

Note on the Front-page Photo

The Spanish melon farmer on the front-page is one of the numerous farmers who have conserved and enhanced plant genetic resources for food and agriculture on a voluntary basis throughout the history of agriculture.

Secretary of the Commission for Genetic Resources for Food and Agriculture, José Esqunias-Alcàzar, met this farmer in 1970. At the time, Esqunias-Alcàzar was active in a field research project involving collecting all the varieties of melons present in Spain. The farmer on the photo appeared in front of him on his donkey during one of the young student's seed collecting trips. Esqunias-Alcàzar was waiting for a bus in an isolated area when the farmer showed up and asked him what he was doing. Esqunias-Alcàzar told him, and the farmer said: "Even if a disease comes along that kills all the melons, mine will still be here". Esqunias-Alcàzar asked him if he could have some seeds and the farmer said, "Sure, it's near here". 'Near here' meant a three and a half-hour ride with him on his donkey, but in the end, Esqunias-Alcàzar got the seeds. Back in his laboratory, Esqunias-Alcàzar analysed the seeds, and it turned out that they were resistant to a particular type of fungus. These seeds became the basis for creating resistance to that specific type of fungal disease for many melon producers around the world.

Source: José Esqunias-Alcàzar 2003 [interview]

The photo is reprinted with the permission of the photographer.

Preface

The work on this thesis has been much harder than I initially had imagined. Many people deserve my gratitude for helping and inspiring me when writing it. First of all thanks to my supervisors, Professor Steinar Andresen at the University of Oslo and senior researcher G. Kristin Rosendal at the Fridtjof Nansen Institute (FNI), who have guided me through the process with professional advice and good will. Research fellow Regine Andersen at FNI has not only functioned as an additional supervisor, but is also a friend, a source of encouragement and a travel companion to Rome. She also deserves thanks for inspiring me in selecting the topic of this thesis.

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Lysaker, May 2004

Svanhild-Isabelle Batta Bjørnstad

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List of Abbreviations

ASSINSEL	International Association of Plant Breeders
CBD	Convention for Biological Diversity
CGIAR	Consultative Group of International Agricultural Research
CGRFAFAO	Commission on Genetic Resources for Food and Agriculture
CPGR	FAO Commission on Plant Genetic Resources
DC	developing country
DUS	distinct, uniform and stable
EC	European Community
ETC group	Action Group on Erosion, Technology and Concentration
EU	European Union
FAO	Food and Agricultural Organisation of the United Nations
FR	Farmers' Rights
GMO	Genetically Modified Organism
GPA	Global Plan of Action
GRAIN	Genetic Resources Action International
GURTs	Genetic Utilisation Restriction Technologies
G-7	the Group of 7 industrialised countries
G-77	Group of 77 developing countries
IARC	International Agricultural Research Centre
IPGRI	International Plant Genetic Research Institute
IPR	Intellectual Property Rights
ITPG	Intermediate Technology Development Group
ITPGRFA	International Treaty for Plant Genetic Resources for Food and Agriculture
IUPGR	International Undertaking on Plant Genetic Resources
JUSCANZ	Informal coalition of Japan, USA, Canada, Australia and New Zealand
MTA	Material Transfer Agreement
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
PBR	Plant Breeders' Rights
PGR(FA)	Plant Genetic Resources (for Food and Agriculture)
RAFI	Rural Advancement Foundation International
REIO	Regional Economic Integration Organisation
TRIPs	Agreement for Trade-related Intellectual Property Rights
UK	United Kingdom
UK _{abc}	UK <i>Agricultural Biodiversity Coalition</i>
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Program
UNEP	United Nations Environment Program
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UPOV	International Union for Protection of Plant Varieties
US(A)	United States (of America)
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation

Chapter 1: Introduction

1.1 Subject of the Thesis

Since the Stockholm Conference on the Environment in 1972 an ever-higher number of international environmental agreements have been adopted. Lately, scholars of international relations have paid particular attention to the role of developing countries in the formation of such agreements. Frank Biermann finds evidence for what he terms “Southern eco-power” when studying the negotiation outcome of the ozone regime (the Montreal Protocol on Substances that Deplete the Ozone Layer) (Biermann 2002). Kristin Rosendal concludes that the norms and principles in the Convention on Biological Diversity (CBD) represent a moral breakthrough for the norms and interests of developing countries (Rosendal 1999). Likewise, in the Climate Convention the developed country Parties have a special obligation to help developing country Parties with financial and technological resources (Yearbook of International Co-operation on Environment and Development 2002). The broad theme for investigation in this study is to the influence of developing countries on international environmental negotiations. Do they really achieve breakthroughs for their interests and proposals?

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), adopted by the UN Food and Agriculture Organisation (FAO) in November 2001, is among the most recent international agreements. The treaty is part of the work done within the FAO system to establish a regime for the management of plant genetic resources for food and agriculture (PGRFA)¹. The Commission on Genetic Resources for Food and Agriculture (CGRFA)² is central in this regime, as it reviews all matters relating to policy, programmes and activities of the FAO pertaining to these resources. The CGRFA has concentrated on the implementation of the International Undertaking on Plant Genetic Resources (1983), the development of the Global Plan of Action (1996) and until quite recently the negotiations for the ITPGRFA.³

¹ *Plant Genetic Resources for Food and Agriculture* are defined in the International Treaty (Article 2) as “any genetic material of plant origin of actual and potential value for food and agriculture”. In this thesis, I will also use *germplasm*.

² The intergovernmental body of CGRFA was first established by the FAO Conference in 1983 as the *Commission on Plant Genetic Resources*. In 1995 it was renamed the *Commission on Genetic Resources for Food and Agriculture*, when its mandate was broadened to cover all components of biological diversity of relevance for food and agriculture.

³ See for example Regine Andersen (2003) for a recent assessment of FAO’s achievements regarding the management of genetic resources for food and agriculture.

Plant genetic resources are a fundamental input in modern as well as traditional breeding. The constant evolution of new diseases makes plant breeding an endless activity. In essence, plant genetic diversity is a vital precondition for food security. No country is self-sufficient in PGRFA (Kloppenburger 1988). Moreover, with the rapid developments in the biotechnological industry, the demand for a constant flow of genetic resources increased in the 1980s (Pistorius 1997; Rosendal 1999). Nevertheless, access to plant genetic diversity is also essential for traditional small-scale farming on which 1.4 billion people world-wide depend for their livelihoods (Crucible II Group 2000:1). Despite the acknowledged importance of plant genetic resources, food crop genetic erosion is a serious problem in almost all countries of the world (FAO 1998b). In China an estimated 90% of the 10,000 wheat varieties that were grown a century ago have been lost. In Mexico an estimated 80 per cent of the maize varieties that were grown in the 1930s are gone. The single most important reason for genetic erosion is the replacement of traditional varieties with modern, high yielding, and genetically uniform ones (ibid.:33).

Both traditional farmers in the South and commercial breeders as well as biotechnology companies in the North need access to PGRFA. The threat to food security due to genetic erosion is a common concern, with a subsequent drive for conservation of PGRFA. So, where is the conflict?

The commercial breeding sector in developed countries desires intellectual property protection of their plant varieties. This protection is mainly provided through systems of plant breeders' rights, but in the realm of biotechnology, genetic material is also subject to patents. Intellectual property rights negate the principle of free exchange of breeding material because the users of the material have to purchase licences from the licence holder. Furthermore, their utility is limited to countries of some economic and technological strength (Rosendal 1999:99). The traditional varieties of farmers in the South do not fulfil the criterion of genetic uniformity needed to merit plant breeders' rights. Neither do they possess the necessary technology to develop their varieties into such stable and uniform varieties. Thus, the genetic material of the South has throughout history been acquired as a common heritage of mankind (meaning open access and free of charge). At the same time, the North can impose exclusive property rights on the varieties developed from the same genetic material. This asymmetry between improved germplasm and traditional germplasm has led to a sense of unfairness and feeling of exploitation among developing countries (Swanson, 1997:102).

This controversy has coloured the debates regarding management of PGRFA in FAO since the late 1970s. In 1983, the Member States of FAO adopted the International Undertaking for Plant Genetic Resources (IUPGR), the objective was to ensure that PGRFA would be explored, preserved, evaluated and made available for plant breeding and scientific purposes (Article 1). However, a handful of developed countries did not want to consider elite breeding lines or patented varieties as material which could or should be freely exchanged (Berg et al. 1991:80). As a response to the development of plant breeders' rights in the North, the South started to claim *Farmers' Rights* in return. In a compromise, these two sets of rights were simultaneously recognised by the FAO Resolution 4/89. Plant breeders' rights were accepted as compatible with the International Undertaking, because it was understood that "free access" did not mean "free of charge". Farmers' Rights were further defined by the FAO Resolution 5/89 as:

[R]ights arising from the past, present and future contribution of farmers in conserving, improving and making Plant Genetic Resources, particularly those in the centres of origin/diversity. These rights are vested in the International Community, as trustees for present and future generations of farmers, for the purpose of ensuring full benefits of farmers and supporting the continuation of their contributions....

With the recognition of Farmers' Rights in the IUPGR, was the North-South dispute regarding the management of PGRFA settled? Due to the complexity and controversy of the concept the International Undertaking did not manage to give Farmers' Rights a proper definition (Girsberger 1999:289). Consequently, these rights were never implemented as prescribed in the IUPGR, even though an additional resolution was passed in 1991 that stated that Farmers' Rights should be implemented through an international fund.

1.2 Research questions

After the adoption of the Convention on Biological Diversity (CBD) in 1992, the Member States of FAO decided that the IUPGR needed revision. Since Farmers' Rights had never been realised, the developing countries wanted these rights to be endorsed by the new agreement when the renegotiations of the IUPGR started in 1994. Seven years later, the legally binding International Treaty on Plant Genetic Resources for Food and Agriculture replaced the non-binding International Undertaking on Plant Genetic Resources. The objectives of the ITPGRFA are the conservation and sustainable use of PGRFA and the fair and equitable sharing of the benefits arising out of their use – in harmony with the CBD – for sustainable agriculture and food security (Article 1). The core of the treaty is a multilateral system for facilitated access to a list of 35 specified food crops and 29 forage crops. Hence, my first research question is as follows:

- *To what extent did the developing countries have a breakthrough for their demands for Farmers' Rights in the International Treaty?*

My second and last research question is:

- *How can the negotiation outcome regarding Farmers' Rights be explained?*

The answer to the former question is needed in order to answer the latter, which is analytically more interesting. Despite the potential impact of Farmers' Rights for the conservation and sustainable use of these valuable resources, little research is conducted on such rights (Correa, 2000:9).⁴ I assume that understanding how and why Farmers' Rights are recognised in the International Treaty may reduce the high uncertainty among practitioners regarding how to implement these rights.⁵

1.3 Choice of Explanatory Framework

The concept of regimes provides analytical tools to understand international co-operation in an anarchic system of independent states (Young 1999). Is the ITPGRFA a regime? According to a formal definition of regimes as advocated for example by Keohane (1993), the ITPGRFA fulfils the criterion of having explicit rules that are embodied in a treaty to be agreed upon by the various parties (see the next chapter for a discussion on regime definitions). In a broader sense, the ITPGRFA is part of FAO's regime for the management of PGRFA. Thus, the insight of regime theory will be fruitful when studying the formation process of the ITPGRFA.

Scholars of international relations differ as to how they explain the formation of international agreements. Broadly speaking, there are three schools of thought in regime theory (Hansenclever, Mayer and Rittberger, 1997:1-2)⁶:

1. The *power-based perspective* focuses on the exercise of power and interests and is based on the assumption that the drive for power is the main motivation for regime formation.
2. The *interest-based perspective* focuses on the interplay of institutions and interests and is based on the assumption that the defence of interests is the main motivation for regime formation.
3. The *knowledge-based perspective* highlights the influence of knowledge, norms and ideas

⁴ See for example Girsberger (1999) and Gollin (1998) for an overview of some research on Farmers' Rights.

⁵ See for example Swaminathan (ed) (1996) for unsettled questions regarding implementation of such rights.

⁶ The distinction among schools of thought within the study of regimes is not novel. Haggard and Simmons (1987) analyse for instance four approaches to regime analysis. See also Hansenclever et al, 1997:6; Young and Osherenko, 1993a: 8-20; P. Haas, 1993:174, 176. G.K. Rosendal distinguishes between a *realist regime model*, a *modified regime model* and an *ideational regime model* (1999:50).

and is based on the assumption that the diffusion of these factors is the main motivation for regime formation.

Following the different focal points in the various perspectives, I assume that all three may add valuable insight to understanding the possible breakthrough for the developing countries regarding Farmers' Rights.

The general purpose of intensive research strategies such as case studies is to thoroughly investigate few subject matters and many factors instead of studying many subject matters and few factors (Yin 1994). The ITPGRFA is the subject matter of this study. My methodological framework is therefore based on a case study approach, where the degree of recognition of Farmers' Rights is viewed as a case of the developing countries' potential breakthrough in international environmental negotiations.

1.3 Limitations of the Study

Several of the choices I have made need specification. First, why do I focus only on Farmers' Rights and not on the possible breakthrough of the developing countries' proposals on all the articles and provisions of the ITPGRFA? This is because Farmers' Rights are the clearest "South-issue". The concept was adopted for the purpose of balancing the rights of traditional breeders in the South with those of the plant breeders in the North. Besides, for the other issues that were dealt with in the treaty, it is more apparent that the developing countries have divergent interests. For example, the developing countries had different views regarding the scope and coverage of the Multilateral System.⁷

Second, why should I study only formation and not implementation of the International Treaty? The lacking realisation of the Farmers' Rights provisions in the International Undertaking illustrates the difference between recognition and implementation. Despite this insight, the implementation of the ITPGRFA is outside the scope of this thesis, the reason being the novelty of the treaty. It was adopted less than three years ago and will enter into force on 29 June 2004. Consequently, it is premature to study any achievements on Farmers' Rights.

Third, why focus on the ITPGRFA when there are several other agreements affecting the management of PGRFA internationally that have relevance for the realisation of Farmers' Rights? In this regard, the Convention on Biological Diversity (CBD), the Agreement on Trade-related Intellectual Property rights (TRIPs), the World

Intellectual Property Organisation (WIPO)⁸ and the Convention for the Protection of New Varieties of Plants of the Union for the Protection of New Varieties of Plants (UPOV) are the most significant arrangements. The ITPGRFA is a legally binding revision of the non-binding IUPGR in harmony with the CBD. While the CBD deals with all kinds of diversity in general, the Undertaking and Treaty deal specifically with plant genetic diversity of relevance for agriculture. Furthermore, the CBD provides specific rights and knowledge of indigenous people, which is related to Farmers' Rights⁹. TRIPs establishes a minimum standard of intellectual property protection of all inventions for contracting parties to the World Trade Organisation. In particular the provision pertaining to living organisms is relevant to the topic of this thesis.¹⁰ When implementing TRIPs, many countries have enacted a plant varieties protection law based on a model of UPOV. Besides, the newest revision of UPOV in 1991 severely restricted the right of farmers' to use, sell and exchange farm-saved seed from protected varieties.

Table 1.1: The Content of the Main International Agreements.

	Conservation, Access and Benefit Sharing	Intellectual Property Rights
Biological Diversity in general	CBD	TRIPs (§ 27.3.b)
Plant Genetic Resources for Food and Agriculture	ITPGRFA	UPOV

Source: Andersen (2004).

Due to the close relationships between all these agreements and organisations, the concepts of *regime linkages* (Young, 1996) and *regime interplay* (Stokke, 2000) are possible points of departure for studying the issue area of PGRFA and Farmers' Rights. When

⁷ The Latin American countries, for example, were advocates of a much shorter list of plants than the African and Asian countries.

⁸ Two important processes are taking place in WIPO. First, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the "IGC") was established by the WIPO General Assembly in October 2000 as an international forum for debate and dialogue concerning the interplay between intellectual property (IP), and traditional knowledge, genetic resources, and traditional cultural expressions (folklore) (see <http://www.wipo.int/globalissues/igc/index.html>). Second, the on-going negotiation round in the Standing Committee on the Law of Patents may lead to a "world patent", which will make it possible to apply for patents once and obtain coverage in all member countries of WIPO in contrast to today's practice of applying for patents in every single country (except for within the EU).

⁹ Article 8(j) of the CBD for example reads that each contracting party shall, as far as possible and as appropriate: "Subject to its national legislation, respect, preserve and maintain knowledge, innovation and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

¹⁰ Broadly speaking, Article 27.3(b) of TRIPs allows governments to exclude plants, animals and "essentially" biological processes (but micro-organisms, and non-biological and microbiological processes have to be eligible for patents). However, plant varieties have to be eligible either for patent protection or through a system created specifically for the purpose ("sui generis"), or a combination of the two.

studying the international governance of agricultural biotechnology, for example, Coleman and Gabler (2002) find evidence for the emergence of two competing regimes: one emphasising trade, intellectual property and food security; and the other stressing biological diversity and food security. Nevertheless, I will keep a focus on the ITPGRFA. This is the newest agreement and FAO is the arena where Farmers' Rights most significantly have been dealt with. Besides, I believe such an approach would have been too comprehensive given the scope of this thesis. References to other agreements will be made throughout the thesis, however.

1.4 Outline of the Thesis

To briefly go through the structure of this thesis: the next chapter will provide the theoretical foundation for the thesis and consists of three parts. First, I will give a general presentation of regime theory. Second, I will develop a framework for evaluating the breakthrough of the developing countries regarding Farmers' Rights in the ITPGRFA. Finally, based on the main assumptions within each school of regime theory, I will identify explanatory variables that will be used to structure my subsequent analysis. Methodological considerations will follow in Chapter 3, where I will explain the choice of qualitative case studies as a research strategy, and the methods to be applied. In order to broaden our understanding of the empirical questions at hand, Chapter 4 will give a brief description of the issue area of plant genetic resources for food and agriculture. Chapter 5 will analyse the degree of breakthrough for developing countries regarding their demands for Farmers' Rights in the ITPGRFA. I will then chronologically describe the negotiation process in FAO from 1994 to 2001 in Chapter 6. Based on the propositions developed in the theoretical part, in Chapter 7 I will examine which mechanisms that can be traced during the negotiation process that can explain the actual breakthrough of the South. Finally, I will sum up my findings and draw some conclusions. Are there any lessons to be learned regarding the "power" of the South in international environmental negotiations?

Chapter 2: Theoretical Approach

How should I design an analytical framework for explaining the recognition of Farmers' Rights in the ITPGRFA? The first part of this chapter will introduce regime theory as an approach for studying international co-operation. In the second part, I will define my dependent variable. In order to explain the observations pertaining to the dependent variable, I will identify independent variables within the schools of thought of regime theory.

2.1 Regime Theory

Regime theory arose in the 1970s and gained momentum during the 1980s as a response to the intellectual challenge posed by the study of collective-action problems and in part as a response to the political challenge associated with an apparent decline in the ability of the United States to function as a dominant actor in international society (Young 1999:189). Much of the post-World War II period had until then been dominated by the *realist* school.¹¹ Their view of the international system as anarchy dominated by national interests and the struggle for power provides dim prospects for international co-operation. The notion of “hegemony”, i.e. the dominance of one powerful state, or a coalition of such states, was a resort of the realists to explain how co-operation could occur and be sustained. Regime theory however, addresses the possibility for selfish actors to actually co-operate under conditions where there are incentives to cheat and no central political authority that stands over national governments. This shift is largely associated with Robert Keohane's *After Hegemony* (1984) (Rosendal 1999:45).¹²

Stephan Krasner identifies *regimes* 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 1983:2). Even though Krasner's definition is called the consensus definition of regimes, critics have attacked it for two main reasons: first, the difficulty of differentiating the four components of regimes, and second, its vagueness in differentiating between those who study international regimes and those who study other features of international relations like international organisations (Levy, Young and Zürn 1995:270). Levy, Young and Zürn argue, however, that the descriptive

¹¹ See for example Carr (1962); Morgenthau (1960); and Waltz (1959).

¹² Despite the origin of regime theory as partly a reaction to the dominance of realist approaches to international relations, realism has also inspired contributions within regime theory. I will later refer to these as *power-based perspectives* of regimes.

richness in the components of Krasner's definition is a major strength of regime theory (ibid.). It makes it possible to display different notions of international regimes, as absorbed by their typology:

Table 2.1: A Typology of Regimes

Formality ↓	Convergence of Expectations →	Low	High
Low		No regimes	Tacit regimes
High		Dead-letter regimes	Full-blown regimes

Source: Levy, Young and Zürn (1995:272).

The vertical dimension highlights the formality of a regime. A regime can be associated with a highly formalised agreement or even the establishment of an international organisation, or it can come into existence without any formal agreements, usually based on precedence. The horizontal dimension focuses on the extent to which states expect that their behaviour will be constrained by their accession to an implicit or explicit set of agreements. If there are no formal agreements or convergence in the expectations that rules will be adhered to, *no regime* exists. On the other hand, even in the absence of formal rules, it can be expected that informal rules will be observed, indicating the existence of a *tacit regime*. By contrast, it is also possible to identify situations where formal rules have been brought into existence, without any expectation that they will be observed, suggesting the existence of a dead-letter regime. Finally, there are *full-blown regimes*, where there high expectations that formal rules will be observed (Levy, Young and Zürn 1995).

In order to meet the second objection to the consensus definition, Levy, Young and Zürn suggest defining international regimes as “social institutions consisting of agreed upon principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas” (Levy, Young and Zürn 1995:274). Defined in this way, they claim that regimes are distinct from international organisations (which are material entities), broader structures of international society (which consists of principles of all issue areas) and world order (which encompasses the sum of all the institutional arrangements operative at the international level). Still, the question remains: how can one determine the existence of regimes?

The vague reference in Krasner's definition and in Levy, Young and Zürn's typology to the “convergence of expectations” does not provide explicit criteria for identifying the presence of regimes. Over time, three distinct positions have emerged on the subject (Hansenclever, Mayer and Rittberger 1996:180-183). Some analysts argue that state behaviour demonstrates that particular injunctions are accepted in a given issue-area, and that an international regime thus exists. This *behaviour approach* is, however, in danger

of applying circular reasoning when identifying regimes based on observed behaviour and then using regimes to explain this behaviour (Levy, Young and Zürn 1995:271). Kratochwil and Ruggie (1986) adopt an approach that shifts the emphasis away from behaviour and towards inter-subjective meaning and shared understandings –a *cognitive approach*. Keohane criticises this approach, because he claims that the identification of a regime is an issue for a descriptive interface based on publicly available texts, rather than psychological insight (Keohane 1993:26-29). This has led him to develop a *formal* definition of regimes, where regimes are conceptualised primarily as explicit rules that are agreed upon by actors and embodied in treaties or other documents.

I endorse this formal approach, since I regard regimes as explicit rules (agreements) agreed upon by more than one state. Nevertheless, I consider states' recognition of these agreements as still having validity as an essential element of a regime. However, my emphasis on the formality dimension of regimes and not the dimension regarding convergence of expectations is because the focus of this thesis is the formation of the ITPGRFA. Hence, I will study the process in which the ITPGRFA is created and adopted and not the implementation of the treaty or other processes that could give evidence of states' recognition of the treaty.

Regime analyses focus on regime formation and regime effectiveness. To analyse the processes by which international regimes come into existence, Oran Young suggests distinguishing between at least three stages: agenda formation, negotiation and operationalisation (Young 1998).¹³ *Agenda formation* “encompasses the processes through which an issue initially find its way onto the international political agenda and rises to a sufficient prominent place on this agenda to justify the investment of time and political capital needed to embark on explicit negotiations” (Young 1998:5). In the case of Farmers' Rights, the agenda formation stage began around the FAO Conference in 1979, where debates concerning the asymmetric benefits derived by donors of germplasm and donors of technology started (Esquinas-Alcázar 1996:4). The phase of *negotiations* begins with the initiation of direct and focused negotiations and ends with the signing of an agreement. The negotiations for revision of the IUPGR started formally in 1994 and ended with the signing of the ITPGRFA in 2001. The *operationalisation stage* includes “those steps needed to move the provisions of an international regime from paper to practice” (Young 1998:5). National ratification of the treaty is such a step, which is a

¹³ These stages are identical with Levy, Young and Zürn's division of regime formation into the stages of agenda formation, institutional choice and operationalisation (Levy, Young and Zürn 1995:282).

current ongoing process in the case of the ITPGRFA.¹⁴ Moreover, the operationalisation of several issues is still to be settled by the Governing Body before the ITPGRFA fully can be implemented.¹⁵ Thus, in terms of regime formation, the ITPGRFA is currently in the latest stage.

Table 2.2: The Formation of the ITPGRFA

<i>Stages of formation</i>	<u>Agenda formation</u>	<u>Negotiations</u>	<u>Operationalisation</u>
<i>Time phases of the ITPGRFA process</i>	Ca 1979-1994	1994-2001	2001-
<i>Object of this analysis</i>		the agreement: ITPGRFA	

The negotiation phase is the “central and most extensively studied stage” (Young 1998:5) and is the subject of this analysis. However, these analytical distinctions are not always easy to maintain in practice. Thus, I will notably make references to the agenda formation stage in instances when events here have implications for the negotiations to come.¹⁶

Studies of regime effectiveness have mainly concentrated on two aspects: first, whether the collective problem in a specific issue-area has actually been solved (in the environmental context this means solving environmental problems) and second, whether the regime has affected the behaviour of the actors (Wettestad 1999:8-9). Because the ITPGRFA is still in the formation stage, it is premature to study its effects and this will not be covered here. My explicit focus is, once again, on regime formation.

The negotiation stage ended with the adoption of the ITPGRFA, which from now on I will refer to as the *negotiation outcome*. Scholars of international relations differ as to how they explain the formation of regimes and their expectations about the negotiation outcome. Broadly speaking, the power-based, interest-based and knowledge-based perspectives are the main schools of thought in regime theory (Hansenclever, Mayer and Rittberger 1997:1-2). I will use all these perspectives to explain the negotiation outcome. The negotiation outcome is therefore my *dependent variable*, because it is the factor to be explained. A variable is an empirical property that appears with two or more values (Frankfort-Nachmias and Nachmias 1992:54). Variables indicate that the empirical properties may vary as to extent, strength or quality of the empirical property. The variables that are expected to explain change in the dependent variable are referred to as

¹⁴ By 31st of March 2004, 48 countries have ratified the treaty. Hence, it will enter into force 29th of June 2004.

¹⁵ For example, the question of how to transfer the provision into the standard Material Transfer Agreement (MTA) into practice still remains to be solved. MTA are agreements between providers and recipients of PGR on the conditions for receiving materials from the Multilateral System. The CGRFA, acting as an Interim Committee for the treaty, set up an expert group to work on this issue at its first meeting in October 2002.

¹⁶ For studies of the politics of plant genetic resources before 1994, see for example Pat Mooney (1983), Cary Fowler and Pat Mooney (1990) and Robin Pistorius (1997).

independent variables or *explanatory variables*. I will identify my independent variables within the regime perspectives, but must first further elaborate on my dependent variable.

2.2 Dependent Variable: The Negotiation Outcome

To what extent did developing countries experience a breakthrough for their request for Farmers' Rights? In this section, I will describe the measurement of such a breakthrough.¹⁷

I regard the developing countries' proposals and expressed will on Farmers' Rights during the negotiation process as highly relevant. The report of the Working Group on Farmers' Rights convened 10-11 December 1996 (FAO 1996b) is the first document from the negotiation process to systematically present the views and opinions of different identified actors. Three opposing texts are proposed: one from "EC" (the European Community) amended by China and Japan, one from "US" (the United States) and one from "developing countries".

My analysis of the negotiation outcome will consist of a comparison between the treaty text and the proposal on Farmers' Rights presented by the developing countries, as reflected in the 1996 report. I assume that the negotiation outcome may vary concerning the *degree* of breakthrough for the developing countries. I have chosen to distinguish between three values: strong, medium and weak.

- *A strong breakthrough* implies a high correspondence between the positions of the developing countries on Farmers' Rights and the text on Farmers' Rights in the treaty. Furthermore, there should be compulsory legal obligations for the contracting parties to implement these rights.
- *A medium breakthrough* involves only a partial correspondence between the positions of the developing countries on Farmers' Rights and the text on Farmers' Rights in the treaty. It may still be regarded as a medium breakthrough even though few legal obligations follow, provided there is correspondence.
- *A weak breakthrough* presupposes that Farmers' Rights are totally excluded from the treaty or that such rights are included to an insignificant extent.

Similar to my regime definition, this is a formal definition of potential values of the dependent variable. For example, establishing compulsory legal obligations for the contracting parties to implement Farmers' Rights indicates a strong breakthrough for the

¹⁷ See the next chapter for a methodological discussion on the operationalisation of the dependent variable.

developing countries. Nevertheless, I want to stress the evident fact that “[n]egotiations that do not end in agreement on legal provisions may still establish or reinforce important non-legal rules” (Malnes 1995:95). Thus, even without a strong recognition of Farmers’ Rights, the concept still has the potential to give prominence to certain normative principles that many states seriously will consider acting on in most situations where they apply –like a “tacit regime”. Similarly, strong recognition in the treaty is insignificant if the provisions are not implemented (“dead-letter regime”). The clearly described, but never materialised international fund for the realisation of Farmers’ Rights in the International Undertaking illustrates the lacking practical significance of a dead-letter regime.¹⁸

In order to broaden the basis for an analysis of the negotiation outcome, I will adopt Biermann’s approach (Biermann 2002) as a supplement. Biermann’s proposed method for an assessment of the South’s influence on international environmental agreements involves comparing the outcome of the negotiations according to three indicators (Biermann 2002:6):

- Variation in the degree of differentiation of norms among actors;
- Variation in the degree of international resource transfers among actors required by the negotiated regime;
- Variation in the degree of participation of actors in decision-making under the negotiated regime, as evidenced for example by voting rights or the legal force of the decision-making powers of different bodies.

While the different responsibility between the North and South for implementing Farmers’ Rights may possibly be found in the negotiated text, the next two indicators could be harder to evaluate at the present stage of the ITPGRFA. The financial mechanism is still subject to negotiation and will be discussed by the Governing Body as soon as the treaty enters into force. It is therefore not possible at present to precisely decide the degree of potential resource transfer from the North to the South. In addition, I consider these indicators to be more useful when analysing the whole agreement. For example, I do not expect a provision on Farmers’ Rights to describe decision-making procedures for the regime. Therefore, I consider Biermann’s method less appropriate for assessing the degree of breakthrough for the developing countries when only focusing on Farmers’ Rights. However, the content of the rest of the treaty may be significant for understanding the recognition of Farmers’ Rights. Hence, I will provide tentative estimates of the indicators suggested by Biermann to get a more general understanding of

¹⁸ FAO decided in 1991 that an international fund is the best way to implement Farmers’ Rights (Resolution 3/91).

the influence of the developing countries in the ITPGRFA.

2.3 Independent Variables: Power, Interests, Institutions and Knowledge

The aim of this section is to identify independent variables within the schools of thought in regime theory. Within each perspective, I will start with a general view and go on to detect basic variables. In conclusion, I will make specific propositions regarding the degree of breakthrough to expect for the developing countries. This will later guide my analysis of the negotiation process in order to understand the negotiation outcome.

2.3.1 Power-based Explanations of Regime Formation

The power-based explanation builds on the neo-realist assumptions that states are the central actors in international relations and that they can best be described as unitary, rational actors, seeking to maximise their own self-interests. “Rational” means that the actors have complete information about their own and others’ preferences and their options for action. According to Underdal (1998a:7) the rational actor model builds upon three basic assumptions:

1. States are unitary, rational actors.
2. Decision-makers evaluate options in terms of costs and benefits to their nation, and only in those terms, and choose whichever option (is believed to) maximise(s) net national gain.
3. States are in full control of “their” societies.

The distribution of power is the major variable for neo-realists. States deploy power resources in pursuit of their preferences. Furthermore, neo-realists assume an international condition of anarchy due to the lack of a central authority. Under anarchy, each state bears exclusive responsibility for safeguarding its own survival and independence. States must therefore protect their capacity for self-help, and this capacity is a function of their relative power capabilities. The strength of one state is measured in relation to the strength of other states. The general content of the national interest is thus determined deductively; it is inferred from the anarchic, self-help character of the international system (Weldes 1996:277). Concerns about relative gains affect the utility functions of states, so that the gains of another state detract from one’s own level of satisfaction (Griceo 1988:500). Together with the notion of distributive bargaining¹⁹, the concern for relative gains makes international co-operation difficult.

¹⁹ In distributive bargaining the states negotiate about fixed values in a zero-sum game (Hopmann 1996). The states try to maximise their own utility at the sacrifice of the other states.

Following these assumptions, the power-based explanation predicts that the interests of dominant state actors will determine international agreements between highly asymmetric actors in high-salient issues. As Waltz (1979:131) writes:

[t]he theory, like the story, of international politics is written in terms of the great powers of an era. ... In international politics, as in any self-help system, the units of greatest capabilities set the scene of action for others as well as for themselves.

This assumption has given rise to the *hegemonic stability theory*, i.e. the view that the presence of a hegemon (a single power or a powerful coalition that includes most great powers) is necessary in order to create and maintain a regime.²⁰ The dominant regime member cannot only use power capabilities to pursue narrow self-interests, but also to accept disproportional costs in order to obtain a public good.

