

BeneLex Learning Module

on benefit-sharing and farmers' rights



July 2019

TABLE OF CONTENTS

1. Introduction.....	2
2. Why is this learning module needed?	4
A. Why the need for farmers' rights?	6
B. Which instruments are relevant for the protection of farmers' rights?	8
a) International biodiversity law.....	8
b) International human rights law.....	12
3. States' obligations concerning the protection of farmers' rights.....	15
A. What is meant by farmers' rights?	15
B. Farmers' right to benefit-sharing.....	18
a) Substantive obligations for States.....	18
b) Procedural obligations for States	20
C. Farmers' right to participate in making decisions at the national level on matters related to the conservation and sustainable use of PGRFA	22
D. Farmers' right to save, use, exchange and sell farm-saved seeds	24
4. Implementation of farmers' rights at the national level	26
5. Farmers relying on international mechanisms to implement their rights	27
6. Self evaluation	29
7. Resources	31
A. Acronyms	31
B. List of boxes.....	31
C. List of international sources.....	31
i) International treaties	31
ii) Decision, report and resolutions under CBD and ITPGRFA and by the FAO	32
iii) Other international human rights instruments	32
iv) Report of the Special Rapporteur on the Right to Food	32
D. Additional sources	32

1 Introduction



THE BENELEX
RESEARCH

Background: BeneLex is an academic project funded by the European Research Council (2013-2018) and is led by Professor Elisa Morgera of the University of Strathclyde, Glasgow, UK. The project focuses on the legal concept of **“fair and equitable benefit-sharing”**, which is understood as the **good-faith, iterative dialogue aimed at building equitable partnerships in identifying and allocating economic, socio-cultural and environmental benefits among State and non-State actors.** The project

explores different ways in which fair and equitable benefit-sharing is understood and put into practice in a plurality of contexts. By understanding benefit-sharing in different contexts, the project seeks to clarify how law can help realize the potential of benefit-sharing to create fair and long-term partnerships between communities and other users of natural resources. To this end the project in particular builds on “mutually supportive” interpretations of international biodiversity law and international human rights law. In short, this means reading international biodiversity law and international human rights law together to clarify how they each can help realize the objectives of the other.

The **targeted users** of this learning module are farmers' representatives/organizations, and human rights and environmental advocates.

This learning module seeks to enable users (either individually or as part of a group) to rely on key research findings from the BeneLex project on international environmental law (which includes international biodiversity law) and international human rights law concerning the rights of farmers when:

- Negotiating agreements with outsiders on benefit-sharing;
- Developing community protocols (NB: for more information on community protocols, see the [learning module on benefit-sharing and the rights of traditional knowledge holders](#));
- Organising training sessions;
- Undertaking advocacy activities; or
- Carrying out litigation activities.

Note that a number of modules on farmers' rights already exist (see e.g. FAO (2017)). This module does not therefore constitute an introduction to farmers' rights. Instead it gives specific guidance on *how* to use farmers' rights.



TARGETED USERS



The **learning objectives** of this module are to strengthen understanding and possibilities for the application of international human rights law and international environmental law of relevance to:

- the promotion and protection of farmers' rights, including the:
 - protection of traditional knowledge;
 - right to equitably share benefits arising from the utilization of plant genetic resources for food and agriculture (PGRFA);
 - right to participate in making decisions at the national level on matters related to the conservation and sustainable use of PGRFA; and
 - right to save, use, exchange and sell farm-saved seeds.
- the implementation of farmers' rights at the national level; and
- funding support for implementation.



This module is part of a series of 3 learning modules (the other two will focus on indigenous peoples' rights over natural resources and on farmers' rights).

Other outputs of the **BeneLex** project include:

- **Working papers and academic publications** analysing international legal developments related to fair and equitable benefit-sharing and relating research findings to broader academic debates in international law;



- **Blog posts** providing real-time, accessible analysis of new international legal developments related to fair and equitable benefit-sharing;
 - **Policy briefs** distilling in a succinct and action-oriented way the main project findings for specific groups of end-users: international negotiators, the private sector, non-governmental organizations (NGOs) and bilateral donors.
- They will be available in English, French and Spanish.

Go deeper

All **BeneLex** outputs are available on the project website and, upon request (email benelex@strath.ac.uk) in memory sticks that will be mailed to you.

Authors

This module was prepared by Thierry Berger and Elsa Tsioumani and benefited from comments and review by members of the **BeneLex** team, including Professor Elisa Morgera. Margherita Brunori prepared the visuals and Yoge designed the layout. The module draws on the following three papers by Elsa Tsioumani (and sources cited in them): 'Exploring Benefit-Sharing from the Lab to the Land (Part I): Agricultural Research and Development in the Context of Conservation and Sustainable Use' BENELEX Working Paper No. 4 (SSRN, 2014); 'Benefit-sharing and Farmers Rights', BENELEX Blog (2014); and 'Access to Markets for Smallholders and Fair and Equitable Benefit-sharing: Mapping the Linkages', BENELEX Blog (2016).

