be worth looking at the World Trade Organization (WTO) negotiations on genetically modified organisms (GMOs), the 2001 International Treaty on Plant Genetic Resources, an agreement related to access and benefit sharing (ABS) within the United Nations Food and Agriculture Organization (FAO), or at the standards of the World Intellectual Property Organization on genetic resources. One cannot deny the interdependence between the CBD processes and political dynamics in other international fora, or between these regimes and the global political economy at large.<sup>3</sup> However, such comparative analyses would require additional fieldwork on our part and, therefore, are beyond the scope of this article. Examining only one regime precludes drawing any general and final conclusion, however it contributes to testing the plausibility of the argument.

In the first section we will review some of the literature on deliberation in an international context in order to stress the potential importance of these processes for the practical outcome of the negotiations. In the second section we briefly sketch the context of the Biodiversity regime and the Biosafety and Access and Benefit Sharing negotiations. The third section scrutinizes these negotiations to identify the deliberative processes at work

and their impact upon outcomes. Our concluding section will sum up this study's main findings and attempt to reframe more general questions on deliberation in MEAs.

## 2. Deliberation in the negotiation dynamics of MEAs

The dynamics of international negotiations – both their bargaining and deliberative dimensions – are still understudied. Social science therefore lacks sufficient empirical analysis of the decision-making process at multilateral environmental conferences. An international diplomacy literature tends to portray negotiations as a linear process (Spector *et al.* 1994, p. 14) although it acknowledges the specificity of environmental treaties (Chasek 2001). In the classical IR literature the negotiation outcome, the existence of an agreement and its design are the result of confrontation between stable state interests (Sjosted 1993, Spector *et al.* 1994, Berton *et al.* 1999, Chasek 2001).

However, this approach has a number of faults:

- (1) Reaching an agreement becomes virtually impossible when national interests are irreconcilable, or at best negotiations can lead only to agreements lacking substance and effectiveness, according to Arild Underdal's law of the lowest common denominator (Victor 2006). This is hardly an accurate description of international environmental negotiations in the last 40 years – especially if one excludes climate change.
- (2) National interest, especially on environmental issues, is not predetermined but the result of interest group pressure at national level (Moravcsik 1997) – a delicate and context dependent political balance which is contingent to the specific issue at stake. Therefore, it can vary over the course of the same negotiation.
- (3) Sometimes, even when there is a wide discrepancy of interests and visions between the parties, the negotiation produces a compromised agreement that is not a simple rational calculus, but rather a reasoned consensus through which the perceptions of some of the parties are transformed – for example the embrace of flexibility mechanisms by European Union (EU) governments after Kyoto and their dedication to implementing emission trading originally proposed by the US negotiators. Such consensus – however fragile it might be – is obtained through the 'logic of arguing' by building a communication consensus (Risse 2000, p. 7), precisely on the basis of common knowledge rather than muscle flexing.
- (4) Negotiations are social processes, sometimes dragging on for several years, a long enough time to build some bonds between delegation members, to change the views of the regular participants, socialize outsiders and dissenters, create a common language between experts coming from various backgrounds, a phenomenon often labeled 'social learning' defined as improved knowledge diffusion on the basis of a 'common lifeworld' shared between all participants, which in turn creates a space of common understanding (Risse and Ulbert 2005, pp. 361–362). This process is even more important if we look at long-lasting regimes – some have been in place since the late 1960s or early 1970s – within which negotiations take place.

In the realm of normative political theory, an important debate developed throughout the last decade or so around the presumed superiority of democratic deliberation over traditional representative democracy (Bohman 1998, Dryzek 2000, Baber 2004). The call to

widen participation in decision-making in order to increase its legitimacy and efficiency has also attracted some interest among IR scholars. More democratic global environmental governance could help to address many global challenges including climate change (Biermann *et al.* 2010). Deliberation, however, encompasses different types of activities and forms of interactions: the closed-door meetings where selected governmental delegation members meet hardly qualify as democracy, nor do the semi-formal meetings where official negotiators and private experts can mix; the larger scene of the conference with its crowd of observers, its outside protesters and its duly registered 'side events'; or even in a broader sense, the national public spaces where debate on environmental issues is conducted ahead of and after global conferences and sometimes away from media attention.

Indeed, these different sites of interaction illustrate the primary divide between *empowered spaces* of 'authoritative collective decisions' and *public spaces*, where conflicting ideas are debated. Both play a role in decision-making (Dryzek 2009). Two key issues here are the transmission between the two spaces and the accountability of the empowered space towards the public space. These two are highly problematic in the domain of international relations and are equally politically sensitive. NGOs often voice harsh criticisms of states in many environmental conferences – e.g. Copenhagen 2009 – accusing them of betraying their ultimate mandate to reach an agreement in defense of the public good. Given the resilience of statist ideology rooted in the Westphalian sovereignty myth (Osiander 2001), government representatives will reject for a foreseeable future any idea of being really accountable to a global public opinion and/or civil society – e.g. allowing the latter to veto their decisions. However, the analysis of transmission between the two spaces should not be limited to the impact of public actions of lobbying, demonstrations and activist's campaigns under constant media focus.<sup>4</sup> There is in fact a grey zone between the public and the empowered spaces of international conferences where different categories of actors interact and actual transmission takes informal channels. Even some advocacy NGOs adopting a radical discourse in a public space are also eager to influence discrete deliberations in the empowered space.