Stephan Krasner has specified ways by which state power can be exercised to produce international co-operation, *inter alia* a state with more military and economic resources can use threats or promises to manipulate others' preferences in order to achieve the result favoured by the more powerful actor (Krasner 1991:340; see also Young 1991:289). Bargaining leverage may also be derived from unequal opportunity costs of change, given the possibility of the strongest actor (usually the one with the greater overall capabilities that is not so dependent on co-operation) to get his way by credibly threatening to walk away from the table if the other side fails to be more forthcoming (Krasner 1991:363).

As a general theory of regimes, the notion of hegemonic stability has had little empirical support (Hansenlever, Rittberger and Mayer 1997:198; Levy, Young and Zürn 1995:284). Besides, high politics, like security, is the main concern for scholars within this approach. They have thus largely ignored international environmental co-operation (Mitchell 2002:504). The issue of Farmers' Rights is far from high politics, since it is about the conservation of PGRFA, food security and small-scale farmers in developing countries. Even so, I will also apply a neo-realistic approach when analysing the negotiation process in FAO, because it will draw my attention to the role of the most powerful states.²¹ In this context, I understand power in the sense of relative position in world politics. In the post-World War II period, the United States²² has been the major superpower and the only superpower after the collapse of the Soviet Union. The

²⁰ See for example Stephen Krasner (1985) or John Mearsheimer (1995).

²¹ Susan Strange (1988) has suggested defining powerful states by the security system, production system, finance system and knowledge system.

²² Keohane (1984) claims in his book *After Hegemony* that the time of a dominant hegemon has past. Strange (1987) on the contrary gives a forceful presentation of the view that the dominance of the United States in international affairs persists.

European Union and other members of G-7²³ –Japan and Canada– also have a strong influence on world politics. I assume that the powerful states' ability to influence politics increases with a higher convergence of their interests.

Following the assumptions within the power-based explanations of regimes it is very difficult to reach an agreement between competing states. Structurally powerful states can gain bargaining power as they have less to lose if agreement is not reached. These states can also pursue their interests during the formation phase through coercion and positive incentives. Hence, I will present the following proposition:

P1: The international negotiation outcome will reflect the interests of the dominant regime members, making a weak breakthrough for the developing countries the most likely outcome. Alternatively, a weak breakthrough with a diluted recognition of Farmers' Rights is possible as a lip service.

2.3.2 Interest-based Explanations of Regime Formation

Interest-based approaches constitute the main approach among theories of regimes. Among the most important theories is Keohane's functional or contractualist regime theory (Hansenclever, Meyer and Rittberger 1997). He builds on the neo-realistic assumption of states being unitary, rational actors, but his original objective was "to show, on the basis of their own assumptions that the characteristic pessimism of Realism does not necessarily follow" (Keohane 1984:67). A central premise in Keohane's theory is the fact that states in several issues have common interests that can only be realised through co-operation. International politics is not necessarily considered a zero-sum-game; it is also possible to create win-win-situations. The assumption that states are only concerned about absolute gains and not about what other states may gain from the co-operation further increases the prospects for co-operation.

Nevertheless, it is important to stress that states are assumed to pursue their self-interests when co-operating with other states. Keohane draws heavily on modern economic theories and uses rational choice models like the Prisoners' Dilemma in his analysis. The point of departure in this dilemma is two actors who prefer to co-operate rather than refrain from co-operation, but both actors will gain more if only the other actor co-operates. The result of the game is that both actors refrain from co-operating: no matter what the other actor does, it will be beneficial not to co-operate. Thus, individual

²³ The G-7, also known as the Group of Seven, is comprised of the seven industrialised democracies of the world: Canada, France, Germany, Italy, Japan, the United Kingdom, and the United States. The G-7 was formed in 1975 when the heads of state of six leading industrial nations met in Rambouillet, France to discuss issues of

rationality often results in collective sub-optimal outcomes due to problems of co-ordination and fear of cheating. This fear is created by an uncertainty about other states' objections and commitment. The contractualist theory sees international regimes as an essential instrument that states can use to overcome this dilemma and achieve common gains. Regimes function in this way by providing information (Keohane, 1984:97). For example, monitoring arrangements make information about others' compliance available and thus reduce uncertainty and reduce the fear of cheating.

While Keohane's and other game theory approaches to international co-operation deal with negotiated regimes, they pay little attention to the bargaining process itself (Hansenclever, Meyer and Rittberger 1997:193). Oran Young, on the other hand, has developed a model of regime formation that he refers to as "institutional bargaining"²⁴. Young's perception of states as selfish actors is in line with general interest-based perspectives, though his model does not fit neatly into this category as it includes elements closer to the knowledge-based perspective. One of his assumptions is that parties in institutional bargaining regularly act under a "veil of uncertainty" regarding their own future positions and interests. Uncertainty is thus central to both Young's and Keohane's theories of regime formation, but the meaning and role of uncertainty is quite different (Hansenclever, Meyer and Rittberger 1998:73). While Keohane refers to an actor's uncertainty about what his counterparts will do (Will they keep their promises?), Young stresses a more fundamental uncertainty (What can we do and what can they do? What may result?). The effect of Keohane's account of uncertainty is to motivate states to create regimes that serve to reduce uncertainty. In Young's model, however, uncertainty is a condition that enables actors to form regimes (ibid.).

Institutions may help overcome obstacles to international co-operation and help to utilise the integrative potential among selfish states. Thus, the interest-based perspective looks at the *interplay* between interests and institutions. Arild Underdal has categorised major institutional factors into *institution-as-arena* and *organisation-as-actor* (Underdal 1997b). Based on this definition, I will differentiate between arena and actor, but will link actor to leadership rather than solely to organisation because various actors –not necessarily connected to organisations– may affect agenda setting (given a flexible agenda).

Institution-as-arena

global concern such as world economic stability, international trade, and economic development in the poorer regions of the world. Russia joined the group in 1998.

²⁴ This is short for bargaining with the aim of establishing an institution.

An important effect of *institution-as-arena* is the facilitation of meetings between the different states, where they learn about each other's interests. Factors associated with arena are primarily associated with how the formal *rules and procedures* may affect the parties' rational choices in negotiation games. In line with Krasner's definition of regimes, this can also include the influence of underlying *norms and principles* on actors' perceptions of their cost-benefit calculations. Important here are the *decision-making rules*, with a distinction between majority voting and consensus rules. International negotiations on environmental issues operate in general on a consensus basis; hence, this factor cannot explain variation in results in international environmental agreements (Rosendal 1999:69). However, the one-country one-vote principle in the agencies of the United Nations, gives "meat power" to the numerous developing countries. Furthermore, rules also include formal and informal codes for conducting the negotiations. For example in FAO, it is common to discuss one article at the time, and when consensus is reached on one article, the issue is usually settled. Another factor associated with arena is the inclusion of all relevant parties, which affects the political feasibility of finding a solution, leading to what Arild Underdal has called *the law of the least ambitious program* (Underdal 1980:36).²⁵ The more parties, the harder it is to find a solution. The goal is to circumvent this law, and leadership may be helpful in this regard.

Entrepreneurial Leadership

Young regards leadership as a necessary (though not sufficient) condition for regime formation (Young 1991). Among his three models of leadership, *entrepreneurial leaders* are associated with the interest-based perspective (Rosendal 1999:71).²⁶ To Young, such a leader is "an individual who relies on negotiation skill to frame issues in ways that foster integrative bargaining and to put together deals that would otherwise elude participants" (Young 1991:293). Such framing can be accomplished in many ways, through skilful agenda setting, popularisation of issues and the construction of inclusive package deals (Young 1991:294). I understand package deals as different from compromises in that compromises generally are about giving and taking on one issue, while package deals involves several different issues. Discussing several issues at the same time increases the possibility of reaching an agreement because different issues often are interlinked.

The entrepreneurial leader resembles what Raino Malnes calls a *problem-solving leader*

²⁵ The law says that "Where international management can be established only thorough agreement among all significant parties involved, and where such a regulation is considered only on its own merits, collective action will be limited to those measures acceptable to the least enthusiastic party" (Underdal 1980).

(Malnes 1995:100). However, the two differ in that the former focuses only on strategy, while the latter also includes a dimension of motivation. A problem-solving leader does not negotiate with the view to maximise returns for him-or herself, as “...their activity qualifies as leadership only if self-interest takes second place to collective goals” (Malnes 1995:94). The label given to an individual attempting to alter institutions and the texture of negotiations is of minor importance for my purpose. In my analysis it is important to know what the actors have done, not what their motivations were for acting as they did.²⁷ Hence, I will stick to the term entrepreneurial leader.

Different actors such as individuals, the secretariat, NGOs or formal delegates can act as *entrepreneurial leaders* (Underdal 1991; Young 1991). Secretariats are believed to often have the best qualifications for fulfilling the role as entrepreneurial leader since they are the only actors that are independent of national interests with an institutional role and memory (Andresen and Skjærseth 1999:7).²⁸ There are at least three requirements for fulfilling this role: first, the secretariat must be able to develop and maintain good relations with member countries (for example ensure credibility both in the North and South); second, there must be a mandate that opens for an active role for the secretariat and finally, the secretariat should also have sufficient funding to carry out its tasks properly (ibid.). Nevertheless, an actor does not have to hold a formal position in an organisation to be such a leader, informal status may also be a source of legitimacy and respect that paves the way for leadership (Underdal 1991:147). Informal status is partly a matter of personal reputation, seniority etc, but can also depend on the political orientation and the prestige ascribed to the government he or she represents. As entrepreneurial leadership is largely based on *individual* skills and status, it is a role to which also representatives of small countries can aspire. In case of mediation, representatives from small countries may even find themselves in an advantageous position compared to their great power colleagues (Underdal 1998b:107). The potential of NGOs to play a leading role in this sense is limited by the fact that they only take part in international negotiations as observers. Still, depending on personal skills and status, representatives from NGOs could potentially act as entrepreneurial leaders.

²⁶ Young (1991) distinguishes between structural, entrepreneurial and intellectual leadership.

²⁷ Besides, my decision on this issue is in part pragmatically due to methodological considerations. It is relatively easy to gather information about the actions done by actors, but it is hard to get facts on the motivation for their behaviour.

²⁸ For a critical view of the potential role of secretariats of international organisations in this regard, see for example Andrew Moravcsik (1999): “A New Statecraft? Supranational Entrepreneurs and International Cooperation”.

Issue-specific power

Keohane's optimistic argument for international co-operation builds on the notion of *complex interdependence*. The point of interdependence is that unilateral efforts are insufficient, making State A dependent on co-operation with one or more other states in order to maximise its welfare. This creates an integrative potential. However, interdependence is not only situations of evenly balanced mutual dependence (Keohane and Nye 1977:10). There are also *asymmetries* in dependence in specific areas, which can provide sources of influence for actors in their dealings with one another. This gives rise to the idea of *issue specific power*, i.e. a kind of power that is not defined or limited by overall material capabilities (which is the kind of power that is central in power-based perspectives). Underdal divides issue specific power into two components (1997a:17):

- *basic game power*: parties' control over the resources in question as well as their economic and technological capacity to make use of the resources (bargaining leverage).
- *negotiation power*: capabilities based on strengths in numbers, coalitions and leadership.

Basic game power is a source of power that is independent of the negotiations, in contrast to negotiation power, which is a potential strength only during the negotiation stage. Frank Biermann's notion of a *Southern eco-power* in situations of ecological interdependence (Biermann 2002) can be divided into these two components. He claims that Southern eco-power gives developing countries bargaining leverage in negotiations of international environmental agreements because Northern governments believe that the South's participation in the regime is necessary to solve the environmental problems (basic game power), but this is only a source of power if Southern governments adopt a coherent negotiation strategy that is fronted by effective leadership (negotiation power). Such *group leaders* differ from entrepreneurial leaders. While the latter strive for consensus, the former promote the interests of the group.

Biermann makes an interesting observation when he states that Northern governments' perception of the necessity of Southern participation depends on their perception of *political* vulnerability rather than *ecological* vulnerability (Biermann 2002: 19). This is based on his assumption that the main concern of Northern governments is to stay in power, and solving environmental problems comes second. In evaluating basic game power, control over plant genetic resources as well as biotechnological capacity to utilise these resources is relevant. Following Biermann's argumentation, however, an

assessment of basic game power also has to be sensitive to *perceptions* and *concerns* for scientific facts as well as the scientific facts per se.²⁹

Summing up

Institutional factors mentioned here may align or alter the interests of the parties, by changing their cost/benefit estimate in order to maximise their own returns. This may increase the feasibility for reaching common solutions. According to Oran Young, interests and institutions are the driving forces that dominate the negotiation stage (Young 1998:21). This is also the stage of regime formation where entrepreneurial leadership is assumed to loom large. Hence, I present the following proposition:

P2a: When arena mechanisms of an institution facilitate the development of an agreement between self-interested countries, it usually involves giving and taking by all parties. Presumably, the developing countries will gain something during such a process. Hence, there is a potential for a strong breakthrough for them.

P2b If entrepreneurial leaders frame issues in such a way that the demands of developing countries are addressed in a favourable way for them, a strong breakthrough for developing countries is possible.

P2c If developing countries have issue specific power, they have a chance to get their interests reflected in the negotiation outcome. Thus, a strong breakthrough is possible.

All these propositions are formulated in a positive way as regards the potential reflection of the developing countries' proposals in the outcome. However, predictions from assumptions within the interest-based perspective are not as explicit as those of scholars within the power-based perspective. Therefore, I use the words "potential" and "possible" instead of "likely", because the effect of the institutional factors may be a modification of developing countries' initial positions as a correction of the positions of the powerful countries.

2.3.3 Knowledge-based Explanations of Regime Formation

Cognitivists are critical to rationalist theories of international politics, both neo-liberal and realist. The common flaw of these theories, from a cognitivist's point of view, is that they treat states' identities and interests as exogenously given, i.e. not as explanatory variables. Proponents of knowledge-based approaches argue that the processes that produce the self-perceptions of particular states (i.e. their identities) as well as the objectives which

²⁹ As we are just about to see, the impact of science and the focus on perceptions are important element in the knowledge-based perspective.

they pursue in their foreign policy (i.e. what they perceive to be in their interests) are shaped by the normative and causal belief systems held by decision makers and that consequently changes in belief systems can trigger changes in policy (Hansenclever, Meyer and Rittberger 1997:136).

Ideas and knowledge play a role in shaping the perceptions and preferences of actors involved in international co-operation. If interests are unknown or incompletely specified, consensus about policy-relevant understanding can contribute to shaping regimes. States are still seen as central actors in international relations, but domestic and trans-national actors must also be included in an explanation of regime formation. According to knowledge-based perspectives, a cost-benefit analysis is not the only basis for predicting state interests and actions. Norms and knowledge may also affect the negotiation outcome through learning and norm diffusion. This may take place through the activities of intellectual leaders.

Intellectual Leaders

Intellectual leaders are defined as individuals engaged in dissemination of new ideas about the desirability of certain arrangements (Young 1991: 288; Malnes 1995:101). Motivated by collective goals, their strategies are attempts to influence national objectives and beliefs. Intellectual leaders may confine their efforts to the generation of ideas rather than to the application of these ideas, therefore “they generally have little ability to control the uses that others make of their ideas” (Young 1991:301). Hence, ideas and intellectual leadership are particularly prominent during agenda formation (Young 1998:21). At an early stage of the regime formation phase, states may not have clarified their interests yet, and consequently may be more susceptible to the influence of ideas and scientific knowledge.

A wide range of actors can act as intellectual leaders, for example representatives from epistemic communities, national delegations or NGOs. *Epistemic communities* are “networks of knowledge-based communities with an authoritative claim to policy-relevant knowledge within their domain of expertise” (Haas 1993:179). Peter Haas and other scholars have focused on the process by which the views of scientists gain acceptance among, and are acted upon by, decision-makers. They argue that epistemic communities are crucial “channels through which new ideas circulate from societies to governments as well as from country to country” (Haas 1992:27). Under conditions of complex

interdependence and generalised uncertainty, specialists can play a significant role in attenuating such uncertainty for decision-makers. Scientists and the epistemic communities they constitute can play significant roles during the period of agenda setting, by raising concerns, clarifying environmental impacts and proposing solutions (Haas 1990:224).

According to Haas (1992:3) epistemic policy co-ordination is only likely to occur in the presence of (1) a high degree of uncertainty among policymakers, (2) a high degree of consensus among scientists, and (3) a high degree of institutionalisation of scientific advice. Considering the first condition, Peter Haas argues that the increasing complexity of global problems give rise to demands for scientific understanding. His notion of *uncertainty* is therefore more similar to Young's perception of uncertainty than Keohane's. However, while Young assumes that high uncertainty about the consequences of different arrangements improves the prospects for states to come to an agreement, Haas presumes that the reduction of scientific uncertainty improves such prospects. With regard to the second condition, scientists or other experts with knowledge relevant to the issue-area have to organise themselves as an epistemic community to share beliefs about causal relationships and appropriate means to solve the problems at hand. Finally, the members of an epistemic community must gain political legitimacy by becoming part of the bureaucratic apparatus.

There are limitations to the theory of epistemic community, since they emphasise large homogenous communities of experts (Andersen 1999:23). In reality, other actors than professionals also influence policy, not least among the Non-Governmental Organisations (NGOs). Furthermore, these actors may be divided into more fragmented groups than the large homogenous communities which are referred to as epistemic communities.³⁰ For instance, international NGOs like GRAIN³¹ and RAFI, (now ETC group)³² can be viewed as part of a coalition working in favour of an international recognition of Farmers' Rights, while the UPOV-secretariat and the International Association of Plant Breeders (ASSINSEL) can be viewed as part of a competitive coalition working against such recognition. Other individuals taking part in the

³⁰ The concept of advocacy-coalition-networks (Jenkins-Smith and Sabatier 1993) includes other civil society actors and more differentiated groups, but since Haas also writes about competing epistemic communities, I will stick to this term.

³¹ GRAIN - Genetic Resources Action International - is an international non-governmental organisation, which promotes the sustainable management and use of agricultural biodiversity based on people's control over genetic resources and local knowledge (<http://www.grain.org/front/>).

³² ETC - Action Group on Erosion, Technology and Concentration (<http://www.etcgroup.org/about.asp>).

negotiations, such as national delegates, can also act as intellectual leaders. This diversity of potential intellectual leaders stresses the fact that science, knowledge and ideas are not devoid of values or interests. Such leaders may use the scientific term for what they propose in order to increase its credibility or legitimacy, but the policy advocated by for example epistemic communities may also be the reflection of some specific interests. Moreover, NGOs usually have a clearly defined policy and specific preferences that may differ from what can be called science.

Norm Diffusion

International negotiations can be an arena for learning and internalisation of norms. The nature of environmental politics makes it sensitive to cognitive factors such as scientific knowledge, exchange of ideas and processes of argumentation (Litfin 1994:3). Proposing to reconstruct processes of regime formation and change in terms of *learning*, this approach seeks to illuminate how new knowledge can influence the demand for rule-based co-operation among states (Hansenclever, Meyer and Rittberger 1997:139). One definition of learning is if changes in beliefs induce behavioural change, this process can be referred to as learning (*ibid.* 1997:145). The idea is that convergent expectations and recognisable norms are generated through repeated interaction and learning. A common acceptance of international norms and rules within issue-areas may affect state behaviour.

This process of learning is, however, very difficult to trace empirically and hard to separate from the result of repeated interaction, which may also influence actors' cost-benefit calculation. The latter would imply a strategic adoption of the idea, rather than a normative one. In an attempt to distinguish between these two reasons for adopting an idea, I will label adoption of the norm as *knowledge* and the inclusion of the idea in one's cost-benefit calculation as the result of *information*.

Oran Young has seemingly contradictory assumptions regarding which stage of regime formation that the cognitive perspectives have greatest explanatory power. On the one hand, he argues that ideas are particularly prominent during agenda formation (Young 1998:21). On the other hand, when looking at norm diffusion through interaction in specific arenas, ideas seem to play a role during the negotiation stage as well, as he puts it: "it is apparent that the power of ideas (..) and the concerns they engender are likely to loom larger and larger in institutional bargaining processes at the international level" (Young 1991:300). I think that these two predictions can be combined through the activities of entrepreneurial leaders. While ideas may highly affect agenda setting, ideas may also play a major role when entrepreneurial leaders use and amplify these ideas

during the negotiation stage. In addition, events in other arenas, like in CBD, WTO and UPOV, may also be important for norm diffusion.

Summing Up

The main complementary contributions from this perspective are the focus on how interests and ideas are formed and the more specific inclusion of other actors than states. In sum, intellectual leaders such as representatives of epistemic communities, national delegations and NGOs may teach state actors about new ideas such as Farmers' Rights and scientific knowledge about agro-biodiversity. Through learning and norm diffusion new ideas may obtain increased legitimacy. Hence, I present the following proposition:

P3 If intellectual leaders advocate knowledge and ideas that are favourable for developing countries claims on Farmers' Rights, and diffusion of these norms takes place, a strong breakthrough is possible.

This proposition is formulated in a positive way regarding the potential reflection of the developing countries' proposals in the outcome. However, there is also the potential existence of for example intellectual leaders who advocate knowledge and ideas contradictory to what is favourable for developing countries. This will logically reduce the possibility of a strong breakthrough.

2.4 Three Perspectives – One Model

The three approaches outlined here, neo-realism, institutionalism and the cognitive approach, have different explanations for the formation of regimes. *Realists* emphasise how power and considerations of relative power positions affect the content, and circumscribe the effectiveness and robustness of international regimes. *Neo-liberals* stress (self-) interests as a motive for co-operation among states and likewise for the creation of international regimes. *Cognitivists* point out that both the perception of interests and the meaning of power capabilities is dependent on actors' causal and social knowledge (Hansenclever, Meyer and Rittberger 1997:211).³³ Still, they are regarded as more complementary than incompatible (Haas 1995:200, Jønsson 1993:203, Keohane 1993:30).³⁴ Young, for example, stresses the importance of studying the interplay between

³³ I want to stress the evident fact that power without interests, and interests without power are hardly significant as explanatory factors. Rather, these perspectives put a different emphasis on the relative importance of interests and power.

³⁴ However, there are theorists who claim to 'prove' that 'their' approach is superior to others. For example Grieco (1988) argues that realism is likely to be proven analytically superior to neoinstitutionalism, Young (1989) claims that his model of institutional bargaining is superior to neorealist as well as mainstream utilitarian models in explaining the formation of regimes, and Biermann (2002) maintains that institutionalist theory

different kinds of leaders (Young 1991). The influence of the ideas of an intellectual leader will be minimal if there are no entrepreneurial leaders to put the ideas into action. Different theoretical perspectives are useful to highlight different aspects of the case, as Allison made a big point of in his classical article about the Cuba missile crisis:

...our understanding of such events depends critically on more self-consciousness about what observers bring to the analysis. What each analyst sees and judges to be important is not only a function of the evidence about what has happened, but also of the 'conceptual lenses' through which he looks at the evidence (Allison 1969:689).

Even though I have derived different hypotheses about the value of my dependent variable based on the various schools of thought, I assume that all three schools will help me explain the degree of breakthrough for the developing countries.

These perspectives may illuminate different aspects of international relations. Furthermore, they may be “activated” at different phases of the processes of regime formation (Rosendal 1999:50). For example, Young’s (1998) assumption, modified by Andresen and Agrawala (2002), can be summarised as follows: ideas and intellectual leadership are particularly prominent during agenda formation; institutional factors and entrepreneurial leadership loom large during the stage of negotiation, material conditions become increasingly significant in the transition between negotiation and operationalisation.

Despite the assumed complementarity of these perspectives, I do not consider them to have equal explanatory power. After all, the interest-based perspective makes up the main approach among theories of regimes, largely because such a viewpoint has proven fruitful when analysing the phenomenon of regimes. Some scholars within this tradition (e.g. Keohane) even started out by showing the infirmity of the power-based perspective. In addition, other scholars (e.g. Young) pay great attention to the very bargaining process. Since I have an explicit focus on regime formation and particularly the negotiation stage, I assume that the interest-based perspective will have highest explanatory power. Inasmuch as the perspectives are complementary, I also include the power-and knowledge perspectives. Although they may have less explanatory power, I assume that they shed light on aspects of the negotiation process that are important for understanding the specific breakthrough for the developing countries and which are ignored or insufficiently captured by the interest-based perspective.

In a multivariate analysis, Young and Osherenko add *context* to the power, interests and knowledge factors (Young and Osherenko 1993:239). They claim that the most

offers the most powerful explanation for the bargaining successes of Southern governments in global environmental negotiations compared to neorealist, neomarxist and constructivist approaches.

illuminating insights into the process of regime formation are revealed when studying the interactions of all these factors at the same time. Even so, I will study the explanatory perspectives one at the time. According to Rosendal one obvious rationale for drawing such an analytical distinction between the three perspectives rather than lumping all explanatory factors together in one mega-model, is to gain greater clarity in the analysis and presentation of the case (Rosendal 1999:50). I will follow the advice provided by Rosendal. However, I have to be aware of the limitations of this model.

Table 2.3: Analytical Model

Explanatory Perspectives	Causal Mechanisms	Effect on Negotiation Outcome
Power-based	<ul style="list-style-type: none"> • Coercion and positive incentives 	<ul style="list-style-type: none"> • Weak breakthrough for developing countries likely
Interest-based	<ul style="list-style-type: none"> • Entrepreneurial leadership • Strategic modification of cost/benefit calculus 	<ul style="list-style-type: none"> • Strong breakthrough for developing countries possible
Knowledge-based	<ul style="list-style-type: none"> • Intellectual leadership • Learning and norm diffusion 	<ul style="list-style-type: none"> • Strong breakthrough for developing countries possible

It is not hard to think of other variables not covered by the three explanatory perspectives that may have influenced the formation of the International Treaty. Economic and technological development and external shocks are sometimes pointed out as explanatory variables not covered by the three schools of thought.³⁵ Nor does the model deal with the role of other international agreements. As elaborated on in Chapter 1, these variables are not included in this analysis in order to reduce the complexity.

³⁵ Nevertheless, Oran Young does include external shocks in his model of institutional bargaining.

Chapter 3: Methodology

The aim of a research design is to link the data to be collected to the initial questions of a study. Interesting research questions have little value alone, if the search for answers is not well guided. Two issues will be discussed in this chapter: the case-study approach and the choice and use of sources.

3.1 Case-study Approach

3.1.1 Designing a Case-study

The general purpose of case studies is to analyse few subject matters in order to study the material in-depth (Andersen 1997:121). Yin (1994: 13) defines the use of a case study approach as appropriate for the study of “[...] a contemporary phenomenon within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident”. The research questions I have proposed demand an intensive research design in order to be answered, making the case-study approach appropriate. Furthermore, this is an *interpretative* case study as it is chosen due to an interest in the case per se, rather than for the purpose of theory building (Lijphart in Andersen 1997). I use theory to organise and understand a complex real world situation with many data available. Theory should not be too general as the link between theory and data will be unclear (Andersen 1997:70). The theoretical perspectives have helped me to systematise these data.

I have used contributions from a general theoretical tradition within international relations: regime theory. However, instead of giving an outline of *all* aspects of this grand theory, I have focused on elements that I believe shed light on what has been important during the negotiations for the International Treaty. I have strived to produce propositions that are as precise as possible in order to approach the ideal of designing falsifiable hypotheses. For example, if the US intensely resists the developing countries’ proposals for Farmers’ Rights, and the concept nevertheless is strongly recognised in the treaty, the explanatory power of the power-based perspective is weakened. Similarly, I have investigated the assumptions derived from the other perspectives.

My use of three explanatory perspectives is an example of theoretical triangulation. *Triangulation* refers to the use of multiple methods to gather in-depth knowledge of different dimensions of a research question. As Sauvè and Watts (2003:312) put it: “What is not seen using one method, can be revealed by using one or more other methods to

examine the same issue.” Triangulation by *methodology* when studying international negotiations can involve process tracing and counterfactual analysis (Betsill and Corell 2001). *Process tracing* (or “detailed case-study”) is an approach in which the researcher looks at the decision process by which various initial conditions are translated into outcomes (King, Keohane and Verba 1994:226). Instead of treating the ultimate result (i.e. the final text of the ITPGRFA) as the dependent variable, new dependent variables are constructed, for example each decision in a sequence, or each set of measurable perceptions by decision-makers of the actions and intentions of others, becomes a new variable. What was for example Ethiopia’s perception –a developing country actively promoting Farmers’ Rights– of the intentions of the powerful states? Did NGOs support the developing countries’ proposal for Farmers’ Rights? By tracing what happened during the negotiation process, starting at the “end” with the negotiation outcome, and moving back in time to the start of the negotiations, I have tried to identify the causal relationship of my variables.

The internal validity³⁶ is also strengthened *counterfactually* when I study the difference between the real negotiation outcome given the actual value of the independent variables and an expected negotiation outcome when one examined independent variable was removed from the chain of events (King, Keohane and Verba 1994:81). Is it possible to imagine that the Farmers’ Rights Article would have been different had I not studied the organisation of the negotiations (“institution-as-arena”)? Thus, a counterfactual analysis is a useful way of ruling out alternative explanations.

A Remark on my Dependent Variable

As the operationalisation of my dependent variable is not obvious, I will now give a thorough explanation of it. Initially, I was interested in studying the degree of recognition of Farmers’ Rights, but was soon faced with the problem of operationalisation. How can one determine the extent to which these rights actually were recognised? The lack of a clear-cut universally accepted definition of Farmers’ Rights before the negotiations started made this a difficult task. One option was to use the proposal of developing countries as comparison, i.e. the *theoretical* dependent variable (recognition of Farmers’ Rights) is made measurable by using the developing countries’ proposal on Farmers’ Rights as an *empirical* dependent variable. This could be justified by the fact that Farmers’ Rights have always been associated with the interests of the South in the FAO discussions. Thus, I would

have assumed that the Farmers' Rights proposal from the developing countries and an *a priori* meaning of Farmers' Rights were synonymous. However, during the negotiation of the International Treaty, several of the elements of Farmers' Rights suggested by developing countries were perceived to represent a too comprehensive understanding of these rights (Crucible II Group 2000). Hence, this operationalisation would imply severe validity problems because measuring the degree of breakthrough of the developing countries' proposal does not necessarily mean measuring the degree of recognition of Farmers' Rights. In an attempt to circumvent this operationalisation problem, I have therefore specified my dependent variable to be the breakthrough of the *developing countries'* request for Farmers' Rights.

Solving one problem, creates another, however: how is it possible to look upon developing countries as one group? Among the former colonies of the Western powers there is a great diversity regarding size, political systems, economic structure and culture. Despite this diversity, the developing countries have since their independence mainly collaborated in the United Nations under the umbrella of Group of 77 Developing Countries (G-77). This group is still frequently referred to as G-77 even after the number of developing countries joining the group has increased. Furthermore, the seeds issue has a historical background as a North-South conflict area (see for example Fowler 1993). Thus, the inclusive term, "developing countries", seems the most simple, broadly used, and intuitive suitable term available (Rosendal 1999:5).³⁷ Finally, the developing countries presented a common proposal on Farmers' Rights in 1996. This fact has been crucial when I decided to apply the breakthrough for the *developing countries* as my dependent variable.

When defining the value of the dependent variable, I compare the negotiation outcome with the proposal on Farmers' Rights presented by the developing countries in 1996. The rationale behind this choice is first, to create a clear basis for comparison and second, to avoid the enormous task of categorising every single intervention by the developing countries during the discussions on Farmers' Rights. Besides, before 1996 the positions of the different countries were generally not well worked out, and therefore not accurately reported in FAO documents. One apparent weakness of this

³⁶ Based on Yin (1994), I understand *internal validity* as the establishment of a causal relationship, whereby certain conditions are shown to lead to other conditions, as distinguished from spurious relationships.

³⁷ For the main part of this study, I shall apply the terms "developing countries", "the South" and "G-77" interchangeably. For a recent review of the applicability of such terms, see Shahid Qadir (2004) (ed): "Special Issue: After the Third World?".

operationalisation, however, is the fact that various countries' positions on an issue may change, especially during such a long negotiation process, as was the case for the ITPGRFA. Nevertheless, the three proposals on Farmers' Rights from 1996 (from the developing countries, the EC and the US) constituted the negotiation text for the next years to come, until 1999 – the year when the Farmers' Rights Article was agreed on. By adding Biermann's method for assessing the influence of the South, I hope to balance for this weakness of my approach. In summary, I will argue that my operationalisation and measurement of the dependent variable are pragmatic and workable rather than perfect.

3.1.2 A Case of “Southern Power”?

The objective of selecting a case-study approach is to gain more insight into the formation of the ITPGRFA. However, political science is a nomotetic discipline with the ambition to make generalisations. Hence, a typical criticism of case studies is the lacking potential to draw conclusions from one case to a universe of cases. Obviously, case-studies are not appropriate for such *statistical* generalisation, no matter whether it is a single case-study or a multi-case study. Rather, the use of theory to facilitate the data collection phase opens a possibility for *analytical* generalisation (Yin 1994:30). In an analytical generalisation, a previously developed theory is used as a template with which to compare the empirical results of the case study. Regime theory is my point of departure, but what is my study a *case of* more precisely? I will base my answer on Frank Biermann (2002).