2 Why is this learning module needed?

Scenario: A farming community has developed a unique variety of rice and has been cultivating it using traditional practices and seed-saving techniques, supporting the livelihoods of its members but also producing global benefits with regard to biodiversity conservation and food security. The levels of production have however been falling. An NGO representing the farmers had approached the regional government to seek support to increase the production. In order to do this, the government had entered into an agreement with the NGO and a foreign-owned company that had been selected to develop mechanised farming and infrastructures (including dams and roads), with government funding. The company has started to experiment with intensive production methods and planted different rice varieties, in contrast to the traditional methods used by local farmers. Farmers raise a number of concerns, including that the methods used by the company may affect the purity of the seed variety. In addition, the company signals its intention to file a patent concerning the seed variety which the community believes will adversely impact its members' customary rights. The farmers also underscore that they are not happy about how benefits, including the profits, are being shared under the agreement and about the lack of meaningful consultation during the negotiations of the agreement. The community expresses the wish to: i) set up a conservation area and acquire different varieties of rice but lacks funding for this; and ii) preserve the rice variety for future generations by placing them in a dedicated structure abroad. The national legal framework of the country where the community is based does not currently address the protection of farmers' rights but the government is planning to develop a new agricultural policy.



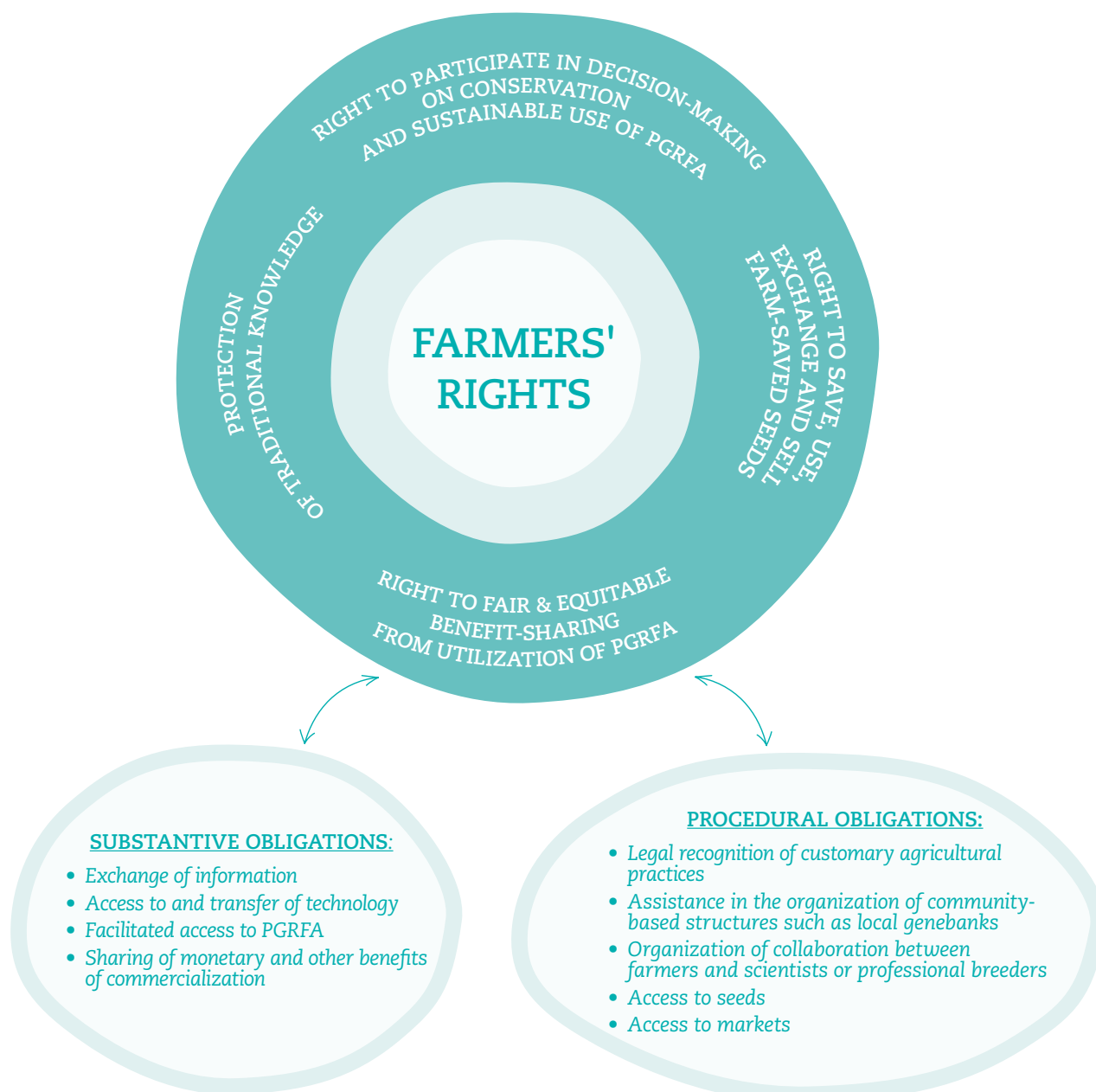
If you were to advise the farmers in this scenario,

- How can they protect their traditional practices and seed-saving techniques while sharing in the profits made by the company?
- How could they protect their seed variety?
- How could they be involved in the making of the new agricultural policy?
- How could they get support to set up a conservation area?