Procedural rules in international environmental conferences are defined by the international law governing treaty making. However, this framework is very broad and the founding conventions of many environmental regimes are not much more precise.<sup>5</sup> Most of the time negotiation chairpersons and Secretariats have some leverage to define their practical role and adjust the procedural rules accordingly (Koester 2002, pp. 45–46, Biermann and Bauer 2009). The COP decides upon general questions of procedure, but more specific rules are defined within smaller working groups formed to tackle certain issues. When paragraphs to be adopted are hotly debated, the delegates meet in even smaller units known as 'contact groups'. Often the remaining obstacles are overcome through the reunion of an informal 'friends of the chair' group, bringing together in closed-door meetings a small number of delegates from the parties most involved in the negotiation. The Parties can also ask for expert groups with a limited number of delegates to be set up, and this in order to examine more thoroughly specific technical points.

In these different settings, the proceedings are conducted largely on an ad hoc basis and rely extensively on the engagement and goodwill of participants concerning their common understanding of the issues under discussion. Negotiation then takes a deliberative dimension. Alongside these scheduled meetings, many informal encounters take place between the various stakeholders. State delegation members and non-state observers meet routinely in the lobbies of the conferences during breaks, over lunch or at side-events. This gives non-state actors opportunities to voice their ideas and produce research papers on the themes under discussion that delegates may deploy in the closed meetings. Therefore the

formal process of negotiation is not isolated from deliberative influences from the outside, although it is difficult to assess how influential each of these interactions are and therefore to measure the exact contribution of the deliberative logic – the classic and important question of ‘decisiveness’ in deliberation (Dryzek and Stevenson 2011, p. 1869).

Consequently, although deliberation plays a role in these interstate negotiations they do not qualify as deliberative negotiations in the sense of being open to all stakeholders, all being on an equal footing, and all looking to reach a consensus through mutual justification without using coercive means (Mansbridge 2009). Moreover, assessed against the normative theory’s criteria (such as participation, truthfulness, respect for others and so on) interstate environmental negotiations seem at odds with the ideals of deliberation (see Dryzek and Stevenson 2011, pp. 1870–1872 for the United Nations Framework Convention on Climate Change (UNFCCC) case). However, we use here a non-normative, sociological and somewhat more modest approach by analyzing elements of deliberation within an overall non-deliberative process to understand their practical impact on the political outcome. While Dryzek and other normative theorists equate deliberation with democracy and foresee the emergence of a transnational democracy at global level (Bohman 2007), we detect instead deliberative techniques used in small, not so representative groups meeting behind closed doors – often a necessary and crucial stage in successful negotiations. It is therefore the efficiency of deliberation we are interested in here.

From a methodological viewpoint, this research requires an inductive approach based on an extended review of the literature and an in-depth study of the negotiation processes. We partially implemented the latter by conducting interviews with key negotiators involved in the CBD negotiation process from 1991 to 2010, and by observing from 2006 to 2009 several meetings of the Convention on Biological Diversity.<sup>6</sup> While 2006–9 is only part of the period covered in this article, a number of CBD procedures present at the time are still in force. Looking at the present therefore informs us about past procedures. The CBD treaty was negotiated in 1991–2 under the aegis of the United Nations Programme for the Environment and officially signed during the Rio de Janeiro Earth Summit. It is a global agreement in which two subsequently adopted protocols are nested. One signed in 2000 is the Cartagena Protocol on Biosafety, which aims at regulating the transboundary movements of GMOs. The other adopted in 2010 is the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. It complements the international guidelines – the so-called ‘Bonn guidelines’ – adopted in 2002 on the issue of ABS and that drew up global norms governing the collection and technological transformation of natural genetic resources used in numerous industrial sectors.<sup>7</sup> The negotiations of the Cartagena Protocol and of the Nagoya Protocol, which took place in different periods of time (1996–2000 for the Cartagena Protocol and 2002–10 for the Nagoya Protocol), provide the empirical basis of our study. The following sections are organized according to the different mechanisms identified that demonstrate deliberation elements within interstate negotiations. After presenting the stakes of the biosafety and ABS negotiations we develop each deliberative element that helped the adoption of an agreement in both cases.

### **3. Setting the scene: the CBD negotiations on biosafety and access and benefit sharing**

The biosafety negotiations started when article 19.3 on ‘handling of Biotechnology and Distribution of its Benefits’ of the Convention was negotiated in November 1991. The original negotiations on this article were difficult, especially because the negotiators did