When studying the role of developing countries in international environmental negotiations, he claims that the South has gained a new form of power vis-à-vis the North which he terms “Southern eco-power” (Biermann 2002). Biermann finds evidence for such power when studying the negotiation outcome of the ozone regime (*ibid.*). The issue of agro-biodiversity is closely related to environmental questions as it concerns loss of biodiversity (genetic erosion). Besides, the aim of renegotiating the International Undertaking was to bring it into harmony with the CBD, which arguably is an international environmental agreement.³⁸ However, the issue of agro-biodiversity far exceeds the scope of being merely of environmental concern. Management of PGRFA includes topics like ownership of genetic resources, food security, trade in agriculture goods, access to traditional and enhanced PGRFA and benefit sharing (see next chapter). Thus, to talk about potential *eco*-power in this case is deceptive. Instead, I will skip the

³⁸ The convention was negotiated under the United Nations Environmental Program.

“eco” prefix, and talk about “Southern power”. Developing countries presented Farmers’ Rights as a symbolic “South-issue” during the negotiations. Thus, the extent to which the concept is recognised in the International Treaty could therefore be regarded as evidence of Southern power.

The forum where state actors meet and negotiate is not irrelevant for the power relation between them. Regarding the issue of genetic resources, Fowler (1994:206) writes:

Different arenas can facilitate the framing and linkage of issues. The United States could not easily link intellectual property rights issues with trade sanctions at FAO. It could and does at GATT. Thus, the choice of arenas (...) can virtually determine who will be able to frame or define the issue and how – a very useful position for an actor.

FAO is hence a relatively favourable arena for the developing countries. The study of their breakthrough in this UN forum is therefore a *most likely case*, with high probability of finding evidence of Southern power. If it does not happen here, it is also less likely to occur in other situations. The breakthrough for developing countries in the ITPGRFA negotiations could in this sense be used to confirm, challenge or extend theories of regime formation with regard to the role of developing countries.

3.2 Sources of Information

I have gathered data from a variety of sources which can be categorised in primary and secondary textual documents and interviews. The aim has been to pick sources that have different biases, and strengths, so that they can complement each other. Primary documents include the final text of the ITPGRFA, drafts negotiated along the way toward the final version, the official FAO reports of each negotiation session, country statements and NGO lobbying materials. I have accessed a main group of primary sources from the archival records of the Norwegian Ministry of Agriculture. These documents are mainly internal reports of the negotiation sessions, and were classified as confidential. I consider these documents to be very reliable in the sense that they were written just after the sessions with a fresh recollection of what had happened and because they were written off the record without being limited by diplomatic concerns. The fact that the documents are written by highly involved actors in the process and represent the opinions of Norway, reduce their reliability. However, given that Norway was widely perceived as a trustworthy “bridge builder” (Stannard 2003 [interview]), justifies my use of these sources.

Secondary documents have also been useful, such as the *Earth Negotiations Bulletin*, which contains detailed daily and summary reports from several of the negotiation sessions, as well as media reports and press releases. The media coverage of the negotiation process was scarce and I have press releases mainly from NGOs. The NGOs involved in the negotiation process have an outspoken agenda. I must therefore be aware

of potential biases in these press releases. Other literature has also been helpful, for example Swaminathan (1996), Girsberger (1999) and Crucible II Group (2000) .

In addition, I have conducted several interviews. The interviews produced specific data on the perceived importance of different factors for the recognition of Farmers' Rights and the perceived recognition of such rights. The selection of respondents should ideally be based on two main criteria: (1) involvement in the entire decision-making process, and (2) position as a decision-maker or as a stakeholder (Arts and Verschuren 1999). However, due to practical reasons, *availability* for interviews had to be my most important criterion. I have interviewed people in Oslo, Trondheim³⁹, Tromsø⁴⁰ and Rome⁴¹. Some were followed up by subsequent e-mail correspondence.

The high rate of “negotiator turnover” makes it difficult to find negotiators who have participated in the entire process of revising the IUPGR (Sauvè and Watts 2003:313). Despite this fact, several of my informants, like Jan Borring, Cary Fowler and Brad Fraleigh, score highest on longevity throughout the entire negotiation process. Besides, my interviewees cover national delegates from the main regions (Latin America, North America, Africa, Europe and Asia). Additionally, I have interviewed observers of the negotiations, like the staff at the secretariat of the Commission on Genetic Resources for Food and Agriculture.⁴² Thus, considering my interviewees in retrospect, they were among the most central actors during the negotiations. Unfortunately, I did not have the opportunity to interview any NGO representatives. It is possible that this could have made up for a potential bias, since “delegates can be expected to understate NGO influence” (Betsill and Corell 2001:81). I expect on that the written comments by NGOs can compensate for this shortcoming.

Qualitative interviews permits the interviewer to ask specific questions that could be difficult to answer through written documentation alone. Thus, they complement the other sources. On the other hand, using interviews as a source of information raises methodological questions regarding validity and reliability. The information is likely to be biased, particularly when dealing with such politicised topics as agro-biodiversity and

³⁹ ”The Norway/UN Conference on Technology Transfer and Capacity Building” took place at the end of June 2003.

⁴⁰ A conference on ”Holistic Foundations for Assessment and Regulation of Genetic Engineering and Genetically Modified Organisms” was arranged in mid- August 2003 by Norwegian Institute of Gene Ecology in collaboration with the New Zealand Institute of Gene Ecology, Third World Network and the University of Tromsø.

⁴¹ The Second Session of Working Group on Plant Genetic Resources for Food and Agriculture, CGRFA, was convened 5 – 7 November, 2003.

⁴² For a full list of the interviewees that I refer to in the text, see the list of references at the back. .

Farmers' Rights. Arguably, “[t]he politicization of the genetic resources issue has mainly become apparent in the discussions on Farmers’ Rights and Plant Breeders’ Rights” (Pistorius 1997:93). This is partly balanced when I interviewed persons from different positions, though - according to one of my informants – I had to keep in mind that everybody I talked to could have strong opinions.

I conducted the interviews with an open interview guide in order to have the necessary flexibility when talking to different persons. I used notes to record the information. Several of the interviewees have read the parts of this thesis where they are quoted, and have corrected misinterpretations and misunderstandings. I use names when referring to the interviews, apart from a few exceptions when the interviewees specifically asked for confidentiality.

3.3 Summing Up

This thesis is a detailed study of the breakthrough for the developing countries’ request for Farmers’ Rights in the ITPGRFA. In a broader sense, it is a case of Southern power and could add to our general understanding of regime formation. Among the main challenges has been to judge the reliability of my sources due to the highly politicised character of the topic. I have attempted to make regular references to the sources to make the thesis transparent and possible for the readers to judge the reliability for themselves. I have summarised my methodological framework in the table below. The strength and weakness of each method and source is in this way sought to balance each other.

Table 3.1: Methodological Framework: Triangulation by Methodology, Data Source and Theory in order to gather Evidence on Breakthrough for the Developing Countries

Methodology	<i>Process Tracing</i> What are the causal mechanisms linking the independent variables to the recognition of Farmers’ Rights?	<i>Counterfactual Analysis</i> What would have happened if I had excluded one of the independent variables?	
Data Source	<i>Primary text</i> (e.g. country position statements, the final agreement, NGO lobbying material, archive records)	<i>Secondary text</i> (e.g. Earth Negotiations Bulletin, media reports, press releases)	<i>Interviews</i> (government delegates and observers)
Theory	<i>Power-based</i> Impact of powerful states	<i>Interest-based</i> Impact of institutional factors	<i>Knowledge-based</i> Impact of ideas and norms

Chapter 4: Farmers' Rights and the Issue Area of PGRFA

What is the relationship between the concept of Farmers' Rights and the issue area of plant genetic resources for food and agriculture? PGRFA are defined in the International Treaty (Article 2) as “any genetic material of plant origin of actual and potential value for food and agriculture”. In this chapter, I will relate the concept to the issue area in three steps: first, I will elaborate on *farmers* and their acquisition of PGRFA; second, I will specify different *ownership* of PGRFA; and third, I will connect *Farmers' Rights* to acquisition of and rights to PGRFA. The last part will briefly outline the background for the renegotiations of Farmers' Rights that started in 1994.

4.1 Farmers and Seed Acquisition

The crucial role of PGRFA in plant breeding makes these resources an essential prerequisite for food security.⁴³ For the farmer, PGRFA are materialised as seeds and other forms of propagating material. A farmer is a person cultivating the land, but how this is done, however, differs largely –from the highly industrialised large-scale farms in the North to small-scale traditional farming in the South. While the former mainly get propagating material from the formal breeding sector, the latter usually get seeds from own holding or neighbouring farmers. De Boef, Berg and Haverkort (1996) describe two independent yet complementary systems of crop development as follows:

The *formal system* consists of private and public sectors. The profit-oriented private sector concentrates on yield-increasing technology, often coupled with the use of agro-chemicals. It caters mainly to the needs of larger farmers living in higher-potential (usually irrigated) areas, who can afford such inputs. The public sector also produces crop varieties for use in high-potential areas, but also caters to the needs of resource-poor farmers living in more marginal rain fed areas, where the conditions for production are less predictable. In both sectors, seeds are multiplied by the seed industry. The private sector now predominates in the industrial countries of the North, after political decisions made by governments in the 1970s to reduce public spending on agricultural research.⁴⁴

⁴³ According to the World Food Summit in 1996, food security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. Achieving food security means ensuring that sufficient food is available, that supplies are relatively stable and that those in need of food can obtain it (http://www.fao.org/spfs/objectives_en.stm).

⁴⁴ During the past decades, there is a clear trend of increased concentration of large multinationals controlling seed supply and inputs such as pesticides, insecticides and fertilisers, especially in countries of the Organisation for Economic Co-operation and Development (OECD). For example: the top five vegetable seed companies

In the South, governmental institutions and the international centres of the Consultative Group on International Agriculture Research (CGIAR) are the main actors. The CGIAR-system consists of 16 International Agricultural Research Centres (IARCs) and has contributed significantly to strengthening agricultural research in developing countries. The IARCs were the driving force behind the green revolution in the 1960s and 1970s and are still important actors in agricultural research that aims at contributing to food production in developing countries.

In the *informal (local) system* farmers acquire seeds by saving them on his or her own farm or from other farmers who have done so. The system relies on the skills of farmers in maintaining, enriching and utilising crop diversity. The main selection criteria used are yield and yield stability, risk avoidance, low dependence on external inputs, and a range of quality factors associated with storage, cooking characteristics and taste. Albeit the former system dominates in the North and the latter in the South, the distinction is not so clear in the real world. In Norway, for example, approximately 25% of yearly produced seeds are grown from farm-saved seeds (Norwegian Agricultural Inspection Service 2003).⁴⁵ One general distinction between seed saving practices, is that in the North farmers usually only use farm-saved seeds from own holdings, while seed saving in the South is part of an informal seed distribution system. Nevertheless, the trend is a shift from seed saving to seed buying together with the rise of commercial agriculture and scientific plant breeding.⁴⁶

The breeding strategies in the two systems differ. In farms the strategy is normally to meet the immediate demands related to cultivation, storage, processing and consumption (Berg et al. 1991:16). Being able to maintain several varieties, the farmers sometimes select different varieties for different fields or for different uses. This results in specific adaptation to micro-level agro ecological niches and to cultural, economic and social needs (ibid.). In formal plant breeding, the strategy is the opposite. The breeding- and seed industry cannot economically handle a great number of varieties. The breeders therefore have to opt for stability in order to produce varieties which can be used by as many farmers as possible. The strive for stability is also based on the desire for plant variety protection, which requires stability as one of the conditions for receiving such

control 75% of the global vegetable seed market, four companies control 69% of the North American maize seed market, and at the end of 1998, a single company controlled 71% of the US cotton seed market (Crucible II Group 2000:17).

⁴⁵ In other European countries the figures are: United Kingdom 30%, Germany 46%, France 35%, Portugal 75%, Spain 88% (Toledo 2002:2).

⁴⁶ For a comprehensive study of this development in the US, see Fowler (1994): *Unnatural Selection*.

protection. Thus, the informal system of crop development produces genetically diverse *farmers' varieties* (traditional varieties), while the formal system contributes genetically homogeneous *cultivars* (high-yielding varieties).

Genetic erosion - the process of the rapid loss of genetic diversity – is reported to be a serious problem in most countries (FAO 1998b). The single most important reason for the loss of PGRFA is the introduction of high-yielding varieties that replace traditional varieties (FAO 1998b: 33). While the green revolution in the 1960s drastically increased production in areas suited for irrigation, it also contributed to the massive loss of traditional varieties (Berg et al 1991:56). Fowler (1994:242) describes the process as follows:

The genetic erosion caused by the green revolution was impossible to ignore. Over 100 million acres of new, uniform rices and wheats were soon being grown where tens of thousands of farmer varieties had once been found. The modern varieties were replacing the resources upon which they were based and upon which their continued existence depended.

Thus, the problem of genetic erosion highlights the difficulty of balancing the need for yield augmentation and long term food security. When farmers shift from seed saving of farmers' varieties to seed buying of cultivars, the speed of genetic erosion escalates.

4.2 Ownership to PGRFA

The importance of PGRFA for plant breeding makes access to these resources highly desirable. Various types of ownership to PGRFA affects access differently. In the following section, three broad categories of ownership will be briefly presented and discussed concerning their impact on access.

4.2.1 Common Heritage of Mankind

Extensive exchange of PGRFA has taken place throughout history. As a consequence, it is today difficult to decide where agricultural plants originated.⁴⁷ Furthermore, an estimated two thirds of all PGRFA held in gene banks do not originate from the same country where the gene banks are located (Crucible Group 1994: xvii). For example, about seventy percent of the PGRFA collected in developing countries are stored in gene banks of developed countries or of the International Agricultural Research Centres (Girsberger 1999:71).

National and international gene banks were set up after World War II after calls from FAO and European and US breeders' organisations (Pistorius 1997:18). The emphasis in 1950s and 1960s was on developing germplasm collections for availability to those who could use them. Conservation became a major aspect only from the late 1960s

⁴⁷ See for example Andersen (2001).

onwards. When the risks of crop uniformity were felt in the early 1970s “collecting missions were organised and gene banks established in an atmosphere of crisis with little contemporaneous thought to legal issues of ownership and control” (Bragdon 2003:20). The uncompensated appropriation of PGRFA was justified by regarding germplasm as the *common heritage of mankind*; “a public good for which no payment is necessary or appropriate” (de Sande, Ruivenberg and Malo 1996:190). Nevertheless, farmers in developing countries generally did not have any sense of ownership for the genes in their plants and gave samples of their seeds freely away to collection missions.⁴⁸ This is how a gradual transfer of the genetic resource base has taken place from the farm sector in the South to the formal breeding sector in the North (Berg et al 1991:18).

The International Undertaking from 1983 was “based on the universally accepted principle that plant genetic resources are heritage of mankind and consequently should be available without restriction” (Article 1). This category of ownership ensures open access to PGRFA.

4.2.2 Private Property

Private property is the situation when an individual or corporation has the right to exclude others from using the resources. In the realm of plant genetic resources, intellectual property rights (IPR) such as plant variety protection and patents are relevant examples. Systems of IPRs are adopted in order to give incentives for breeding and research.

Plant Breeders' Rights provide intellectual protection of distinct, uniform and stable plant varieties (the so-called DUS-criteria). For this purpose, a certificate is issued describing the new characteristics of the new variety. The certificate acknowledges the work of the breeder and states the name of the new variety. Anyone who wants to multiply the variety specified in the certificate has to be licensed by the holder of the certificate and has to pay a fee. Farmers' varieties do not fulfil the DUS-criteria. There are usually two important modifications of the breeders' rights (de Sande, Ruivenberg and Malo 1996:193): To encourage further breeding, other breeders are allowed to use the protected material of their competitors free-of-charge as starting material for their own improved varieties. This constitutes what is known as the *breeders' exemption*. Similarly, farmers are allowed to withhold part of their crop of a protected variety as seed material

⁴⁸ However, Cleveland and Murray conclude that indigenous farmers do in fact have the concept of intellectual property in folk varieties (1997:495).

for the next crop without having to pay additional fees to the breeder. This is known as the *farmers' privilege*.

Most national systems of plant breeders' rights comply with the provisions of the Convention of the Union for the Protection of New Varieties of Plants (UPOV). The UPOV Convention was adopted in 1961 to provide standardised principles for the protection of plant breeders' rights. It was later revised in 1972, 1978 and 1991. The main difference between the latest and earlier versions is that UPOV 1991 restrict the usual modifications of the breeders' right (Crucible II Group 2000:119). The provision for breeders' exemption is restricted because the holder of rights in a variety is granted control over the marketing not only of that variety but also of essentially derived varieties. The most important consequence of this amendment is that an UPOV-protected variety, into which for example another breeder has inserted a frost resistant gene, can no longer be marketed without the permission of the original certificate holder. Furthermore, Member States of UPOV wishing to do so may now restrict the "farmers' privilege" by forbidding the sales of the seed saved on-farm. Hence, UPOV 1991 provides a model for legislation that is less flexible and adaptable to the needs of developing countries, where the majority of the farmers rely on local seed supply systems than UPOV 1978 (Correa 2000:32).

Patents protect new inventions. With the breakthrough of modern biotechnology, living materials such as plants and plant material such as genes have also become subject matter of patents. Patents limit the rights of farmers to sell or reuse seed they have grown and the rights of breeders to use that seed for further research and breeding purpose (Bragdon 2003:22; Correa 2000:38). For smallholder farmers it is important to note that if a plant protected by plant breeders' right is mixed with a farmers' variety, the result is not covered by the intellectual protection. However, if a plant with genes that are patented is mixed with a farmers' variety, the patent covers the result if the patented genes are in the new seedling. Thus, patents restrict access even more than plant breeders' rights (Andersen 2003; Bragdon 2003; Correa 2000; Falcon and Fowler 2002).

Both patents and plant breeders' rights are territorial rights, in the sense that they are only valid in those countries where registration has been obtained (Correa 2000:30). This may change if a present negotiation round in the Standing Committee on the Law of Patents in the UN World Intellectual Property Organisation (WIPO) opens for "world patents", making it sufficient to apply for a patent once and get coverage in all WIPO member countries. Member States of the WTO have to comply with the minimum

standards of IPR as specified in the Agreement on Trade-related Intellectual Property Rights (TRIPs). The states must either grant patents on plants or provide for an effective *sui generis* system⁴⁹ for the protection of plant varieties, or a combination of the two (Article 27.3 b). While mostly developed countries have had IPR legislation, an increasing number of developing countries are adopting such legislation, partly due to their TRIPs' obligations.⁵⁰ This trend is amplified by the growing numbers of bilateral "TRIPs plus" agreements that go beyond TRIPs between the US, the EU or the EFTA and a developing country (Bjørnstad 2003; Wolff 2004:32). The former demand of the latter to implement the highest international standards in intellectual property, including patent protection of plant and animal varieties. At the same time, the development of the Substantive Patent Law Treaty under the auspices of the World Intellectual Property Organisation is being pushed. The draft treaty not only strives for minimum standards (like TRIPs) but it defines both the top and the bottom line of IPR standards (ibid.).

4.2.3 State Sovereignty and Domestic Regulations

Due to their obligations to UPOV, a handful of developed countries were reluctant to include their modern varieties as common heritage in the 1980s (FAO 1998b: 271). Therefore, they adhered to the International Undertaking only with modifications.⁵¹ Thus, while farmers' varieties were regarded as common heritage, modern varieties become private property through intellectual property rights. This asymmetry between improved germplasm and traditional germplasm led to a sense of unfairness and feeling of exploitation among developing countries (Swanson, 1997:102). Rosendal (1999:99) sums up the central conflict line in the biodiversity issue-area as:

- *Intellectual property rights negate the principle of free exchange of breeding material, and their utility is limited to countries of some economic and technological strength.*
- *There was a growing tension in the South about their genetic material being acquired as a common heritage of mankind (meaning open access – free of charge), at the same time as the North could impose exclusive property rights to the varieties developed from the same genetic material.*

In response to Northern IPR regimes, Southern states started to claim national sovereignty over the genetic resources in their territories. State sovereignty gives the authorities the mandate to define specific rights to PGRFA or to prevent that such rights are granted. This principle was emphasised by the twenty-sixth Session of the FAO

⁴⁹ A *sui generis* system of protection means a special system of protection designed for a specified subject matter.

⁵⁰ 25 of 30 OECD members are parties to UPOV, which 53 states have adhered to. Almost all of the non-OECD UPOV members became part of the Union after TRIPs entered into force 01.01.1995 (Israel became member in 1979; Uruguay and Argentina adhered to the Union in November and December 1994 respectively).

Conference in 1991 through the Resolution 3/91. The resolution reads that “the concept of mankind’s heritage, as applied in the International Undertaking on Plant Genetic Resources, is subject to the sovereignty of the states over their plant genetic resources”.⁵²

The principle of sovereignty is also asserted in the Convention on Biological Diversity (CBD). The CBD establishes international rules on access to all kinds of biological diversity, which is made subject to the principles of *prior informed consent* and the *sharing of benefits* (articles 3 and 15). This means that the recipient of biological resources needs to obtain consent by the source country of the resources before permission for access is granted. Such permission is dependent on promises that the benefits arising from the use of the resources will be shared with the source country. When implementing the CBD, several developing countries have developed legislation regulating access to plant genetic resources. With an emphasis on conditions enabling benefit sharing, these provisions proved in many cases to be bureaucratic, overly restrictive, and time-consuming (ten Kate and Laird 1999:17-33, 293-312). So far, these regulations have restricted access to plant genetic resources without providing much in monetary benefits for developing countries (FAO 1998b:290).

In sum, the commercial breeding sector in developed countries desires intellectual property protection of their varieties, mainly systems of plant breeders’ rights. As a response to the development of intellectual property regimes of the North, the South claims *benefit sharing* in return. Both the access legislation following from the implementation of the CBD and the legislation on intellectual property rights following from the implementation of the TRIPs create legal restrictions on access to PGRFA for both modern and traditional breeding.

4.3 Farmers’ Rights

There is no consensus among the Member States of FAO on what kind of property rights, if any, *Farmers’ Rights* represent concerning PGRFA. As a political idea, Farmers’ Rights dates back to the political work by NGO-activists Pat Mooney and Cary Fowler in the early and mid-1980s (Fowler 1994:192).⁵³ During the FAO debates in the 1980s, Third World delegates argued that if industrialised countries demanded recognition of

⁵¹ The countries that signed the IUPGR with reservation were: Canada, France, Germany, Japan, New Zealand, Switzerland, United Kingdom and USA (FAO 1994a).

⁵² This resolution became part of the International Undertaking as Annex III.

⁵³ The notion of Farmers’ Rights is, however, even older. For example, Jack Harlan speaks about the “amateurs” who really had created the genetic diversity (Fowler 1994:192).

plant breeders' rights; they should be prepared to recognise *farmers' rights* as well.⁵⁴ In a compromise, plant breeders' rights and Farmers' Rights were simultaneously recognised by the FAO Resolution 4/89. Plant breeders' rights, as provided for under UPOV⁵⁵, were accepted as compatible with the International Undertaking. Farmers' Rights were further defined by the FAO Resolution 5/89 as:

"[R]ights arising from the past, present and future contribution of farmers in conserving, improving and making Plant Genetic Resources, particularly those in the centres of origin/diversity. These rights are vested in the International Community, as trustees for present and future generations of farmers, for the purpose of ensuring full benefits of farmers and supporting the continuation of their contributions..."

This was the first international definition of Farmers' Rights. The concept was adopted with a view to realising the objective of balancing the rights of traditional breeders and those of plant breeders, while allowing the farmers to benefit, in some way, from the value that they have contributed (Correa 2000:4). While plant breeders' rights are legal rights, Farmers' Rights were introduced as political and moral rights. However, the concept was only defined in a broad, imprecise manner, and its adoption fostered an intense debate on the ways to recognise and reward traditional farmers. FAO had established an international fund for PGR in the 1980s and Resolution 3/91 decided that Farmers' Rights should be realised through this fund.

Due to the complexity and controversy of the concept, the International Undertaking did not manage to give Farmers' Rights a proper definition (Girsberger 1999:289)⁵⁶. Nevertheless, Correa has identified the rationale of Farmers' Rights to be based on three sets of considerations: the need to *ensure conservation* of PGRFA; the establishment of barriers to IPR that may restrict *farmers' practices* with respect to saving, selling and exchanging seeds; and *equity* (Correa 2000:9-14).

There are two main forms of conservation of agricultural varieties: *in situ* and *ex situ* conservation. *In situ* conservation here refers to the growing of varieties in farmers' fields, (i.e. *on-farm* conservation), whereas *ex situ* conservation pertains to gene banks storage. When *ex situ* conservation strategies were given priority in the 1960s, critics were worried that crop development and conservation would become too separated, bearing the risk that locally improved crops (farmers' varieties) would lose their adaptive complexes and therefore become more susceptible to pests and pathogens (Bennett in Pistorius 1997:24). As a solution to this problem, Altieri and Merrick in 1987 proposed a

⁵⁴ According to Barry Greengrass in the UPOV secretariat, the link between Farmers' Rights and Plant Breeders' Rights is so close, that had not UPOV called this form of plant protection "breeders' rights", Pat Mooney would not have come up with the idea of "Farmers' Rights" (Greengrass 1996:54).

⁵⁵ This is before the latest revision of UPOV in 1991.

strategy for in situ conservation through conservation of traditional farming systems and a continuation of old farming systems in selected gene rich areas by means of subsidies (Berg et.al. 1991:19).⁵⁷ Since the main reason for genetic erosion is the replacement of farmers' varieties, the concept of Farmers' Rights could be a useful tool to support conservation activities undertaken by traditional farmers. Meanwhile, the rationale for Farmers' Rights is that "unless a share of benefits reach small farmers maintaining landraces, they will have no incentives to continue to maintain them" (Esquinas-Alcázar 1996:3), but *how* Farmers' Rights could be such a tool for conservation is not described properly.⁵⁸

Evidently, the introduction of plant breeders' rights in a country encourages the sales of improved varieties. In Brazil, for example, the multinational company Monsanto increased its share of the maize seed market from zero to 60 per cent, following the adoption of plant variety protection (Commission on Intellectual Property Rights 2002). This is one of the forces that conservation efforts are confronted with. Another element underlying the concept of Farmers' Rights is the need to counterbalance IPR in order to ensure farmers' use and improvement of plant genetic resources. Conservation and continuous development of farmers' varieties is dependent upon the possibility of saving and exchanging seeds, particularly within their communities. Thus, Farmers' Rights may be understood as customary rights arising from the practice of farmers during the past 10.000 years to reuse and exchange seeds from their harvests.

Equity is the third component for the rationale of Farmers' Rights. Huge areas of crop diversity are located in the South (Berg et al 1991:7) and all the 30 plant species that make up 95% of human food consumption are originally from developing countries (Kloppenburger 1988). Under the PGRFA regime of the common heritage of mankind, modern breeders have had free access to the food crops cultivated by farmers throughout centuries and millennia. They could only add a last little chain in the development of a new variety and claim intellectual property rights for it, while the farmers in the South had no rights to their farmers' varieties. This created a perception that a lot of money was generated from the use of PGR stemming from the South. Pat Mooney (1997:53-54)

⁵⁶ Due to the complexity of the concept, Cary Fowler does not want to define Farmers' Rights, even though he is one of the persons who coined it as a political concept (Fowler 2002 [interview]).

⁵⁷ The main benefit of *in situ* conservation is that plants develop in harmony with the evolution in its environment. This development, however, makes *conservation* maybe an inappropriate, at least a misleading name for this activity. *In situ* management might be a more suitable name (FAO 1998b).

⁵⁸ See for example Brush (1994) for a suggestion on how Farmers' Rights could be used to achieve *in situ* conservation.

claims that “the conclusion is inescapable; the North is benefiting handsomely from Southern farmers”. Arguably, farmers will have no incentives to continue to maintain farmers’ varieties unless a share of the benefit reaches the farmers (Esquinas-Alcázar 1996:3). In this context, Farmers’ Rights are the result of equity considerations: “there is a moral obligation to ensure that traditional farmers receive a fair share of the benefits arising from the use of plant genetic resources that they conserve and improve” (Correa 2000:11).

The rationale behind Farmers’ Rights differs from the logic of plant breeders’ rights. First, due to the conditions for protection (i.e. uniformity), PBR only covers plant varieties resulting from systematic breeding. Farmers’ Rights on the contrary, explicitly recognise the unsystematic breeding work of farmers all around the world, but particularly in the centres of origin or diversity.⁵⁹ Second, while plant breeders’ rights stimulate the spread of high-yielding varieties, Farmers’ Rights promote the conservation of farmers’ varieties. Third, plant breeders’ rights can restrict the right of farmers to save, use and sell farm-saved seed, while Farmers’ Rights endorse the importance of this practice for the maintenance of traditional farming communities and sustainable use of PGRFA.

Despite the apparent conflict between Farmers’ Rights and plant breeders’ rights, Esquinas-Alcázar (1996:11) claims that the former should be considered complementary, and not opposed to the latter. In a *sui generis* system, Farmers’ Rights and plant breeders’ rights could for example be combined if the former is granted to those who provides agro-biodiversity as input and the latter to those who adapt biotechnology as an instrument to process that input (Esquinas-Alcázar 2003 [interview]). Such a *sui generis* system could harmonise the need for genetic homogeneity and uniformity to meet the needs of TRIPs and UPOV recognition, with the need to maintain genetic diversity and heterogeneity as stressed in the CBD (see for example Swaminathan (ed.) 1996).

4.4 Background for the Renegotiations of Farmers’ Rights

In 1991, the IUPGR was amended by the Resolution 3/91, which stated that the best way to implement Farmers’ Rights was through an international fund already established by FAO. This fund never materialised. Hence, the recognition of Farmers’ Rights in the International Undertaking was never implemented. The IUPGR may therefore be summed up as “a moral victory for the South, but lacking material implications”

⁵⁹ The Russian scientist Vavilov (1887-1943) identified areas particularly rich in genetic diversity, which he termed centres of origin. The work of Vavilov has been revised several times, and it is now common to refer to such areas as centres of diversity.

(Rosendal 1999:109). The perception of a moral victory is enhanced when looking at the international developments on intellectual property rights. The UPOV Convention was again revised in 1991, strengthening the rights of modern breeders at the expense of other breeders and farmers. In addition, the domestic implementation of TRIPs enhances the process of granting patents on PGRFA and plant breeders' rights in developing countries.

According to Correa (2000) the adoption of the CBD in 1992 supports the international recognition of Farmers' Rights (2000). Although the Convention does not explicitly address the issue, he considers it to be a relevant framework for the implementation of some components of such rights, like the sharing of benefits and funding (Articles 15.7 and 20) (Correa, 2000:6). Still, resolution 3 of the Nairobi Conference for the Adoption of the Agreed Text of the CBD in May 1992 identified the realisation of Farmers' Rights as one of the "outstanding issues" for further negotiation "within the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Sustainable Agriculture". This was supported by Chapter 14.60 (a) of the UNCED Agenda 21, adopted June 14, 1992. This subparagraph states that the appropriate United Nations agencies and regional organisations should "strengthen the Global System on the Conservation and Sustainable Use of PGRFA by...taking further steps to realise Farmers' Rights".

In following up on these matters, the FAO Conference, at its twenty-seventh session, in November 1993, adopted Resolution 7/93, "Revision of the International Undertaking on Plant Genetic Resources". The resolution requested the Director-General to provide a forum for negotiations among governments for:

- the adoption of the IUPGR in harmony with the CBD;
- consideration of the issue of access on mutually agreed terms to PGR, including *ex situ* collections not addressed by the CBD; and
- the issue of realising Farmers' Rights.

This resolution initiated the renegotiations of the International Undertaking. Farmers' Rights were explicitly included in the mandate for these renegotiations that started in 1994.

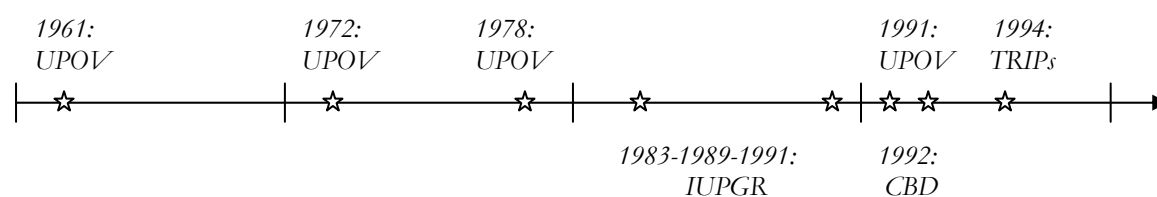


Figure 4.2: Relevant Agreements for the ITPGRFA on a Time-scale

Source: Andersen (2004)

Chapter 5: Breakthrough for the South?

The aim of this chapter is to define the value of my dependent variable. First I will present the proposals on Farmers' Rights. Then the content of the article on Farmers' Rights in the International Treaty will be introduced, before the proposal and the article will be compared to evaluate correspondence and divergence. Finally, some tentative assessments on the South's influence on the treaty in general will be made.

5.1 Proposals for Farmers' Rights

Following discussions, the Working Group on Farmers' Rights at the Third Extraordinary Session in December 1996 retained three consolidated proposals, submitted by the United States (US), the European Community (EC) (and amended by China, Japan and Australia), and the developing countries (DCs) respectively (FAO 1996b).