This module will, first, highlight opportunities to protect farmers' rights by relying on both international environmental law and international human rights law. It will then discuss various ways in which farmers' rights can be protected, looking at the obligations of States in that connection. Third it will focus on opportunities to promote farmers' rights at the national and international levels. Finally, it will conclude by returning to the scenario above to give you an opportunity to apply what you have learnt.

The below diagram maps various sources and concepts relevant to farmers' rights that will be referred to throughout the module.

Module map. International human rights, biodiversity and agriculture sources and concepts relevant to farmers' rights



**International environmental law/
agricultural law**

International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)
Convention on Biological Diversity (CBD)
Nagoya Protocol on Access to Genetic Resources and Benefit-sharing

Human rights law

UN Declaration of the Rights of Peasants and other people working in rural areas
International Covenant on Economic, Social and Cultural Rights
Reports of the UN Special Rapporteur on the right to food

A. Why the need for farmers' rights?

Effective conservation and sustainable utilization of PGRFA has long been recognised as a pressing and permanent need that requires funds and technologies to support it (FAO Conference, Resolution 3/91 paras 4-5). This is because of the small number of crops that are used to fulfil “human food energy needs” and the fact that crop diversity is crucial to face future food security challenges, related for instance to climate change (FAO (n.d.)). However, such diversity faces “genetic erosion”, meaning that it is lost due to the uniformization promoted by commercial crop varieties (*ibid.*).



Farmers play a key role in the conservation and sustainable use of PGRFA and related knowledge, thus contributing to the global genetic pool and therefore food security (International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) Governing Body, Resolutions 8/2013, 5/2015 and 7/2017, and FAO (2017)). Governing Body, Resolutions 8/2013, 5/2015 and 7/2017, and FAO (2017). Farmers often exchange traditional seeds (see Box 1 below for an explanation of technical terms) informally or on a customary basis. Thus farmers have effectively donated their seeds to professional breeders and seed companies that relied upon them to produce commercial varieties. Protecting farmers' rights became necessary to promote equity and justice, due to the asymmetry in the benefits received by farmers and commercial breeders: the latter received protection for their commercial varieties pursuant to **intellectual property rights** (IPRs – see below), but no reward existed for farmers for conserving, developing, and providing access to, their traditional seeds.

Commercial varieties are protected pursuant to a number of legal instruments that can negatively impact and sometimes conflict with farmers' rights. These include the **International Convention for the Protection of New Varieties of Plants (UPOV)**, as amended, and national patent laws. UPOV protects the rights of ‘plant breeders’ (see Box 1 below) provided they develop plant varieties which are new (or ‘novel’ – see Box 1 below), distinct, uniform and stable. In its initial version, UPOV permitted farmers to re-use farm-saved seeds (known as **farmers' privilege**) but it later limited this right and made it optional for UPOV member States to protect in 1991. Since then, farmers' use of protected varieties can be allowed at the discretion of member States, but only for propagating and plantings *on their own holdings*. Farmers may not use them for informal sale, thereby restricting the exchange of seeds among farmers and access to the seed markets. Patent laws generally do not allow farmers to save seeds.

In contrast, farmer varieties cannot be protected by IPRs, because they do not satisfy the criteria for protection. In addition, farmer varieties generally do not satisfy the criteria set by national regulations on seed certification and marketing. As a result, farmers are unable to sell them on commercial markets.

Farmers' rights aim to ensure that farmers can carry on acting as “custodians of the plant genetic heritage and as innovators in agriculture” (FAO (2017)). Reaching

a balance between farmers' rights and IPRs is therefore crucial. Farmers need to be able to carry on and should be actively supported to contribute to global plant genetic resources and food security (UN Doc A/64/170). In this regard, the **UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (the Declaration on the Rights of Peasants)** (see Box 3 below) specifically requires States to ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas (Declaration on the Rights of Peasants, Art 19.8).

A number of key technical terms are defined and explained in Box 1 below

Box 1. Definitions and explanations of key terms relevant to PGRFA

Terms related to materials

Germplasm refers to "samples of genetic resources containing units of heredity, such as seeds, pollen, sperm or individual organisms, held in in situ or ex situ collections such as genebanks" (Zaid et al. (2001)).

Genetic material means "any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity" (ITPGRFA, Art. 2).

Genetic resources are defined as "genetic material of actual or potential value" (Convention on Biological Diversity (CBD), Art. 2).

PGRFA means "any genetic material of plant origin of actual or potential value for food and agriculture" (ITPGRFA, Art. 2).

Deoxyribonucleic acid (DNA) "constitutes the genetic material of most known organisms" (Zaid et al. (2001)).

