

Realizing access and benefit sharing from use of genetic resources between diverging international regimes: the scope for leadership

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Abstract This article examines how access and benefit sharing (ABS) in international transactions with genetic resources can be achieved and how Norway contributes to their realization. Regarding the first question, progress on the ground has been slow, but important principles have been agreed within the convention on biological diversity (CBD) and its Nagoya Protocol (NP). Although domestic legislation is adopted, key user countries remain reluctant. They argue that the ABS regime needs to be supplemented with sector approaches within forums such as the Food and Agriculture Organization. In principle, this may sound logical, but sector approaches may risk undermining the ABS regime of the CBD/NP. The principle of access is more user-oriented and benefit sharing is weaker in the relevant FAO negotiations. Against this background, the future practical significance of the ABS regime remains uncertain. Norway has played an important leadership role in ABS within the CBD/NP framework. This stems in part from ‘fortunate circumstances’, as Norway has relatively few stakes in this issue area, but also includes strong normative elements: Norway’s inclination to support weaker part, the South. The Norwegian position has also been solidified by good coordination and strong institutional capacity among the actors involved. However, there are indications of a growing split in the Norwegian position along sector lines. We do not yet have sufficient empirical evidence that this is the case—but if it is, achieving an effective ABS regime may be even more difficult.

Keywords Genetic resources · Benefit sharing · Global governance · Institutional complexity · Leadership · Norway

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1 Introduction

A main challenge of international biodiversity negotiations is to achieve an effective regime for access and benefit sharing (ABS) in the face of North/South conflicts. Norway has supported the Southern states since the start of negotiations in the late 1980s and has been an active supporter for the threefold objective of the convention on biological diversity (CBD): the conservation and sustainable use of biodiversity and equitable sharing of benefits derived from utilization of genetic resources (Rosendal 2000). This article examines whether Norway can continue this role as the current process of negotiations over access and benefits to genetic resources now take place in a situation of increased complexity. As a rich and sparsely populated country, with relatively low pressure on ecosystems and with little vested interests in biotechnology at the time, this was a low-cost option for Norway to enhance a positive bridge-builder image internationally (Rosendal 2005). However, this is also in line with Norway's explicit emphasis on the rights and interests of the South more generally. As the CBD goals proceed through the more demanding and complex implementation phase and Norway increases their biotechnology ambitions, the leadership role may be challenged.

The CBD principles of ABS have since been sought strengthened through the 2010 Nagoya Protocol (NP) of the CBD. The early phases of the negotiations started out with the CBD as a wildlife conservation treaty, but its scope was soon expanded to genetic resources, including the value of domesticated material. This met the demands from developing countries, where the bulk of terrestrial biodiversity is found. That move strengthened their negotiating clout and led to the inclusion of the ABS principles in international transactions involving genetic resources (Rosendal 2000). As the inclusion of domesticated genetic material is where the CBD most clearly interacts with the UN Food and Agricultural Organization (FAO), this relationship is a central focus of the present study.

Against this backdrop, our research question concerns how Norway may contribute to the realization the ABS objectives. In addition to considering domestic explanatory factors, we discuss how new and more complex international regime linkages and actor constellations may affect Norway's opportunities for continuing this leadership role.

The CBD and its ABS regime have been ratified by 194 countries and the NP by 51 (as of 4 August 2014). Acknowledging countries' national sovereignty over genetic resources, the regime stipulates that access to genetic resources is to be based on prior informed consent (PIC) and mutually agreed terms (MAT). The regime enjoys considerable legitimacy among actors engaged in international transactions with genetic resources. Realizing the need for trust in such transactions with provider countries, many public and private bioprospectors have incorporated PIC and MAT in their statutes as regards accessing genetic resources (Laird 2000). Still, legal compliance in user countries and financial results from benefit sharing remain imperfect and uncertain. The ABS principles have been a source of alienation between providers and users of genetic resources and the regime is poorly implemented in user countries. Implementation in provider countries was delayed during the negotiations of the NP. The ABS principles also go a long way towards explaining why the CBD has not been ratified by the USA (Rosendal 1995). Although the NP helped to strengthen and concretize the ABS regime, conflicts remain over access standards, user measures to comply with ABS, traditional knowledge, functional and temporal scope, and the relationship to other international forums.

In September 2013, Norway became the first industrialized country to ratify the NP. Norway also has an explicit mandate not to support legally binding ABS agreements under

the CGRFA/FAO, as this is seen as not supporting the NP.¹ Norway therefore seems to be pursuing a different policy from most other developed countries. Norway has been among the few user countries to strive for coordinated CBD/ABS implementation domestically and has pursued a leadership role throughout the international negotiations.

In the following, we develop the analytical approach for the study of leadership in a situation of complexity. We then go on to consider hurdles and possibilities for the ABS regime in a complex governance situation, before applying our analytical approach to the case.

2 Approach and methodology

Let us consider the means through which leadership can be conducted and then the motivation to choose a leadership role. Leadership can be defined as ‘an asymmetrical relationship of influence, where one actor guides or directs the behaviour of others towards a certain goal over a certain period of time’ (Underdal 1992: 3). Scholars have noted four avenues through which leadership in international negotiations can be pursued (Young 1991; Underdal 1992). There is ‘structural leadership’, based on unilateral power and out of the league of small states (Young 1991). Remaining channels, accessible also for small countries, are instrumental, intellectual and directional leadership, associated with setting a good example (Underdal 1992). ‘Intellectual leadership’ may affect the systems of thought that shapes the perspectives of those participating in institutional bargaining (Young 1991). ‘Instrumental leadership’ is characterized by the ability to come up with creative solutions and then move negotiations in the preferred direction. This type has similarities with ‘directional leadership’, as a proposed solution is likely to gain greater international credibility if the proposer can show that it has already been successful at the domestic level.