The US proposal does not mention the term *Farmers' Rights*, but affirms that states and regional economic integration organisations (REIOs) “shall take measures to promote the efforts of their farmers to conserve and use sustainable plant genetic resources for food and agriculture”. All the mechanisms it suggests for such promotion are related to conservation: strengthening national germplasm systems; programs which preserve and improve native germplasm; promotion of and research into crops that are not widely used; and activities that help to control the erosion of arable land. No references are made to whether conservation by farmers has benefited agricultural production. The states and REIOs are responsible for realising these mechanisms, which may be financed by “any benefits they [states and REIOs] receive from contractual arrangements relating to access” to PGRFA.⁶⁰ This is the only place where benefit is mentioned. Otherwise, the states and REIOs should use national, bilateral and multilateral funding sources and involvement of the private sector, including NGOs. Moreover, this proposal stresses that the support to farmers' activities to conserve and use sustainable PGRFA should take place “without restricting or disturbing trade”.

The first paragraphs of the EC and DC texts are almost identical, both recognise the enormous contribution made by farmers of all regions of the world, particularly those in the centres of origin and crop diversity, for the conservation and development of PGR, which constitute the basis for food and agriculture production throughout the world.

⁶⁰ I believe these contractual arrangements resemble bilateral agreements for access which the Bonn Guidelines of the CBD from 2002 now provide an international standard for.

These texts in turn, form the basis for appropriate measures necessary for farmers to continue to conserve, manage and improve PGRFA.

The European proposal suggests that contracting parties, “for the purpose of strengthening the role of farmers in conservation and sustainable use of PGRFA and ensuring fair and equitable sharing of benefits, shall as far as possible and as appropriate” inter alia “subject to its national legislation, respect, preserve and maintain the knowledge, innovations and practices of farmers relevant to the conservation and sustainable use of [PGRFA]”. Benefits to be shared with the provider of PGRFA are “results of research and development and benefits arising from the commercial and other use of genetic resources”.

The text from the developing countries states that the responsibility for realising Farmers’ Rights at the national level rests with both the national governments and the international community. 15 legislative measures are suggested.

Box 5.1: Main Ideas of the Developing Countries’ Proposal

- Protect and promote the collective rights of farmers with respect to their innovations, knowledge and cultural diverse systems;
- Assist farmers in different regions of the world, especially in areas of origin/diversity of plant genetic resources for food and agriculture, in the evolution, conservation, improvement and sustainable use of PGR;
- Promote the establishment and advise on the elaboration, in each country, of *sui generis* systems pertaining to the fair and equitable sharing of the benefits arising out of the utilisation of plant genetic resources;
- Promote the establishment and advise on the development of an international *sui generis* system for the recognition, protection and compensation of knowledge, innovations and practices of farmers and traditional communities;
- Recognise and ensure the rights of farmers, in fully sharing the benefits arising from the use of plant genetic resources on a fair and equitable basis, and as mutually agreed, including through transfer of technology, participation in research, and access to its results, derived at present, and in future, form the improved use of plant genetic resources through plant breeding and other modern scientific methods, as well as from their commercial use;
- Establish and implement an international fund;
- Ensure that the prior informed consent of the concerned farmers and local communities is obtained before the collection of plant resources is undertaken;
- Recognise and protect traditional rights of farmers and their communities to keep, use, exchange, share and market their seeds and any other plant reproductive material, including the right to re-use farm-saved seed;
- Take the necessary measures to ensure that farmers and local communities fully participate in the definition and implementation of the measures and legislation on Farmers’ Rights at national and international levels;
- Review, assess and, if appropriate, modify intellectual property rights systems, land tenure, and seed laws in order to ensure their harmony with the provisions of this Article.

Several of these measures have clear links to other agreements. The term “prior informed consent” is a concept from the CBD’s provisions on access to genetic material. “*Sui generis*” refers to the *sui generis* system for the protection of plant varieties all WTO Member States have to establish, if they do not accept patents for plants and animals

(TRIPs Article 27.3b). The rights of farmers to keep, use, share and market their seeds, including re-use of farm-saved seed, are challenged in several countries by seed and IPR legislation, for example in those countries that adhere to UPOV'91. Additionally, the last suggested measure directly disputes other arrangements.

In sum, the three proposals could be spread over a continuum of what Farmers' Rights could entail. The American proposal is close to a kind of "minimum" definition of Farmers' Rights, while the DC text establishes a wide-embracing definition. The EC text is somewhere in between these two.

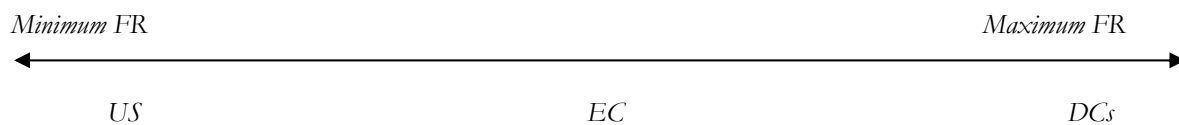


Figure 5.1: The Proposals on Farmers' Rights (FR) on a Continuum from no Farmers' Rights to a Comprehensive Definition of such Rights.

5.2 Presentation of the Negotiation Outcome

The International Treaty on PGRFA was adopted at the FAO Conference in November 2001. Farmers' Rights are mentioned in the preamble and constitute Part III, Article 9.

The preamble affirms "that the past, present and future contributions of farmers in all regions of the world, particularly those in centres of origin and diversity, in conserving, improving and making available these resources, is the basis of Farmers' Rights". Furthermore, the preamble affirms the rights recognised in the treaty to save, use, exchange, and sell farm-saved seed and other propagating material. To participate in decision-making on plant genetic resources and in the fair and equitable sharing of the benefits arising from the use of PGR for food and agriculture are considered fundamental for the realisation of Farmers' Rights, and the promotion of Farmers' Rights at national and international levels.

In Article 9 (see Annex 1) "[t]he Contracting Parties recognize the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis for food and agriculture production throughout the world." The article continues by stipulating that responsibility for realising Farmers' Rights rests with national governments, which should adopt, according to their needs and priorities, and subject to national laws, measures to protect traditional knowledge, benefit-sharing and to ensure the participation of farmers in decisions on PGRFA. The article also says that

nothing in the article will be interpreted as restricting the rights of the farmers to conserve, use, exchange and sell propagating material held on their farms, in accordance with national legislation. The question now is whether this recognition of Farmers' Rights is a breakthrough for the developing countries.

Box 5.2: A Comparison between Article 9 and the Annexes to the Undertaking Adopted through FAO Resolutions 4/89, 5/89 and 3/91

- The article recognises the “enormous contribution” that has been made for the “conservation and development” of PGRFA, thus closely following point 3 of FAO Resolution 4/89.
- While only “farmers” were mentioned in the annexes to the IUPGR, the article alludes to “the local and indigenous communities and farmers”, in line with the terminology of the CBD.
- The article states that the responsibility for realising Farmers' Rights rests with national governments. This is a major difference compared with the original FAO text, which had emphasised the *global* nature of farmers' contributions and the primary role of the international community in realising Farmers' Rights (Correa 2000:26). Resolutions 4/89 and 3/91 had, in this regard, established that Farmers' Rights would be implemented through an international fund.
- The right of farmers to use, exchange and sell farm-saved seeds was not explicitly mentioned in any of the annexes, but the article does.

5.3 Analysis of the Negotiation Outcome

I will conduct this analysis in two steps, by first comparing the developing countries' proposal and the treaty and second, give some tentative answers to the indicators of the South's influence.

5.3.1 Correspondence or Divergence?

The first paragraph of Article 9 recognises the “enormous contribution” that farmers of “all regions, particularly those in the centres of origin and crop diversity” have made and will continue to make for the conservation and development of PGRFA. The DC text does not in this connection include local and indigenous communities, but refers to local communities in its suggestion for legislative measures. Thus, there is high correlation between the DC text and the article on this aspect. It is therefore also high correlation between the EC text and the article, since the first paragraph of the European proposal and the DC text were almost identical. The US text did not contain this aspect of Farmers' Rights.

An international fund was part of the International Undertaking, and a purely national implementation of Farmers' Rights as prescribed in the article is arguably a move away from the original idea (Engels 2003 [interview]). Why is this? First, PGRFA do not respect boundaries between states. In every country most of the germplasm used in agriculture comes from other countries (FAO 1994). Thus, differing national systems of Farmers' Rights render the sharing of benefits and enforcing of such rights among different geographic origins of PGRFA difficult or even impossible (Girsberger 1999:

277). Furthermore, plant breeders are primarily interested in PGRFA already collected and characterised, that is, PGRFA stored in *ex situ* facilities (ASSINSEL 1996). Consequently, this form of PGRFA is more likely to be commercialised in the future than PGRFA from *in situ* conditions. If Farmers' Rights are to cover PGRFA stored in *ex situ* collections, it is necessary to realise these rights at the international level. Moreover, in the process of improving modern plant varieties, formal plant breeders can use PGRFA from different regions. In these cases, the improved modern plant varieties have pedigrees from different geographic areas, but to calculate the share of each pedigree used is very difficult. If the sharing of benefits is to be co-ordinated through an international fund, such a calculation is not necessary (Girsberger 1999: 277). However, it is needed when Farmers' Rights are realised at the national level.

The national responsibility entails that the developed countries are not obligated to do anything for realising Farmers' Rights in developing countries. They do not have to compensate farmers in the South when receiving materials from the international gene banks, nor do they have to receive a *prior informed consent* before collecting PGRFA in the South, or inform about the origin of the material when applying for patents. Consequently, Article 9 does not prevent corporations of the North from patenting plant material that stems from the South without sharing the benefits (Evjen 2002 [interview]). However, the preamble of the treaty affirms the promotion of Farmers' Rights at both the national *and* international levels, hence opening for implications as to who should share the responsibility of realising these rights (Esqunias-Alcàzar 2003 [interview]). In sum, the lack of an international dimension is a clear divergence from the proposal of the developing countries, but is in accordance with the EC and US views.

Besides the international fund, the developing countries proposed the establishment of an international *sui generis* system, which could design intellectual property rights for farmers' varieties. They also pushed for revision of the existing IPR legislation in agreement with the provisions on Farmers' Rights in the International Treaty. None of these claims are reflected in Article 9. Since the TRIPs Agreement regulates geographic indications, patents and trade secrets and UPOV Conventions regulates plant breeders' rights internationally, Farmers' Rights should be regulated at this level as well if they are to be considered to be parallel rights of the South against IPR of the North (Girsberger 1999: 279). The Farmers' Rights Article does not modify or complement existing IPR legislation. Clearly, the developing countries did not have a breakthrough on these positions either.

On the other hand, convergence is traced in the measures to protect and promote Farmers' Rights. These included the right to equitable participation in sharing benefits, protection of traditional knowledge and the right to participate. Besides, the paragraph provides only an *illustrative* list of the measures that could be adopted. Consequently they do not exhaust the list of modalities under which Farmers' Rights may be realised (Correa 2000:27). This means that developing countries may include legislative measures not mentioned in the article like the establishment of national *sui generis* systems. "The African Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources" by Ekpere (2001) provides an example of how this can be done. The objective is after all to provide a model for African countries when developing national *sui generis* systems as required by TRIPs. The Model Law for instance recommends the intellectual protection of farmers' varieties. According to Egziabhar, who drafted the Model Law, this legal protection of farmers' varieties is intended to be a defensive right to prevent others from patenting the varieties or charging anybody for using them, rather than a new set of exclusive rights (Egziabhar 2003 [interview]). He considers the implementation of such rights as compatible with Article 9. Thus, the illustrative list in the article enables countries to interpret and implement Farmers' Rights nationally in an extensively way.

The illustrative list arguably also retains the possibility to nationally grant the right to use, sell and exchange farm-saved seeds. However, critical objections are also made concerning the formulation of these rights as the article does not give a positive recognition of them. It is neutral in that respect, since it cannot constitute a sufficient legal basis for claiming rights in relation to saving, using and exchanging seeds. At the same time, the article does not restrict the options that may be adopted by national governments in that regard. "Clearly, the agreed text does not exclude the possibility that national laws (including PBRs and seed legislation) limit farmers' rights in relation to saving, using and exchanging seeds/propagating materials" (Correa 2000:27). Therefore, NGOs warn that the article establishes the primacy of national patent laws over Farmers' Rights (Crucible II Group 2000:59). The concern is that the article will allow national governments to use intellectual property laws to prevent farmers from saving and exchanging seed. However, the preamble affirms "the right recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material". I think this strengthens an interpretation of the article towards granting this right. In addition, some

plant breeders and governments in the Crucible Group⁶¹ warn that the article does not explicitly exclude plant varieties protected either by patents or by plant breeders' rights when farmers are allowed to use, sell and exchange farm-saved seeds (Crucible II Group 2000:60). This also indicates that one possible interpretation of the Farmers' Rights article is that farmers do have the right to continue their traditional uses of seeds also when planting protected varieties.

Why is recognition of the right to use farm-saved seeds important? All Member States to WTO have to implement a *sui generis* system, but what such a system is has never been defined, however. The UPOV secretariat and several OECD countries - fronted by the US - have suggested it means legislation along the lines of UPOV 1991 (Andersen 2003:44). UPOV 1991 restricts farmers from using farm-saved seeds in their traditional way. If the ITPGRFA had provided a strong formulation on farmers' right to reuse seed, it would have been easier for developing countries to resist the pressure from the UPOV-friendly countries and to implement this right in their development of national *sui generis* system when implementing TRIPs.

Farmers' rights to use, sell and exchange seeds were not mentioned in either the European or the American proposals on Farmers' Rights. In summary, this points to a breakthrough for developing countries. However, the equivocal manner in which the right is formulated earns only the characteristic of medium breakthrough.

In addition, the language of Article 9 is important when evaluating the degree of breakthrough. In general, the weak formulations establish few, if any, legal obligations on the contracting parties. According to the article, Farmers' Rights are to be established in accordance with "the needs and priorities" of each Party "as appropriate, and subject to its national legislation". Governments *should*, not *shall* take certain measures. This means that the implementation will be largely dependent upon each government's judgement on what is appropriate in the light of its own priorities and consistent with its national law. Given the flexibility offered by the agreed text, some countries may even opt not to implement this provision (Correa 2000:27). After all, you do not need an international treaty to state that countries have the right to prepare their own legislation (Fowler 2002 [interview]). On the other hand, it is not possible to say that the article is without obligations, although they are watered down (Borring 2002 [interview]).

⁶¹ The Crucible Group consists of individuals from South and North; from the private and public sectors and from NGOs. They met for the first time in 1993 to debate the most contentious points among themselves and to prepare a non-consensus report that would simply lay out the best argument of every side (Crucible II Group 2000).

5.3.2 Influence of the South?

The partial correspondence between the developing countries' proposal and the Farmers' Rights Article indicates a medium breakthrough. I will now give a tentative assessment of the South's influence, viewing the treaty in more general terms. Are there any indications of a differentiation of norms between the North and the South, any resource transfers from the North to the South, or a variation in the degree of participation of actors in decision-making between the North and the South?

As regards norms, the national responsibility to realise Farmers' Rights implies that all actors have the same duties. Furthermore, the general language throughout the treaty is "each Contracting Party shall", which does not differentiate between the developing countries and the developed countries. However, Article 18 on financial resources places more responsibility on the North for the implementation of the treaty in the South (Article 18 (b)):

The extent to which Contracting Parties that are developing countries and Contracting Parties with economies in transition will effectively implement their commitments under this Treaty will depend on the effective allocation, particularly by the developed country Parties.

In summary, there is not a case of maximum differentiation where the North has undertaken all obligations while the South has only rights; nor is it a situation of no differentiation at all.

As concerns resource transfers, several provisions of the treaty specify the allocation of resources. The benefits shared under the Multilateral System "should flow primarily, directly and indirectly, to farmers in all countries, especially in developing countries, and countries with economies in transition" (Article 13.3). Capacity-building should take "into account the needs of developing countries and countries with economies in transition" (Article 13.2 (c)). Also technical assistance to Contracting Parties favours developing countries and economies in transition (Article 8). Thus, the resource transfers that the negotiated regime intends to facilitate will be mainly allocated to the South (and to economies in transition). This makes the distinction between the national and international implementation of Farmers' Rights to some extent superficial (Borrington 2002 [interview]). But where will the resources come from and how large will they be?

The provision of benefit sharing in the Multilateral System will to a large extent decide the degree of international resource transfer in the negotiated regime. A general Material Transfer Agreement (MTA) will regulate the terms for access to the crops and forages covered by the system, and a Panel of Experts is set up to examine the issues involved with the MTA. Payments to the international fund, which is established as part

of the Multilateral System, are compulsory when seeds received from the system are commercialised. When the seeds are not commercialised or still freely available, the payments are voluntary. What constitutes commercialisation in terms of Article 13.2d (ii) of the Treaty is, however, one of the questions for the Panel to answer.⁶² Most likely, commercialisation and degree of availability is connected to intellectual property rights. According to Susan Bragdon, “patenting will likely trigger the benefit-sharing mechanism; plant breeders’ rights probably will not” (Bragdon 2003:21, see also Falcon and Fowler 2002:211). Since the capacity to patent living material is concentrated in the developed countries, the resources in the system are likely to come from them.

No resources have yet been transferred from the North to the South as the Multilateral System is still in the pipeline. However, Falcon and Fowler believe that the amount of money to flow to the international fund is not going to be considerable (Falcon and Fowler 2002:211):

If our interpretation is correct, the multilateral provision is unlikely to generate substantial funding. Royalties will be assessed as percentage of profits from seed sales of particular new varieties, which is not a particularly large base. Moreover, the two countries where such patenting is available and most widely used – the US and Japan – are unlikely to ratify the treaty.

Thus, the prospects for resource transfers from the North to the South are dim. The Contracting Parties recognise that facilitated access to PGRFA, which is included in the Multilateral System, constitutes a major benefit (Article 13.1). In this sense of benefit, developing countries have an advantage since they are net recipients of improved germplasm from in particular the international agricultural research centres (Fowler, Smale and Gaiji 2001).

By degree of participation, Biermann refers to the difference between the general United Nations system with the one country – one vote rule in comparison with economic policy institutions such as the World Bank or the International Monetary Fund (Biermann 2002). In the latter institutions, votes are weighted by contributions, thus guaranteeing the decisive influence of Northern governments in these bodies. Therefore, it does not come as a surprise that the Governing Body in the ITPGRFA –negotiated under a UN special agency for agriculture – is composed of all Contracting Parties and that all decisions shall be taken by consensus (Article 19).

Taking Biermann’s criteria together, they reflect only modest Southern power particularly because the North does not have the responsibility to realise Farmers’ Rights, and because the resources to be transferred are likely to be limited.

⁶² For more unsettled questions regarding the MTA, see Fowler (2003:12).

5.4 Conclusion

The viewpoints and satisfaction regarding the recognition of Farmers' Rights in the ITPGRFA vary between different actors. A FAO legal paper argues that the formal endorsement of Farmers' Rights by a legally binding instrument “represents a major step towards wider acknowledgement and genuine implementation of the rights conferred to informal innovators (“traditional farmers”), on equal footing with the rights already granted to formal breeders (“modern breeders”)” (Mekoaur 2002:6). The final article on Farmers' Rights has found broad support among FAO member countries, including developed and developing countries alike (Correa 2000:26). Both one of the strongest adherents (Tewolde B. G. Egiziabhar from Ethiopia) and one of the strongest opponents (Brad Fraleigh from Canada) of Farmers' Rights, were satisfied with the recognition (Egiziabhar; Fraleigh 2003 [interviews]). However, another spokesperson from developing countries that promoted Farmers' Rights, Rene Salazar from the Philippines, considered the recognition a mistake and fought to reverse it (ETC group 2001; Fowler 2002 [interview]). Salazar is supported by Jan Borring from Norway, who also considers the agreed text to be watered down (Borring 2002 [interview]). Comments from NGOs clearly show their discontent with the output. Via Campesina describe the text as a step back and a bleak lip service to what these rights should entail, in their opinion (Via Campesina 2001).⁶³

Based on my discussion of the negotiation outcome, I argue that these rights are sufficiently included in the International Treaty so that the option of a weak breakthrough is ruled out. On the other hand, no international responsibilities for implementation of Farmers' Rights apart from the reference in the preamble are established. Besides, no legal obligations are placed on the contracting parties to put into practice the provisions of the article. Thus, the International Treaty also does not represent a strong breakthrough for the developing countries as regards Farmers' Rights. Regardless of lacking legal obligation, a normative agreement and a process of learning can give greater legitimacy for local and regional claims for Farmers' Rights. The provision of Farmers' Rights has arguably significant implications for the recognition of group rights and represents a precedent in recognising the contributions of farmers and indigenous and local communities (Earth Negotiations Bulletin 2001:12). In addition, several of the positions of the developing countries are included in the article, which is far more comprehensive than the modest American proposal from 1996. Moreover, the optional list offered by the

⁶³ See also for instance ECT group 2001 and GRAIN 2000.

article makes the national implementation flexible and gives room for an extensive interpretation. Besides, the wording of the treaty in general is strong compared to the weak formulations of Article 9. Since other parts of the treaty point in the same direction as the Farmers' Rights article, the strongly formulated treaty may be beneficial for the realisation of Farmers' Rights (Borrington 2002 [interview]). My conclusion is therefore that the negotiation outcome represents a medium breakthrough for the developing countries. The tentative assessment of Biermann's indicators of the South's influence supports this judgement.

Chapter 6: The Long Negotiation Process

This chapter provides a chronological description of the re-negotiation process of the International Undertaking. The process started in 1994 and ended with the adoption of the International Treaty in 2001. Such an outline is necessary to find explanations for the medium breakthrough of the developing countries.

The Commission on Genetic Resources for Food and Agriculture (CGRFA) was the sole forum for the negotiations. The CGRFA holds regular sessions every two years. At the plenary meetings of the Commission, delegates from all the member states sit around the table with board cards in front of them, indicating which country they represent. The procedures at the plenary sessions follow formal patterns, with first the election of Chair and Vice-Chairs, then the adoption of the agenda, before more substantial discussions start. The Chair presides over the sessions, and the representatives take the floor by raising their respective board cards. As of February 2003, 165 countries and the European Community were members of the Commission. Representatives from Non-governmental organisations and Intergovernmental organisations took part as observers during the negotiation process.

6.1 First Extraordinary Session (1994): ‘Brainstorming’

In 1993 the FAO Conference set up a working group of 14 countries representing different regions with the task to prepare the work of the Commission. The Working Group had nine sessions and one extraordinary session before the *First Extraordinary Session of the CPGR* in November 1994. The Working Group proposed a three-stage process for the revision of the International Undertaking: Stage 1 would be consolidation of the Undertaking by incorporation of its annexes and its harmonisation with the CBD. This would result in the first consolidated text for negotiations. Stage 2 would be a process of adjusting the IUPGR to also address the issues of access on mutually agreed terms to PGR, including ex situ collections not addressed by the CBD, and the realisation of Farmers’ Rights. As these are complex issues, the working group provided a more technical analysis of some of the essential questions (FAO, 1994c). The third and last stage would be consideration of the possible legal and institutional status of the revised

IUPGR.⁶⁴ According to the working group, questions regarding Farmers' Rights that needed to be resolved included (ibid.):

- i) the nature of the funding to the international fund (voluntary or mandatory)
- ii) the linkage between the financial responsibilities and the benefits derived from the use of PGR
- iii) who should bear the financial burdens (countries, users or consumers)
- iv) how the relative needs and entitlements of beneficiaries, especially developing countries, were to be estimated
- v) how farmers and local communities would benefit from the funding.

The Working Group stated in their report that the implementation of Farmers' Rights needed international action because in every country most of the germplasm used in agriculture comes from other countries (FAO, 1994c). Furthermore, it stated that the issues of access to germplasm and realisation of Farmers' Rights are not independent.

The Vice-Chairs, Mr. B. Fraleigh (Canada) and Mr. R. S. Rana (India) alternated in chairing this session of the Commission. The Commission reviewed and commented on the first negotiation draft, which incorporated the three annexes, and provided a more rational structure by dividing it into 14 articles. During its first extraordinary meeting it did not have the time to negotiate further. It was reaffirmed that it would be desirable if the process of revising the International Undertaking could be completed in time for the 1996 International Technical Conference, so that the revised Undertaking become available together with the report on the State of the World's Plant Genetic Resources and the Global Plan of Action (GPA) ⁶⁵. Four background study papers had been prepared at the request of the Secretariat of the CPGR to provide a theoretical and academic background for economic, technical and legal issues related to the revision of the IUPGR. Among these papers was one on Farmers' Rights: "Providing Farmers' Rights through *in situ* conservation of crop genetic resources" by Stephen B. Brush.⁶⁶

The *Working Group* did not have the mandate to negotiate, but at its *10th Session* in May 1995 it discussed various aspects of Farmers' Rights, including whether they are collective or individual rights; the need to develop the International Fund to finance the *in situ* and *ex situ* conservation, compensate farmers and raise the living standards of farmers

⁶⁴ The options were that it remained a voluntary, non-binding agreement; that it became an independent, legally binding agreement; or that the revised international agreement was presented to the Conference of the Parties to the CBD, for possible adoption as a protocol to the Convention.

⁶⁵ The objective of a GPA was to renew concerted efforts to implement the International Undertaking, because national achievements regarding the IUPGR were behind schedule (Andersen 2003:49).

⁶⁶ Steven Brush is Professor of Applied Behavioural Science at the University of California, Davis, USA.

and agricultural communities; and whether Farmers' Rights are socio-economic rights such as the access by farmers to new technologies (FAO, 1995). The working group pointed out that the concept of Farmers' Rights had several operational dimensions. In order to avoid confusion it suggested that these dimensions be dealt with separately, perhaps in the form of three articles dealing with the following points:

- i) restating and balancing the concept of Farmers' Rights against the concept of Plant Breeders' Rights; including the acknowledgement of the right to "the farmers' privilege"
- ii) linking Farmers' Rights to the funding mechanism, which would not only make it possible to compensate and provide incentives for farmers to contribute to the conservation and development of PGR, but would also lay the foundations for just and equitable sharing of the benefits deriving from PGR
- iii) establishing the rights of traditional farmers and communities in the national context, as custodians of indigenous knowledge and PGR (in line with Article 8(j) of the CBD).

6.2 Sixth Regular Session (1995): Fumbling

The Commission took into account the recommendations of the Working Group at its *Sixth Regular Session* in June 1995, but it generated considerable controversy when the Commission undertook its first reading of the preamble and discussions of the articles on scope, access and Farmers' Rights (FAO 1995). Several formal written proposals on Farmers' Rights were made during the session, but no agreement on how to approach the issue was reached. Some countries therefore suggested that each member should prepare short statements of its views on the main issues of scope, access and Farmers' Rights, which would facilitate the discussions of the Commissions on these points. Much time was spent discussing the possibility of, and the need for holding one or more extraordinary sessions in 1996. The Commission also reiterated the need for funds to be made available to facilitate the participation of developing countries in the negotiation process (ibid.).

6.3 Second Extraordinary Session (1996): Polarisation

The Secretariat reviewed the proposals made so far and integrated them in a consolidated text, which was presented at the *Second Extraordinary Session of the Commission* in April 1996 (FAO 1996a). The Commission did not, however, have the time to negotiate the revision of the IUPGR because the meeting was dominated by long discussions on financial questions related to the implementation of the GPA. This happened at the initiative of G-77, which was strongly influenced by attitudes of the Latin American group, headed by

Brazil (The Norwegian Ministry of the Environment 1996). The OECD countries, except for Mexico, stressed the need to do things in a different order: first there was a need to discuss the content of the GPA, and only then would it be possible to discuss financial questions. The battle on this issue created a bad atmosphere and led to a strong polarisation of the Commission between the OECD and G-77 countries (*ibid.*). This bad atmosphere led them to ignore statements by the NGOs and industry representatives present, urging the Commission to go back to discussions on the very content of the GPA.

Cary Fowler presented the secretariat's draft report on the State of the World's PGRFA. The work by the secretariat on this report and their draft for a GPA was positively received among the delegates. *In situ* and on-farm conservation were new elements in the GPA. USA and Canada expressed their scepticism about this and some countries said that support to on-farm conservation could be trade distorting, as the support would function as subsidies. Malaysia replied that since the expensive and well-developed gene banks in Western countries could be viewed as insurance for food security, then it is unreasonable to claim that support for on-farm conservation is subsidies.

During the meeting it became apparent that several developing countries had stronger regional interests than common interests with the rest of the G-77 (The Norwegian Ministry of the Environment 1996). For example large forest countries like Brazil, Indonesia and Malaysia strongly opposed the inclusion of forest genetic resources in the GPA, while African countries supported the EU proposal on such an inclusion. After the session, it was uncertain whether Brazil wanted progress in the renegotiations, even though the Commission agreed that forestry would not be included in the GPA. The US was very sceptical to the whole concept of Farmers' Rights and showed very little willingness to discuss anything that could moderate their strong demand for the protection of IPR (*ibid.*).

The Leipzig Conference: Farmers' Rights in the Global Plan of Action

When representatives from 150 countries met for the *Fourth International Technical Conference on Plant Genetic Resources* in Leipzig, Germany (the so-called Leipzig Conference) in June 1996, the work on revising the IUPGR still had a long way to go. Thus, the proposed schedule for completion of the revision was exceeded. The first comprehensive Report on the State of the World's Plant Genetic Resources for Food and Agriculture was presented by FAO. It was the first world-wide assessment of conservation and sustainable utilisation

of the world's PGR. It concluded that genetic resources are being lost, and that, while farmers and genetic resources programmes are helping to conserve diversity, there are insufficient links between farmers and plant breeders (Earth Negotiations Bulletin 1996).

More than 200 NGOs attended the Leipzig Conference. According to GRAIN they made Farmers' Rights *the* major topic at the governmental meeting (GRAIN 2000). The central objective for the organisations was to secure control over and access to agrobiodiversity by local communities, so that they could continue to develop and improve their farming systems. Rather than a simple financial compensation mechanism, the NGOs pushed for Farmers' Rights to be socio-economic rights, including the right to land, to appropriate agricultural research, to decent livelihoods, and the protection of their knowledge systems. Farmers' Rights were also projected as a struggle against privatisation and IPRs on biodiversity. Farmers' Rights were among the crosscutting issues in the GPA that were closely scrutinised (Earth Negotiations Bulletin 1996). The US outlined several legal problems associated with Farmers' Rights and the lack of internationally accepted "normative standards". Therefore the US emphasised that "the concept" of Farmers' Rights was the only acceptable formulation (*ibid.*). Several developing countries sought removal of "the concept of". Sweden, supported by Norway, noted that Farmers' Rights as a legal mechanism had not been agreed upon internationally and the proper place for such consideration was within the revision of the IUPGR in harmony with the CBD.

Noting the polarised positions on the issue, the Chair established a small contact group on Farmers' Rights, but it did not achieve any real agreement. Remaining differences over language were resolved through informal consultations by the "Friends of the Chair" (Earth Negotiations Bulletin 1996). The final language on Farmers' Rights read "to realize Farmers' Rights, as defined in FAO Resolution 5/89", rather than realise "the concept of" Farmers' Rights.

At the end of the conference, the representatives adopted the Leipzig Declaration and the GPA. The adoption of the *Leipzig Declaration* was the Conference's key political statement, which restated the objectives of the IUPGR. The countries acknowledged *inter alia* the "roles played by generations of men and women farmers and plant breeders, and by indigenous and local communities, in conserving and improving plant genetic resources". The adoption of the *Global Plan of Action* was the Conference's main substantive output. It is a rolling plan that is to be periodically updated. The Plan aims to promote the conservation, sustainable use and the fair and equitable sharing of benefits flowing from plant genetic resources. While the IUPGR dealt with *ex situ* conservation,

the GPA incorporated priority activities for *in situ* conservation as well. Farmers' Rights are included in the GPA under long-term objectives for *in situ* conservation.⁶⁷ The USA was upset by this paragraph as they did not want Farmers' Rights at all (Fowler 2002 [interview]). The GPA is now part of the FAO Global System for the Conservation and Sustainable Utilisation of PGRFA.

6.4 Third Extraordinary Session (1996): Positions on Farmers' Rights

The Working Group set up in 1993 held its eleventh session ahead of the Third Extraordinary Session of the CGRFA.

6.4.1 Eleventh Session of Working Group: Proposals on Farmers' Rights

The discussions on scope, access and Farmers' Rights continued at the *11th Session of the Commission's Working Group* in December 1996. Brazil, France and USA had made written submissions to the Working Group (FAO 1996b). Only the American submission dealt with Farmers' Rights as well, and this submission was the most comprehensive and concrete one. The Americans stressed the conservation aspect of Farmers' Rights. Furthermore, the US believed that it is the responsibility of national governments to determine how to best encourage farmers' efforts to conserve and use sustainable PGR. The US also submitted a proposal for a framework to focus the discussion of the Commission, where they specified several questions that they found relevant.

The secretariat had provided a "non-paper" for informal discussion purposes only. It included an extensive comment on Farmers' Rights and provided possible elements for a Simplified Text. This text concretised the international fund for the implementation of Farmers' Rights, suggested measures for ensuring benefit sharing (including identification and recording of varieties of PGR provided by farmers); and a requirement to disclose the origin of PGR utilised in the development of protected varieties; and recognition and protection of traditional rights of farmers and their communities to keep, use, exchange, share and market their seeds and plant reproducible material, (including the right to re-use farm-saved seed under the UPOV) (FAO 1996b).