Units of heredity are "the parts of a living organism that can pass traits to offspring, i.e. those parts containing DNA or genes" (Zaid et al. (2001)).

Agricultural Biodiversity is "a broad term that includes all components of biological diversity of relevance to food and agriculture, and all components of biological diversity that constitute the agricultural ecosystems, also named agro-ecosystems: the variety and variability of animals, plants and micro-organisms, at the genetic, species and ecosystem levels, which are necessary to sustain key functions of the agro-ecosystem, its structure and processes" (CBD Decision V/5 (2000), Appendix).

Terms related to activities

Breeder is a person who bred or discovered and developed a variety; or the employer or successor of that person (UPOV, Art. 1(iv)).



In situ conservation means the “conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated plant species, in the surroundings where they have developed their distinctive properties” (ITPGRFA, Art. 2).

Ex situ conservation means the “conservation of PGRFA outside their natural habitat” (ITPGRFA, Art. 2).

Genebank means the “physical location where collections of genetic material in the form of seeds, tissues or reproductive cells of plants or animals are stored” (Zaid et al. (2001)).

Novel means that the variety has not been previously marketed in the country where plant variety protection rights are applied for (UPOV, Art. 6(1)).

Seed systems refer to the “interrelated set of [...] breeding, management, replacement and distribution of seed” (Thiele (1999)).

B. Which instruments are relevant for the protection of farmers' rights?

Farmers' rights are supported by binding international treaties, and soft law decisions and other materials. According to **BeneLex** research, **claims based on farmers' rights can be strengthened** by relying on a combination of international biodiversity law and international human rights law. We will introduce each instrument in turn here, as invoking a specific international legal instrument can contribute to make a stronger argument about the protection of farmers' rights and to challenge obstacles that may have emerged at the national level.



a) International biodiversity law

Key treaties include the **CBD** adopted in 1992, the **ITPGRFA** adopted in 2001 and the **Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the Nagoya Protocol)** adopted in 2010.

The **CBD** confirmed the principle of natural sovereignty over national resources (Arts. 3 and 15), partly to address concerns in relation to the rise of IPRs. Fair and equitable sharing of the benefits arising out of the utilization of genetic resources is one of the CBD three objectives (alongside the conservation of biodiversity and the sustainable use of its components (Art. 1)), and can be seen as a tool to correct injustices associated with IPRs. In particular, the **results of research and development and the benefits arising from the commercial and other utilization of genetic resources are to be shared in a fair and equitable manner** with the country providing such resources on the basis of mutually agreed terms between



the provider and the user of the genetic resources (Art. 15(7)). The **Nagoya Protocol** is a supplementary agreement to the CBD and provides a legal framework for the effective implementation of its benefit-sharing objective, including by providing greater legal certainty for providers and users of genetic resources (see Box 2 below).



The most significant treaty for farmers' rights and benefit-sharing is the **ITPGRFA**. The ITPGRFA was negotiated in harmony with the CBD and aimed to respond to the specificities of **agricultural biodiversity** to promote the overall goals of sustainable agriculture and food security. It recognizes the fair and equitable sharing of the benefits arising out of the use of PGRFA as its third objective, alongside conservation and sustainable use (Art. 1, see Box 2 below), and as an element of farmers' rights (Art. 9, see section 3 below). The ITPGRFA establishes a multilateral system (the **Multilateral System**) to access a specified list of PGRFA considered vital for global food security and agricultural research, and share benefits arising from their use. A standard material transfer agreement is used to exchange PGRFA in the Multilateral System. Benefits accrued from users of PGRFA in the Multilateral System and from additional voluntary contributions are shared via projects financed by a benefit-sharing fund under the ITPGRFA (the **Benefit-Sharing Fund**) (Arts. 13.3 and 18.5 – see section 5 below), and aim to assist in particular farmers in developing countries who conserve and sustainably utilize PGRFA on-farm.

The **Nagoya Protocol** recognizes the fundamental role of the ITPGRFA for global food security and the sustainable development of agriculture. Its provisions do not apply in the case of PGRFA in the ITPGRFA Multilateral System. The Nagoya Protocol also calls on its Parties to consider the importance of genetic resources for food and agriculture and their special role for food security when developing access and benefit-sharing legislation (Art. 8).

Box 2. Key treaties for farmers' rights and benefit-sharing

CBD

Art. 1 "The objectives of this Convention [...] are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding."

Art. 3 "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."



Art. 10(c) “Each Contracting Party shall protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements”.

Art. 15 “1. Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

[...] 7. Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 [access to and transfer of technology] and 19 [handling of biotechnology and distribution of its benefits] and, where necessary, through the financial mechanism established by Articles 20 and 21 [of the CBD] with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.”

ITPGRFA

Art. 1 “1. The objectives of [the ITPGRFA] are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.

2. These objectives will be attained by closely linking [the ITPGRFA] to the Food and Agriculture Organization of the United Nations and to the Convention on Biological Diversity.”