What, then, about the motivations for leadership? Putnam (1988: 434) notes that, while domestic groups pursue their interests by pressuring governments to adopt advantageous international policies, there may also be powerful incentives for consistency in policies between the national and international levels. In areas of typically low-salience politics, maintaining a positive international profile can be valuable for smaller states with few other tools for demarcating itself on the international arena. Ideational and cognitive perspectives within regime theory point to how reiterated learning and development of common norms may affect the behaviour of negotiating parties, independently of structural power (Haas 1992; Young 1982). Despite scant implementation, the ABS system constitutes the central international regime for the governance of genetic resources (Oberthür and Rosendal 2014). Small states can be assumed to be even more likely to comply with such norms and principles, especially when they have helped to bring them into being.

Among the motivating factors for assuming the bridge-builder role is a normative and material interest in carving out a positive international profile—coupled with the means or capacity to maintain this role. Capacity comes largely in the form of institutional ability to allocate staff and resources to pursuing certain policies. In addition to these domestic factors, such a role has been shown to be easier pursued in collaboration with like-minded

¹ Norway’s mandate to the CGRFA-14: “Norway should recommend ratification of the Nagoya Protocol. It is not an option to support proposals for developing legally binding agreements on ABS under the CGRFA”. The MoE added that the last entry is due to the perception that this would not support the Nagoya Protocol”. Gaute Voigt-Hanssen, Senior Advisor, Ministry of the Environment, e-mail to author, 12 April 2013.

countries (Rosendal 2007). While increased international complexity may enlarge the scope for package deals, it could also make for more unruly coalitions. A central question becomes whether there are changes in these domestic (normative and/or material interest, institutional capacity) and international (complexity and coalitions) factors that may affect the motivation and means for maintaining a leadership role.

Against this backdrop, Norway's leadership position in ABS might be hampered or strengthened by changes in the following:

1. *Domestic normative persuasion as basis for leadership* One explanation for assuming an intellectual leadership role could be a normative persuasion regarding the ABS principles (equitable sharing). Our examination of the equity dimension aims to shed light on Norway's implementation of ABS and domestic coordination of policies relating to the CBD and FAO. An examination of norms and values must acknowledge the potential for inconsistency between them. Norway's position might rest on a genuine belief that the equity inherent in the ABS is worth promoting. Adding to this explanatory perspective is how Norway has ratified the CBD with its ABS, which could imbue the *pacta sunt servanda* view (Franck 1990).
2. *Domestic material interests as basis for leadership* Norway's persistent interest in pursuing a leadership role could be accounted for by stable or evolving/diverging relevant material interests. Here, Norway could be expected to have an interest structure that differs from most other developed countries. We would assume that domestic interests have not been diverging much, historically or recently. The empirical task is to check for factors that might change the cost–benefit analysis for Norway. We also compare Norwegian domestic ABS legislation with that of other relevant OECD countries, providing a background for discussing why and how Norway deviates from others.
3. *Domestic institutional capacity for coordinated implementation* The degree of national-level continuity and coordination between ministries could be explained through institutional factors, in terms of their capacity to coordinate positions between related international negotiation processes. In this category, we find leadership by an example: the ability to coordinate and agree on domestic legislation that can be used as a lever to sway international negotiations in the desired direction.
4. *International regime complexity and interest coalitions* Increased regime complexity tends to produce inter-institutional competition and even open conflict and turf battles, as it opens for forum shopping (Gehring and Faude 2013). Change or stability in leadership could hinge on how the Norwegian position links up to increased regime complexity and shifting coalitions. Norway aims at bridge-building through intellectual and instrumental leadership—and has a history of maintaining this position across a range of forums. Such tightly knit linkages across issue areas can enhance trust through the effects of iterative negotiation games and cooperation (Keohane 1984). As a corollary, motivation might decrease in value if the original coalition partners change their positions. The main question here concerns the collaborative robustness of Norway's position and leadership role in a setting of greater complexity and altered coalitions.

These four explanatory perspectives are additive rather than mutually exclusive. They encompass different aspects of the motivation and ability to maintain a robust policy position, both internationally and at home. If they all pull in the same direction, this could indicate persistency in Norwegian leadership on ABS. If some factors are becoming less important, then that could spell a change in Norwegian policy. In addition, the examination

may shed light on how Norway differs from most other user countries, as well as indicating how the ABS objectives may be achieved.

2.1 Methodology

Based on extensive earlier studies, we trace the Norwegian ABS position back to the early phases of the CBD negotiations and through the negotiations of the NP. This is compared to the Norwegian mandate in the FAO–CGRFA meetings. The next section traces how Norway has followed up (or not) the CBD obligations relating to ABS. This sheds light on eventual changes in Norway’s approach to ABS policies. We base these examinations largely on academic studies of the role of Norway in the CBD and FAO. The investigation also includes interviews with key actors in Norwegian ministries and from the CBD negotiations. The authors’ direct participation in a FAO commission meeting has helped to bring out nuances. We have also discussed with stakeholders from domestic NGOs and academics. From the ministry sector, actors from agriculture, environment, coastal and fisheries are represented.