⁶⁷ Paragraph 32 of the GPA (1996) reads: "**Long-term objectives:** To better understand and improve the effectiveness of existing on-farm conservation, management, improvement, and use of plant genetic resources for food and agriculture. To achieve a better balance between ex situ and in situ conservation. To realize Farmers' Rights as defined in FAO Resolution 5/89 at the international, regional, and national levels. To promote the equitable sharing of benefits from plant genetic resources for food and agriculture as called for in the Convention on Biological Diversity. To foster the future emergence of public or private seed companies and co-operative enterprises as an outgrowth of successful on-farm selection and breeding. To encourage traditional seed exchange and supply systems."

A number of countries wanted their comments on the report of the Working Group to be reflected in the record (ibid.). Brazil, for example, believed that there had been no general agreement concerning scope, and no broad agreement on access, while Ethiopia stated that Farmers' Rights should not be regarded just as a concept, as they were a reality, being implemented in a number of countries.⁶⁸

6.4.2 Third Extraordinary Session: Three Stands on Farmers' Rights

The *Third Extraordinary Session of the CGRFA* took place in mid-December 1996. The meeting heard a number of general statements by countries regarding their positions on the matters under negotiation, before it decided to constitute two open-ended working groups.⁶⁹ Mr. José Miguel Bolívar from Spain chaired the Working Group on scope and access, while Mr. R. S. Paroda chaired the Working Group on Farmers' Rights.

Chair Bolívar established a "Friends of the Chair's Contact Group", which agreed to use as a basis for discussion the Ethiopian proposal of developing a matrix based on the scope of access and on the level of facilitation to access. However, the Group realised that these subjects were very complex, and agreed that it would be useful to develop a study for the Commission to facilitate its preparations for the next meeting. IPGRI presented a study on access under the title: "Options for access to plant genetic resources and the equitable sharing of benefits arising from their use" (FAO 1996c). In contrast to a previous document presented at the Second Extraordinary Session, which favoured one specific solution, this document elaborated several options as well as information on transaction costs under a variety of options.

Following the discussions in the Working Group on Farmers' Rights, three consolidated proposals were retained, submitted by the EC, US and developing countries respectively. As elaborated on in chapter 4, the EC text stressed conservation and sustainable use of PGRFA and benefit sharing, and suggested measures "subject to its national legislation". The US text outlined the measures to be taken by states and regional economic integration organisations to promote the efforts of their farmers to conserve and use sustainable PGRFA. The text of the developing countries consisted of the highest number of measures (a total of 15) and resembled the secretariat non-paper from the last session of the Commission's Working Group, but went even further.

⁶⁸ India is a pioneer country for national implementation of Farmers' Rights (Act 53 of 2001: "The Protection of Plant Varieties and Farmers' Rights Act").

⁶⁹ In such groups, all countries can participate and non-state observers can join in.

Representatives from the WTO, UPOV, GRAIN and Via Campesina provided inputs during the discussions in the Working Group. A number of countries considered it crucial that countries and regions should clarify and define their positions prior to the Commission's next session, particularly with respect to scope, access and Farmers' Rights (FAO 1996b).

6.5 Seventh Regular Session (1997): Approach between the Developing Countries and Europe

The situation before the *Seventh Session of the Commission* in May 1997 was very difficult and polarised (The Norwegian Ministry of the Environment 1997a). Brazil wanted a very narrow definition of scope, while African countries had a restrictive proposal on access with complicated arrangements for benefit sharing. At the same time, they continued to state in more general terms that they were in favour of an open access regime if benefit sharing provisions were developed in a satisfactory way. US and Australia wanted more or less to skip the whole concept of Farmers' Rights. At the same time, the effects of the CBD started to be more evident. The CBD establishes the principle that states have national sovereignty over their biological diversity. Several developing countries implemented the CBD provisions on *prior informed consent* and on *mutually agreed terms* into restricted access regimes as a response to their perception of the effects of extended patenting practices in developed countries.⁷⁰ Thus, CBD had started to become a tool for "bilateralisation" of access to plant genetic resources. Some Latin American countries were positive to this trend, as they believed they could benefit from it.

The Commission elected Mr. Fernando Gerbasi (Venezuela) as Chairman (FAO 1997a).⁷¹ During the first day, regional groups met to prepare regional positions on the revision of the IUPGR, which was followed by inter-regional contacts on these positions. Afterwards, the negotiations were split into two *Ad hoc* Working Groups, one considered access and scope, and the other considered Farmers' Rights.

Mr. Fernando Gerbasi chaired the first Working Group. The European region advocated a free access regime, opposed by the US and Brazil. A background study paper on germplasm transfers had showed that all countries are dependent on PGR from

⁷⁰ The new wave of laws introduced since the CBD in the Philippines and the Andean Pact, and laws and drafts in several other countries, which regulate access to genetic resources and benefit sharing, are by foreign scientists and companies considered cumbersome, time consuming and costly to follow (ten Kate and Laird 1999:32).

⁷¹ Mr. Tewolde G. Egziabhar (Ethiopia), Mr. Eng Siang Lim (Malaysia), Mr. Mohammed Taeb (Iran), Mr. Gert Kleijer (Switzerland), Mr. Andrew Pearson (Australia) and Mr. Thomas Forbord (USA) were elected Vice-Chairmen.

abroad, and that developing countries today are net recipients of PGR from the international gene banks.⁷² After this paper, Brazil became more flexible on the issue of access (Borrington 2002 [interview]). The G-77 stressed the need to connect access to benefit sharing. The African countries proposed strict access and complicated benefit sharing mechanisms. The Asian countries, headed by Malaysia, on the other hand, could accept broader access as long as satisfactory benefit sharing mechanisms were assured.

It was widely recognised that the EU had a good proposal on access. However, internal divisions and co-ordination problems related to this made it difficult for them to present and defend their positions in a forceful way (The Norwegian Ministry of the Environment 1997b). The NGOs lobbied the Africans heavily, and moderated their views. Nevertheless, as time passed, the positions of the EU, the rest of Europe and G-77 came closer to each other. An agreement on the broad picture for access and scope was reached and at the end of the meeting Malaysia, on the behalf of G-77, clarified its positions, which was close to what had already been agreed on. As a reaction to this, however, the USA withdrew its support to the text. Many were of the opinion that the USA only used Malaysia's speech as an excuse, because they did not want the agreed text (ibid.).

Gert Kleijer chaired the Working Group on Farmers' Rights, which began to move beyond the entrenched positions of the OECD and G-77 blocks to clarify positions (Earth Negotiations Bulletin 1998:2). In particular, a convergence of positions between a number of EU countries and most of the G-77 countries took place, in that both recognised Farmers' Rights as more than a concept. Overall, however, the debate remained rhetorical and a precise definition of Farmers' Rights remained elusive. The formal output on Farmers' Rights was still a heavily bracketed text.

There were important remaining problems regarding Farmers' Rights (The Norwegian Ministry of the Environment 1997b): First, the very use of the concept was still controversial. Particularly the US, Canada, Japan and Australia had problems with the concept as they thought it implied acceptance of some sort of legal rights. Therefore, they only accepted references to the *concept* of Farmers' Rights. Norway said several times that they regarded Farmers' Rights as a goal and principle and not as a legally binding form of rights. Norway had informally shown a text proposal to some central delegates, which they believed could be accepted by the opposite poles of USA and Ethiopia.

⁷²Palacios, Ximena Flores (1999): Contribution to the Estimation of Countries' Interdependence in the Area of Plant Genetic Resources, CPGR Background Study Paper, No.7, Rome: FAO.

Another remaining problem was the level of implementation. The Western countries that had accepted Farmers' Rights as being more than a concept, considered the implementation of Farmers' Rights as primarily a national responsibility. Most developing countries could accept formulations that made the implementation a national responsibility as long as there would be some implications at the international level. Brazil could not. A third problem was related to the degree of obligations in the tools for implementing Farmers' Rights. This included the relationship between Intellectual Property Rights and the interests of local communities. Fourth, the question of reference to other agreements was outstanding. Australia's proposal which stated that measures for realisation of Farmers' Rights should be non-discriminatory and not trade distorting, only got support from the US. Finally, a limited number of countries had problems with formulations that obliged them to implement Farmers' Rights. The US was in a particular position and argued that any agreement it was to ratify would carry the same weight as the rest of the American Constitution. Hence, they argued that they had to be careful with binding formulations.

After the Seventh Session of the Commission, Argentina, Australia, Brazil, Canada, Japan and the US were the countries that had problems with the text on Farmers' Rights (The Norwegian Ministry of the Environment 1997b). There were also some outstanding questions regarding access. The mutual approach between Europe and the developing countries was apparent. There was a polarisation between two groups of countries: those who wanted even stronger patenting and IPR regimes on genetic material (particularly the US) and those who wanted to restrict by law the traditional free access to genetic material (developing countries). The states had the option either to continue to work towards full consensus or to work towards a solution the majority could accept. The EU was considering isolating the US (ibid). All in all, this session had provided a much better understanding of each other's positions, though the need for high-level political involvement in the negotiating process was highlighted (FAO 1997a).

6.6 Fourth Extraordinary Session (1997): Stand Still on Farmers' Rights

The negotiations at the *Fourth Extraordinary Session of the Commission* in December 1997 were organised in one closed Contact Group and one open-ended Working Group (FAO 1997b). The Commission decided that access, scope, Farmers' Rights and financial security should be discussed in the Contact Group chaired by Mr. Gerbasi. Due to the

lack of time, however, Farmers' Rights were discussed in the Working Group, chaired by Mr. Kleijer, together with the other remaining articles.

The Contact Group made good progress since it was now clear that there would be a multilateral system for the exchange of PGRFA. Australia, Canada, the US and Switzerland opposed this system, hence keeping possibilities open for bilateral arrangements for the exchange of PGRFA (The Norwegian Ministry of the Environment 1997c). G-77, headed by the Asian Group, supported a multilateral system on the condition that satisfying mechanisms for benefit sharing were put in place and that Farmers' Rights were realised. Some developing countries like Angola, Colombia and Ethiopia made unclear statements, but they were believed to support the opinion of G-77 (*ibid.*). Some OECD countries were of the opinion that the advantage of an open multilateral system was benefit sharing enough.

The Working Group made progress in drawing the general picture for further negotiations, but there was little development in the discussions on Farmers' Rights. There were various statements during the discussions with direct reference to other forums (FAO 1997b, Appendix E). First, FAO's Legal Counsel Gerald Moore said that the system proposed by the developing countries for the recognition, protection and compensation of knowledge, innovations and practice of farmers and traditional communities undoubtedly was compatible with the *sui generis* system of plant variety protection of the TRIPs Agreement. Second, the observer from UPOV stated that UPOV is only designed to protect plant varieties and is not adapted to the protection of indigenous knowledge, while a programme of WIPO included examining the possibility of protecting such knowledge. The TRIPs Agreement on the other hand, he continued, does not require or forbid the protection of traditional knowledge.

Two NGOs also made statements. RAFI referred to several countries exploring *sui generis* systems for the protection of Farmers' Rights both within the framework of IPR law and outside patent-like regimes in the realm of "collective rights". Based on its monitoring through 20 years, RAFI concluded that IP systems are not appropriate "[g]iven that the average cost of defending a patent is approximately US\$ 250,000, a farming community would have to have its own lawyers in at least Tokyo, Washington and Munich in order to protect its interest" (FAO 1997b, Appendix E). The Gaia Foundation urged the negotiators to speed up the process of developing and implementing collective Farmers' Rights in order to correct the asymmetry of rights that existed. According to the organisation, the CBD and FAO had to strengthen their

capacity as a counterbalancing force to the power of corporations, which asserted their commercial rights through the WTO.

In sum, considerable progress was made during this session but not on Farmers' Rights. The text on Farmers' Rights still included several options and was among the most difficult issues that now remained (The Norwegian Ministry of the Environment 1997c). Outstanding questions included also financing. Developing countries wanted an international fund to have a central role in the new treaty, as they were concerned with the commercialisation through IPR of genetic resources stemming from resources that used to be freely available. Developed countries, on the other hand, stressed that IPRs can only be awarded for new inventions. The US was still creating uncertainty about whether it would be possible to reach consensus even if Europe and G-77 would agree on a compromise (ibid). The negotiating process started to become more intense and resource demanding and several developed countries therefore increased the size of their delegations.

Box 6.1 Illustration of the Controversy Created by the Concept of Farmers' Rights

Neither Farmers nor Rights

During a session when Farmers' Rights were discussed, the discussion stagnated due to the incompatible interests of the delegates. Cary Fowler, senior adviser at IPGRI, is sitting on the podium next to Chairman. In front of them are the delegates, sitting in alphabetic order: Angola, Australia.... etc. Fowler does not think the delegates will manage to reach an agreement with the current atmosphere that is in the room. Thus, he suggests to the chairman to collect a smaller group of countries, a so-called friends of the chair, to continue the discussion backstage. Fowler proposes a number of countries that can be part of the group: India, US, Brazil, Angola, EU... The chairman follows the advice of Fowler. While the plenary session is decomposed and the countries of the friends of the chair are leaving the room, the Australian delegate approaches Fowler, red in the face with anger. Sitting close to the podium, he had observed Fowler given the advice to the chairman, and suggesting which countries that should be included. The Australian delegate is furious because Australia is not part of that group, thus, he claims, the interests of Australia are not attended to. Fowler replies that the main objective of friends of the chair is to reduce the number of participants, thus all countries cannot take part, but the US is part of the group. The US is also opposing the recognition of Farmers' Rights, so the interests of Australia are attended to, says Fowler. The Australian delegate replies (still red in the face): But the US is against "rights" and we are against "farmers"!

Source: Fowler (2002 [interview]).

6.7 Fifth Extraordinary Session (1998): Further Polarisation

Developing countries had high expectations before *the Fifth Extraordinary Session of the Commission* in June 1998 (The Norwegian Ministry of Agriculture 1998). The negotiations continued in the Contact Group, still chaired by Mr. Gerbasi, discussing access and benefit sharing, and in the Working Group on Farmers' Rights, chaired by Mr. Kleijer.

The texts from the developing countries, the EU and the US from the Third Extraordinary Session still formed the basis for negotiations on Farmers' Rights. The document was heavily bracketed, and the Working Group managed to remove a few, but several of the subparagraphs were left unamended. The questions on legal aspects and farmers' privileges again took much of the time. Australia, Canada, Japan and the US still

wanted to avoid the whole idea of Farmers' Rights, but should it be used they insisted that it should be addressed as the "concept of Farmers' Rights". Canada said its farmers had rights because of their citizenship, not because they were farmers. Canada proposed a definition on Farmers' Rights: "Farmers' Rights are those rights which Member States may wish to apply to their farmers, and are applied at the national level" (Earth Negotiations Bulletin 1998). Most of the developing countries, on the other hand, wanted a development towards legal rights as they regarded the establishment of Farmers' Rights as a way of balancing Intellectual Property Rights. Therefore, the developing countries used formulations such as "recognising" Farmers' Rights. During the meeting, Ethiopia suggested a formulation that circumvented the definition problem by avoiding the controversial words of both "concept" and "recognition".⁷³ After regional consultation, the European Region accepted this proposal without brackets, while Australia and the US still had to make reservations.

Distinct positions dominated also the discussion on the subparagraph of legislation that addressed the protection and promotion of farmers' and farming communities' knowledge. Ethiopia underscored the importance of this subparagraph, while developed countries referred to other forums like WIPO and UNESCO as more appropriate arenas to discuss this issue (FAO, 1998c). On behalf of several NGOs, the Gaia Foundation emphasised that Farmers' Rights are *a priori* rights, and that the role of the Commission was to defend the rights of the weak and not to collude with the strong (Earth Negotiations Bulletin 1998).

When the countries that had made reservations could not compromise further even after consultation with their capitals, there was a clear opinion among the developing countries that there was no point in continuing negotiations (The Norwegian Ministry of Agriculture 1998). Several small contact groups composed of key regional representatives were established throughout the week to clarify text. Still, the negotiations came to a grinding halt on the fourth day.

It was evident that some delegations, particularly several developed countries with indigenous populations, were profoundly nervous about conceding to any principles on Farmers' Rights, fearing that it would trigger commensurate rights for local and

⁷³ Ethiopia suggested keeping "Parties recognize the enormous contribution that farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agricultural production throughout the world" and add "these contributions form the basis for Farmers' Rights as they relate to PGRFA" (Earth Negotiations Bulletin 1998).

indigenous communities under the CBD (Earth Negotiations Bulletin 1998:10). The US wanted weaker language in the article on Farmers' Rights, for example to alter "ensure their participation" to "arrangements in which they may participate". It was not even clear whether Farmers' Rights would be included in the treaty at all (ibid.). The African and Latin American Regions expressed their appreciation to the European Region for its willingness to negotiate and reach a consensus. Albeit the lack of progress on the issue of Farmers' Rights, the European Region believed that after this session there was a much better common understanding of what Farmers' Rights meant in the context of PGRFA and the aspects of particular importance to the different regional groups (FAO 1998a). Norway confirmed its willingness to look into any option for financial arrangements, which should be predictable, transparent and also mandatory. Such options could be explored in a Secretariat document. Norway also confirmed its commitment to a solution for Farmers' Rights that would clearly express the rights of farmers to re-use farm-saved seed in traditional ways.

In contrast to the lack of progress in the Working Group, the strong Chair in the Contact Group and a smaller gathering of delegates led to greater flexibility and clarification of positions. It seemed possible for Europe, Africa and Asia to reach an agreement, while Latin America's position was unclear. The JUSCANZ countries⁷⁴ had completely divergent attitudes, stressing that the questions of access and benefit sharing should not be mixed. They insisted that that benefit sharing should not be dependent upon individual access transactions of germplasm. In the discussions on access and IPR, some delegates were keen to investigate the possibility of modified IPR regimes that give concessional arrangements to countries of origin. These initiatives were met with a stone wall response from TRIPs-friendly countries (Earth Negotiations Bulletin 1998:9). Developing countries wanted the three main questions of access, benefit sharing and Farmers' Rights to be seen in context.

During a side event at lunchtime, the International Association of Plant Breeders (ASSINSEL) presented its willingness to engage in financial compensations for patented material. The private seed industry appeared thus to sidestep government negotiations on financial arrangements and going directly to countries of origin to negotiate access

⁷⁴ This is an informal coalition of Japan, the US, Canada, Australia and New Zealand. These countries co-operated at the first Conference of the Parties to CBD, and the negotiation cartel was also active during the Kyoto negotiations, where Norway and Switzerland also joined the group. These two European countries were also part of the JUSCANZ group in the beginning of the ITPGRFA-process, before the negotiations were based on more regional representation (Borrington 2002 [interview]). When referring to JUSCANZ countries in this thesis, only those countries with their initials included in the abbreviation are included.

arrangements (Earth Negotiations Bulletin 1998). The explanation of the industry's move was partly that their proposal is a form of benefit sharing and partly that patenting, unlike traditional plant breeders' rights, reduces access to further breeding due to the restrictions on farm-saved seed (The Norwegian Ministry of Agriculture 1998).

In general, some developed countries, particularly the JUSCANZ countries, blocked the negotiations to a large extent. They had so far in the negotiation process kept their cards close to their chest and had shown little willingness to really negotiate (The Norwegian Ministry of Agriculture 1998). The process had, however, come so far, that this was no longer possible. Tewolde Egziabhar from Ethiopia had a closing remark where he saw considerable asymmetries since the international agreements protecting Western industry through IPR regimes were so easy to develop, while at the same time it seemed impossible to shape international frames that protect the traditional knowledge in developing countries on the use of genetic resources. He made an appeal to listen to the developing countries and take the issues of benefit sharing and Farmers' Rights seriously. The speech from Ethiopia was representative of the disappointment among the developing countries (*ibid.*).

The climate was further polarised due to several current developments (The Norwegian Ministry of Agriculture, 1998). First, the EU's patent directive was adopted, paving the way for stronger intellectual property rights on genetic material in the European Region.⁷⁵ Second, recent examples of patents based on material from the CGIAR-system reinforced the perception of biopiracy⁷⁶ of the South's resources. Third, the new developments of 'Genetic Use Restriction Technologies' (GURTs)⁷⁷ represent a threat to farmers' traditional practise of saving seeds. In addition, the developing countries feared that the on-going review of TRIPs would put extra pressure on them to introduce strict IPR regimes. Regarding the next meeting, the US proposed continuing negotiations at the eighth session of the CGRFA in May 1999 (Earth Negotiations Bulletin 1998:9). Norway supported convening an extraordinary session in autumn 1998 and requested the Secretariat to prepare a document for exploring options for financial arrangements.

⁷⁵ The EU Directive on Legal Protection of Biotechnological Inventions (98/44/EC) was adopted in May 1998. The directive is highly controversial and critics have said that it is in conflict with the CBD (Emmott 2001).

⁷⁶ The term biopiracy is often used by NGOs and GRAIN defines it as "stealing of genetic material and knowledge from communities in gene-rich developing countries" (<http://www.grain.org/front/>).

⁷⁷ These genetic technologies either render the harvested seeds sterile ("V-GURTs", popularly dubbed "Terminator technology") or "turn off" certain agriculturally valuable traits in a plant when it is replanted ("T-

In August 1998 Mr. Gerbasi embarked on a series of consultations, particularly to countries belonging to the Chairman's Contact Group and members of the Bureau as representatives of their regions and for active involvement in the whole negotiation process (FAO, 1999a). Gerbasi asked them "if they thought the conditions existed for a compromise to break the deadlock that had befallen the negotiations" (FAO 1999a:2). In general terms, the delegations needed more time so they could conduct consultations both within their respective countries and between countries. Mr. Gerbasi continued his consultations at the 115th Session of the Council in November 1998 and the Council unanimously supported his proposal to convene an informal meeting.

Informal meeting in Montreux: A turning point?

In January 1999 Chair Gerbasi invited 21 countries and the European Union to an *informal expert meeting in Montreux* in Switzerland. The experts represented the various regions and positions. Switzerland and the United States facilitated the participation of developing country participants (FAO 1999a). FAO staff and IPGRI representatives also participated. The experts addressed in their personal capacity issues such as benefit sharing, Farmers' Rights, financial mechanisms and the legal status of the revised IUPGR. During the week, there was progress from the well-known repetition of old views via good dialogue to a closure, which Chair Gerbasi summed up as "progress, but still too big distances to reach an agreement" (ibid.). The result of the meeting was summed up in "The Chairman's Elements for a Draft Text".

Most of this document reflected a broad consensus, with some clear exceptions, particularly Australia but also the US. However, regarding Farmers' Rights there was no broad consensus. The ETC group strongly criticised the behaviour of Australia at the Montreux meeting: "Australia's participation in recent CGRFA meetings has been marked by discord and the Down Under delegation's increasing isolation from the vast majority of countries. Australia's is an outsider because of its implacable opposition to Farmers' Rights and delaying tactics perceived by most observers to reflect a questionable commitment to abandoning the status quo under which Australia has granted so many suspect PBR claims on foreign germplasm" (ETC group 1999). The problems regarding Farmers' Rights thus reflected the real conflict between the wish to establish the importance of intellectual property rights within this sector and the wish to stress the possibilities and traditional practice of smallholder farmers to conduct breeding activities,

GURTs", partly dubbed "Traitor technology") (Wolff 2004: 28). See for instance CBD-report (2003) for an

among others through the freedom to use seeds from own harvest, even when they have bought protected varieties (The Norwegian Ministry of the Environment 1999a). Due to Australia's lack of co-operation, Montreux apparently did not change the polarised condition.

Box 6.2: The Chairman's Elements for a Draft Text on Farmers' Rights (FR) (FAO 1999a).

- *Recognition of the enormous contribution that farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.*
- *The responsibility for realising FR, as they relate to PGRFA, rests with national governments. In accordance with their needs and priorities, each Party should, as appropriate, and subject to its national legislation, take measures to protect and promote FR, including:*
 - *The right to use, exchange, and, in the case of landraces and varieties that are no longer registered, marked farm-saved seeds;*
 - *Protection of traditional knowledge*
 - *The right to equitable participation in benefit sharing*
 - *The right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of PGRFA.*

Since there was no clear breakthrough at the January meeting, there were rumours that Gerbasi would withdraw as Chair of the negotiations. Individuals usually chair the Commission for only one session, and Gerbasi's normal term was now completed. According to the Norwegian representative at the meeting, it would be very unfortunate for the negotiations if Gerbasi withdrew. Through the Norwegian Embassy in Rome, the Norwegian Authorities sent a letter to Gerbasi to encourage him to continue as Chair (The Norwegian Ministry of Foreign Affairs 1999). At an OECD-meeting 18th of March, there was agreement to support the sitting bureau and Gerbasi as chair. However, if Gerbasi resigned or if the G-77 wanted to change Chair, Canada said it would provide a candidate for the leadership of the Commission (Royal Norwegian Embassy, Rome 1999).

6.8 Eighth Regular Session (1999): The Breakthrough

It turned out that the OECD countries did not have to worry since Gerbasi was re-elected at the *Eighth Regular Session of the CGRFA* in April 1999 (FAO 1999c). The Chairman's Elements were incorporated into the appropriate articles of the "Composite Draft Text for the revision of the International Undertaking incorporating the Chairman's Elements". The Commission established a Contact Group to continue the negotiations using this Composite Draft text as the basis for discussions (Earth Negotiations Bulletin 2000:2-3). The Contact Group was "closed" meaning that only the countries in the group could participate. All other countries and non-state actors were excluded. Nevertheless, international organisations presented reports on their policies, programmes and activities

assessment of the impact of GURTs on Farmers' Rights.

on agro-biodiversity (FAO 1999b). For example ASSINSEL mentioned their activities in conservation and increasing the genetic diversity available to farmers. Furthermore, the FIS and ASSINSEL Members from developing countries warned delegates at this session that in the absence of a multilateral agreement, plant-breeding activities in developing countries would be endangered. The organisations particularly pointed out the need to: (i) promote the use of modern technologies, including biotechnologies, (ii) create incentives for plant breeding while protecting intellectual property, (iii) favour access to PGRFA and (iv) set up a simple and efficient system for benefit sharing (FAO, 1999b). RAFI informed about its analysis of so-called Terminator (seed sterilisation/GURT's) technology and of 147 possible abuses of Plant Breeders' Rights and patents around the world.

Regular co-ordination took place in the European Region, but there was a problem with this co-ordination as it took place *after* the EU's internal co-ordination meetings (The Norwegian Ministry of Agriculture 1999a). The EU's positions were not very flexible due to the many internal compromises they already had made. The other European countries partly had to accept this, and the positions of the European Region at times greatly reflected the views of the EU. When issues were raised during the negotiations that the EU had not discussed, however, it occurred that the EU had problems in fully participating in the debate.

An important condition for progress was met when the Commission agreed on using the text from Montreux as basis. However, the real progress at this session was the agreement on the article on Farmers' Rights! Based on the Chairman's Elements, the approved text was proposed by the US and amended by Ethiopia. When they realised at the end of the session that they had achieved this breakthrough, the delegates started to applaud (Fraleigh 2003 [interview]).

At the Eighth Regular Session the US and Canada were perceived to be constructive (The Norwegian Ministry of Agriculture 1999a). During the meeting, the opposite poles were mainly developing countries/ Brazil versus the EU, while the US and Canada were compromise suppliers. Despite the constructive behaviour of the Americans, however, it was still uncertain whether they really wanted an agreement soon, because they had showed little willingness to co-operate during the recent biosafety negotiations in Cartagena (*ibid.*).

The Commission recognised the very significant progress that had been made during this session, and expressed great appreciation for the commitment and skilful leadership of the Chairman (FAO 1999c). The Commission decided to continue the

negotiations for the revision of the IUPGR, and the old deadline of November 1999 was altered to November 2000. It also decided to establish an intersessional Contact Group to continue the negotiations and authorised the Chairman to convene sessions of this group.

Box 6.3: The Unbracketing of the Farmers' Rights Article.

The Decisive Moment

At the Eighth Regular Session, Farmers' Rights were on the agenda of the Contact Group. During a meeting in the German room – which is without windows like many other of the rooms in the pale buildings of the FAO headquarters – Ms Cathleen Enwright from the American delegation started saying: "For proposing this I will probably lose my job". Then she continued to present a proposal that resembled the Chair's Element on Farmers' Rights. Listening to her, Mr. Cary Fowler, representing CGIAR, was stunned because he believed the proposal was not in the interests of the USA. However, Mr Tewolde Egziabbar from Ethiopia immediately reacted negatively because there was a lot of mistrust between the actors, and then proposed an amendment to the American proposal that actually diluted it. The Americans, now realising that they had given much in the first place, accepted the amendment. When both the USA and Ethiopia, the two counterparts on the issue of Farmers' Rights, had come to an agreement, everybody should apparently have been satisfied. Ms Grethe Evjen's comment on the proposals was, however, "That's horrible!" Norway was sceptical about both the national responsibility for the implementation and the ambiguous formulation on farmers' right to use, sell and exchange farm-saved seeds. Thus, Norway together with Poland and Malta –which were sitting next to Norway – opposed. Upon this, the Chairman addressed them saying: "Everybody else in the room seems ok with the text, only the three of you disagree. Can you withdraw your objections?" So they did, and the agreed text of this meeting became Article 9 of the final version of the International Treaty. Just a few minutes too late, Rene Salazar from the Philippines realised what had happened and went up to Fowler and asked: "Did we just make a mistake here?", whereupon Fowler replied: "From your perspective, I would say yes".

Source: Evjen; Fowler 2002 [interviews]

6.9 Chairman's Contact Group (1999-2001): Back and Forth

6.9.1 First Meeting: Stand Still on Benefit Sharing

The Contact Group consisted of 40 countries representing the different regions.⁷⁸ The *First intersessional meeting of the Contact Group* in September 1999 focused on benefit sharing in the Multilateral System on the basis of a submission by the developing countries (Earth Negotiations Bulletin 2000).⁷⁹ The meeting was only open to members of the Contact Group and representatives of CGIAR, CBD and UPOV as resource persons. This was the first time that the article on benefit sharing was thoroughly discussed. Many delegates believed that a solution to this question was necessary in order to achieve an agreement. Norway got a very positive response from the developing countries for its positions during the negotiations, and the EU and some other countries signalled that Norway was respected as a compromise supplier (The Norwegian Ministry of Agriculture 1999b).

⁷⁸ The members of the Contact Group were Angola, Argentina, Australia, Benin, Brazil, Burkina Faso, Canada, China, Colombia, Cuba, Ethiopia, European Community, Finland, France, Germany, India, Iran, Republic of Korea, Libya, Malaysia, Malta, Mexico, Morocco, Netherlands, New Zealand, Norway, Philippines, Poland, Romania, Samoa, Senegal, South Africa, Switzerland, Tanzania, United Kingdom, United States of America, Uruguay, Venezuela, Zambia and Zimbabwe (FAO 1999c).

⁷⁹ There is no formal report of the meeting (FAO 1999c). Therefore, my description of the meeting is mainly based on the internal Norwegian report from it.

The EU delegation was troubled with internal disagreement and poor leadership (The Norwegian Ministry of Agriculture 1999b). It also suffered from a lack of continuity and ability to present its positions. Jan Borring was, however, more optimistic after an informal meeting in Denmark in February 2000 (Borring 2000). A group of negotiators had met to discuss outstanding issues at the initiative of the Nordic countries. Before the next meeting of the Contact Group, Norway suggested to Vice-Chair Kleijer that it was possible to improve the potential for reaching a solution by using some strategies like changing topics when the negotiations get stuck; announcing breaks more frequently; asking a few delegates to meet and see if they can agree on something; by jumping a little more back and forth between subjects; and by imposing time limits on discussions (ibid.).

6.9.2 Second Meeting: The ‘Gang of Six’ Blocking Progress⁸⁰

At the *Second Intersessional Meeting of the Contact Group* in April 2000 the Brazilian delegation dropped a bombshell by presenting a proposal limiting the coverage of the Multilateral System, which led to a breakdown in the negotiations. Brazil had counted on support from other developing countries. But after a long, tense day of regional consultations, all other participants, North and South alike, came out against Brazil (GRAIN 2000).

The NGOs were at this time organising a campaign to pressure governments to come to an agreement (ibid). They demanded that the industrialised countries come up with concrete commitments (money to implement the Global Plan of Action); no Intellectual Property Rights on genetic material; implementation of Farmers’ Rights; and expanded representation, because a high level of representation is necessary to make decisions and commitments.

The Contact Group made only moderate progress in clarifying positions (Earth Negotiations Bulletin 2000:3). The Brazilian delegation stated that it was the first country to make a concrete, balanced proposal on access to PGR, but was still missing a clear and meaningful reaction concerning finance and benefit sharing (FAO 2000a). The European delegation remarked that informal consultations had shown to their regret, lack of clarity of certain proposals and mistrust, which had resulted in a slowdown of the negotiation process. The Europeans welcomed the proposals tabled by Norway and Japan to the effect that when PGRFA obtained under the Multilateral System results in commercial benefits, those benefits should be shared.

⁸⁰ Observing NGOs labelled Australia, Canada, New Zealand, USA, Brazil and Colombia as the “Gang of six”, referring to what they perceived to be laggards in the negotiations (Wertheim 2001).