not share a 'common lifeworld' (McConnell 1996, pp. 72–73). They perceived the issues at stake either as trade matters (in particular Organisation Economic Co-operation and Development (OECD) countries), or as environment protection and development issues (developing countries), or even for the latter in terms of domination by Western transnational corporations. On the one hand, the developing countries that supported the call for a binding protocol had very few resources at their disposal and had no control on biotechnology applications. Therefore, they did not have the capacity, at national level, to create an adequate legal framework supplementing the lack of international regulations. Moreover, most did not master the technical dimension of these negotiations. On the other hand, the EU – and especially Germany – was initially subjected to intense pressure from the US government (Steffenhagen 2001) that threatened the Union with commercial sanctions if it did not accept GMOs. In view of this strong polarization, an agreement on article 19.3 became possible only through direct bargaining: the Malaysian delegation that drafted the original article accepted US demands regarding the CBD financial mechanism in exchange for a mandate for future negotiations on biosafety in article 19.3. That was not the end of it however: not only did the United States not ratify the CBD Convention, in part because of its provisions on biosafety, but developing countries had to voice their interests for a protocol forcefully before obtaining the creation of a working group on this topic a good three years after the Convention had been adopted. When the negotiations in the biosafety working group began, their precise purpose was far from clear and many countries still hoped for the adoption of non-binding guidelines for the diffusion of biotechnology, rather than a stronger regulation on risk prone biotechnology applications. Moreover, the very question of what 'biosafety' was about was highly contentious (Gupta 1999).

Very much like biosafety, the issue of the access to genetic resources was addressed by the CBD text as early as 1992 (see article 15 of the Convention). However, at the time very few countries' delegations were conversant in this topic and most of the negotiators' attention was directed towards biotechnology issues. Article 15 was therefore drafted by a small group of delegations from Parties to the Amazon treaty (Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Surinam and Venezuela), which saw their proposal accepted without much resistance (and much awareness).<sup>8</sup> Again, developing countries were eager to protect their rich natural genetic resources from the developed countries' tendency to use them freely to develop patented products. The concerns raised in both camps on ABS were confined to economic interests and articulated through bargaining over sovereignty rights, revenue sharing and technology transfer (Svarstad 1994, p. 47, Arts 1998, p. 192, McConnell 1996, p. 72).

However, the reluctance of a majority of OECD countries to accept legal constraints in this matter, the lack of resources at the disposal of developing countries to enforce would-be ABS provisions, as well as the difficulties encountered whilst drawing up the Cartagena Protocol on biosecurity, resulted in this issue not being institutionalized by the CBD Parties until 1999 (although it was discussed during several COP meetings, see Blais 2002, p. 147). Confronted with a growing number of 'biopiracy'<sup>9</sup> cases, the Parties brought article 15 back to life and put in place expert groups on the topic in 1999 and working groups in 2001. The working group discussions lead to the adoption of the 'Bonn guidelines', a non-binding agreement concerning ABS adopted in 2002 by the Parties to the Convention. However, the consensus on the guidelines was somewhat weak as they raised a certain number of controversial questions over the contents of the text and the decision-making procedures.

Both the legal standing and the contents of the text pitted OECD countries against developing countries. The latter believed that a non-binding agreement would have only limited influence on biopiracy practices. In addition, several developing countries perceived the Bonn undertaking as a text guaranteeing access to genetic resources rather than enabling a true sharing of the benefits derived from utilization. This was fuelled by the OECD countries' initial insistence that no financial benefit would be granted without a prior guarantee of access, *de facto* perpetuating the free access industrialized countries had enjoyed in the past. The developing countries' position was the exact opposite: 'no access without the obligation of sharing the benefits' since companies from industrialized countries with access to the Southern countries' genetic resources had a tendency to privatize them by claiming exclusive intellectual property rights. Although this bargaining process was framed by ideas about distributive justice and sovereignty, it was fundamentally about protecting national economic interests – alleged or real. On one side the leaders were Germany and Switzerland wishing to support their pharmaceutical industries by imposing less constraining voluntary guidelines (Bled 2010). On the other side, the developing countries as the main suppliers of natural genetic resources wanted some kind of financial compensation for their use. In this confrontation, the economic capacities and negotiation skills of the OECD countries enabled them to gain the upper hand over the weaker developing countries.

When negotiating positions were clarified and the issues gained priority on the CBD agenda, actual negotiations began, in 1995 for biosafety and 2002 for ABS, although with little prospects of success given the wide gap between the conflicting interests. The following section examines the deliberative dynamics that nevertheless in the end made the adoption of international binding regulations possible in both cases.

#### **4. Deliberative dynamics in interstate negotiations: the cases of biosafety and access and benefit sharing**

Several deliberative elements that can be observed in the interstate negotiations are common to biosafety and access and benefit sharing. Therefore, we chose to present both cases simultaneously, with the section organized around the deliberative mechanisms. Moreover, it is important to note that these mechanisms progressively overlapped.

##### **4.1. *Sparkling off the discussion: the role of negotiation chairpersons***

In 1998 at the penultimate meeting of the biosafety working group (BSWG) in charge of drafting the future protocol, the disputed draft still included 450 brackets.<sup>10</sup> As the stalemate prevailed, the chairperson of the working group,<sup>11</sup> Veit Koester, put forward his own text during the last BSWG meeting, while continuing to negotiate with the Parties. His aim was to consolidate a document which reflected, as objectively as possible, the position of each delegation and which could serve as a base for the future agreement. In spite of strong initial protests from the organized coalitions of states involved in the debates,<sup>12</sup> who all thought that the text was biased towards the others, the EU, the Like Minded Group and the Compromise Group began gradually to use the presidential proposal and tried to produce a final version. By proposing the first consolidated text, Veit Koester answered the delegates' question 'when do we start negotiating?' (quoted in Koester 2002, p. 48).