We asked key Norwegian actors in the negotiations to identify specific items where Norway had special interests and impact on the treaty text. Further, we enquired about specific barriers to ABS policy and legislation, and whether the actors have seen changes in the mandates relating to ABS—due to shifting norms, changes in interests, or changes emanating from complexity. Our interviewees have been very close to the negotiation processes for more than a decade, holding central positions. Still, these actors may admittedly inflate the actual Norwegian impact. Hence, their views have also been checked with a non-Norwegian key actor, who has also been closely linked to the ABS negotiations. A total of six key actors have been interviewed. In sum, this has allowed for an in-depth study of Norway’s role and a comparison of the Norwegian arguments in the CBD/NP negotiations with those at the FAO Commission talks. Still, ideally, we should have had more non-Norwegians in our interview sample, but time and resources have not allowed for that.

3 Negotiations and state of the ABS regime

3.1 Early phase (1989–1992): CBD and ABS

The bulk of terrestrial species diversity is found in the tropical South (Heywood 1995: 749), while developed countries (their private companies in particular) are largely in a position to gain the biotechnological revenues from utilization of genetic resources. This North/South controversy still colours the ABS conflict, although the negotiating coalitions have been changing along with the pattern of providers and users.

Developed and developing countries came to the CBD negotiations with widely differing agendas and largely incompatible interests. Most developing countries wanted genetic material from both wild and cultivated/agricultural species included in the Convention, to ensure that they would receive a fair share of the proceeds from their use. They also wanted compensation and incentives to preserve their biological diversity, and thus avoid having to shoulder the greatest burdens. By contrast, most developed countries wanted a straightforward conservation treaty. Implicitly, they preferred the current arrangement to remain as it was, allowing them to enjoy free access to genetic resources in the South. Speaking for the interests of the biotechnology sector, they did not want to link

conservation with economic obligations in developed countries, or to link the use of genetic resources to benefit sharing (Schei 1997; Rosendal 2000, 2011).

How to parcel out the economic responsibility for conserving biological diversity has remained among the toughest topics in negotiations. From the outset, the interaction between the CBD and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO/TRIPS) was contested due to the relationship between ABS and intellectual property rights (IPR). There was also political and organizational strife concerning the demarcation between the CBD and FAO, as not only wild but also domesticated genetic resources (seeds) became subject to the CBD (Rosendal 1991). This turf battle coincided with the FAO seed wars in the late 1980s and hinged on property rights to seeds, as the FAO Undertaking on PGRFA was reinterpreted in 1989 to accommodate IPR, waiving the ‘common heritage of mankind’ principle for systematically bred seeds (Raustiala and Victor 2004; Pistorius and van Wijk 1999; Rosendal 1991). Common heritage and patents/plant breeders’ rights were at the centre of the FAO seed dispute; the CBD’s response was to balance increased Northern seed patents with (re)acknowledging natural resources as subject to national sovereignty. For seeds in international gene banks collected prior to the CBD entering into force, the strife resulted in the Nairobi Final Act (1992) by the CBD Parties, which referred to the role of FAO in dealing with this material (Andersen 2008; Rosendal 2000). In 2001, the FAO Parties concluded the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) on this basis.

3.2 Strengthening ABS (2002–2010, to present): Nagoya Protocol

At its sixth meeting (2002), the COP6 adopted the Bonn Guidelines,² and considered the role of IPRs in ABS and the relationship with the WTO/TRIPS (ENB 2014). The 2002 World Summit on Sustainable Development in Johannesburg called for a more detailed ABS agreement, which, like the CBD and unlike the Bonn Guidelines, should be legally binding. COP7 decided to start negotiations.

These negotiations took place in a setting of rising international regime complexity, as concrete efforts to link access to benefit sharing made the *practical* interaction with other international regimes apparent. The G77 coalition, which had remained stable throughout the ABS negotiations (Najam 2005), became fragmented; it included the African group, the like-minded Asia–Pacific countries, the like-minded megadiverse countries and group of Latin American and Caribbean countries (GRULAC). More technologically advanced countries like India and Latin American countries stressed the need for compliance mechanisms and inclusion of derivatives³ from genetic resources. The African group was concerned with genetic material in *ex situ* (gene bank) collections accessed prior to and since the CBD. Still, the North/South schism persisted as the dominating conflict line (Wallbott et al. 2014). While the G77 split may have reduced the overall strength of the providers, the loosening up of the deep conflict lines may nevertheless have made it possible to reach agreement in Nagoya. This agreement is characterized as impressive, given the high level of technicality characterizing the legal and biological challenges that

² Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization, adopted by Decision VI/24, Doc. CBD UNEP/CBD/COP/6/20 (2002) [Bonn Guidelines].

³ The debate concerns the distance (derivation) from the functional units of heredity (genetic resources) at which the obligation to share benefits remains in force (Tvedt 2014).

negotiators had to deal with.⁴ Another element that may have furthered agreement on the NP was the perceived failure of the Climate Change Summit in Copenhagen: advocates of multilateral UN collaboration sorely needed a success story.