6.9.3 Third Meeting: Progress on Benefit Sharing

At the *Third Intersessional Meeting of the Contact Group* in Teheran, Iran, August 2000 the delegates continued negotiations on the Consolidated Draft Text, specifically on access, benefit sharing and financial resources. An initial round of discussions was also held on the countries' consultations with their private sectors regarding commercial benefit sharing, and regional groups presented their proposed list for crops covered by the Multilateral System. This was yet the most successful of the Contact Group sessions. The compromise was fuelled by pressure from the Chair to break the stalemate on benefit sharing by forcing a closed session to resolve the issue. Gerbasi impressed upon the group that this was the last chance to move forward, and the threat of negotiations being terminated by the FAO Council for lack of progress placed additional pressure on the participants (*ibid.*).

6.9.4 Fourth Meeting: Breakdown

There was some progress at the *Fourth Intersessional meeting of the Contact Group* in Neuchatel, Switzerland in November 2000, but the negotiations almost broke down when Australia, Canada, New Zealand and the US could not accept the compromise suggestion on benefit sharing that was agreed *ad referendum*⁸¹ in Teheran (The Norwegian Ministry of Agriculture 2001a). The JUSCANZ countries feared a possible incompatibility with TRIPs if benefit sharing was made mandatory when patenting plant genetic material. Chair Gerbasi regarded the situation as very difficult and announced that he did not want to call more meetings in the Contact Group until he had reported to and obtained a new mandate from the Commission. Gerbasi got new confidence at the *119th Session of the FAO Council* (November 2000) as long as the negotiations would be finished by November 2001.

Remaining questions included the number of crops to be included in the Multilateral System (regional proposals ranged from 9 (Latin American proposal) to 287 (European proposal) crops) and whether genetic material in the international gene banks (CGIAR) should be covered by the Multilateral System (The Norwegian Ministry of Agriculture 2001a). G-77 wanted to limit the list of crops. The reasons were believed to be: first, that the developing countries thought they could use the list as a trading card; second, that several developing countries didn't see the value of developing new varieties;

⁸¹ *Ad referendum* is commonly understood to mean that delegates realize that they need to refer the text back to their governments. The JUSCANZ countries reported in Neuchatel that as a result of such consultations, they were not able to accept the Teheran wording (Fraleigh 2003 [interview]).

and third, that many countries, particularly the Latin-American countries feared losing the potential to earn money on their own genetic resources if the list became too comprehensive (ibid.). The CGIAR has in an agreement with FAO committed itself to managing the genetic material in its gene banks on behalf of humanity.⁸²

6.9.5 Fifth Meeting: The Return of the ‘Gang of the Six’

The article on Farmers’ Rights was finalised in 1999, but some thought that the developing countries had given too much and that the article should therefore be reopened for negotiations. In January 2001 there were few indications that this was a relevant approach, however (The Norwegian Ministry of Agriculture 2001a).

The *Fifth Intersessional Meeting of the Contact Group* in February 2001 somehow became a repetition of previous sessions. The JUSCANZ countries did not want to make any commitments on benefit sharing even though their contribution to the fund did not seem large. As a response, the developing countries –Argentina, Brazil and Colombia—reduced the list of crops included in the Multilateral System for facilitated access. Australia, Canada, EU and USA wanted the opportunity to patent materials received from *ex situ* collections and to have a long list of crops included in the Multilateral System. However, in the long run, their practice of patenting genes may reduce access to important genes in the Multilateral System (Evjen 2003 [interview]). According to Pat Mooney from RAFI –the only NGO allowed to participate in the talks– if it had not been for the “gang of six” there probably would have been an agreement by now (Wertheim 2001).

The lack of progress in February provoked the NGOs to take action. Greenpeace together with more than 100 other organisations wrote an open letter to the delegates at the next meeting of the Contact Group, demanding that patents on seeds and plants as well as food made from them should be forbidden (Greenpeace 2001). Via Campesina also wrote an open letter to the Contact Group, demanding that the negotiators respect Farmers’ Rights and fully incorporate them into any agreement, and to avoid any incorporation of IPR on plant genetic resources. Via Campesina regarded the current

⁸² The 1994 Agreement between FAO and the CGIAR Centres formally acknowledges that the Centres are custodians of the PGRFA and the Centres agree not to “claim legal ownership over the designated germplasm” or to seek any IPRs over “that germplasm or related information” (Fowler 2003). This PGRFA has two type of status. The genetic material collected after the entry into force of the CBD is covered by the CBD’s provisions on benefit sharing and national sovereignty. The remaining question is what should happen with material collected before the entry info force of CBD. Colombia proposed in Neuchatel that *ex situ* material not on the list should not be covered by the Multilateral System either (ibid.). Colombia’s position is related to the fact that

proposed text on Farmers' Rights as a step backwards compared to earlier recognition of these rights, and "a bleak lip service to what these rights entail" according to them (Via Campesina 2001).

Norwegian government ministers also felt the need to act. The Minister of International Development, the Minister of Agriculture and the Minister of the Environment sent a letter to all members of the Contact Group, urging them to work for a fair and workable system for the continued open exchange of PGR between countries (The Norwegian Ministry of Foreign Affairs 2001). They feared that long-term food security was at stake.

6.9.6 Sixth Meeting: Approach between Europe and Developing Countries

Chair Gerbasi prepared in consultation with the rest of the Bureau, a *Chair's Proposal for a Simplified Text*, which was consistent with the Chairman's Elements from Montreux and which suggested a revised structure of articles. In doing so, he removed brackets and provided a single text where it appeared to him that consensus might be possible, seeking to balance the expressed opinions of the regions (FAO 2001a). The *Sixth Intersessional Meeting of the Contact Group* that met in Spoleto in Italy, April 2001, decided to use Gerbasi's simplified text as a basis for negotiations.

After the first three days of totally blocked negotiations, the Chair called the group to order and insisted that they should either admit failure and go home, or get serious and move on. European donors threatened there would be no money for a further meeting unless substantial progress could be shown (Civil Society Organisations 2001). That sent repercussions and pushed the process forward. The increased presence of civil society also helped to keep up pressure as delegations felt they were being watched.

What was the status after the sixth meeting? The relationship between Europe and G-77 had improved; Australia, Canada and the US were isolated in several issues; the US had announced that it could not accept obligations to share benefits derived from the use of PGR; the destiny of the CGIAR centres was still uncertain (a solution to these questions had to include Colombia); and there was no solution to the IPR question regarding materials from the Multilateral System, even though a compromise was reached between G-77 and Europe (The Norwegian Ministry of Agriculture 2001b). The USA reinstated an old proposal that would render the entire IUPGR useless (GRAIN 2001a).

the International Centre for Tropical Agriculture attends to Colombia's genetic collections and that this is covered by the agreement between CGIAR and FAO (The Norwegian Ministry of Agriculture 2001a).

It consisted of letting each country decide which germplasm of each crop was to be included in the Multilateral System, based on the argument that governments cannot control what private companies collect, store and exchange. The NGOs had increased presence at the negotiations of late, but their demands for no IPRs on PGRFA and stronger Farmers' Rights had not really been dealt with (ibid.).

The Farmers' Rights text was not discussed during the Spoleto meeting, but informally there had been some talk about the possibility flagging it as an outstanding issue in a separate resolution to come with the new treaty and committing countries to deal with at a higher level (Civil Society Organisations 2001). Furthermore, RAFI announced that NGOs and farmers' organisations would go to Rome in June to re-open the negotiations on Farmers' Rights (RAFI 2001). If the negotiations could be reopened, they would call for an extraordinary resolution from the Commission to send Farmers' Rights to the UN High Commissioner on Human Rights. RAFI hoped for progress there, since they believed that the US had little influence on the High Commission.

6.10 Sixth Extraordinary Session (2001): Towards Conclusion of the Negotiations

There was no time scheduled for renegotiating Farmers' Rights at the *Sixth Extraordinary Session of the CGRFA* in June 2001. Nevertheless, the issue was discussed when all the issues suppressed in the Eighth Commission meeting resurfaced in "an attack led by Canada and the US" (UK^{abc} 2001). The debate focused in particular on the paragraph in the preamble affirming farmers' rights to save, use and exchange PGRFA, and the purpose of preamble paragraphs in general, and the paragraph's consistency with Article 9 (Earth Negotiations Bulletin 2001). Canada proposed deleting one of the two paragraphs on Farmers' Rights, but this was opposed by Ethiopia, Zambia and India, among others, who all stressed the importance of Farmers' Rights in the International Undertaking. Africa's work on The African Model Law on Community Rights had ensured that the region was well prepared and made their negotiation positions particularly strong in comparison to earlier processes. Ethiopia, on behalf of most of the G-77, defended the proposed paragraphs on Farmers' Rights in the Preamble. This contributed to the difficulty in reaching agreement (ibid.).

To illustrate the implications of global IPR systems at the farm level, NGOs at the CGRFA invited all delegates to a side event during lunchtime on June 29 (NGO release 2001). The NGO claimed that a Canadian judge dealt a crushing blow on Farmers' Rights by ruling that farmer Percy Schmeiser must pay the biotech company Monsanto

thousands of dollars for violating the company's patent on genetically modified canola. According to the NGOs, the patent legislation not only deprives farmers of their right to seed saving, but may also force them to pay royalties on genetically modified seeds found on their land, even if they do not buy the seeds or benefit from them.

Beyond the lengthy discussion of Farmers' Rights in the preamble, the most contentious issues, in particular the functioning of the Multilateral System, were negotiated by a "Friends of the Chair" contact group (Earth Negotiations Bulletin 2001). Informal working groups negotiated the list of crops to be covered by the Multilateral System; and the use of terms and resolutions. The Report of the Expert Panel commissioned during the sixth meeting of the Contact Group in Spoleto was an extremely valuable addition to participants' understanding of various food crops and forages relevant to world food security.

The Netherlands requested that the working groups should be open to observers. This was granted by the Chair, which made the work of the Commission more transparent. The "Friends of the Chair" meeting, however, was less publicised and some delegations wondered what schemes were being hatched by these "unknown" friends (UK*abc* 2001). The key process was being conducted behind closed doors, with rumours and counter-rumours leaking out. For most delegates, this lack of transparency led to a lack of trust in the whole process (*ibid.*). The group of Friends of the Chair was constituted to create flexibility and ensure inclusion of interests from key developed countries without alienating developing countries (Earth Negotiations Bulletin 2001:13). A recurring problem in Plenary was however delegations involved in closed-door negotiations re-opening discussions over their own agreements.

In the end, the Commission "adopted the text of the International Undertaking on Plant Genetic Resources" and "requested the Director-General to transmit it, through the Seventy-second session of the Committee on Constitutional and Legal Matters (8-9 October 2001) and the Hundred and Twenty-first session of the Council (30 October-1 November 2001), to the Thirty-first session of the Conference (2-13 November 2001), for its consideration and approval" (FAO 2001b).

Despite the conclusion of the negotiations, there were some outstanding issues. The most worrisome subject was the IPR question regarding materials from the Multilateral System. USA did not want restrictions in their IPR practice, while the developing countries of Brazil, Colombia, Ethiopia, India and Iran argued that the risk of "draining" out materials originally in the open system must be prevented. The others did

not accept the American stand, because after all, the “yellow bean” case was going on (The Norwegian Ministry of Agriculture 2001c).⁸³ Norway was head of the European Region from July on. Norwegian initiatives included e-mail contact with Barbara Tobias, head of the American delegation; they sent a letter to the FAO Director-General and stressed the need to promote increased political awareness during the limited time left; they had contact with Beijing to ensure China’s acceptance of the treaty and urging it to include soybeans on the list of crops for the Multilateral System; there was contact with the CGRFA secretariat and Chair Gerbasi. Presumably, other informal intersessional discussions took place, helping countries to further define and clarify their positions on what constitutes genetic material and whether it can be patented under the Multilateral System (Earth Negotiations Bulletin 2001:13).

6.11 121st Session of the FAO Council (2001): Adoption of the International Treaty on Plant Genetic Resources for Food and Agriculture

Informal negotiations started at the Italian Ministry of Agriculture on 25th of October (The Norwegian Ministry of Agriculture 2001c). In addition to the outstanding issues from the last session, the US had a new proposal on a “security clause”, which none of the other countries supported (ibid.). Even the name of the treaty was subject to discussion, where some Latin American countries favoured its long and complicated name, hoping that this would contribute to reduce the significance of the treaty (Evjen 2002 [interview]). During the *Open-ended Working Group on the International Undertaking* from 30 October till 1 November 2001, the last remaining questions were settled. And finally, the FAO Conference adopted through Resolution 3/2001 the *International Treaty on Plant Genetic Resources for Food and Agriculture* on 3rd November 2001. The adoption was unanimous, with two states abstaining (Japan and USA).⁸⁴

6.12 Summing Up

The negotiations included 3 regular sessions and 6 extraordinary sessions of the Commission on Plant Genetic Resources for Food and Agriculture, an informal expert meeting and 6 intersessional meetings of the Chairman’s Contact Group. The treaty is described as “the result of a laborious and lengthy, hard-fought seven-year negotiation process” (Mekoaur 2002:3). For most of the 1990s the negotiations seemingly dragged on

⁸³ Larry Proctor, president of a seed company in Colorado, USA, gained in 1997 a US patent on “Enola yellow bean”. He had developed the bean on the basis of Mexican beans and NGOs have called this a schoolbook example of “biopiracy” (ETC group 2001b).

⁸⁴ USA signed the treaty on November 1st 2002.

in every direction except forward. By 1998, negotiations had come very close to a total standstill, having produced an “overly long, unreadable and almost completely bracketed (i.e. not agreed) negotiation text” (GRAIN 2000). Progress was relatively considerable since 1999, and the April 1999 meeting of the Commission produced only moderated bracketed text for three central articles, including an entire unbracketing of Farmers’ Rights. The Contact Group negotiated most of another key article, benefit sharing, in September 1999. During the remaining meetings of the Contact Group, the “gang of six” alternated in halting progress. Finally, the FAO Conference adopted through Resolution 3/2001 the International Treaty on Plant Genetic Resources for Food and Agriculture on 3rd November 2001.

The acrimony and distrust that characterised the discussions during the meetings held by FAO between 1981 and 1983 continued to influence the negotiations to revise the IUPGR (Bragdon 2000:1). Experienced FAO diplomats had said that this had been the most difficult negotiation process they ever had attended (Borrington 2002 [interview]). Farmers’ Rights were one of the most contested issues with highly divergent positions.



Figure 6.1: Various regions’ position on Farmers’ Rights (FR) on a continuum from no Farmers’ Rights to a comprehensive definition of such rights. The most active countries on the issue are highlighted as several countries in each region were bystanders.

Table 6.1: Summary of the Negotiation Process

	<i>Session</i>	<i>Main Outcome</i>
1994	<ul style="list-style-type: none"> • 1st Extraordinary 	<ul style="list-style-type: none"> • Incorporation of the three annexes in the IUPGR to the 1st Negotiation Draft
1995	<ul style="list-style-type: none"> • Several sessions of the Working Group • 6th Regular 	<ul style="list-style-type: none"> • Examined articles on scope, access and FR • Some proposals on FR
1996	<ul style="list-style-type: none"> • 2nd Extraordinary • Leipzig Conference • 11th session of Working Group • 3rd Extraordinary 	<ul style="list-style-type: none"> • Adoption of GPA • Proposals on FR that subsumed into 3 distinct stands on the issue
1997	<ul style="list-style-type: none"> • 7th Regular • 4th Extraordinary 	<ul style="list-style-type: none"> • Heavily bracketed text on FR, but Europe and G-77 agreed that FR are more than a concept
1998	<ul style="list-style-type: none"> • 5th Extraordinary 	<ul style="list-style-type: none"> • Proposal on benefit sharing from ASSINSEL
1999	<ul style="list-style-type: none"> • Montreux meeting • 8th Regular • 1st session of Contact Group 	<ul style="list-style-type: none"> • Chairman's Elements • Adoption of FR Article
2000	<ul style="list-style-type: none"> • 2nd –4th session of Contact Group 	<ul style="list-style-type: none"> • Near at hand agreement on benefit sharing
2001	<ul style="list-style-type: none"> • 5th –6th session of Contact Group • 6th Extraordinary • 121st session of FAO Council 	<ul style="list-style-type: none"> • Chair's proposal for a simplified text • FR in the Preamble • Adoption of the ITPGREFA

Chapter 7: Analysis of the Negotiation Process

In the following, general observations based on the theoretical framework will be evaluated against the factual observations from the negotiation process, in order to come closer to an explanation for the medium breakthrough of the developing countries' proposal on Farmers' Rights. For reasons of clarity, I will adopt the perspectives one at a time.

7.1 Dominance of Powerful Actors?

Based on the main assumptions of the power-based perspective, I assumed that *the international negotiation outcome would reflect the interests of the dominant regime members, making a weak breakthrough for the developing countries likely. Alternatively, a weak breakthrough would be possible as lip service.* I have concluded that the developing countries experienced a *medium* breakthrough for their interests regarding Farmers' Rights. Does this apparent divergence between the prediction of outcome and the actual outcome disprove the explanatory power of the power-based perspective in this case?

One obvious advantage for rich countries is that they can afford to attend international negotiations. During the negotiations of the International Treaty, they could increase their delegations when the process became more demanding. Furthermore, they could spend money on thorough preparations ahead of the negotiation processes. Generally, most developed countries were better prepared than their less advanced counterparts. Since their policy goals were more clearly defined, it was easier to strive for their achievement as well.

The JUSCANZ Countries

The two coalitions of powerful actors had different positions regarding Farmers' Rights, the EU being more favourable than the JUSCANZ countries. Why did the latter so strongly oppose the international recognition of Farmers' Rights? In general, they believed that such recognition could have inverse effects on their general policy and interests in the issue area of PGRFA. Japan, the US, Canada, Australia and (to a lesser extent) New Zealand are in the forefront in research and use of modern biotechnology, IPR legislation pertaining to living material and their industrialised agricultural sectors produce surpluses that they are eager to export. Australia, Canada and New Zealand are

members of the Cairns Group⁸⁵ and therefore sceptical of support to national agriculture. They stressed that the realisation of Farmers' Rights should not be trade distorting agricultural subsidies (see for example the American proposal on Farmers' Rights: FAO 1996b). The JUSCANZ countries also grow the most GMOs⁸⁶ and Australia, Canada and the US are for example members of the so-called Miami Group⁸⁷. That group lobbied against international restrictions on trade of GMOs during the negotiations for a biosafety protocol to the CBD.⁸⁸ They were concerned that the precautionary principle would be included in the protocol and thus give environmental concerns precedence compared to trade. Another condition that affected the JUSCANZ countries' negotiating positions concerning Farmers' Rights is the presence of indigenous populations (Earth Negotiations Bulletin 1998:10). The special role of indigenous people was recognised in the CBD, in particular in Article 8 (j). An additional recognition of such rights in a FAO treaty would make central governments even more responsible for implementing these rights. Particularly Australia and US were sensitive to this concern.

Initially, the JUSCANZ countries were unwilling to discuss the Farmers' Rights issue at all. They insisted that Farmers' Rights had to be called the "concept of" Farmers' Rights, referring to their legal systems where rights automatically become part of their constitutions (particularly the American delegation was concerned with this aspect) (The Norwegian Ministry of the Environment 1997b). Their lip service consisted inter alia of attempts to weaken the language in the article on Farmers' Rights. US for example suggested altering "ensure their participation" to "arrangements in which they may participate" (Earth Negotiations Bulletin 1998:10). Since the negotiations at times reached a deadlock and they did not get their will, the US delegation considered on several occasions to withdraw from the negotiations (Fraleigh 2003 [interview]). This put the other countries in a predicament, as they did not know how much to give in to the demands of the US. Even if they complied with the American proposals, they had no guarantee that the US would sign or ratify the final agreement, as illustrated in the CBD process. However, in 1997 the procrastinating behaviour of the US led to discussions on

⁸⁵ The members of the Cairns Group have been pushing for "a fair and market-oriented agricultural trading system", which is "placing trade in agricultural goods on the same basis as trade in other goods" (Cairns group 2003). The Cairns Group of 17 agricultural exporting countries was formed in 1986 and the members are: Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay.

⁸⁶ Argentina, China and South Africa are other significant growers of GMOs, though the acres of GMOs in these countries are small compared with the US and Canada.

⁸⁷ Argentina, Australia, Canada, Chile, Uruguay and USA constitute the Miami Group. They are less willing to let environmental concerns reduce their opportunities to export genetically modified crops.

excluding the Americans from further discussions (The Norwegian Ministry of the Environment 1997b).

Nevertheless, there were routine changes in the American delegation around 1998 (Bretting 2003 [interview]). In the following years, the US negotiators won admiration for their constructive sincerity (ETC group 2001a:15). However, they filed a last minute proposal on security which did not gain any support. Thus, they had an excuse not to sign when the treaty was adopted in November 2001. According to the ETC group (2001a:15), Canada astonished many G-77 countries with its unsympathetic and uncompromising posture. According to their own judgement, Canada tried to find compromises, but its role in clarifying issues was not always recognised (Frleigh 2003 [interview]). Australia also showed little willingness to co-operate. During the Montreux meeting it became an outsider because of its implacable opposition to Farmers' Rights and its delaying tactics (ETC group 1999). The US, Canada and Australia in particular often delayed the process because they had to consult with their capitals. Japan and New Zealand played a more marginal role in the JUSCANZ coalition.

EU and the European Region

As opposed to the JUSCANZ countries' reluctance to Farmers' Rights, the EU was far more positive to the demands of developing countries. They could recognise Farmers' Rights as something more than just a mere "concept" of conservation. They recognised the need to create some benefit sharing mechanisms. However, they did not accept IPR for farmers' varieties and they advocated national responsibility for implementation. The explanation for the EU's position is mainly found in its agricultural sector (Borring 2002; Latin American delegate 2003 [interviews]). Compared to for example the North American sector, there are far more farms that are still family run due to public support. Regarding IPR, it is more common with plant breeders' rights in the EU, and the opposition to patents is strong.⁸⁹ Environmental and other concerns make the Europeans sceptic to GMOs. Due to a *de facto* EU moratorium on the recognition of new GMOs in 1998, the US launched a case against EU in the court of WTO in spring 2003 (The Office of United States Trade Representative 2004).

The EU's position was between the developing countries and the JUSCANZ countries. Did the Union use this position to influence the outcome by being a

⁸⁸ The Cartagena Protocol was adopted in January 2000 and entered into force September 11 2003.

⁸⁹ See for example Steve Emmott (2001): "No Patents on Life: The Incredible Ten-year Campaign against the Europe Patent Directive".

compromise supplier? During the years of negotiations, the EU and G-77 got closer to each other. However, due to partly unsuccessful co-ordination, because of divergence of views internally and inflexible negotiating tactics, the EU did not manage to fill its potentially very important role as intermediary (Borrington; Evjen; Fowler 2002; Smith 2003 [interviews]). Trying to achieve a common EU position was rather like a negotiation within the negotiations and was definitely not always easy, particularly when the negotiations took a direction that the EU was unprepared for. Within the EU, there are a mixture of interests combining narrow self-interests and more idealistic views, though many EU delegates sought to develop pragmatic and realistic positions which would further the progress of the negotiations. This mixture can have confused the developing countries, which made it easier for them to relate to the pure “realpolitik” of the North Americans (Borrington 2002; Egziabhar 2003 [interviews]). The text on Farmers’ Rights that was accepted stemmed from an American proposal rather than a European one. If the EU had managed to be more vigorous and effective, it is possible that the article on Farmers’ Rights could have been more committing. On the other hand, it is believed that the article on Farmers’ Rights would have been even weaker had it not been for the EU’s influence (Smith 2003 [interview]). It must be said, however, that the EU played a much more dynamic role in later stages of the negotiations and was instrumental in helping to find solutions to many issues, including the articles on access and benefit sharing. At the same time, co-ordination within the European *Region* developed in a positive way and became an important vehicle for the dynamics of the negotiations (Borrington 2002 [interview]).

Conclusion

The assumptions of the power-based perspectives are misleading as regards the dominance of powerful states. They were not capable of dictating the outcome. If the EU had joined the JUSCANZ countries’ opposition against Farmers’ Rights, the probability of fulfilling the power-based prediction would have been higher. Still, even if the two coalitions of powerful states had been united, I do not think the negotiation outcome would have been essentially different. The EU’s relatively strong sympathy for the developing countries’ request for Farmers’ Rights might have obstructed a weaker breakthrough. However, the EU’s acceptance of Farmers’ Rights as something more than a mere concept, could be seen as just lip service, since the responsibility of realising these rights rests with national governments. A strong recognition of Farmers’ Rights would have threatened the interests of the powerful states particularly regarding their views on

intellectual property rights, because a legally binding recognition of farmers' right to save, sell and exchange farm-saved seeds from protected varieties would limit the scope of rights of the patent holder or plant breeder.

Because of their greater resources and because they were less in need of an agreement, the powerful states used delaying tactics in their attempts to achieve their goals. Therefore, powerful states were more prominent during the negotiations than the average country. The fierce resistance of particularly some of the JUSCANZ countries against the strong recognition of Farmers' Rights explains why it was so difficult for developing countries to get their interests through. Moreover, Japan and the US demonstrated their independence and superiority, by being the only two states not to sign the treaty on its adoption in November 2001.⁹⁰ On the other hand, if I had excluded the power-based perspective from my explanatory framework, the above average prominence of the powerful states would have been lost. Having said this, I would like to add that abusive tactics are not confined to powerful states, as the Brazilian behaviour illustrates.

In summary, the power-based perspective does explain a bit, but not much, regarding the medium breakthrough for the developing countries' demand for Farmers' Rights. With high expectations about achieving a broader understanding, I now move on to the interest-based perspective.

7.2 Interplay between Interests and Institutions

Did different institutional factors have significance for the medium breakthrough? Following the outline of the theory chapter, I will first look at factors that are associated with *arena*, before looking at factors connected with *actor*. In the last section, I will analyse the developing countries' *issue specific power*.

7.2.1 Institution-as-arena

As can be recalled from the theory chapter *when arena mechanisms of institution facilitate the development of an agreement between self-interested countries, it usually involves giving and taking by all parties sake. Presumably, developing countries will gain something during such a process. Hence, there is a potential for a strong breakthrough for them.* The factors associated with arena include both the characteristics of the arena where the negotiations take place, formal and informal rules and how the negotiations are conducted.

⁹⁰ On November 1 2002, the US ambassador to the FAO signed the ITPGRFA. The ETC group describes this as only change of strategy and not change of policy, as they believe US will do what they did with the CBD – “the United States will “sign” but never “ratify” the Law of the Seed” (ETC group 2002).

The conditioning of the influence of the most powerful states is *inter alia* framed by the decision-making procedures in UN organs like FAO. During the negotiations in CGRFA, all countries have one vote, hence equalising superpowers with Lilliputian states. Although rich states have more resources at hand making them potentially more prepared and represented in the negotiations, they still only have one vote and one say. Since the majority of the members of the CGRFA are developing countries, they have proportionally more to say compared to their material capabilities. Of course, if this majority values the participation and resources of richer countries, they need to consider their interests when negotiating. However, the “meat power” of developing countries contributed to prevent one single party – including the powerful countries – from dictating the wording of the International Treaty.⁹¹

Regarding *rules*, the renegotiations of the International Undertaking involved the discussion of one article at a time – similar to other negotiations in FAO. Since most of the essential questions like access, benefit sharing, funding and Farmers’ Rights are interrelated, these rules made the actors more reluctant to give their final acceptance to an article since they wanted to await the outcome of the other articles. This was obvious for example in the case of access: the developing countries did not want to accept wide access before they were assured satisfactory benefit sharing. After all, it took five years to unbracket the first article - Farmers’ Rights in April 1999. There were some informal efforts to reopen the discussions, from the Philippines and at the request of NGOs (GRAIN 2000; Via Campesina 2001). However, due to the practice of not reopening agreed articles this was not done. Consequently, it is possible to argue that these rules made it more difficult for the states to agree on an article and indirectly more difficult for the developing countries to gain support for their views.

Arguably, all relevant parties were included, since all FAO Member States could take part and non-state actors were free to observe the plenary sessions. With so many

⁹¹ An accustomed response by these countries to this kind of limitation of their power and influence, has been to move issues from one arena to another. For example, the JUSCANZ countries, particularly US, did not want FAO to place any restriction on their patent practice. Therefore, they argued that other UN forums were specialized in IPR issues and thus should handle it. Because the revision of the IUPGR was threatening their patent practice, they pursued their interests about IPR in other forums, for example advocating an interpretation of TRIPs that only UPOV provide an effective *sui generis* system. In like manner, discussions on IPR were moved from WIPO to WTO (the TRIPs agreement) when it was clear that the new trade organisation was going to have strong compliance mechanisms. Since WTO has become object of world-wide critics, however, the continuation of discussions on IPR have partly been moved back to WIPO, where discussions on ‘world patent’ are taking place (for ongoing discussions in WIPO, see their official webpage: <http://www.wipo.int/>). The patent organisation is a much less ‘visible’ arena than WTO and thus less exposed for critics. Since this thesis is focusing on the FAO process in the 1990s, I will not elaborate further with this kind of regime interlinkage.

actors sitting around the table, however, the plenary discussions often ended up as unilateral declarations and turned out less efficient. This reduced political feasibility and solutions favoured, according to the *law of the least ambitious program*, the minimum definition of Farmers' Rights presented by US, rather than the comprehensive definition presented by the developing countries. The *organising* of the negotiations affected the degree to which this "program" was activated. The regional meetings before the plenary sessions, for example, reduced the practical number of voices to be heard, with a subsequent increase in political feasibility. Variations to size, inclusiveness and formality of sessions, also contributed in this direction. For example, the establishment of smaller groups like the open-ended working groups and closed contact groups speeded up progress because the number of parties was reduced. The law of the least ambitious program was, however, not fully circumvented when the *size* was reduced, as most regions and positions were usually represented in the smaller groups as well. The dismantling of the negotiations therefore only partly enhanced the possibility of reaching an agreement closer to the developing countries' proposal than the American proposal. Furthermore, this way of organising the negotiations was disadvantageous for the developing countries, as they did not have the resources to attend several meetings taking place at the same time (FAO 1994b: Appendix C).

The working groups and contact groups differed as to *inclusiveness*. While all countries and observers could participate in the former, the latter was reserved for the countries selected for the group. This influenced the effectiveness of the work in the groups. According to Earth Negotiations Bulletin (1998), it was apparent that the negotiations on Farmers' Rights suffered from the fact that they were carried out in a working group. The unwieldiness of the group meant that little progress was made. In contrast, a strong Chair in the Contact Group and a smaller gathering of delegates led to greater flexibility and clarification of positions. After all, the agreement on the article pertaining to Farmers' Rights was reached in a closed contact group.

As the negotiation atmosphere often suffered from a polarised climate, *informal* meetings turned out to be an important supplement to the formal sessions in order to push the process forward. At least four "types" of informal meetings took place: The first category is the "friends of the chair"- meetings that took place during the ordinary sessions. They were necessary for loosening up deadlocks. They can be described as the least informal, as they were integrated parts of the formal sessions. The second category was informal meetings arranged by individual countries. They can be described as the

most informal as the CGRFA did not have any responsibility for them. Such meetings were held both in Norway, Denmark and Sweden. The informal expert meeting in Montreux in January 1999 constitutes a third category as a personal initiative of the Chairman. In addition, informal discussions took place at private initiatives for example during lunchtime.

The informal meetings were often efficient because the participants took part as individuals and not as representatives of any government (apart from the “Friends of the Chair” meetings). This made it possible to talk more freely and be more creative. If governments did not like the outcome of the informal talks, they could just say that it was an independent individual present at the meeting who did not represent the views of the government (Fowler 2002 [interview]). Several possible solutions were raised for the first time during these informal meetings, for example the idea of a list of plants to be included in the Multilateral System.⁹² In addition, it was easier to clear up misunderstandings under informal circumstances. However, it was also a challenge for the participants to become too personal. It was difficult to say something at an informal meeting that was contradictory to the positions you later had to defend in the formal negotiations (Fraleigh 2003 [interview]). Particularly the informal expert meeting in Montreux turned out to be a turning point in the negotiations as it had created an area of overlap between the parties’ proposals (Bretting; Fraleigh 2003 [interviews]). Although Farmers’ Rights remained a controversial issue at Montreux with no consensus reached, the impact of the Montreux meeting is evident as the final text on Farmers’ Rights is almost identical to the draft article from the Swiss meeting.

Since the smaller gatherings were more effective than the larger ones, the closed sessions were more effective than the open-ended ones, and the informal meetings more effective than the formal ones, why keep the plenary sessions? The reason lies in the transparency of the plenary sessions, which is a precondition for the legitimacy of the decisions. When the small, closed or informal sessions were perceived as not transparent enough, distrust reduced the efficiency. Since the “Friends of the Chair” meetings were less publicised, some delegations wondered what schemes were being hatched by these “unknown” friends (Ukabc 2001).⁹³

⁹² Brazil suggested such a list, as they did not want to include forest genetic resources in the treaty. A list with specified crops could ensure the exclusion of such resources.

⁹³ A prime example of effective but not transparent negotiations leading to a lack of legitimacy, are the “green rooms” used in talks in WTO. The distrust of what happened during the WTO negotiations culminated in the riots in Seattle in 1999.