Art. 5.1 “Each Contracting Party shall [...] promote an integrated approach to the exploration, conservation and sustainable use of plant genetic resources for food and agriculture and shall in particular, as appropriate: [...] c) Promote or support, as appropriate, farmers and local communities’ efforts to manage and conserve on-farm their plant genetic resources for food and agriculture. [...]”

Art. 6.1 “The Contracting Parties shall develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.”

Art. 9 “1. The 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 of food and agriculture production throughout the world.

2. The Contracting Parties agree that the responsibility for realizing 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 sharing benefits arising from the utilization 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.

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

Art. 10.2 “[...] the Contracting Parties agree to establish a Multilateral System, which is efficient, effective, and transparent, both to facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis.”

Art. 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 sustainably utilize plant genetic resources for food and agriculture.”

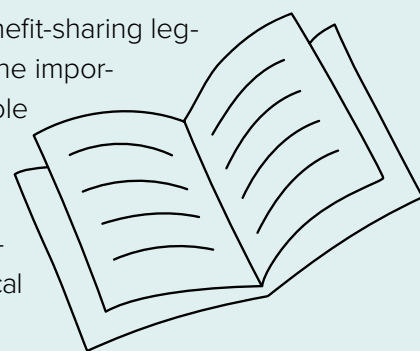
Art. 18.5 “The Contracting Parties agree that priority will be given to the implementation of agreed plans and programmes for farmers in developing countries, especially in least developed countries, and in countries with economies in transition, who conserve and sustainably utilize plant genetic resources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

Nagoya Protocol

Art. 1 “The objective of [the Nagoya Protocol] is the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.”

Art. 8 “In the development and implementation of its access and benefit-sharing legislation or regulatory requirements, each Party shall: [...] c) Consider the importance of genetic resources for food and agriculture and their special role for food security.”

Art. 12.4 “Parties, in their implementation of this Protocol, shall [...] not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the [CBD].”



The ITPGRFA Governing Body has issued resolutions concerning the implementation of farmers' rights (resolutions 8/2013, 5/2015 and 7/2017) (see section 4 below).

b) International human rights law

International human rights law is also relevant to farmers' rights. Former UN Special Rapporteur De Schutter has highlighted the interaction between farmers' seed systems, farmers' rights and the human right to food. The **right to “adequate food”** has been affirmed by several international instruments, including the **International Covenant on Economic, Social and Cultural Rights (ICESCR)**. In particular, the ICESCR provides: “The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed: To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources” (Art. 11.2(a)).



The normative content of the right to food has also been clarified by the **Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (Right to Food Guidelines)**. The Right to Food Guidelines provide that: “States should promote agricultural research and development, in particular to promote basic food production with its positive effects on basic incomes and its benefits to small and women farmers, as well as poor consumers” (Guideline 8.4).

Another key instrument for farmers' rights is the **Declaration on the Rights of Peasants** adopted by the UN General Assembly in December 2018 (see Box 3 below). The Declaration on the Rights of Peasants applies to a broad range of actors. “Peasant” is defined as “any person who engages [...] in small-scale agricultural production for subsistence and/or for the market, and who relies significantly [...] on family or household labour and other non-monetized ways of organizing labour, and who has a special dependency on and attachment to the land” (Art. 1.1). The Declaration has a broad scope: it applies to “any person engaged in artisanal or small-scale agriculture, crop planting, [...] to dependent family members of peasants,” (Art. 1.2) “to indigenous peoples and local communities working on the land” (Art. 1.3) and “to hired workers [...]” (Art. 1.4). The reference to “local communities” could assist with interpretation of the term also in the CBD context (see the Module on indigenous peoples' rights over natural resources).

Box 3. UN Declaration on the Rights of Peasants and Other People Working in Rural Areas

Article 19 “1. Peasants and other people working in rural areas have the right to seeds [...] including:

- (a) The right to the protection of traditional knowledge relevant to plant genetic resources for food and agriculture;
 - (b) The right to equitably participate in sharing the benefits arising from the utilization of plant genetic resources for food and agriculture;
 - (c) The right to participate in the making of decisions on matters relating to the conservation and sustainable use of plant genetic resources for food and agriculture;
 - (d) The right to save, use, exchange and sell their farm-saved seed or propagating material.
2. Peasants and other people working in rural areas have the right to maintain, control, protect and develop their own seeds and traditional knowledge.
 3. States shall take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas.
 4. States shall ensure that seeds of sufficient quality and quantity are available to peasants at the most suitable time for planting, and at an affordable price.
 5. States shall recognize the rights of peasants to rely either on their own seeds or on other locally available seeds of their choice, and to decide on the crops and species that they wish to grow.
 6. States shall take appropriate measures to support peasant seed systems, and promote the use of peasant seeds and agrobiodiversity.
 7. States shall take appropriate measures to ensure that agricultural research and development integrates the needs of peasants and other people working in rural areas, and to ensure their active participation in the definition of priorities and the undertaking of research and development, taking into account their experience, and increase investment in research and the development of orphan crops and seeds that respond to the needs of peasants and other people working in rural areas.
 8. States shall ensure that seed policies, plant variety protection and other intellectual property laws, certification schemes and seed marketing laws respect and take into account the rights, needs and realities of peasants and other people working in rural areas.”