Five core elements remain contested in the NP (see Wallbott et al. 2014 and Oberthür and Rosendal 2014). Firstly, (1) elaboration of *international access standards* (as demanded by user countries) and (2) '*user measures*' (as demanded by provider countries). The Protocol became highly detailed concerning access standards and obliges provider countries to grant legal certainty and transparency in their ABS legislation. Repeating original obligations from the CBD, user countries are required to take appropriate measures to ensure that the genetic resources are accessed in accordance with PIC and MAT in provider-country legislation. However, the long-standing demand of providers for a mandatory disclosure requirement regarding genetic resources in patent application failed again in the negotiations. This contested area of ABS governance includes balancing access to genetic resources with intellectual property rights (IPR) (Swanson 1995; Esquinas-Alcazar 2005; Rosendal 2011; Pavoni 2013). ABS seeks to balance IPR as both systems aim to set economic conditions on legal use of the material. Concerning (3) *traditional knowledge*, the Protocol establishes similar requirements regarding PIC and MAT, more detailed than what was formulated in the CBD. As regards the (4) *scope* of resources covered, providers succeeded in that the Protocol covers genetic resources along with their derivatives, which are currently more often the source of the benefits. However, derivatives are still subject to debate, as they are mentioned in the NP only in the definitions (Koester 2012). The exact temporal and functional scopes of the NP remain disputed due to ambiguous language (Tvedt 2014). Finally, the (5) *relationship with other international institutions* forms the fifth core contested element of the Protocol (Art 4.3, 8.b). Crucial here is that sector-specific ABS regimes can be created (as demanded by users), if they are supportive of and do not run counter to the objectives of the NP and the CBD (as demanded by providers). It is with regard to this last issue that the complexity and a potential turf war with the FAO become apparent.

3.3 The sector approach to ABS: general challenges and interaction with the FAO

The norms and principles of the ABS regime have come to penetrate an increasing number of institutions and arenas, providing the regime with normative (albeit not very strong practical) momentum (Oberthür and Rosendal 2014). The success of ABS depends on whether user countries will create incentives for benefit sharing (Tvedt and Young 2007). With regard to user measures, there is an untapped potential for synergy with the WTO (Kamau and Winter 2009; Pavoni 2013). The lack of political willingness to make the patent system a useful tool for workable benefit sharing reduces its potential to contribute to ABS implementation. This is seen in the reluctance of countries in the World Intellectual Property Organization (WIPO) and WTO to take on board an obligation to provide information about PIC and MAT in patent applications (disclosure). The imbalance between ABS and IPR is strengthened by the restrictions on access that emanate from IPRs.⁵

⁴ As pointed out by head of Norwegian delegation, Birthe Ivars, Ministry of the Environment, 27 January 2014.

⁵ IPR tends to impede research and development on the specific needs of poor populations in developing countries, especially in agriculture and health (Oberthür et al. 2011).

Several arenas, including the FAO and the World Health Organization (WHO)⁶ have opened discussions on sectoral approaches. Such approaches could represent a fine-tuning of governance within specific areas to enhance access. The arguments for a sectoral approach to plant genetic resources in food and agriculture stem from the incremental improvement and multiple sources characterizing seeds and plant breeding, indicating high interdependence among providers and users in plant breeding (Morgera et al. 2012). Incremental improvement, multiple sources and interdependence suggest that there is not one end-product tied to the accession, that it is hard to identify one source country and that a provider can become a user and vice versa (Schloen et al. 2011; Chiarolla 2011). These characteristics provide the rationale for decoupling benefit sharing from both the plant genetic resource and the provider in the legal instruments deliberated within the FAO. However, whereas these characteristics can to some extent be documented for plant breeding, the other sectors currently contemplated by the FAO—farm animals, forest trees, aquatics, microorganisms and invertebrates—follow different patterns (Medaglia et al. 2013). These differ from plant seeds in that there is less or no incremental improvement involved and generally far less dependency on multiple sources or interdependence among users/providers.

There are also difficulties of principle with sectoral approaches. Tvedt (2014) argues that opening for sector-wise ABS rules for pathogens, academic use and other groupings of domesticated genetic resources might entail fragmenting what is covered by the general ABS rules of the CBD/NP. ABS establishes a mechanism to counterbalance private exclusive rights (patents) to innovation and discovery based on genetic material. When certain uses or resources are removed from the scope of ABS under the Protocol, there is no guarantee that the balance acquired in the CBD is maintained. Hence, the sectoral approach could also be interpreted as forum shopping by powerful actors seeking to circumvent benefit sharing and as an illustration of persistent turf wars between the CBD and FAO. Competing sector approaches could challenge implementation of the CBD/NP regime for ABS (Tvedt 2014; Medaglia et al. 2013). More tailored and streamlined solutions could be beneficial for some actors and such efforts must be considered on a case-by-case basis. Nevertheless, poor provider countries would generally be financially burdened by entering into prolonged negotiations in yet more forums.

3.4 The sectoral approach in FAO and the CGRFA: in practice

Within months of concluding the NP, the parties to the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA) started preparing for negotiations on sectoral approaches for access to farm animal, forest tree, aquatic, microorganisms and invertebrate genetic resources, as well as for plants outside the multilateral system of the ITPGRFA.⁷ This harks back to the early turf struggles during the establishment of the CBD. Within the CBD, ABS is principally regarded as a prerequisite for conservation and sustainable use of biodiversity through increased *equity*, whereas *access* to seeds has top priority with the FAO.

⁶ In May 2011, a Pandemic Influenza Preparedness (PIP) Framework (Agreement) for the Sharing of Influenza Viruses and Access to Vaccines and Other Benefits was adopted by the WHO Assembly.

⁷ On ratifying the FAO Plant Treaty, countries agree to make their genetic diversity and related information about the crops stored in their gene banks available to all through the Multilateral System (MLS). <http://www.planttreaty.org/content/what-multilateral-system> Accessed 21 November 2014.