In summary, the formal and informal sessions seem to have been important complementary elements for reaching an agreement as they served different needs. The informal meetings tended to be more efficient and ensured progress. However, this progress would not have occurred without the legitimacy created from the transparency of the formal sessions. The different forms of formal meetings - from plenary sessions via open-ended working groups to closed contact groups – also seem to vary, from ever less transparent to increasingly efficient.

Table 7.1: The degree of efficiency and transparency depends on type of formality, inclusiveness and number of actors.

Transparency ↓	Efficiency →	Low	High
Low		--	informal, closed, few
High		formal, open-ended, many	--

An important effect of *institution-as-arena* is the facilitation of meetings between the different states. Despite the general assumption that states are unitary and have full information, state actors were not as well informed about the interests and priorities of the other participants in the area of agro-biodiversity. The fact that they met regularly at the headquarters of FAO in Rome facilitated a situation where they could meet and learn about each other’s positions. In order to tap the integrative potential you have to know in which issues there are common interests and in which there are divergent views. Another consequence of these meetings was the strategic adjusting of positions. New information sometimes changed states’ cost-and benefit calculus, which was followed by corresponding changes in strategies to maximise their own benefit and avoid stalemates. For example, what had appeared to be a too hasty reaction by Egziabhar in April 1999 when the Farmers’ Rights Article was adopted, was due to a rational modification of Ethiopia’s cost/benefit calculus rather than a mistake (see box 7.1).

Box 7.1: Illustration of strategic change of cost-and-benefit calculus.

Ethiopia Adjusts its Position

Ethiopia was among the countries pushing the hardest for Farmers’ Rights. Such rights could include several aspects, such as land rights and an international fund to finance the implementation. After an informal discussion with an American delegate, however, the Ethiopian delegate reviewed his opinion. They had discussed the problems of seed conservation by farming communities and what the treaty could do for them. This is how Egziabhar recalls the situation:

American: The private sector should get in and help them.
Egziabhar: But the private sector will just buy the land and plant homogenous seeds?!
American: Yes.
Egziabhar: What is then the contribution of the private sector for the conservation of plant genetic resources?
American: The private sector must be brought in.
Egziabhar: Are you being ideological now?
American: Yes. Groups should never have rights granted to them because fascism and communism build on community rights. Community rights could repress individual rights.

After this conversation, Egziabhar realised how strongly the US was against Farmers' Rights. He told me that he did not support the comparison between small-scale farmers in developing countries with Nazis and communists, but in order to ever achieve an international agreement including Farmers' Rights, he had to redefine Ethiopia's demands. More important than having an international fund was to ensure that those countries which wanted Farmers' Rights, had the opportunity to grant such rights nationally.

Source: Egziabhar 2003 [interview].

Conclusion

Characteristics of the actual negotiation arena seem to have some credit for the partial success of the developing countries. Most of the other institutional factors seem to have pulled in different directions, however. New ways of organising the negotiations helped to move the process forwards and was therefore an essential precondition getting an agreement on Farmers' Rights at all. Delegates from both developing and developed countries had to modify their initial proposals to make them more realistic in terms of what their counterparts would accept. The informal meetings were particularly important in this respect, as they facilitated a search for common ground instead of just repeating distinct and distant proposals on Farmers' Rights in plenary sessions. In addition, the different ways of conducting the negotiations helped to partly circumvent the law of the least ambitious program, hence moving the Farmers' Rights Article from the minimum American definition closer to the developing countries' definition. On the other hand, the search for a common ground also forced the developing countries to adjust their initial proposals. In summary, the factors associated with institution-as-arena go some way in explaining the medium breakthrough for developing countries.

7.2.2 Entrepreneurial Leadership

The issues included in the mandate for the renegotiations of the IUPGR were decided at an early stage. The way to *frame* these issues, however, was not fixed. *If entrepreneurial leaders frame issues in such a way that the demands of developing countries are addressed in a favourable way for them, a strong breakthrough for developing countries is possible.* I have identified such leaders among persons with both formal and informal positions during the negotiations.

Secretariats are in a formal position to conduct entrepreneurial leadership. Besides, they have the best qualifications for fulfilling the role as entrepreneurial leader since they are the only actors that are independent of national interests and with an institutional role and memory (Andresen and Skjærseth 1999:7). Previously, in the late 1980s, the FAO secretariat was known to have been proactive in favour of the interests of the developing countries, but they were more even-handed during the revision of the IUPGR. In the last stages of the Treaty negotiations, the impression was that the Director General of FAO did not do much to enhance the negotiation process, although political attention and

priority from a high level may have accelerated the progress (Borrington 2002 [interview]). The secretariat of the CGRFA on the other hand, was dedicated to the process.

The Secretary of the CGRFA, José Esquinas-Alcázar was actively engaged in the revision of the IUPGR. Together with his Assistant Secretary, Clive Stannard, he professionally facilitated the negotiations, winning respect from all member countries (ETC group 2001a:15). They did not have the mandate to negotiate, but they identified issues that were complex and unclear. They provided a “non-paper” that elaborated on *inter alia* Farmers’ Rights, which incorporated aspects of Farmers’ Rights proposed by the developing countries and identified remaining issues (FAO 1996). In order to clarify difficult issues, they provided Background Study Papers written by scientists and other experts that were independent of FAO and the negotiating governments. As time dragged out, the ordinary budget of the CGRFA was not sufficient to finance the participation of developing countries. Requesting additional funding was therefore another function of the secretariat.

While the secretariat worked hard to carry out the negotiations smoothly, Ambassador Fernando Gerbasi from Venezuela chaired the Commission from 1997 until the end. Did he use his formal position as chairman to exercise entrepreneurial leadership? Gerbasi actively framed the issues on the agenda by setting up working groups and contact groups as well as temporary groups of “friends” of the chair” to discuss difficult questions in more confidential settings. Despite his efforts over two years to move the negotiations ahead, negotiations had come very close to a total standstill by 1998, having produced an overly long, unreadable and almost completely bracketed negotiation text (GRAIN 2000). During a consultation round in August that year he visited, *inter alia* laggards like Brazil and USA, in an attempt to make them more supportive to the process. The Montreux meeting in January 1999 took place on his initiative. At that meeting, he suggested discarding the heavily bracketed negotiation drafts, and to start from scratch. He presented the results of the meeting at the next session in the CGRFA as the “Chair’s Elements”, which constituted a much clearer negotiation draft. This made it easier to focus the discussions. In April 1999, he also initiated the establishment of the permanent Contact Group.

Gerbasi followed the formal and informal rules of international negotiations always with progress in mind. Rene Salazar from the Philippines had fought to reverse the “Farmers’ Rights blunder” (ETC group 2001a:15), but Gerbasi refused to reopen the discussions on Farmers’ Rights after a consensus had been reached in 1999. Because there

were several controversial issues besides Farmers' Rights, a reopening of this issue might have upset the negotiations. All my informants expressed satisfaction with the work done by Gerbasi. The ETC group describes him as "the single most important factor in the success of the negotiations" (ETC group 2001a:15). But is it necessary to have an institutional role such as Chair in order to be an entrepreneurial leader?

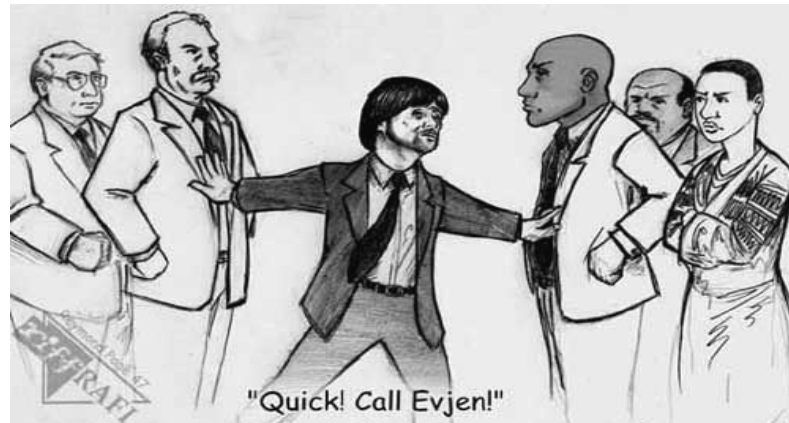


Illustration by the ETC group: The Norwegian delegate Jan Borring separates the fronts and calls for his colleague, Grethe Evjen. According to the ETC group, Norway had the most effective delegation (ETC group 2001a).

The Norwegian delegation proved that this is not. Jan Borring was one of the few delegates who took part in the negotiations throughout the whole process. Grethe Evjen joined him in 1998. While all the countries were perceived as only fighting to maximise their own self-interests, Norway was looking for compromises (Fowler 2002 [interview]). Norway wanted an open access regime, strong restrictions on IPR, mandatory benefit sharing and recognition of Farmers' Rights that also developing countries could accept. It was faithful to its principles, and sometimes portrayed as "more royal than the king" (Fraleigh 2003 [interview]). For its views, Norway was not always popular among the other OECD countries, but it did not always support the developing countries either.

The Norwegian delegation was creative and many of the breakthroughs occurred following Norwegian proposals (Stannard 2003 [interview]). For example, they made some suggestions as to how the Chair could address the issues on the agenda; by regularly changing topics, announcing breaks more frequently, asking 2/3/4 delegates to meet and see if they can agree on something, and making clear at the beginning of meetings that time would not be spent according to how long people wanted to discuss items, but the aim of the meeting was to cover all issues on the agenda (Borring 2000). Due to the interlinkage of the issues, Norway advocated the idea of discussing package

deals rather than one issue at a time. Furthermore, Norway initiated together with the other Nordic countries informal consultations in Norway, Denmark and Sweden, and efficiently headed the European Region during the last part of the negotiations.

As a supplier of compromises, Norway built bridges between the traditional blocs of OECD and G-77. Jokingly, it was said that the country's contribution to the negotiation process was disproportionate to its contribution in plant breeding (Fraleigh 2003 [interview]). This absence of strong economic interests in the breeding sector partly explains why Norway could take on this role as mediator (Fowler 2002 [interview]). The Norwegians were trusted because they did not have a desire to rule the world (Egziabhar 2003 [interview]). Thus, as a small country, Norway was in an advantageous position compared to their great power colleagues. In addition, as a Western European country and not member of the EU, they were freer to adapt to how the discussions developed during the sessions. Such flexibility was a necessary condition for Norway to play the role it did. Besides, the EU did not always, particularly not in the early stages, manage to play a central role. Hence, there was room for other actors to take the lead. For that matter, Norway's line in the negotiations was in harmony with its general foreign policy as a small and marginal country favouring strong multilateral regimes. But were Norway's positions supportive for developing countries?

They were so in at least three ways. First, Norway worked for addressing the issues in package deals rather than one article at a time. The JUSCANZ countries did not want to mix the issues of access and benefit sharing, while developing countries favoured such a structuring of the negotiations. Besides, the delaying effects of discussing one article at a time might have been reduced by the package deals. Second, Norway worked for issues of importance for developing countries, including mandatory benefit sharing and the importance of *in situ* conservation. On several occasions it stressed that the right of farmers to save, sell and exchange farm-saved seeds was an essential part of Farmers' Rights. Third, Norway, like some other countries, financially supported the participation of developing countries. For example in May 1997 African countries had a thorough preparation process before the session, which made them more prepared and thus more able to protect their interests.

Jan Borring was described as "the Norwegian delegate who has emerged as a pivotal figure in the talks" in *The Financial Times* (22 June 2001). All in all, personalities dominated the whole negotiation process. Since few countries had stable delegations, the contribution of the various countries differed according to the individual representatives.

When for example Linda Brown from the UK took part, the UK gave constructive contributions in the discussions on Farmers' Rights. Johan Bodegård from Sweden was the most proficient chair of the EU, but when Sweden no longer had the EU presidency, he did not return to Rome. Germany was very active in Leipzig, but after that, their involvement dropped (Borring; Fowler 2002 [interviews]). Zofia Bulinska Radomska from Poland also supported Farmers' Rights (ETC group 2001a:15). Other constructive players from the European region included Peter Vermeij from the Netherlands, Lise Steffensen from Denmark, Gert Kleijer from Switzerland and Dieter Obst from the EC Commission. Potential entrepreneurial leaders from the developing countries will be dealt with in the next section.

A paper by Susan Bragdon (2000) at IPGRI suggesting different legal mechanisms that may have helped the parties overcome the barriers that caused them to act with suspicion, can be called an attempt to conduct entrepreneurial leadership by an international organisation. I have not found any references to her suggestions, which included memoranda of understanding and letters of intent. This may illustrate the difficulty of non-state actors to play a leading role in this sense, as they only took part in the negotiations as observers.

Conclusion

Individuals earning the label entrepreneurial leaders seem to have been crucial for the adoption of the ITPGRFA, thus supporting Young's assumption that leadership is a necessary condition for regime formation. These leaders have in several aspects also been fundamental in addressing the issues in such a way that the developing countries partly got their interests included. Integrated package deals have been particularly important in this regard. The secretariat's good relations with all member states gave them credibility across the North-South divide. Although they did not have the mandate to negotiate, their mandate allowed for activities, such as the "non-paper" and financial support which were a positive contribution to the developing countries. The leadership of the Chairman was more neutral in this respect, while some European countries, particularly Norway, were important in framing how Farmers' Rights were addressed. Because all these leaders took many considerations into account, the support for developing countries was not absolute. Thus, this factor of entrepreneurial leadership also goes a long way in explaining the medium breakthrough for developing countries.

7.2.3 Issue-specific Power

If developing countries have issue specific power, they have a chance to get their interests reflected in the negotiation outcome. Thus, a strong breakthrough is possible. I will now analyse the two components of such power, basic game power and negotiation power respectively (Underdal 1997a).

Basic Game Power

Basic game power refers to the parties' control over the resources in question as well as their economic and technological capacity to make use of the resources. Although agrobiodiversity is not evenly distributed, no country is self-sufficient in plant genetic resources (Kloppenburg 1988; Palacios 1999). This interdependence among states establishes the rationale for the multilateral system for access to PGRFA. However, some rich countries and large corporations could well manage a situation without a treaty, as they can afford bilateral agreements to access these vital resources (Fowler 2002 [interview]). Furthermore, there seems to be less interest in the South's germplasm for agricultural purposes.. While the need for traditional varieties and wild relatives was widely acknowledged in the 1950s (Pistorius 1997:18), breeders' associations like ASSINSEL say that farmers' varieties play an insignificant role in modern breeding (Ministry of Agriculture, Fisheries and Food and Royal Botanic Gardens Key 1999). Kerry ten Kate and Sarah Laird (1999:155) account for industry's need for and interest in South's germplasm as follows:

Companies' confidence that adequate collections for the next few decades are easily available without the need for prior informed consent and benefit-sharing, and the disadvantages of working with unadapted and primitive germplasm, mean that they are not prepared to engage in speculative investment in access to new, unadapted or primitive germplasm. This limits their demand for access and their enthusiasm for benefit-sharing. The sad truth is that there is not sufficient, ongoing demand for new materials for there to be the political will to make commitments on benefit-sharing.

Although the raw material to the biotechnological industry always has to come from somewhere, the limited demand for access to farmers' varieties therefore reduced the basic game power of the developing countries. This subsequently weakened the strength of their claims for Farmers' Rights during the negotiations. Since more gene materials are now collected and stored in gene banks, the dependency on developing countries as providers of germplasm is reduced. Consequently, it was very important for the advocates of Farmers' Rights to reach an agreement now (Borring 2002 [interview]). One consequence of this limited interest in farmers' varieties is that potential IPR protection of traditional PGRFA and their wild and weedy relatives are likely to have small economic value, especially if the protected subject matter originates from *in situ* conditions (Girsberger 1999:317). In addition, Fowler, Smale and Gaiji (2001) claim that the

developing countries in recent years have increased their dependency on germplasm from abroad, particularly on improved germplasm from the CGIAR centres. On the other hand, it is possible to claim that the developing countries are just getting back resources that they supplied the gene banks with earlier. It is precisely the high contribution of PGRFA from developing countries to the gene banks that make the developed countries less dependent on the “South” today, because they have free access to the gene banks. Furthermore, what also reduces the developing countries’ basic game power is the fact that their economic and technological capacity to use these resources is far smaller than is the case for most developed countries (Rosendal 1999:147). Conventional breeding as well as modern biotechnology is still at an advanced level in mainly OECD countries.

There is apparently a paradox regarding the value of the South’s germplasm. On the one hand, little value is ascribed to it by the breeding industry. On the other hand, it is perceived unfortunate that traditional varieties are being lost. For example, recent efforts to collect and conserve wild relatives of peanuts in Bolivia and papaya in Colombia have been turned away (Fowler 2002). These varieties are now extinct. The concern for such losses contributes to the belief of Northern governments that the South’s participation in the regime is necessary in order to solve the environmental problem of genetic erosion. This perceptible paradox is linked to the fact that PGRFA have high *agricultural* value as shared and accessible resources, and low *economic* value when exclusive rights are placed on them (either through IPR or national access regulation).

While it is not a straightforward task to assess developing countries’ basic game power regarding their control over the resources in question, the important issue during the negotiations was that the developed countries to a less extent *perceived* the South’s germplasm to be important and valuable for them. I will return to two questions related to basic game power in connection with the knowledge-based perspective (see section 7.3): first, I will argue that the high percentage of the material stored in international gene banks that stem from the South means a *moral* obligation for benefit sharing and Farmers’ Rights. Second, developed and developing countries perceive the situation and evaluation of the sources of basic game power differently. In summary, I only find limited scope for the developing countries’ *basic game power* when considering control over resources other than desire and the technology to utilise them.

Negotiation Power

Negotiation power refers to capabilities based on strength in numbers, coalitions, and leadership (Underdal 1997a: 17). As in many other forums under the UN umbrella, the

renegotiations of the International Undertaking divided the FAO Member States into two groups: The Group of 77 Developing Countries plus China (G-77, -which now consist of a higher number of countries) on the one hand and the OECD Member States on the other. Based on *strength in numbers*, the G-77 countries form a majority in UN forums and hence have potentially strong negotiation power. Nevertheless, I will argue that an insufficiently organised coalition due to divergent interests, an insufficiently developed national policy and limited resources reduced this power.

Despite the notion of a clear North versus South dimensions in the discussions regarding plant genetic resources, it became apparent that the different regions of the Third World had divergent interests, with subsequent consequences for creating a strong *coalition*. The issue of Farmers' Rights was the most strongly advocated by African countries, especially Ethiopia, Angola and Cameroon. Tewolde Egziabhar represented Ethiopia at many of the negotiation sessions and his country was perceived as the main counterpart to the JUSCANZ countries regarding Farmers' Rights. The Philippines (Rene Salazar) and India (though this varied a lot from representative to representative) also supported the recognition of such rights (Borrington 2002 [interview]). During the negotiation process, India started the pioneering work of legislating Farmers' Rights nationally. This showed India's commitment to this issue.

The modernised agricultural sector of several Latin American countries faces different challenges than the African and Asian smallholding farmers. In general, the support for UPOV was strong among some Latin American countries (*ibid.*). Uruguay in particular refused to accept the right of farmers to use farm-saved seeds in a traditional way as part of Farmers' Rights. Brazil and Colombia read the CBD paragraphs on prior informed consent and benefit sharing literally and strongly supported the benefit sharing aspect of Farmers' Rights. Furthermore, they paved the way for a 'bilateralisation' of international germplasm transfers.

Argentina was perceived as "a flag-bearer for the Cairns Group" and "the delegation rarely bothered to pretend membership in the G77" (ETC group 2001a:13). They feared that Farmers' Rights could be used as a tool by the Europeans to continue to subsidise their agriculture (anonymous Latin American delegate 2003 [interview]). Due to the historical genocide of the Indians, there are no local farmers in Argentina and Farmers' Rights therefore only have indirect relevance for this country. According to one Latin American delegate, Farmers' Rights should give opportunities for rural farmers to improve their quality of life. A lot of rural farmers come from Bolivia, Peru, Ecuador and

Colombia and settle in shantytowns in Buenos Aires because their living standards are so low. Thus, he concludes that Farmers' Rights is an excellent tool for studies on how to improve the living standards of rural populations (ibid.).

The list of crops to be covered by the Multilateral System also made the absence of a coalition among the developing countries perceptible as they were not willing to include "their" plants. When China did not want to include soybeans, Malaysia refused to include oil palm and Latin America rejected the inclusion of tomatoes. The only issue where the developing countries were clearly united was about financial transfers from the North (Borrington 2002 [interview]). One representative from the developing countries claims that G-77 was united in its stand on Farmers' Rights (Egziabhar 2003 [interview]). Another representative stresses that Ethiopia was the main proponent of the issue, while most other developing countries were bystanders (Lim 2003 [interview]). My perception is that the African countries were by far the most consistent defenders of Farmers' Rights, with the blessing of the Asian countries. In their rhetoric, the Latin American countries seemed sympathetic too, but due to their UPOV-allegiance I find that they were supportive of a less comprehensive definition of Farmers' Rights than the two other regions. This is summarised in the figure below.⁹⁴

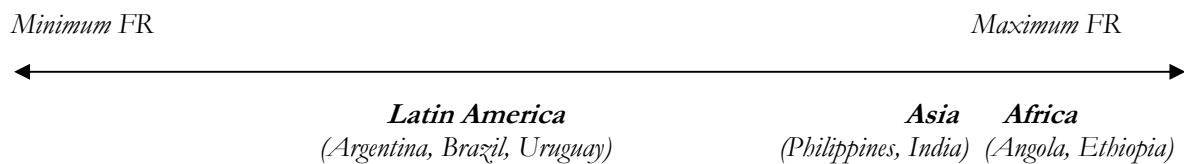


Figure 7.1: The regions of the “South” on the continuum of Farmers’ Rights (FR) and the most active countries are highlighted. The most active countries on the issue are highlighted as several countries in each region were bystanders.

While some developing countries had well-defined national interests, this was not the case for numerous other G-77 countries (Borrington; Fowler 2002; Egziabhar; Fraleigh; Lim 2003 [interviews]). Several Southern governments did not understand what was at stake; hence, they did not develop a national policy. The position of Kenya during the negotiations, for example, was up to the Kenyan delegate to decide. A trip to Rome was considered a reward rather than an opportunity to fight for national interests. This resulted in a situation of high turnover and poorly prepared delegates. Many delegates did not know exactly what Farmers' Rights were, just that they were considered to be in the interests of

⁹⁴ This picture challenges my point of departure with the South as one group. Nevertheless, the history of Farmers' Rights as a “South-issue” in the FAO debates before 1994 and the common proposal on Farmers' Rights in 1996 as well as their endeavour to present a united picture of themselves, justify my approach.

the South. Several issues were raised as part of Farmers' Rights, which by other delegates were believed to exceed the core of the concept. This might have reduced the developed countries' willingness to accept the developing countries' proposal on Farmers' Rights. According to Egziabhar, the high turnover and relative poor level of preparedness, did not affect the developing countries influence on the issue of Farmers' Rights (Egziabhar 2003 [interview]). Another delegate believed that the poor level of preparedness related to high turnover reduced the delegates' innovative abilities and therefore slowed down the negotiation process (Borrington 2002 [interview]). On the other hand, one delegate viewed the causality of turnover and duration differently: there was a high turnover because the negotiations lasted long (Fraleigh 2003 [interview]).

The concept of Farmers' Rights is very complex and several of the objections and critical remarks are related to the practical operationalisation of the concept. This is for example what Barry Greengrass from the UPOV secretariat says about IPR for farmers' varieties (Greengrass 1996:51):

If someone is to be granted a legal right to a plant variety that may need to be enforced in the courts, then the identity of the plant variety or material must be establishable. This is one of the key features that underlines the whole basis of Farmers' Rights. If the material cannot be identified, it will impose limitations in any system that is created. There is no point in creating a new form of rights unless it can be enforced in practice.

The developing countries provided only to a little extent work and suggestions for how their proposal on Farmers' Rights could be put to work. The Indian legislation as well as the African Model Law for collective rights are contributions in this regard (Ekpere 2000)⁹⁵. Thus, it is possible that with more prepared and stable delegations and having clearly defined national positions that were operationalised, the developing countries would have become more influential than they were. This is partly due to the small resources that several developing countries had available to spend at these negotiations. Participation in international negotiations is costly, which made developing countries disadvantaged in comparison with developed countries. Many of the G-77 countries had to rely on support from donors in order to take part, and could rarely send more than a few persons, while developed countries often were strong in numbers. This became a problem for example when the plenary negotiations were divided into smaller groups. In combination with the developed countries, the scarce resources made developing countries more susceptible to proposals from the rich countries (Egziabhar 2003

⁹⁵ The objective of the model is to draft a suggestion for a national *sui generis* system where collective rights, Farmers' Rights and plant breeders' rights are recognised in one integrated system.

[interview]).⁹⁶ Furthermore, their distrust of Europeans, made them go for the American proposal rather than the European one, even though the latter would have provided a wider recognition of Farmers' Rights than the former (Borrington 2002 [interview]). In addition, critics insist that the range of claims made under the Farmers' Rights umbrella far exceeded the mission of both CGRFA and the CBD, and should either be reduced or dropped altogether (Crucible II Group 2000:58).⁹⁷ Developing countries' 'inclusive' definition of Farmers' Rights may explain why they did not achieve a breakthrough for many of their ideas. In addition, it is claimed that Farmers' Rights were of great importance for developing countries in the beginning, but as the years passed, they lost their focus on the issue in favour of benefit sharing (Fowler 2002 [interview]). In sum, divergent interests, unprepared delegations as well as poorly developed proposals weakened the coalition among the developing countries.

Accordingly, *leading* this group was a challenge. Among the active delegates from the developing countries, Lim Engsiang of Malaysia comes closest to a description of an entrepreneurial leader. The ETC group gives him credit for being professional and pragmatic when constantly being positioned between "the abusive tactics of Brazil and the demands of Africa" (ETC group 2001a:14). Other individuals also provided effective leadership, but then more in the sense of *group leaders* who promote the interests of the group rather than entrepreneurial leaders who have to strive for a consensus. Egziabhar from Ethiopia put a lot of effort into co-ordinating the policy of the African countries. As the African delegates changed very often, he had a lot of work in briefing all of them. He made written comments on what had happened at previous sessions, what were the most conspicuous issues and what should be the positions of the African region (Egziabhar 2003 [interview]). According to Egziabhar, his written comments made the African policy more coherent when delegates from different African countries participated in different working groups. Fowler, representing IPGRI at the negotiations, however, has the impression that the developing countries were strongly and emotionally arguing for Farmers' Rights for years without knowing what it was (Fowler 2002 [interview]). Rene Salazar from the Philippines was another prominent advocate for Farmers' Rights and a

⁹⁶ This aspect is very relevant in the preparations for discussions at the Governing Body as well. When the treaty enters into force the conditions for receiving materials –so-called *Material Transfer Agreements* (MTA) - from the Multilateral System will be decided at the first meeting of the Governing Body. While most developed regions, such as North American and European countries, are working on their proposals for MTAs, particularly developing regions and most African countries do not have the resources to run similar preparatory processes (Esquinas-Alcázar 2003 [interview]).

leading person in the Asian Group. Informally he explored the possibilities for reopening the discussions on Farmers' Rights after the unbracketing of the text in April 1999. The Brazilian delegation was also influential, but its main efforts were not directed at the recognition of Farmers' Rights.

Conclusion

There appears to be only limited scope for the developing countries' *basic game power*. Apparently, a weak coalition and variable group leadership also reduced their *negotiation power*. This may to some extent account for the medium breakthrough of the developing countries' interests. Altogether, the variables connected to the interest-based perspective largely explain the medium breakthrough for the developing countries. Nevertheless, they do not explain everything. Where does for example the idea of Farmers' Rights come from in the first place? I will now turn to the knowledge-based perspective to see if this approach has something to add to our understanding.

7.3 Significance of 'Knowledge'

Where did the states get their perceptions and preferences about Farmers' Rights? Ideas and knowledge regularly play a significant role in shaping the beliefs and expectations of states involved in international co-operation. *If intellectual leaders advocate knowledge and ideas that are favourable for developing countries claims on Farmers' Rights, and diffusion of these norms takes place, a strong breakthrough is possible.* Did anyone conduct such leadership during the revision of the IUPGR?

Epistemic Communities

Representatives from epistemic communities often attempt to influence national objectives and beliefs. According to Haas (1992:3) epistemic policy co-ordination is only likely to occur in the presence of (1) a high degree of uncertainty among policymakers, (2) a high degree of consensus among scientists, and (3) a high degree of institutionalisation of scientific advice. The complexity of the ITPGRFA negotiations demanded competence in plant genetic resources, intellectual property rights for plants and genes, the financial and technical aspects of germplasm flows and transfer agreement, as well as knowledge of the CBD. "Such a panoply of issues has even some developed countries concerned about their lack of expertise" (Earth Negotiations Bulletin 2000:16). Furthermore, several linkages between the issues at hand are not clear-cut. Does for example IPR in reality

⁹⁷ Some have for example suggested that some elements of Farmers' Rights might be included in the current review of 'Right to Food' being jointly undertaken by UNHRC and FAO.

restrict access?⁹⁸ GRAIN claims that most of the 1990s negotiations seemingly dragged on in every direction except forward, largely because of confusion among the delegates about what was at stake (GRAIN 2000). Obviously, the uncertainty among policymakers was high, and the potential influence of the scientists present. What about consensus?

As far as consensus is concerned, the Keystone Dialogue Series on Plant Genetic Resources is close to the description of an epistemic community (Rosendal 1999:173). Some of the Keystone representatives belonged to international organisations (including FAO), others were scientists or members of various NGOs. The declared goal of Keystone was to reach consensus among experts from varied disciplines, through informal debates (Keystone 1988). Of relevance for international recognition of Farmers' Rights, Keystone was "one of the first international forums to recognise the informal crop development system as counterpart to the formal, institutional system" (de Boef, Berg and Haverkort 1996:103). During its second meeting in Madras, the final report recognised Farmers' Rights and identified an international fund to implement them (Keystone, 1990). Since such a diverse group of individuals, including representatives from the breeding sector and the developed countries supported the idea of Farmers' Rights, this gave increased legitimacy for the developing countries' claims.

IPGRI represented the CGIAR centres during the negotiations. The research institution achieved most of its main policy goals, like the adoption of the Multilateral System for access and benefit sharing (Sauvé and Watts 2003).⁹⁹ This may be related to the presentation of their input in the negotiations as "science", which may have increased the legitimacy of their suggestions. However, science is not necessarily either free of interests or true. IPGRI and the other CGIAR centres, for example, played a leading role in the green revolution, which increased food production. On the other hand, the high-yielding varieties from the laboratories of CGIAR replaced local varieties on a large scale, thus increasing the process of genetic erosion. Today, these centres are actively involved in controversial projects involving genetic engineering, like the well-known "Golden Rice"-project now being conducted at the International Rice Research Institute in the Philippines.¹⁰⁰ Thus, with regard to the second condition for an epistemic community, I

⁹⁸ For an analysis of this question, see for example Carlos Correa (1999): *Access to Plant Genetic Resources and Intellectual Property Rights*.

⁹⁹ Watts works at IPGRI, and Sauvé was an intern there, which may reduce the reliability of this study.

¹⁰⁰ In 1999, Swiss and German scientists announced the development of "golden rice" that is genetically engineered to produce beta-carotene, a substance which the body can convert to Vitamin A. The new rice has been presented as a miracle cure for vitamin A deficiency, a condition which afflicts millions of people in developing countries, especially children and pregnant women. Several environmental and developmental

will argue that there is not a full scientific consensus in the issue area of plant genetic resources.

Regarding Haas's third condition, scientific advice was to a large degree institutionalised in IPGRI. A study by Sauv  and Watts shows IPGRI's importance as a leading source of scientific and technical information (Sauv  and Watts 2003:319). Numerous delegations to the negotiations had not prepared their own scientific data upon which to base their decisions. Through studies, seminars, formal interventions during negotiations and personal contact, IPGRI exerted their influence. Since the reduction of scientific uncertainty seems to have increased the prospects for states to reach an agreement, Haas's notion of uncertainty rather than Young's notion seems to describe the situation best. IPGRI's paper on international germplasm transfers, explaining that developed countries today usually get their germplasm from other developed countries, and that developing countries to a large extent import germplasm, contributed to change the perceptions of hard-liners such as Brazil (Borring 2002 [interview]). Brazil had been tough on promoting strict access regimes and favouring "bilateralisation" of germplasm transfers. Some of the African delegates, however, were perceived as wishing to ignore such data (Fraleigh 2003 [interview]). Nevertheless, this study influenced the perception among developed countries of their dependency on germplasm from developing countries. Getting "scientific evidence" that they did not need the PGRFA of the South had an impact on their views on the South's basic game power. This made it harder for the developing countries to argue for Farmers' Rights, particularly the benefit sharing part of these rights.

Despite the lack of downright scientific consensus, IPGRI may be said to have been part of an epistemic community which encompassed members of IPGRI, members of the CGRFA Secretariat and the technically oriented members of national delegations (Sauv  and Watts 2003:324). The State of the World's Plant Genetic Resources and the Background Study papers prepared at the request of the Secretariat of the CGRFA, were also important in providing scientific knowledge on relevant issues. No direct references to the study papers were made during the negotiations, but they were inputs to various countries' proposals and speeches (Smith; Stannard 2003 [interviews]).