Chairpersons also played an important role in the launch of the ABS negotiations. Negotiations for drafting a text on this question started in 1999 with two expert groups

and led to the organization of an ABS working group (ABSWG) in Bonn, the mandate of which was to reach an agreement. However, the text discussed in the ABSWG was pushed by the chair of the working group who deliberately confined the negotiations to a limited number of points. However, at the sixth Conference of the CBD Parties that should have approved the text, a certain number of issues had still to be negotiated<sup>13</sup> before the final agreement. The Parties thus added numerous exemption clauses and special provisions when they adopted the Bonn agreement (Tully 2003, p. 86). The next sections underline how imperfect this adopted text was, but it was helpful nevertheless in sparking off international discussions on ABS. These examples underline the importance of certain actors in steering the debate. In contrast, a failure to take the initiative can otherwise kill the process from the start. To a certain extent effective deliberation relies on such technicalities.

#### **4.2. *Contrasted impacts of 'forum shopping'***

The Miami Group, a vocal coalition in the biosafety negotiations, defended a rigid stance based on the economic interests of its members, the largest worldwide grain exporters several of whom were involved in biotechnologies. At the beginning of the Cartagena Protocol negotiations, the United States and Canada were the leading worldwide GMO investors while Argentina was the leading exporter of genetically modified soya. Furthermore, the Miami Group was created in 1995 ostensibly to ensure that economic issues were at the forefront of the CBD negotiations (Enright 2002, p. 97). The rigidity of the group's position culminated during the Seventh Meeting of the BSWG in Cartagena that was tasked with adopting the final text of a protocol. Although all other groups agreed on the Chair's text, the Miami Group rejected it altogether on the last day of the conference, objecting to any international regulation on GMOs and insisting instead on enforcing free trade in GMOs invoking the trade legislation enforced by the WTO. The Miami Group also denied that CBD norms enjoyed an equal status in international law with those of the WTO. In particular the precautionary principle recognized by the CBD as a valid basis for the Protocol contradicted the WTO's Sanitary and Phytosanitary Measures that emphasizes instead the need for scientific evidence to discriminate between similar commodities (Li 1999, p. 3). The collapse of the negotiations was difficult to accept for other delegations because a large number of cabinet ministers from various countries had travelled to Cartagena for what was supposed to be the solemn signature of the agreement.

In using their capacity to block the negotiations at Cartagena, in reality the Miami Group countries intended to shift the debate from the international biosafety norms to free trade, and thus to an arena where such discourse would be more easily accepted. In December 1999, at the WTO Summit in Seattle, the United States, Canada and Japan demanded the creation of a new biosafety working group within the framework of trade negotiations. Had it been approved, this initiative could have seriously undermined the CBD negotiations then underway. However, the failure of the Miami Group's proposal in Seattle in the context where free trade discourse was under attack from the global civil society, the political climate in the CDB negotiations changed: 'Despite initial, sometimes incredulous opposition from one or more of the other negotiating blocs, [some] compromises prevailed in the final hours of the negotiation, and proved absolutely critical to the successful conclusion of the protocol in Montreal' (Enright 2002, p. 104). This apparent major turnaround and the triumph of the logics of deliberation need to be more closely scrutinized.

Although Canada and Japan backed the American proposal in Seattle (Dufault 2006, pp. 92–93) and the European Commission wanted to do so initially, the British, Danish,

Belgian, French and Italian Ministers for the Environment joined forces against the creation of a specialized WTO working group, maintaining that the CBD was the only appropriate forum (European Commission 1999). The European Commissioner for Trade, Pascal Lamy, ignored this call. However, the Ministers for Trade of the 15 member states rallied behind the Ministers for the Environment expressing unanimity against the Commission's project (Williams and De Jonquières 1999, Tapper 2000). A spokesperson for the British delegation explained: 'Lamy overstepped his mandate and the Ministers for Trade were very annoyed' (Kempf 2003, p. 223). This account was confirmed by one of the NGO representatives present at Seattle:

The delegates representing the Ministers for the Environment were not informed of the Commission's proposal. Even the Ministers for Trade opposed the way that the Commission had gone about things, which was contrary to the normal consultation procedures. They declared that the European position was global and that if one part was to be modified, it called the whole of it into question.<sup>14</sup>

This bid by the Miami Group countries actually strengthened the solidarity of the other negotiators within the CBD, who in turn were more determined to reach an agreement (Samper 2002, p. 72).

In a similar way developing countries expressed their demands for binding ABS regulations going beyond the Bonn agreement, which was totally unsuitable as far as they were concerned, in a forum outside of the CBD but nevertheless, in view of influencing negotiations in the latter. The mobilization of the developing countries began in November 2001 at the WTO meeting in Doha where several contentious issues pitting the OECD countries against the South were raised, including intellectual property rights for living organisms (Rosendal 2006, p. 436). However, it was in another arena that the developing countries won one of their first victories. In 2002, the World Summit on Sustainable Development in Johannesburg, despite its otherwise disappointing outcomes, acknowledged the inadequacy of the non-binding Bonn guidelines<sup>15</sup> and called for the opening of negotiations for an international ABS treaty within the CBD framework (Cusco Declaration 2002). In this case, forays in parallel fora boosted the CBD negotiations that were reconvened in 2003 through the revitalization of a working group on ABS.