Key messages

- International biodiversity law and international human rights law both support the protection of farmers' rights, including the right to share the benefits arising from the utilization of PGRFA.
- The ITPGRFA has established a Multilateral System for access to PGRFA and sharing of the benefits arising from their use, which is specifically aimed at supporting farmers.

In practice...

A farming community has developed a unique variety of drought-tolerant soybean. To increase production and support the livelihoods of its members, it has entered into negotiations with a private company, to allow the latter use the soybean for further breeding in research and development, and grow the soybean on the community's land using modern production methods. The country where the community is based is a Party to the CBD and the ITPGRFA and is actively promoting farmers' rights, including benefit-sharing arrangements with regard to access to traditional varieties. The community is therefore able to argue that the agreement should include provisions on fair and equitable benefit-sharing.



3 States' obligations concerning the protection of farmers' rights

A What is meant by farmers' rights?



Art. 9 of ITPGRFA addresses farmers' rights but does not define them. As international agreement on their content and interpretation was impossible during negotiations, States agreed that the "responsibility for realizing farmers' rights [...] rests with national governments." **Realization of farmers' rights** therefore largely depends on the model of agricultural development promoted in each country and other national circumstances and international obligations and may differ from country to country. Measures that States should take to "protect and promote" farmers' rights in accordance with their "needs and priorities" include:

- The protection of traditional knowledge (on this issue see the [learning module on traditional knowledge holders](#));
- The right to equitably participate in sharing benefits arising from the utilization of PGRFA; and
- The right to participate in making decisions at the national level on matters related to the conservation and sustainable use of PGRFA (Art. 9.2).

Farmers' rights therefore include but are not limited to benefit-sharing. This is echoed by the **Declaration on the Rights of Peasants** which however more explicitly recognizes the rights of peasants and other people working in rural areas not only in relation to each of the three categories listed above but also seed rights (see Box 3 and section 3.D below).

In contrast to the Declaration on the Rights of Peasants, the ITPGRFA Art. 9.3 states that "nothing in this Article shall be interpreted to limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate." The ITPGRFA does not therefore limit the customary rights of farmers to reuse, exchange or sell farm-saved seeds – nor, however, does it safeguard these rights by establishing an international legal basis for their protection. It rests with national governments to protect farmers' seed rights, in accordance with human rights obligations, recently affirmed in the Declaration on the Rights of Peasants (see section 3.D below).

It should be noted that the ITPGRFA also:

- Recognizes the contribution that farmers have made for the conservation and development of PGRFA (Art. 9.1); and
- Acknowledges the fundamental role of the rights recognized in the ITPGRFA, for the realization of farmers' rights and their promotion at national and international levels, to:
 - save, use, exchange and sell farm-saved seed;
 - participate in decision-making regarding the use of PGRFA; and
 - participate in the fair and equitable sharing of the benefits arising from the use of PGRFA (ITPGRFA, Recital).

There are therefore a number of differences between the Declaration on the Rights of Peasants and the ITPGRFA including the following. First, the former applies to a broader range of actors and has a wider scope than the latter, as noted above.

Second, the Declaration on the Rights of Peasants more explicitly recognizes farmers' rights, including seed rights. Third, unlike the ITPGRFA, the Declaration on the Rights of Peasants sets out in detail States' obligations in relation to seed rights. For instance, it requires States to take measures to respect, protect and fulfil the right to seeds of peasants and other people working in rural areas (Art. 19.3).

Key messages

- Based on a combined reading of international biodiversity law (including the ITPGRFA) and international human-rights law (including the Declaration on the Rights of Peasants), States have the obligation to protect and promote farmers' rights which include:
 - The protection of traditional knowledge relevant to PGRFA;
 - The right to equitably participate in sharing benefits arising from the utilization of PGRFA;
 - The right to participate in making decisions at the national level on matters related to the conservation and sustainable use of PGRFA; and
 - The right to save, use, exchange and sell their farm-saved seed.

In practice...

A farming community organization, a private sector company and a regional government has entered into an agreement for the cultivation of a traditional variety of rice, particularly well-adapted to the area's harsh climate. The agreement highlights the fundamental role of the community's traditional agricultural knowledge and methods in the development and successful cultivation of the rice variety. Building on the ITPGRFA and the Declaration on the Rights of Peasants, the agreement includes provisions to ensure protection for the community's traditional agricultural knowledge and their right to receive part of the benefits arising from cultivation, including their rights to continue saving, using, exchanging and selling rice seeds, support from the company and the regional government for the community's farming school and seed bank, and a percentage of the income arising from the rice sales.