Another effect of this epistemic community is evident on the agenda for the revision of the IUPGR, since Farmers' Rights became an item on the agenda partly due to

organisations have opposed the project for *inter alia* being nothing more than a PR stunt by an industry with an image problem. See for example Friends of the Earth's official web page for critical views on Golden Rice

the secretariat of the CPGR. In the early 1990s, José Esquinas-Alcázar believed that the draft for the CBD did not reflect the specific needs for preserving biodiversity in agriculture (Esquinas-Alcázar 2003 [interview]). Gathering other delegates with an agricultural background who were present in Nairobi in 1992, they drafted a resolution declaring the issues of *ex situ* collections collected before CBD as well as Farmers' Rights were unresolved. This resolution was adopted and prompted the mandate for the renegotiations of the International Undertaking. The fact that Farmers' Rights were explicitly part of the mandate for the revision of the undertaking also made it easier for developing countries to confront the powerful states with their demands. Initially, the JUSCANZ countries were unwilling to discuss the issue. Despite their bargaining advantage, however, they did not manage to exclude Farmers' Rights from the agenda. This illustrates the power of ideas. When Farmers' Rights were included as an element in the issue area of agro-biodiversity in the 1980s, not even the only superpower in the world could remove it.

Non-Governmental Organisations and Intellectual Leadership

Did any NGO-representatives disseminate ideas about the desirability of certain arrangements of relevance for Farmers' Rights? Obviously, the coining of the political idea of Farmers' Rights by the NGO-activist Pat Mooney and Cary Fowler in the early and mid-1980s is fundamental (Fowler 1994:192).¹⁰¹ Since there were *plant breeders' rights*, they considered that there should be *Farmers' Rights* too. The argument was that farmers in developing countries are breeders too and should get credit for their work since modern breeders only add the last link in the chain in the development of modern varieties. In addition, through their agricultural practice they conserve PGRFA, in contrast to the monoculture of modern agriculture which reduces diversity. Commenting on the origin of the concept, Barry Greengrass in the UPOV secretariat says (Greengrass 1996:54):

If we had not adopted the expression "Breeder's Right," my guess is that Pat Mooney would not have come up with the idea of "Farmers' Rights," and we would not have allowed ourselves to be led down the wrong road as a result of the language that we have chosen to use.

Linguistically, Farmers' Rights "balanced" Plant Breeders Rights. Despite UPOV's discontent with the creation of the concept, Mooney and Fowler lobbied the developing countries so successfully that Farmers' Rights become one of the major issues for discussions at the CPGR during the 1980s and 1990s (CEAS 2000:43). In addition to the

(<http://www.foe.org/safefood/rice.html>).

¹⁰¹ At the time, they both worked in the Canadian NGO Rural Advancement Fund, later to become RAFI (Rural Advancement Foundation International), which now is called ETC group (action group on erosion,

concept of Farmers' Rights, they generally highlighted the role of traditional farming in conservation and the taxonomic knowledge of farmers. The words used evince the recognition of such farming and breeding. Farmers' varieties used to be called primitive cultivars, which reflect a lack of recognition.

Box 7.2: Illustration of NGOs' recognition of farmers' contributions in PGRFA development.

Landraces or Farmers' Varieties?

Recognition of traditional varieties has been part of the political debate regarding Farmers' Rights. The debate has sometimes had a more rhetorical than a substantial content. Cary Fowler recalls a discussion in the 1980s with Jaap Hardon, who was running a gene bank in the Netherlands. Fowler and other NGO-representatives referred to traditional varieties as farmers' varieties. The argument was that these varieties were not just given by the land, but differed from other raw materials in that farmers had improved them. Hardon believed landraces was the proper name, and disagreed that inventions should be named after the inventors. He said that this was not the case regarding other inventions, "after all, we call it Landrover", he said. However, Fowler and his colleagues were not convinced and considered farmers' varieties still to be the legitimate name for the varieties at stake, so they replied: "but we have Volksvagen!"

Source: Fowler 2002 [interview]

Various accomplishments by NGOs like GRAIN, RAFI and UKabc during negotiations could be described as intellectual leadership in favour of the developing countries. First, the Gaia Foundation's interference saying that it was the duty of the secretariat to help the poor and less resourceful countries get their interests attended to, and not to promote the interests of the rich. Second, the transfer of information to delegates at side events highlighting the importance of Farmers' Rights and the negative consequences if farmers' traditional right to save and use seeds is not recognised. Third, the writing of open letters to delegates, urging them to finalise the negotiations and reopen the discussions on Farmers' Rights during the first half of 2001.¹⁰²

Taken their own comments into account, the NGOs promoting Farmers' Rights did not succeed as intellectual leaders in the sense that they felt that their ideas were incorporated in the treaty text. Via Campesina for example describes the text on Farmers' Rights as a step backwards and a bleak lip service to what these rights should entail, in their opinion (Via Campesina 2001). The NGOs' faultfinding publications in the most recent years may have come too late in the process to be influential. Besides, according to Cary Fowler, the NGOs favouring Farmers' Rights participated irregularly and if leaders of the NGOs had joined the last sessions, representatives from developing countries

technology and concentration). Mooney is still director of ETC group, while Fowler is Professor at the Agricultural University of Norway and Senior Advisor to the Director General of IPGRI.

¹⁰² Among the NGO publications, press releases and open letters are for example: Patrick Mulvany (2001): "Global seed treaty hangs in the balance"; GRAIN (2001b): "The IU Hanging on its Last Brackets: A Brief Assessment"; Via Campesina (2001): "Open Letter Tegucigalpa"; Greenpeace (2001): "Who will gain control over seeds and foodstuffs?"; NGO RELEASE (2001): "International Undertaking endangered by crafty US delegation".

would not even had recognised them (Fowler 2002 [interview]). Thus, Fowler believes that the medium breakthrough is associated with the fact that the developing countries were present but unprepared, while the NGOs were often prepared but not always present in the negotiation sessions.

Table 7.2: One interpretation of the medium breakthrough is that actors promoting Farmers' Rights were not present and well prepared at the same time.

<u>Presence</u> ↓	<u>Preparation</u> →	<i>Low</i>	<i>High</i>
<i>Low</i>		--	NGOs
<i>High</i>		Developing countries	--

Why is Cary Fowler so critical? He seems to prove the fact that intellectual leaders generally have little ability to control the uses that others make of their ideas. Oran Young says this is “a fact that can become a source of irritation or even acute frustration on the part of those who dislike the way in which their ideas are applied to actual cases” (Young 1991:301). As time passed, Farmers' Rights were increasingly connected to benefit sharing, which Fowler describes as “the first hi-jacking” (Fowler 2002 [interview]). Fowler and Mooney regarded the International Undertaking with a fund to promote conservation as providing a real and substantial benefit to farmers since it was protecting a resource that was disappearing. Thus, there was an element of benefit sharing in the original idea, but this was collective benefit sharing, not benefit sharing aimed at specific farmers, communities or countries. During the negotiations, however, benefit sharing became increasingly associated with *monetary* benefit sharing, which Fowler calls “the second hi-jacking”. The aspect of this last “hi-jacking” that he considers the most negative occurred when Farmers' Rights came to be used as a slogan for advocating a form of intellectual property rights for farmer varieties. According to Fowler, this was a serious and major misappropriation of the term (*ibid.*). For him, Farmers' Rights are especially important in the connection of *in situ* conservation (see for example the Global Plan of Action, which to some extent is written by him) and he believes that *non-monetary* benefits are likely to far exceed any cash return that may result from the use of the genetic resources (Raymond and Fowler 2001). He gets support from Carlos Correa (2000:21), who says that “it would seem illogical to make Farmers' Rights part of the IPRs system because it is that very system that has created the problems that the concept of Farmers' Rights aims to solve”.

In general, my informants from the developed countries were very critical about the role played by the NGOs that favoured Farmers' Rights. The NGOs were believed to be busy criticising developed countries instead of trying to influence developing countries

as they used to do in the 1980s. Particularly the work of GRAIN is criticised during this process (Borring; Evjen; Fowler 2002 [interviews]). Due to GRAIN's firmness on its principles concerning no patents on life, they were perceived as giving priority to these principles in a fundamentalist way, thereby risking to spoil an agreement rather than achieving an agreement in which they could not support every single paragraph. According to Fraleigh, the NGOs had both good ideas and not so good ideas regarding Farmers' Rights (Fraleigh 2003 [interview]). However, the "lecturing" attitude demonstrated by many NGOs, which "treated government representatives as stupid puppets that just existed in order to be pressured", made it difficult for delegates to accept even their good ideas (ibid.). The NGOs could stick more faithfully to their programmes and principles since they did not have to take the responsibility at the negotiating tables, where states find themselves in the situation that compromises are the only way to move forwards.

Instead of getting their views accepted, the NGOs may have influenced the negotiation atmosphere in a negative way. The coining of concepts such as "biopiracy" made NGOs contribute to the polarisation between the developed and the developing countries. RAFI, for example, thought that IPR exacerbated the unequal distribution of benefits between North and South while at the same time encouraging and even legitimising the exploitation of traditional knowledge (CEAS 2000:42). Thus, the NGOs created an illusion among the developing countries that they had a treasure which the industrialised countries desperately wanted (Fraleigh 2003 [interview]). The truth according to Fraleigh, was that the industrialised countries mainly got their PGRFA from breeding programmes in their own or other industrialised countries rather than the unimproved landraces of the South. In contrast, my informant from a developing country found the presence and work of the NGOs to be supportive (Egziabhar 2003 [interview]). The UK *abc* get credit for its work on getting the negotiations covered by the media (Borring 2002 [interview]). Thus, the significance and perception of the NGOs favouring Farmers' Rights varied, limiting the diffusion of the norms they advocated. What was the role of the breeding industry?

ASSINSEL's surprising proposal on benefit sharing supports some sorts of compensation to the South. According to Patric Mulvany of ITDA (UK) the developing countries appreciated this move: "Developing nations took the industry proposal as "admission that the South has been 'ripped off' but now the companies are prepared to pay" (IATP et. al., 2001). However, the developing countries did not get support from the

NGOs regarding their claim for IPR for farmers' varieties. Apart from this proposal, ASSINSEL promoted views and ideas contradictory to developing countries regarding Farmers' Rights. How does the position of ASSINSEL have relevance for Farmers' Rights? First, regarding maintenance of genetic resources, ASSINSEL believed that *ex-situ* conservation is the most important and must be emphasised especially for landraces and obsolete varieties. *In situ* conservation could be a useful and complementary approach, but ASSINSEL considered on-farm conservation of landraces as difficult to defend (ASSINSEL 1996). Second, ASSINSEL members "are strongly against any "farmers' privilege" going beyond the provisions of the 1991 Act of the UPOV Convention" (ASSINSEL 2001). As this act permits farmers to use protected varieties for propagating purposes on their own holdings, ASSINSEL believed that subsistence farmers are not affected by plant breeders' rights (Ministry of Agriculture, Fisheries and Food and Royal Botanic Gardens Key 1999). Third, they reckon genetic diversity in landraces and wild species as resources of limited present value for breeding purposes (*ibid.*).

Nevertheless, the long period it took to finalise the negotiations provided ample time for new ideas to mature in the minds of delegates. For example, the important role of traditional knowledge is recognised in the CBD and discussions are taking place in WIPO. While only "farmers" were mentioned in the Annexes to the IUPGR, Article 9 alludes to "the local and indigenous communities and farmers", in line with the terminology of the CBD. This is a clear indicator of the growing recognition of the role played by such communities in the creation and preservation of knowledge of value for the society as a whole (Correa 2000:26). Similarly, the delegates may have dropped the idea of an international fund to implement Farmers' Rights since they had learned that the FAO fund established in the 1980s never materialised.

Egziabhar from Ethiopia presented Farmers' Rights as a "South" issue, hence playing on the image of the historical exploitation by the North of the South. This illustrates that delegates from the developing countries themselves were able to become intellectual leaders. When Farmers' Rights were looked upon as the "South's" rights against the "North's" plant breeders' rights, it may become a legitimate norm rather than just a claim from some actors promoting their own self-interests. The Europeans may therefore have recognised that Farmers' Rights are fair, explaining the closing of the gap between the European Region and the developing countries during the discussions on the issue.

The ‘fear’ of the precedence that norm diffusion can create, was obvious in several issues. For example, the financial question caused a lot of trouble. In 1991, the FAO Commission agreed that an international fund was the best way of implementing Farmers’ Rights. In the meantime, a fund had been established under the Montreal Protocol and the funding mechanism of CBD (the Global Environment Facility) was being developed in UNEP, UNDP and the World Bank. It is likely to believe that the developed countries were opposed to making the international fund for Farmers’ Rights workable, in an attempt to prevent the creating precedents for such financial mechanisms which obligated them to pay, in the context of a world-wide economic downturn in the early 1990s. Furthermore, the JUSCANZ countries’ unwillingness to accept benefit sharing as mandatory when patenting plant genetic material may be due to a fear of establishing a norm affecting their general patent practice.

Conclusion

A variety of actors can be described as intellectual leaders – supporting to a large extent the developing countries’ request for Farmers’ Rights. Most importantly, the very idea of Farmers’ Rights as a political concept is the result of intellectual leadership. The performance of several NGOs in favour of Farmers’ Rights did not appeal to developed countries, however. This reduced the potential influence of their ideas on Farmers’ Rights. The impact of “science” from IPGRI regarding Farmers’ Rights was less significant compared to the more ethical and moral discussions of Keystone. However, IPGRI’s reference to science may have increased their influence, while NGOs’ behaviour might have reduced their influence. This indicates that intellectual leadership supporting the idea of Farmers’ Rights is not a necessary condition for enhancing the developing countries’ breakthrough. The *presentation* of the ideas is crucial for whether a diffusion of these ideas will take place. The partial ambiguity of the ideas promoted by intellectual leaders as well as the presentation of the ideas seems to be significant for understanding the medium breakthrough for the developing countries.

7.4 Complementarities and Modifications

How do the three perspectives relate to each other in this case? Together they provide a more comprehensive explanation for the medium recognition of Farmers’ Rights than if considered separately. Their complementary aspects are thus obvious. Without the focus on dominant states provided by the power-based perspective, for example, there would be a small gap in our understanding of why it was so difficult for promoters of Farmers’

Rights to gain acceptance for a comprehensive recognition of these rights. Likewise, if organisation of the negotiations was left out, it would be difficult to understand how self-interested states could ever reach an agreement on such controversial issues as Farmers' Rights. Since non-state actors such as NGOs played an important role in coining the concept of Farmers' Rights and later in promoting it, the knowledge-based perspective is necessary to complement the state-focus of the interest- and power-based perspectives. Other supplements of the knowledge-based perspective are explanatory factors such as the role of science.

It is important to stress, however, that the borders between the perspectives are not always clear-cut. This creates the practical challenge of deciding which theoretical label best describes an empirical event. I have been confronted with this challenge particularly in the case of leadership where some people could be described as both entrepreneurial as well as intellectual leaders, and sometimes they may even have acted as group leaders for their coalition. In addition, the arena factor is the basis for two different mechanisms since it facilitates learning which results in strategic changes in states' cost-benefit calculus as well as changes in states' perceptions due to norm diffusion.

The complementary appearance of the three perspectives is not always the case, as they sometimes seem to modify each other. This is most obvious in the case of the shortcomings of power. The institutional characteristics of FAO demonstrate that power based on overall material capabilities is not as absolute as assumed in the power-based perspective. In addition, ideas highly influence the agenda and what is on the agenda is discussed. This reduced the powerful states' scope of influence. Besides, when applying the knowledge-based perspective, the assumption that states are unitary and rational made in both the interest- and power-based perspectives is modified. The cognitively oriented viewpoint illuminates the dynamic character of states' interests and perceptions which can change when confronted with new ideas and scientific knowledge. Thus, states' interests and perceptions are not given *a priori*. Following this argument, the states' interests and perceptions are not necessary stable. During the long negotiation process of the ITPGRFA, the positions of the states "matured" as a respond to what both happened at the negotiation table, but also as a reaction to what happened in other forums. This helps us understand why the developing countries could present one common proposal on Farmers' Rights in 1996, but have different opinions regarding the issue a few years later.

When applying a time dimension for the formation phase of the International Treaty, the prominence of ideas and intellectual leadership during the agenda formation

seems apparent. The institutional factors such as entrepreneurial leadership proved to be very important during the negotiation stage. The fact that institutional factors are significant at this stage does not come as a surprise, considering that this is the time when the actors actually meet in the institutional arena. The inability of the JUSCANZ countries to exclude Farmers' Rights from the agenda shows that the power-based perspective is more notable after the agenda formation. The refusal of the US and Japan to sign the treaty at its adoption in November 2001 also indicate the explanatory power of the power-based perspective in the transition between negotiation and operationalisation.

Chapter 8: Conclusions and Reflections

8.1 Looking Back

The objective of this thesis was to find out whether the recognition of Farmers' Rights in the ITPGRFA represents a breakthrough for the South. Farmers' Rights have been among the most contested issues during the germplasm debate in FAO since the 1980s. These rights were simultaneously recognised in 1989 together with plant breeders' rights. Nevertheless, due to the lacking implementation of Farmers' Rights, and the developments in other international forums, Farmers' Rights were again placed on the international agenda when the revision of the International Undertaking started in 1994. Throughout seven hard years of negotiations, the Member States of FAO discussed the text of what was to be the first legally binding treaty specifically pertaining to PGRFA. In 1999 the negotiating parties adopted a set of provisions on Farmers' Rights as part of the treaty. As elaborated on in Chapter 5, I consider this recognition to be a medium breakthrough for the South. The deficient international responsibility for implementing Farmers' Rights as well as the ambiguous recognition of the right of farmers to sell, use and exchange farm-saved seeds of protected varieties is a departure from the developing countries' original proposal on Farmers' Rights. On the other hand, the recognition of the rights of farmers to participate in decision-making regarding PGRFA as well as in the sharing of the benefits arising from the use of these resources are in line with the claims of the developing countries. Besides, the optional list for what countries can include as Farmers' Rights, do not prevent countries to implement Farmers' Rights nationally in a comprehensive way.

In order to understand this negotiation outcome, the power-based hypothesis was deemed least relevant. According to neorealist theory, an assessment of power relationships in international negotiations must comprise the overall power resources of states and compare them with other states. The prospect for breakthrough for the developing countries is thus weak and this perspective excludes the potential of a kind of "Southern power". On the other hand, such power can be captured by the concept of *issue-specific* power endorsed by interest-based theory. The developing countries' relatively low values on the two components of issue-specific power go a long way in explaining why Farmers' Rights were not fully recognised as the developing countries had opted for. First, the basic game power of the developing countries is weak because germplasm

collections to international gene banks during the last decades have reduced their control over plant genetic resources. Second, the partly divergent interests that prevented the developing countries to stick together throughout the seven years of negotiation as well as the variable group leadership reduced their negotiation power. In the case of Farmers' Rights, even some developed countries (e.g. Norway) worked harder for their recognition than some developing countries. Entrepreneurial leaders have been fundamental in addressing the issues in such a way that the developing countries got their interests included. Even though delegates from both developing and developed countries had to modify their initial proposals during the negotiations, the different ways of conducting the negotiations helped to partly circumvent the law of the least ambitious program. Hence, the Farmers' Rights Article was moved from the minimum American definition of these rights closer to the developing countries' definition. Altogether, the interest-based perspective's specific focus on the negotiation phase largely helps us to understand the moderate results from the developing countries' point of view. Nevertheless, neo-institutional theory can not fully account for the negotiation outcome. While it was harder to assess the role of norm diffusion and intellectual leaders, the knowledge-based perspective contributed to our understanding with additional aspects. For example, the very concept of Farmers' Rights was coined by NGO-representatives. In addition, several NGOs supported most of the measurements on Farmers' Rights suggested by the developing countries, but their behaviour reduced their influence as intellectual leaders. Furthermore, scientific knowledge contributed to changes in the perceptions of some of the delegates.

8.2 Scope for Generalisations

To what extent is regime theory a useful analytical tool for analysing the role of developing countries in regime formation? I will opt for a confirmative answer with some reservations. The interest-based perspective had, as expected, by far the strongest explanatory power and could to a large extent account for the result. In addition, particularly the cognitive approach complemented the understanding provided by the institutional factors. The power-based perspective was less beneficial in this case, partly because in the realist view, environmental degradation as long as it does not affect the natural resource base does not constitute a separate power resource (Biermann 2002:15). The power-based perspective was also not so relevant because I looked at the ITPGRFA in isolation without including the other on-going international processes. The powerful

states pursue their interests more successfully in forums like for example the WTO. If the analysis of regime formation would have included regime interaction, the power-based perspective would have had a higher explanatory power.

On this background, it is reasonable to ask whether “Southern Power” is a fruitful approach to study Farmers’ Rights and the issue area of PGRFA. Undoubtedly, the conflict line in the issue area of biodiversity has in general been between the North and the South, as described in chapter 4. Thus, several analyses of the international debate on these matters have described them in these terms (see for example Bragdon 2000:4; Cullet 2003:6; Fowler 1993). This perception is also shared by NGOs engaged in the sustainable management of PGRFA (see for example GRAIN 2001c). However, this persisting framing of the debate in terms of North-South is believed to have further polarised an already difficult negotiation climate. Furthermore, this framing may also blur the actual situation of high interdependence on genetic resources. The developing countries often co-operate under the label of G-77 and in 1996, they presented a common proposal on Farmers’ Rights. Thus, in the case of the international germplasm debate, I will argue that the picture of the North versus the South has captured much of the actual situation. Today, the South has become a more comprehensive and complex group due to among other things different economic development between the least developed countries and newly industrialised countries. The common interest in a new economic world order in the 1970s is not prevailing nowadays. The developing countries have therefore different approaches to IPR on living material, biotechnology and agricultural trade. However, the North-South picture still prevails in the minds of people (like representatives of NGOs and developing countries), despite the fact that the issue specific power of the South has changed during the last decades.

Regarding basic game power, the richness in PGRFA and capacity in biotechnology differ widely between the various regions and countries of the South. Partly because of these differences, the developing countries have occasionally different interests. This has consequences for the South’s negotiation power. For example, in the biodiversity negotiations (Conferences of the Parties to the CBD and the Cartagena Protocol), the group of “like-minded mega-diversity countries”¹⁰³ and the Miami-group¹⁰⁴

¹⁰³ In 2002 the countries richest in biodiversity established the Group of Like-minded Megadiversity Countries. The Group’s member countries are Bolivia, Brazil, China, Costa Rica, Colombia, Ecuador, India, Indonesia, Kenya, Mexico, Malaysia, Peru, Philippines, South Africa and Venezuela. These countries have established a common agenda for sustainable development and decided to cooperate and promote their interests related to sustainable use and conservation of biological diversity, including access to genetic resources and benefit sharing, and the protection of traditional knowledge (<http://www.megadiverse.org/>).

now have developed stronger coalitions than the G-77. Although the adoption of a “Southern power” approach in my case has been fruitful, this approach has apparent weaknesses. Thus, when analysing the international germplasm debate in the future, such an approach has to be done with caution.¹⁰⁵ What are the lessons from this case regarding “Southern power” in international environmental negotiations in general?

First, basic game power is essential. If the Northern governments believe that the participation of the developing countries in the negotiated regime is necessary to combat an environmental problem, there is a potential for the developing countries to push for differentiation in norms and responsibility. This could for example include technology transfers of more environmentally friendly technology from the North to the South. Basic game power is apparent in the case of climate change. Evidently, the reduction of polluting emissions from the North has less significance if not populous developing countries such as India and China follow up with similar efforts. Intellectual leaders may promote scientific knowledge or norms that influence the perceptions of the South’s basic game power.

At the negotiation table, the degree of coalition among the developing countries and group leadership will be crucial for whether the South will manage to transform potential basic game power into negotiation power. The further away the position of the South is from the position of the dominant actors, the harder will it likely be to gain a strong breakthrough. However, entrepreneurial leaders, who may frame the agenda in a favourable way for the developing countries, can support the negotiation power of the South. The characteristics of the arena may also affect the negotiation power. The developing countries’ strength in numbers is only relevant if the decision-making rule is one country – one vote. If for example negotiations on management of genetic resources are moved from FAO and UNEP to the WTO, the negotiation power of the South is probably reduced. Moreover, the case of agro-biodiversity has shown that even in an issue-area that historically could be described along the lines of the North versus the South, such phrases might blur the actual situation. At the beginning of the third millennium, the policies and interests of G-77 countries may diverge so much that constellations during international environmental negotiations may not take place under the umbrella of “the South”. Instead of collaborating together with all G-77 countries,

¹⁰⁴ This group consists of Argentina, Australia, Canada, Chile, Uruguay and USA. They were lobbying heavily for the wider use of GMOs during the negotiations for a biosafety protocol to the CBD. The Cartagena Protocol was adopted in January 2000 and entered into force September 2003.

¹⁰⁵ The explanation of why I adopted this approach is elaborated on in Chapter 3.

smaller groups of developing countries tend to form coalitions during international environmental negotiations. The well-organised collaboration within the group of “like-minded mega-diversity countries” give the group high negotiation power. Since these countries are particularly rich in biodiversity including medicine plants, their basic game power is arguably higher than the case of the South in the ITPGRFA negotiations, which dealt exclusively with plant genetic resources for food and agriculture. This comparatively high negotiation as well as basic game power, may give room for influence in international environmental negotiations for countries relatively poor in overall material capabilities. The “Southern power” approach may therefore have relevance for studies of these new coalitions of developing countries even though they do not include all developing countries.

8.3 Looking Ahead

What are the future prospects for Farmers’ Rights? With the ITPGRFA, the Contracting Parties affirm that the promotion of Farmers’ Rights at the national and international levels are fundamental to the realisation of these rights (Preamble), and that the responsibility for realising Farmers’ Rights rests with the national governments (Article 9). The suggested measures to protect and promote Farmers’ Rights are not legally binding but subject to national legislation, as appropriate, in accordance with the needs and priorities of the countries. The two other articles, which contain provisions related to Farmers’ Rights, are, however, legally binding. The first article provides for farmers who contribute to maintaining plant genetic resources for food and agriculture, to receive benefits arising from the Multilateral System (Section 13.3). The second provision ensures that when it comes to funding, priority will be given to the implementation of agreed plans and programmes for farmers in developing countries, who conserve and sustainably utilise plant genetic resources for food and agriculture (Section 18.5). Whereas the latter two provisions will be dealt with by the Governing Body, due to their status of being legally binding, there is great uncertainty pertaining to the question of how to approach Article 9, since its provisions are not legally binding. This uncertainty may also affect the implementation of Articles 13 and 18, since the plans and programmes to be supported (Sections 13.3 and 18.5) are measures undertaken by national governments (Article 9). The treaty will enter into force this year, though the Governing Body will probably take some time until it gets to further elaborate on Farmers’ Rights.

Meanwhile, other international processes affect the future of Farmers' Rights. The *Ad Hoc Open-ended Inter-Sessional Working Group on Article 8j and Related Provisions* of the CBD is mandated to *inter alia* provide advice on the application and development of legal and other appropriate forms of protection for the knowledge of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biodiversity; and also to identify objectives and activities falling within the scope of the CBD, and recommend priorities, including equitable benefit sharing (Earth Negotiations Bulletin 2003). At the same time, the WIPO's *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* elaborates on connected issues. Some countries may argue that the work being done in these two forums is sufficient in these matters, so they will avoid "duplications" by opening another front in the FAO. Others might want coherence in the developments and co-ordination between these forums and organisations. The implementation of Farmers' Rights as they relate to PGRFA will depend on how these processes will work together. At the national level, there have been some attempts in different directions to develop operational domestic guidelines and acts of legislation for the implementation of Farmers' Rights (e.g. by the Organisation for African Unity, Zambia, India, Thailand, and Bangladesh).

Developments in "adverse" forums like WTO, UPOV and WIPO will also condition the realisation of Farmers' Rights. What if for example UPOV is revised once again and plant breeders' rights get even closer to patents regarding restriction of access to PGRFA? Alternatively, what if the possibility of "world patents" becomes possible through WIPO? The Substantive Patent Law Treaty will probably prohibit Member States from making any further demands on patent applications than those found in the treaty (Wolff 2004:32). If such a treaty is adopted, it will not be possible to require the patent applicant to inform about the source country of the biological materials, which is a necessary precondition for benefit sharing. In addition, the US, the EU and the EFTA countries all enter into bilateral trade agreements with single developing countries on the condition that the developing countries comply with even stricter IPR legislation on living material than the standard put forward by the TRIPs (Bjørnstad 2003). Such strong IPRs restrict the right of farmers to save, use and exchange farm-saved seeds.

In summary, these different and partly conflicting processes limit the scope for implementation of Farmers' Rights, as they were initially proposed by the developing countries. Hence, the longer it takes to start implementing the provisions on Farmers

Rights under the ITPGRFA, the weaker the prospects for the realisation of these principles will be.

Appendixes

Appendix 1:

THE PROVISIONS PERTAINING TO FARMERS' RIGHTS IN THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

From the *Preamble*

The Contracting Parties,

(...) *Affirming* that the past, present and future contributions of farmers in all regions of the world, particularly those in centres of origin and diversity, in conserving, improving and making available these resources, is the basis of Farmers' Rights.

Affirming also that the rights recognised in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material, and to participate in decision-making regarding, and in the fair and equitable sharing of the benefits arising from, the use of plant genetic resources for food and agriculture, are fundamental to the realisation of Farmers' Rights, as well as the promotion of Farmers' Rights at national and international levels.

Article 9 – Farmers' Rights

9.1 The Contracting Parties recognise the enormous contribution that the local and indigenous communities and farmers of all regions of the world, particularly those in the centres of origin and crop diversity, have made and will continue to make for the conservation and development of plant genetic resources which constitute the basis of food and agriculture production throughout the world.

9.2 The Contracting Parties agree that the responsibility for realising Farmers' Rights, as they relate to plant genetic resources for food and agriculture, rests with national governments. In accordance with their needs and priorities, each Contracting Party should, as appropriate, and subject to its national legislation, take measures to protect and promote Farmers' Rights, including:

- (a) protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
- (b) the right to equitably participate in the sharing of benefits arising from the utilisation of plant genetic resources for food and agriculture; and
- (c) the right to participate in making decisions, at the national level, on matters related to the conservation and sustainable use of plant genetic resources for food and agriculture.

9.3 Nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seeds/propagating material, subject to national law as appropriate.

From Article 13 – Benefit Sharing in the Multilateral System

13.3 The Contracting Parties agree that benefits arising from the use of plant genetic resources for food and agriculture that are shared under the Multilateral System should flow primarily, directly and indirectly, to farmers in all countries, especially in developing countries, and countries with economies in transition, who conserve and sustainable utilise plant genetic resources for food and agriculture.

From Article 18 – Financial Resources

18.5 The Contracting Parties agree that priority will be given to the implementation of agreed plans and programmes for farmers in developing countries, especially in the least developed countries, and in countries with economies in transition, who conserve and sustainable utilise plant genetic resources for food and agriculture.

Appendix 2:

**THE PROVISIONS PERTAINING TO FARMERS' RIGHTS IN THE
INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES**

From Resolution 4/98 – Agreed Interpretation of the International Undertaking

3. states adhering to the Undertaking recognise the enormous contribution that farmers of all regions have made to the conservation and development of plant genetic resources, which constitute the basis of plant production throughout the world, and which form the basis for the concept of Farmers' Rights;

4. the adhering states consider that the best way to implement the concept of Farmers' Rights is to ensure the conservation, management and use of plant genetic resources, for the benefit of present and future generations of farmers. This could be achieved through appropriate means, monitored by the Commission on Plant Genetic Resources, including in particular the International Fund for Plant Genetic Resources, already established by FAO. To reflect the responsibility of those countries which have benefited most from the use of germplasm, the Fund would benefit from being supplemented by further contributions from adhering governments, on a basis to be agreed upon, in order to ensure for the Fund a sound and recurring basis. The International Fund should be used to support plant genetic conservation, management and utilisation programmes, particularly within developing countries, and those which are important sources of plant genetic material. Special priority should be placed on intensified educational programmes for biotechnology specialists, and strengthening the capabilities of developing countries in genetic resource conservation and management, as well as the improvement of plant breeding and seed production.

From Resolution 5/98 – Farmers' Rights

Endorses the concept of Farmers' Rights (Farmers' Rights mean rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity). These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the International Undertaking) in order to:

- (a) ensure that the need for conservation is globally recognized and that sufficient funds for these purposes will be available;
- (b) assist farmers and farming communities, in all regions of the world, but especially in the areas of origin/diversity of plant genetic resources, in the protection and conservation of their plant genetic resources, and of the natural biosphere;
- (c) allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods.

From Resolution 3/91 – National Sovereignty and International Fund

Endorses the following points:

1. that nations have sovereign rights over their plant genetic resources;
2. that breeders' lines and farmers' breeding material should only be available at the discretion of their developers during the period of development;
3. that Farmers' Rights will be implemented through an international fund on plant genetic resources which will support plant genetic conservation and utilisation programmes, particularly, but not exclusively, in the developing countries;
4. that the effective conservation and sustainable utilisation of plant genetic resources is a pressing and permanent need, and, therefore, the resources for the international fund as well as for other funding mechanisms should be substantial, sustainable and based on the principles of equity and transparency;
5. that through the Commission on Plant Genetic Resources, the donors of genetic resources, funds and technology will determine and oversee the policies, programmes and priorities of the fund and other funding mechanisms, with the advice of the appropriate bodies.

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