Although 'forum shopping' had unexpected outcomes for the actors deploying this tactic, in both cases the negotiation process was eventually strengthened. For the biosafety protocol the threat cemented the alliance backing the agreement and ended up isolating the Miami Group. For ABS it resurrected interest in the topic and bolstered the legitimacy of the developing countries' demands for a more adequate legal framework. In both cases, power politics failed – the United States was not able to shift the GMO issue to the WTO forum – and the logic of arguing prevailed, and all this while the basic distribution of national economic interests had not been significantly altered.

#### **4.3. Bridging antagonistic views: the role of negotiation brokers**

As on other environmental issues such as climate change, the EU played a decisive brokerage role in the biosafety negotiations. When the biosafety protocol negotiations reconvened there were still strong polarities. On the one hand, developing countries had dominated the agenda-setting phase and had succeeded in steering the debates towards the environmental issues at stake. On the other hand, the economic interests of the Miami Group converged with those of the agricultural biotechnology corporations with which the governments of

the six exporting countries – especially the United States and Canada – had very close ties. Indeed, a genuine ‘biotech bloc’ emerged from these alliances between companies and governments (Andrée 2005). Facing the Miami Group, the other delegations initially seemed initially to be in a no win position. However, in coalition with the Compromise Group, the EU progressively forged a negotiation stance carefully balancing environmental and trade concerns (Bail *et al.* 2002, p. 168, Afonso 2002, p. 423), which fostered the adoption of a final agreement. As a result, the Miami Group had to make some concessions to accept the final agreement (Andrée 2005, p. 157), while developing countries abandoned part of their claims.

The reopening of the ABS negotiations sparked a more noticeable contribution from the developing countries. To be more efficient in the debates, they regrouped in a new coalition: the Like Minded Megadiverse Countries (LMMC). Just as the EU in the biosafety case, the LMMC proposed an intermediary negotiation stance, bridging some of the economic interests of developed countries (such as the maintenance of intellectual property rights) with the radical claims of the African countries opposed to any economic exploitation of natural genetic resources. The LMMC countries, which were biodiversity rich countries<sup>16</sup> and the main ‘suppliers of natural genetic resources’, announced their alliance in November 2002. They committed themselves to work towards a binding ABS regime – or ABS protocol<sup>17</sup> – within the CBD and to link the theme of ABS to matters of intellectual property rights for living organisms. The LMMC group was more a discussion platform than a well-defined political actor. However, little by little, it enabled delegates from biodiversity rich developing countries to formulate a certain number of demands to be defended in common.

The organization of the LMMC into a coalition progressively improved dialogue between the main ABS negotiating actors: the LMMC, the EU, the African group (with some of its members being also part of the LMMC), and a certain number of individual countries and in particular Australia, Canada, the United States, Japan and Switzerland. A conference delegate from the LMMC stressed this increased collaboration between his coalition and the other stakeholders: ‘The people carrying the proposals from the European Union and Switzerland are on our side. They know that they want a binding agreement however they do not yet know its scope’.<sup>18</sup> This feeling of more intense collaboration was confirmed by an interview with a delegate from the EU.<sup>19</sup> Even Canada started to reconsider the need of setting up international regulations on the matter.<sup>20</sup> In the end, the Nagoya Protocol was adopted thanks to a particular deal between the EU and Brazilian delegation that was negotiating on behalf of the LMMCs (Rabitz and Oberthür 2011, p. 15).

#### ***4.4. Stirring the negotiating process: small negotiating groups as deliberative environments***

When negotiations resumed in earnest procedures had to be clarified. In both our cases preference was given to small negotiating groups to draft the ‘reasonable consensus’ between Parties. On biosafety three rounds of informal negotiations took place between February 1999 and January 2000, before an extraordinary meeting was eventually convened in Montreal to adopt the Protocol, all these steps being conducted in a changed atmosphere. In reality these negotiations followed a different procedure, the ‘Vienna Setting’ proposed by Juan Mayr, the original Chair of the Cartagena meeting (another sign of the influence of the negotiation chairpersons). It brought together the spokespersons from the main negotiating coalitions to argue for their position. Meanwhile, a selection of the other delegates was allowed into the back of the room as observers, with no right to step in and speak. The meetings were closed to all the other conference participants. During

these informal negotiations, the turn of the speakers was drawn by lots. In Montreal the 'Vienna Setting' took place at the Delta Hotel, adjacent to the official site of the conference, in order to play down public confrontation and thus de-politicize the situation.