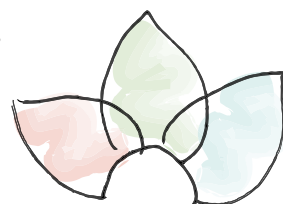
B. Farmers' right to benefit-sharing



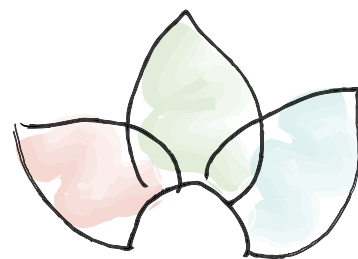
a) Substantive obligations for States

As noted, farmers have the right to equitably participate in sharing the benefits arising from the utilization of PGRFA. The question is what this means in terms of States' obligations.

Based on a systematic examination of all relevant ITPGRFA provisions, **BeneLex** research suggests that the **ITPGRFA provisions concerning international benefit-sharing**, including Art. 13, **are critical for both the interpretation and the implementation of farmers' right to benefit-sharing**. Under Art. 13, States are required to share the benefits arising from the use of PGRFA in the ITPGRFA's Multilateral System via international mechanisms including on:



- Exchange of information;
- Access to and transfer of technology;
- Capacity-building;
- Facilitated access to PGRFA; and
- Sharing of monetary and other benefits of commercialization.



Whilst the ITPGRFA does not expressly deal with how States should provide benefits at the national level, **these mechanisms can be used as guidance** for interpretation of States' benefit-sharing obligation and its implementation at the national level. BeneLex research therefore proposes that States could take inspiration from the ITPGRFA provisions on benefit-sharing at the international level and apply them at the national level (access to information, technology transfer, capacity building, etc).

In practice...

As part of an agreement between a community organization, a private sector company and a regional government, a number of benefit-sharing provisions have been negotiated, including on production and profit-sharing, pursuant to which the community would receive 30% of profits from rice sales. However, the community is unhappy about the outcome of negotiations, because they failed to include the non-monetary benefits they had requested, including protection of their traditional knowledge, support for the community's farming school and seed bank, and protection of freshwater resources from overuse and pollution. In addition, many community members consider that the 30% production share is too low. As a result, they decide to initiate a process for the development of a community protocol, which would guide the conclusion of future agreements with third parties, including provisions on the community's vision on non-monetary benefits and the minimum percentage for profit-sharing.



b) Procedural obligations for States

According to BeneLex research, States' obligation in relation to farmers' right to benefit-sharing goes **beyond substantive aspects and extends to supporting / procedural measures**. This argument is supported by international human rights and biodiversity law, as detailed below. Such procedural measures include:



- The legal recognition of customary agricultural practices;
- Assistance in the organization of community-based structures such as local seed banks;
- Organization of collaboration between farmers and scientists or professional breeders;
- Access to seeds; and
- Access to markets.

Access to markets in particular can be considered as an “enabling condition” to enhance use of traditional knowledge and benefit-sharing in order to realize of farmers' rights under the ITPGRFA (Tsioumani (2016)).

Former Special Rapporteur Olivier De Schutter has underscored that States' obligation to fulfil the **right to food** implies:

- i) Strengthening access to and utilization of resources and means to ensure peoples' livelihoods; and
- ii) Improving methods of production of food by making full use of technical and scientific knowledge (in accordance with Art. 11(2)(a) of the ICESCR and Guidline 8.4 of the Right to Food Guidelines).

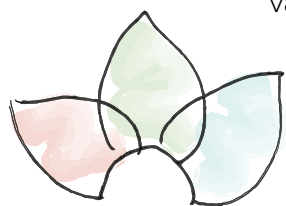
These obligations apply both to the regulation of commercial seed systems and to the preservation and enhancement of informal or traditional farmers' seed systems. This means that **States should ensure that informal, non-commercial seed systems can develop** and be protected from interference by third parties and pressures imposed by the commercial seed sector. In addition:

- The commercial seed system needs to be regulated to ensure that farmers have access to inputs upon reasonable conditions; and
- Innovations, including improved varieties, should benefit all farmers, including the most vulnerable and marginalized among them.

Art. 5.1(c) of the ITPGRFA requires Parties to “*promote and support* [...] farmers' [...] efforts to manage and conserve on-farm their PGRFA” (emphasis added). ITPGRFA Art. 5 should be read together with ITPGRFA Art. 6, which requires Parties to develop and maintain appropriate policy and legal measures that promote the sustainable use of PGRFA via measures such as:

- Promoting the expanded use of local and locally adapted crops, varieties and underutilized species (Art. 6.2(e));
- Supporting the wider use of diversity of varieties and species in on- farm management, conservation and sustainable use of crops (Art. 6.2(f)); and
- Reviewing and adjusting breeding strategies and regulations concerning variety release and seed distribution (Art. 6.2(g)).