Within the CBD multilateral system of ABS, benefit sharing is to be negotiated bilaterally between a user and a provider. Monetary benefits may include fees per sample, milestone payments, royalties on net sales and/or licensing agreements; non-monetary benefit sharing might cover training, capacity building, research exchanges, supply of equipment and technology transfer. Within the FAO, benefit sharing is decoupled from the provider and is defined in non-monetary terms—as access to improved breeding material from the FAO multilateral system (MLS). This is not in line with the ABS system under the CBD/NP, and it does not balance the IPR of multinational seed corporations. Users favour this definition and this constitutes the FAO position of most OECD countries—with the notable exception of Norway.⁸ The multinational seeds sector has economic interests in flexible, open-access regimes and argues that ABS may restrict this. However, the increased private appropriation of genetic resources through intellectual property rights represents a much more serious barrier to free and flexible access—and the FAO debate, unlike that in the CBD, does not acknowledge this.

In discussions in the FAO–CGRFA 14 (April 2014), the sector approach was hotly debated and patent issues were excluded from the agenda. At the first session of the *Ad Hoc Technical Working Group* on ABS for GRFA (CGRFA-14/13/6), the document on the need for and modalities of ABS arrangements for GRFA (CGRFA-14/13/7) were debated.⁹ The European Regional Group (ERG), the USA and Japan all emphasized the need to ensure that ABS measures accommodate FAO and do not impede food security. They stressed the users' arguments in favour of a sectoral approach to genetic resources (see Morgera et al. 2013). This evoked the core conflict of the NP negotiations and was rejected by the African group and the Southeast Asia Regional Initiatives for Community Empowerment (SEARICE), an NGO which has been central to and followed the ABS issue closely since the start of the CBD negotiations (Rosendal 2000).¹⁰ However, other G77 countries remained almost silent on the issue. The former two groups emphasized sovereign rights over genetic resources and urged all FAO parties 'not to splinter the ABS into a landscape that small actors cannot navigate in, as this would also not be helpful for food security'.¹¹ They also made calls for a study on the impact of IPRs on ABS for GRFA, but that debate was not kept on the agenda nor reported in the ENB.¹² The USA demanded that mention of the relationship with the WIPO be struck from the debate. The report of the CGRFA debate ended up without a single reference to IPR issues.

Removing all domesticated genetic material (GRFA) from the NP would seem to run counter to the interests of the developing world. For developing provider countries to open negotiations here could mean going back to square one in negotiating ABS regulations. Benefit sharing is mandatory under the CBD and practically voluntary within the system in place with the FAO, the ITPGRFA. Also the volume of access to samples distributed under the ITPGRFA is much greater than what is done legally under the CBD. It would certainly be in the interest of users to move the bulk of genetic resources to a forum without mandatory benefit sharing and where the relationship between ABS and patents has a weaker position. By contrast, providers are likely to remain interested in mandatory and

⁸ Grethe Evjen, LMD, 10 September 2013, Seminar at FNI, Norway.

⁹ Both authors were present as observers in this plenary debate; here we present the elements of the ensuing debate that relates to ABS. See also ENB 2013, vol. 9, no. 597.

¹⁰ SEARICE promotes and implements community-based conservation, development and sustainable use of plant genetic resources. <http://searice.org.ph/about-searice/what-we-do/>, accessed 20 February 2014.

¹¹ Authors' observations from the CGRFA meeting.

¹² ENB, vol. 9/no. 597.

monetary benefit sharing, irrespective of which forum deals with the genetic resources. The FAO efforts to expand could mean that providers must devote resources and efforts to ensure that new ABS mechanisms are supportive of and do not run counter to the CBD/NP, as required by Article 4. Neither the FAO multilateral system nor the CBD–ABS system has yet provided much in terms of financial allocations, but the systems rest on very different principles.

4 Role of Norway in ABS

4.1 Norwegian leadership in the international ABS negotiations

Throughout the CBD negotiations, Norway has assumed the role of bridge-builder. Initially along with the Nordic countries, Denmark and Sweden in particular, Norway insisted that all countries have a common responsibility for sharing the costs of biodiversity conservation. The Nordics argued for a system that would allow a returning flow of benefits in compensation for the use of genetic resources from the South (Koester 1997; Rosendal 2000). Further central Nordic goals were the principles that the CBD should include all biological diversity (Schei 1997; Svensson 1993). These goals were successfully achieved in liaison with the G77. One of the most controversial articles, which caused greatest discomfort to the USA, is Article 16.5 (Rosendal 1995). It reads: ‘The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives’. According to central negotiators, this text was crafted by the Norwegians.¹³ That the working group drafting this text was led by the chief Brazilian negotiator also helped to promote the essence of the Article, as the whole of G77 was aligned with Norway on these issues and Brazil was a strong advocate.¹⁴

During the NP negotiations, Norway played a central role in the architecture of the core compliance provisions (Articles 15, 16, 17 and 18)—especially the principle that users must comply with ABS regulations in provider countries. Achieving strong user-country measures was of utmost importance to Norway in these negotiations.¹⁵

For Norway, these objectives go back to the period preceding the CBD negotiations (Rosendal 2005). The objectives were already set out in White Paper no. 46 (Ministry of the Environment 1989); and the accompanying *Blue Book* (Ministry of Foreign Affairs 1988) and were put into effect during the CBD negotiation phase. *White Paper 46, 1989 (p. 113) has the following international biodiversity goals, ‘To support international activities that give developing countries a more equitable share of the benefits accruing from the use of genetic resources’. The same goals are set out in the Blue Book of the Min of foreign affairs (1988, p 23)* (further elaborated in Rosendal 2005, 2007). The principles were also central in the report of the World Commission on Environment and Development (1987:

¹³ Interview, Veit Koester, Danish delegation leader to the CBD negotiations, 28 April 2014. Koester presided over the negotiation of the portion of the Convention on Biological Diversity resulting inter alia in the Access and Benefit Sharing (ABS) system.