Several negotiators have since acknowledged the virtues of such a system, in particular because it favored the strengthening of personal relations between the delegates: 'This was a good process, fully transparent, fair – remember the colored bears?'<sup>21</sup> – yet controllable, enabling the five negotiating blocs, brought together through common interest, to develop internal discipline' (Anderson 2002, p. 239; see also Pythoud and Thomas 2002, p. 47). Over the course of the debates peer pressure increased and personal relationships that one participant called 'friendship shortcuts'<sup>22</sup> provided delegates with some influence or even a capacity to follow the debates. In particular, as one NGO representative pointed out, as people got tired in the last days of the negotiations obstructionist behavior was no longer tolerated.<sup>23</sup> An analysis of the list of participants in the biosafety negotiations reveals that there were only a few key negotiators – a dozen individuals followed at least half of the meetings leading to the adoption of the text – a club phenomenon that increased the intensity of their interactions and its importance for successful discussion.

The growing familiarity in the relationship between participants over the course of the negotiations was also palpable in several ABSWG meetings, themselves split into 'contact' and 'friends of the chair' groups. For instance, in 2006, at the COP8 meeting, Ethiopia requested Australia and Canada to contribute to the collaborative effort in order to carry on with the negotiations of the ABS working group: 'Speaking on a personal level, please do not put off the negotiations again'. After several stormy exchanges between Ethiopia and Canada, the representative for Brazil stepped in to solve the conflict and urged: 'Thanks very much and I like you both'.<sup>24</sup> These more personal interjections became more frequent as the debates went on. Furthermore, an analysis of the list of negotiators at the ABS meetings<sup>25</sup> shows that in 2009, only nine delegates had a precise knowledge of the ABS issue, largely because these negotiators had attended half the ABS negotiation meetings. They were representatives from Canada, Costa Rica, the EU, Malaysia, Mexico, Switzerland and the United States. These nine delegates had interacted with each other on a regular basis since the Bonn agreement had been passed in 2002. They definitely shared a common understanding of the issues at stake – something different of course from being in full agreement on everything – that helped to steer the debates.

#### **4.5. Proposing concrete solutions: consensus on wording**

The adoption of the Biosafety Protocol also stemmed from a change of the words in which the debate was framed. To accommodate demands for secured international trade of GMOs, the negotiation options progressively evolved towards documentation and labeling procedures for each load (Secretariat of the Convention on Biological Diversity 2003, p. 59). The Miami Group was naturally opposed to these rules that were seen as breaching free trade principles. However, the same group was responsible for the wording of the Protocol's text on these issues: 'Finally the Miami Group's representative joined the negotiating groups in the corridor and announced that it had developed a new proposal, which was supported by five of the six members of the group' (Bodegard 2002, p. 342). Drawn up by Canada, this compromise solution was based on a semantic innovation: a mention 'may contain GMOs' for GMO cargos intended for direct use as food or feed, or processing. On the one side, this mention was a considerable step forward in the negotiations as it prepared the ground for better information procedures on GMO movements, a step warmly welcomed by developing countries and the EU. On the other side, the formulation was still vague and was seen

as ‘putting the documentation issue temporarily on hold’ (Anderson 2002, p. 241). Indeed, it had to be complemented by a more precise formulation that came two years after the first meeting of the Parties to the Cartagena protocol. In any case, ‘this use of creative language allowed for the multilateral dialogue to proceed even as differences continued to persist’ (Gupta 2000, p. 209).

Similarly, progress in the ABS negotiations also relied on the wording of consensual notions, such as the ‘certificate of origin’ for natural genetic resources. Ever since the Johannesburg Summit, the LMMC defended the implementation of an international certificate of origin for all genetic resources used in the development of patented industrial products. This certificate was meant to allow each resource supplier country to claim financial compensation for the use of the aforementioned resources. This measure was a compromise between the CBD rules for ABS and the WTO trade and intellectual property rules. Without getting rid of the companies’ rights to file patents related to natural genetic resources, this new instrument was derived from the existing ABS practices, all the while suggesting improvements on the transparency of processes.

The reinvigoration of the CBD working group around better-defined objectives, and the organization in 2007 of a meeting of experts on the more specific issue of a certificate of origin, facilitated progress in the discussions and the emergence of areas of consensus between Parties to the CBD. The closer cooperation between the LMMC delegations, the EU and Canada, mentioned above, was built in particular around this notion of a certificate of origin. In the meantime, some countries – either resource suppliers or resource users – already started to incorporate the certificate of origin, though in different forms and with various specifications, into their national legislation.<sup>26</sup> Therefore, they were willing to negotiate its formalization at the international level within the CBD or other international fora. For instance, the EU and Switzerland proposed the World Intellectual Property Organisation as another appropriate forum (Bled 2010, p. 573). The final text of the Nagoya Protocol was somewhat softened but still refers to ‘an internationally recognized certificate of compliance’ (article 17). Therefore, the search for consensual wordings and ideas was beneficial to the conclusion of both negotiations.

## 5. Conclusion

This brief examination of two processes within the CBD regime – on biosafety and ABS – highlights how deliberative elements can also be observed within interstate negotiations. Over and above differences in the stakes involved and the international context where they took place, the two negotiations were successfully concluded thanks to these consensus-seeking attempts on the objectives pursued, on the compromise wording of specific points and on decision-making procedures. Although national interests and ‘the shadow of hierarchy’<sup>27</sup> remained in the background, the actual progress and ultimate achievements were utterly dependent on these deliberative elements, all of which usually fall below the radarscope of IR theory. Negotiators are social actors deploying inventive tactics to steer negotiations towards the desired outcome, including the transnational networks of experts that were built up over the years. Not only was deliberation necessary to bringing about a successful outcome, but it also fostered its legitimacy especially in the eyes of the weaker states.