¹⁴ Personal communication (7 April 2014) from Peter Johan Schei, who headed the Norwegian delegation to the CBD negotiations and COP meetings from 1989 to 2004. Personal communication, Veit Koester, Danish delegation leader to the CBD negotiations, 28 April 2014.

¹⁵ Personal communication from Birthe Ivars, Ministry of the Environment and member of the Norwegian delegation to the CBD and the Nagoya Protocol, and chair for the Bonn Guidelines process. 8 April 2014.

the ‘Brundtland Report’), which urged: ‘Industrialised nations seeking to reap some of the economic benefits of genetic resources should support the efforts of the Third World nations to conserve species’ and ‘Developing countries must be ensured an equitable share of the economic profit from the use of genes for commercial purposes’ (WCED 1987).

Also in the more recent phases of ABS negotiations Norway has had an acknowledged role as a significant player, with a level of engagement mirrored by its own national ABS legislation (Burton 2012). Compared with many other countries, Norway has high capacity to coordinate the positions of negotiation delegations across international arenas. Moreover, a typical characteristic is continuity, as the same civil servants—mostly from the Ministries of Foreign Affairs, Agriculture, Fisheries and the Environment, with the latter in the lead—have attended these UN forums for several years (Rosendal 2007). Here, Peter Johan Schei and Birthe Ivars have played central roles in leading the ABS negotiations through crucial phases. In the negotiations leading up to Nagoya, the delegation was strengthened with a member from the Ministry of Legal Affairs in order to include expertise on negotiations underway in the WTO and WIPO.¹⁶ These elements have provided Norway with expertise, commitment and continuity in negotiations.¹⁷ Because of this expertise and commitment, Norway was chosen by the Japanese hosts along with Brazil, the EU and Namibia to form a group to assist in the final rounds of the Nagoya negotiations.¹⁸

This bolsters the explanation that Norway has a high degree of institutional capacity and continuity for coordination of domestic policies regarding ABS, and also that the normative basis for ABS remains part of the Norwegian politics. Both *pacta sunt servanta* and iterative negotiation games with stable coalition partners appear to strengthen the likelihood that Norway will be able to continue its ABS position. Moreover, due to the broad representation from various ministries, Norway has a long history of supporting the CBD principles across international forums. The growing complexity in ABS governance could, however, affect the normative basis, as this could be seen as a case of competing norms: FAO parties cite the normative principle linked to food security and access to GRFA and worry that the ABS could obstruct access to genetic material. As argued in Sect. 3.4, this normative controversy could also be interpreted as part of the interests of structurally powerful parties and organizational turf wars; as the FAO, more so than the CBD, is dominated by users and an increasingly strong multinational seeds industry. This illustrates the difficulty of distinguishing between normative and interest-based motivations. In order to examine this more closely, the next sections take a closer look at the material basis for Norway’s ABS position. According to our analytical presumptions, how ABS objectives are reflected in domestic legislation and how this corresponds with domestic material interests may affect the leadership role.

4.2 Norway and domestic ABS implementation: directional leadership

We have shown how Norway has been active in advocating four core principles of the ABS regime: equitable sharing, the inclusion of domesticated genetic resources (seeds), balancing IPR and ABS systems (Article 16.5) and strengthening user measures in order to comply with the ABS regime. Let us now see how these items are reflected in domestic legislation.

¹⁶ Interview with Birthe Ivars, Norwegian Ministry of the Environment, 27 January 2014.

¹⁷ Substantiated in interview with Birthe Ivars, Norwegian Ministry of the Environment, 27 January 2014.

¹⁸ Interview with Birthe Ivars, Norwegian Ministry of the Environment, 27 January 2014.

Sections 57–60 of Norway's Nature Diversity Act (2009) directly address user-measure obligations in the ABS. The import of genetic material into Norway from a provider state that requires prior informed consent may take place only in accordance with such consent. When such material is utilized for research or commercial purposes in Norway, such use shall be accompanied by information about the country of origin according to the amended Patent Act, section 8b, of 2003. Moreover, any person receiving genetic material from a public collection shall refrain, in Norway or abroad, from claiming intellectual property rights to the material, unless the material has been modified in a way that results in a substantial change. Contrary behaviour is subject to sanctions through legal action (see also Medaglia et al. 2013; Tvedt 2010). *By tying sanctions to non-compliance*, Norway goes further than required by the ABS obligations of the NP.

Among user countries, the most significant ABS measures are the legal amendments in patent legislation regarding *disclosure of origin of genetic resources in patent applications*. Norway and eight other European countries, including Sweden and Denmark, have provided such far-reaching legislation. Other significant legal measures relate to legal language demanding respect for PIC and MAT, found in legislation in Norway and a few other OECD countries. The measures vary considerably, however: in Norway, the legislation on PIC and MAT is aimed at Norwegian activities abroad, whereas Australian PIC and MAT legislation is directed towards external bioprospectors within their own country (Prip et al. 2014). A third significant legal activity is the introduction of *penalties/sanctions for non-compliance*, which has been enacted in Norway, Denmark and Switzerland.

Compared with most other user/OECD countries, Norway has held a leading position in establishing compatible domestic regulations with a view to implementing ABS. Norway was the first among the user countries thus far to ratify the NP. Among developed countries, Australia, Norway and Switzerland are the earliest implementers of the ABS regime. They have contributed to the NP through domestic legislation (directional leadership) which allows the NP to build on key elements that have already been tested and found to work (Burton 2012).

This part of the picture thus seems to confirm that Norway has invested institutional capacity in achieving a coordinated policy and a normatively consolidated approach to the ABS principles. During the legislative process, the translation of these principles into domestic legislation was not subject to diverging sub-national interests.¹⁹ The domestic enactment of compatible legislation may have bolstered Norwegian instrumental leadership during negotiations, indicating leadership by example. We now turn to domestic ABS legislation in Norway and its relation to national material interests.

4.3 Norwegian international efforts in light of domestic material interests

Do Norwegian biotechnological and live-sector interests deviate significantly from those of the environmental authorities over ABS? Since the entry into force of the CBD in 1993, seven regions²⁰ and 57 countries (40 developing countries and 17 developed countries) have formulated domestic legal ABS measures.²¹ The emerging economies of Brazil, China, India and South Africa have all enacted fully fledged ABS legislation. Compared

¹⁹ Personal communication, Ole Kristian Fauchald (FNI); central in developing the legal framework on Norway's Nature Diversity Act (*Naturmangfoldloven*).

²⁰ The African Regional Intellectual Property Organization, African Union, Andean Pact, Central American countries, Commission des Forêts d'Afrique Centrale, European Union, and the Nordic region.

²¹ <http://www.cbd.int/abs/measures/groups.shtml> Accessed 30.06.2014.

with those countries, Norway was a latecomer here with the amended Patent Act of 2003 and Nature Diversity Act of 2009. Compared with other users, which is more relevant, Norway is a pioneer in enacting user measures.

This type of legislation would seem to have come at relatively low domestic costs for Norway. Through most of the negotiations, its biotechnology sector has been comparatively small (Ernst and Young 2001). The USA, the EU and Japan together accounted for about 80 % of all applications for biotechnology-related patents under the system administered by the WIPO (OECD 2009). In Norway, there have been fairly few domestic economic interests linked to intellectual property rights to genetic resources.

However, Norway may expect greater attention from multinational corporations within the pharmaceutical sector and in the rapidly growing aquaculture sector. There is considerable interest in prospecting for marine genetic material, which has displayed promising medicinal traits. Still a relatively small user country, Norway might also have a particular interest in ABS legislation as a provider, due to its high levels of interesting marine genetic material. Also Australia deviates from most OECD countries by being not only a typical user country: it also ranks among the 17 megadiverse countries—a typical provider (Burton 2012). This goes a long way towards explaining Australia's elaborate ABS legislation as a provider country. By contrast, Switzerland is hardly megadiverse and is home to a very strong biotechnology sector, but has nevertheless gone far in developing legal user measures such as disclosure and has also pursued the role of bridge-builder in the negotiations (Hufty et al. 2014). Denmark and Switzerland still rank higher than Norway in patents granted, although also in Norway the biotechnology sector has increased during the last decade (Ernst and Young, 2005, 2008, 2012; OECD 2011).²²

The study of domestic interests also warrants some scrutiny of evolving trends in agriculture, relevant for the interests Norway may pursue vis-à-vis the FAO. All countries, including Norway, depend on exchange of seeds (Kloppenborg 2004). Still, the specific climatic conditions for Norwegian agriculture may set it apart from most other developed countries. Does this make Norway more or less dependent on the large seed corporations? Do multinational corporations have a less dominant role in Norway, accompanied by much lower demand for IPRs in seeds? The argument here is that multinational corporations have strong economic interests in pursuing broader patent protection; at the same time, they can evade the governmental control and regulations intended to enforce ABS behaviour (Louwaars et al. 2009).

Although the latter issue remains uncertain, the upshot is in line with the expectation that Norway does not seem to have strong domestic interests that deviate from the ABS principles. Norway differs from most OECD countries in having a relatively small biotechnology sector, being well endowed with genetic resources and with climatic conditions that place Norwegian agriculture on the outskirts of the radar of multinational seeds corporations. This would seem to furnish Norway with a somewhat different interest-base compared with most OECD countries. There might be altered policy deliberations ahead as Norwegian biotechnology picks up, although the Swiss example indicates that ABS compliance is possible also in countries with a strong biotechnology sector. Norway and Switzerland both seem inclined to advocate equitable sharing even though their material interests might dictate otherwise. This could be because both countries think that it does not necessarily mean great losses to support ABS and that the benign international profile and coming across as a legitimate bioprospector would make-up for possible economic losses in their biotechnology sector.

²² <http://www.oecd.org/sti/inno/keybiotechnologyindicators.htm> Accessed 14 October 2013.

4.4 Increased complexity and altered coalitions: affecting Norwegian leadership role?

As noted, Norway has long had a leadership role in this issue area. Its independent role from the EU and the JUSCANZ²³ group provided Norway with wider scope in the negotiations to develop its own position. The increased complexity did not appear to have negative consequences for exerting leadership within the NP negotiations—indeed, this may have broadened the scope for manoeuvre and leadership.²⁴ This may be different within the framework of the FAO, where Norway is a member of the European group, indicating less scope for independent leadership. The spilt in the FAO–CGRFA meeting, with only the African group arguing against sectoral approaches, may also affect Norway's role and position. It is important to note that the Norwegian delegation participated in CGRFA with a mandate *not* to support legally binding sectoral ABS agreements under the CGRFA.²⁵ Nevertheless, Norway did *not* express vocal support to Africa at the 2013 meeting. How can that be explained?