However, in contradiction with the deliberation theory summarized in the first section, and although we should be careful in generalizing this observation, deliberation in international negotiations is not necessarily either very democratic or transparent. The recurrent

interventions by the chairpersons and the limitation of participation in small negotiating groups, or even personal-level empathy between certain delegates, runs against the call for greater participation and equality of treatment. Indeed, secrecy often seemed to be both unavoidable and the most efficient means of reaching agreement (MacGraw 2002, p. 16). Debates were far from being inclusive, not only because the use of the 'Vienna Setting' for instance led to the exclusion of some delegations from developing countries (Nevill 2002),<sup>28</sup> but also because of the specialized, intensive and technical nature<sup>29</sup> of the debates. For instance, when the biosafety agreement was reached, all the delegates were suffering from a lack of sleep (Anderson 2002, p. 241).<sup>30</sup> Only a handful of negotiators worked till the end on the draft. However, preparatory sessions before each meeting allowed the members of all delegations to keep up to date with the process and key negotiators to consult members of their group. This circulation of information, although imperfect, mitigated the phenomena of exclusion highlighted above.

It is typical of multilateral negotiations that ritualized plenary sessions, open to all delegations and observers, are usually a waste of time. Addressing a larger audience often produces expected, general and common discourses that we call 'symbolic mobilizations' (Risse and Ulbert 2005, p. 359). Conversely, discussions behind closed doors allow the actors to speak their mind more freely and make concessions (Checkel 2002, p. 5). In smaller groups, the chairperson plays an important role in steering the debate, and a reasoned consensus is more attainable. This is why some negotiators of the Cartagena protocol hope that the 'Vienna Setting' will be used in other negotiations (Mackenzie and Sands 2002, p. 464). This can be said also of deliberation mechanisms in general. However, the characteristics of deliberation are different between 'empowered spaces' – here the formal arenas of interstate negotiations – and 'public spaces'.

The second circle of deliberation that is peripheral to the genuine negotiations – and even more so the 'public space' outside the conference building – such as conversations in the corridors between delegates and civil society members or discussions at the *side events* organized by the latter, certainly had some indirect influence on the deliberation inside the negotiation rooms, and this by raising awareness on specific points. However, as a whole these deliberations were not really taken into account in the final decision-making process. Therefore, focusing on the transmission between the public space and the empowered space as suggested by deliberation theorists (Dryzek and Stevenson 2011) is largely misleading. The different circles alluded to above are often loosely connected.

This article has instead focused on deliberation in international negotiations in order to analyze them as social constructs beyond the dry models of game theory upon which mainstream IR interpretations rely. It provides some understanding of how a successful outcome – here a binding agreement – can arise from polarized negotiations involving seemingly irreconcilable interests. This is not to suggest that such outcomes are sufficiently robust and therefore long lasting. Some wording appears excessively vague or ambiguous, creating subsequent controversies. The consensus can be fragile indeed: despite accepting the Montreal compromise, the Miami Group countries did not sign or ratify the Cartagena Protocol which they still perceived as being contrary to their corporations' interests.<sup>31</sup> Even though the Canadian delegation proposed the 'may contain' formula it later tried to oppose it when realizing it could undermine their country's industrial interests and went beyond what its government back home was prepared to accept (Anderson 2002, p. 241). The adoption of the Nagoya Protocol is too recent for us to be able to predict its future implementation, but it is very likely that several key countries (including the United States) will again not ratify this agreement.

Our study also highlights the fluidity of the negotiation process within the CBD regime where the logics of arguing and persuasion can call previous gains into question. This is the downside of deliberation. A participant in the biosafety negotiations concurred:

The problem is that the Protocol was re-negotiated in the last week in Montreal. We had already decided on the main themes, in the end it is the details that are the most important and there is always a chance of including new elements.<sup>32</sup>

This observation also raises the question of the time factor. Negotiations are processes that drag on for some time (months or years). At the outset, the logics of national interest and power politics tend to shape the initial negotiation position of each government, and in principle set the acceptable limits of bargaining. However, as the deliberative dimension becomes more important and the logic of arguing introduces uncertainty about the outcomes, a change of attitude tends to emerge even for the structurally strong states. In other words, environmental negotiations are politically constructed rather than determined by the structure of the international system, although they also bear the imprint of contemporary international political economy (Newell 2010).

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### Notes

1. Regimes are identified as 'sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations' (Krasner 1983, p. 2). However, a more mundane understanding more or less equates a regime with a set of interrelated treaties in a domain of international relations such as climate change or global trade.
2. In Risse's article, the logic of 'appropriateness' also refers to the role of norms in framing the behavior of social actors on the international scene, as highlighted by other constructivists (Finnemore 1996, Finnemore and Sikkink 1998).
3. For such an ambition see Brand *et al.* (2008). However, their neo-Poulantzian framework emphasizes structural factors and does not fit with our actor-based theoretical approach. Moreover, this critical International Political Economy perspective is quite different from the traditional approach of regime overlaps in terms of institutional mechanisms and norms (Rosendal 2000). See also the debate in Falkner (2007) (chapters on global corporate power and on the WTO).
4. Contrary to what Dryzek and Stevenson suggest, the distinction between accredited NGOs with an observer status and total outsiders is rather immaterial and largely irrelevant for the problem of transmission. NGO members only get real access when they are included in the official delegation of a state (some feature more than 100 members). The real question is how observers

influence deliberations in close meetings. It does not help much to claim that non-deliberative forms of transmission such as street demonstrations increase ‘the deliberativeness of the larger system’ (Dryzek and Stevenson 2011, p. 1871).

5. For instance, Article 29.2 of the CBD states very vaguely that: ‘Amendments to this Convention shall be adopted at a meeting of the Conference of the Parties’.
6. The study was carried out at a number of negotiation meetings of the CBD: the fourth and fifth working groups on ABS, the third and fourth meetings of the Parties to the Cartagena Protocol as well as the eighth and ninth COPs of the CBD. In addition to the observation of the formal and some parallel sessions – including business and NGOs coordination meetings – our research material includes 56 semi-directive interviews with key actors in these debates. This was supplemented by archival research for the previous stages of the CBD negotiations.
7. These natural genetic resources are used, in particular, as raw materials in the pharmaceutical industry, in cosmetics, and in agro-industries.
8. Interview with a Colombian delegate, Paris, 6 July 2007.
9. Biopiracy is the colloquial name given to the illegal or illegitimate use of the natural genetic resources and the traditional knowledge associated with them.
10. The negotiations aim at reaching a consensus on the contents of the future treaty. The various contributions and amendments are first put in brackets, discussed, and then possibly modified, before being accepted or rejected.
11. The person elected as president by the COP plenary assembly is then responsible for steering the debates and taking the necessary initiatives to organize them.
12. By then, there were five coalitions of states negotiating: the Miami Group – the largest world-wide grain exporters, Argentina, Australia, Canada, Chile, the United States and Uruguay – the most hostile group against the passing of a binding protocol; the European Union; the Like Minded Group; the majority of developing countries; and the Compromise Group – Japan, Mexico, Norway, Korea and Switzerland, later joined by New Zealand and Singapore.
13. These were mainly the choice of the right terms and the domain of relevance of the agreement, the involvement of local stakeholders, intellectual property rights and capacity building.
14. Interview with an NGO representative, Bonn, Germany, 9 January 2007.
15. Especially the Declaration of Johannesburg on sustainable development and the Implementation Plan, paragraph 42 (0) as approved on 4 September.
16. Bolivia, Brazil, China, Columbia, Costa Rica, Equator, India, Indonesia, Kenya, Malaysia, Mexico, Peru, the Philippines, South Africa and Venezuela.
17. The explicit reference to an additional CBD protocol was a strategic gain linking the future development of the ABS regime to the successful Cartagena Protocol, hence guaranteeing a binding agreement.
18. Interview with a Colombian delegate, Paris, 9 July 2007.
19. Interview with a representative from the European Commission, Paris, 5 March 2008.
20. Interview with a Canadian delegate, Paris, 9 July 2007.
21. A reference to the differently colored teddy bears that were used in Montreal to draw lots. These were bought at the very last minute in the subway.
22. Interview with an environmental NGO representative, Bonn, Germany, 9 January 2007.
23. Informal discussion with an environmental NGO representative, Bonn, Germany, 14 May 2008.
24. Fieldwork notes, ABS contact group, Curitiba, Brazil, 28 March 2006.
25. Our sample is a total of 14 meetings, including three expert groups, six working groups and five COPs.
26. Such as the community of The Andes – Bolivia, Columbia, Equator, Peru, Venezuela – Costa Rica, Denmark, India, Nepal, Norway and the African Union – i.e. 53 African countries (Chouchena-Rojas *et al.* 2005, p. 9).
27. On this notion, see Heritier and Lehmkuhl (2008).
28. Others, however, perceived this configuration as balanced, probably because in the absence of real rules the differences would be even bigger between the participation of different groups of delegations (Nobs 2002, p. 192, Nechay 2002, p. 212).
29. This problem, however, is not specific to international negotiations. It raises the broader issue of democratic control in a technological society, where there is a constant flow of innovations that are beyond the understanding and control of the average citizen.
30. The *Earth Negotiations Bulletin* often caught the delegates asleep in the corridors during their breaks. The Ethiopian negotiator for the biosafety protocol stated that the Miami Group had

to change their representative during the first special meeting for the passing of the Cartagena Protocol and the European negotiator could not manage to keep his eyes open till the end of the process (Howard 2000).

31. As noted by several authors, however, this attitude does not fundamentally call into question the effectiveness of the biosafety regime (Bled 2010). Broadly speaking, the implementation phase of environmental agreements often displays manifestations of logics of interests.
32. An interview with a Swiss delegate, from the Federal Office for Agriculture, Curitiba, Brazil, 24 March 2006. The same representative stated that the possibilities for progress in the negotiations vary from one type of meeting to another. For instance, he stated that it is no use going to the COP with position papers to hand out. For working groups however, the situation is very different because only 80% of the texts have already been officially adopted at that stage.

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