The Norwegian position cannot provide an explanation. Norwegian administrators are not comfortable with the FAO definition of ABS in terms of non-monetary benefits. The Ministry of Agriculture and Food (MAF) and the Ministry of the Environment (MoE) concur that Norway does not follow the OECD interpretation and position in this definition.²⁶ Across ministries, there is recognition of the need to be aware of the different power and interest structures of the various international forums, as well as the need for national-level coordination when negotiating interacting regimes. As regards the FAO multilateral system, the MAF is aware that it is problematic that the multinational seed corporations enjoy full access without providing benefit sharing. These corporations generate large sums of money that are not returned to farmers.²⁷ Norway is also the third largest contributor to the ITPGRFA fund,²⁸ acknowledging that the seed industry is not likely to provide the necessary funding. Moreover, as fiscal support is unlikely to be forthcoming through the ITPGRFA, that concern is meant to be implemented through the CBD-ABS.²⁹

However, the composition of the Norwegian delegation might explain why they did not stand up in defence of the African group/Namibia/SEARICE's proposal in the plenum debate. Norway's delegation did not include representation from the MoE, even though that ministry had had a noteworthy role in forging the coordinated mandate. The MoE representative fell out of the delegation at the last minute before the CGRFA meeting. If MoE had been present, might Norway have made an intervention in favour of the African view? Perhaps, the ministries represented did not have enough stakes in the mandate to make a public statement in its defence. To the sector-based ministries, the FAO and its CGRFA are more important venues than the CBD and its ABS regime, so these sector-

²³ JUSCANZ is for all practical purposes a group for coordination and exchange of information, not a negotiating group.

²⁴ Interview with Birthe Ivars, Norwegian Ministry of the Environment, 27 January 2014.

²⁵ Gaute Voigt-Hanssen, Senior Advisor, Ministry of the Environment, e-mail 12 April 2013.

²⁶ Interview, Birthe Ivars, Ministry of the Environment, 27 January 2014. Grethe Evjen, Ministry of Agriculture and Food, FNI seminar on farmers' rights, Lysaker, 10 September 2013.

²⁷ Elisabeth Koren, Ministry of Agriculture and Food, FNI seminar on farmers' rights, Lysaker, 10 September 2013.

²⁸ IT/ACFS-7/12/3. "Resource Mobilisation: Implementation of the Strategic Plan for the Implementation of the Benefit-sharing Fund". <http://www.planttreaty.org/content/seventh-ad-hoc-advisory-committee-funding-strategy>.

²⁹ Grethe Evjen, Ministry of Agriculture and Food, FNI seminar on farmers' rights, Lysaker, 10 September 2013.

based ministries might cater to a different set of interests than the MoE. On the other hand, the fact that the MoE representative was not replaced may also signify that the FAO–CGRFA is not considered to be very important for the MoE. In that case, this may point towards a division of labour between the sector ministries (focusing on FAO) and the more general MoE (focusing on CBD/NP). If this is the case, it points towards a less coordinated position in the future and maybe therefore also less scope for leadership when the ABS issue is discussed in the FAO. However, there is as yet not enough empirical material to substantiate such a conclusion.

5 Conclusions

With this article we have sought to shed light on how Norway, through leadership, has attempted to contribute to the realization of the ABS objectives. Regarding the implementation of ABS in general, progress on the ground has been rather slow, but important principles have been agreed within the framework of the CBD/NP. Although the necessary legislation is gradually being adopted in an increasing number of countries, key user countries have been reluctant to comply with the ABS regime. Most OECD countries argue that the general framework of the ABS within the CBD/NP needs to be supplemented with sector approaches within forums like the FAO and argue that this is necessary for fine-tuning specific application in different issue areas. In principle, this may sound logical, but we believe that some sector approaches may risk undermining the ABS regime as it is fleshed out in the CBD/NP. In our case in point, the FAO and the CGRFA, we find that the principles related to ABS are framed in a more user-oriented manner. Against this situation of increased complexity, the future practical significance of the ABS regime remains uncertain.

As to the role of Norway in realizing the ABS regime, we have shown how Norway has played an important role as instrumental and directional leader. Both our literature reviews and interviews with a range of key actors indicate that Norway has long been central in getting acceptance for the gradual strengthening of the ABS regime within the CBD/NP framework. The basis for this leadership role stems in part from ‘fortunate circumstances’, as Norway has relatively few stakes in this issue area compared with many other OECD countries. However, we have also argued that there are fairly strong normative elements in Norway’s position, with an inclination to support the weaker part, the South, reflecting a long-standing tradition in many important global environmental processes. The Norwegian position has also been solidified by good coordination and strong institutional capacity among the actors involved. However, judging from the FAO meeting on the issue, there are indications of a growing split in the Norwegian position along sector lines. Managing institutional complexity requires skill and capacity and hence tends to increase the burden of domestic cross-sectoral co-ordination. In this case, increased complexity may have led to weaken the G77 coalition, with which Norway has traditionally supported ABS. Both of these factors may eventually weaken Norwegian leadership in the ABS issue area. We do not yet have sufficient empirical evidence that this is the case—but if it is, Norway’s leadership role may become less pronounced and achieving an effective ABS regime may be even more difficult.

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