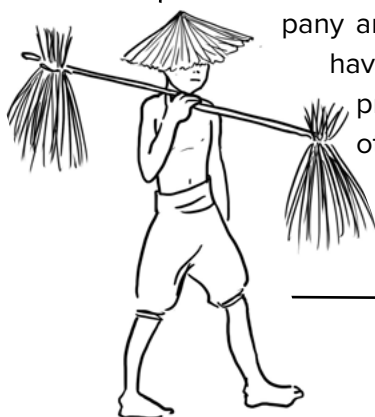
BeneLex research therefore suggests that implementation of farmers' rights is a **pre-condition for the achievement of ITPGRFA objectives** including on-farm conservation and sustainable use of PGRFA (ITPGRFA Governing Body resolution 8/2013; reiterated in 5/2015 and 7/2017).



According to **BeneLex** research, Art. 12.4 of the **Nagoya Protocol** could provide an **additional legal basis to reinforce farmers' rights**, particularly regarding farmers' right to save, use, exchange and sell farm-saved seed. This provision sets out a positive obligation on Parties not to restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous peoples and local communities. This obligation thus goes beyond the ITPGRFA formulation with regard to farmers' seed rights (see section 3.A above).

In practice...

As part of an agreement between a community organization, a private sector company and a regional government, a number of benefit-sharing provisions have been included, such as on promotion of traditional agricultural practices in areas where community members preferred to engage in other activities, support for the community farming school, training to improve the operation of a community seed bank, and construction of an improved irrigation system.



C. Farmers' right to participate in making decisions at the national level on matters related to the conservation and sustainable use of PGRFA



As noted, States assume the responsibility to realize farmers' rights under the **IT-PGRFA**, which include the right to participate in making decisions at the national level on matters related to the conservation and sustainable use of PGRFA (Art. 9.2). The **Declaration on the Rights of Peasants** also explicitly recognizes that right (see Art. 19.1(c) and Box 3 above).

Farmers' right to participate in such decisions is crucial given their contribution to the conservation and sustainable use of PGRFA and food security through their traditional varieties and knowledge. They should therefore be able to take part in decision-making processes such as seed regulations and crop production laws, as well as policies regarding food security and sustainable agriculture (FAO (2017)). Women farmers in particular, should be able to take part in these decision-making processes, which should pay particular attention to their role (ITPGRFA Governing Body (2009), FAO (2017)).

In practice...

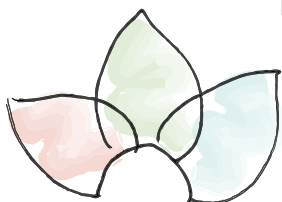
An NGO representing a farming community has arranged meetings to ensure the participation of all community members, with a view to gathering their views in relation to the proposed agricultural policy and influencing the decision-making process. Additional (sometimes separate) meetings have been organised for women who were unable or unwilling to participate in general meetings, as requested, at times and locations that suited them, to ensure their effective participation.



D. Farmers' right to save, use, exchange and sell farm-saved seeds



The customary rights of farmers to save, use, exchange and sell farm-saved seeds have been jeopardised and narrowed due to the rise of IPRs (for instance under UPOV) and seed certification systems affecting their access to markets, as noted above (see section 2.A).



The ITPGRFA does not take a clear stand with regard the link between IPRs and farmers' right to save, use, exchange and sell their farm-saved seed. However, according to **BeneLex** research, a stronger argument about farmers' right to customary seed exchanges can be made on the basis of international human rights law, including the Declaration on the Rights of Peasants, and Art. 12.4 of the Nagoya Protocol (see section 3.B.b above).

In practice...

A farmers' community decides to include in its community protocol a clear statement on the need to respect their customary rights to save, use, exchange and sell farm-saved seed on the basis of international biodiversity and human rights law. On that basis, a community representative demands that a new national agricultural policy ensures that traditional varieties are not made subject to seed certification requirements.



4 Implementation of farmers' rights at the national level

National approaches relating to farmers' rights can be quite diverse, as such approaches are linked to the agricultural development model promoted at the national and global level. This diversity in approaches is illustrated by court cases and legislations alike. For instance, some national courts have made patent rights prevail over the right of the owner of the seed to save and replant (e.g. the Canadian and US Courts in *Monsanto Canada Inc. v. Percy Schmeiser* (2004); and *Bowman v. Monsanto Co* (2013)). On the other hand, India has enacted laws attempting to protect farmers' rights (Act on Protection of Plant Varieties and Farmers' Rights (2001)). The Indian Act specifically provides that farmers are entitled to save, use, exchange, share or sell his farm-saved seed. This entitlement however is coupled with a registration requirement which may be difficult for farmers to implement.



Farmers can encourage governments to develop national action

plans for the implementation of farmers' rights, and review and adjust national measures that affect the realization of farmers' rights (ITPGRFA Governing Body Resolution 7/2017). National measures that affect the realization of farmers' rights may relate to regulations concerning variety release, seed distribution, seed certification, and IPRs, among others. Farmers can rely on ongoing international reviews, in the ITPGRFA context, of experiences and best practices, to identify examples which could be used to inspire national implementation of farmers' rights (ITPGRFA Governing Body Resolutions 8/2013, 5/2015 and 7/2017).

In practice...

Community representatives contact an international NGO specialising on international biodiversity issues, to help them assess opportunities and constraints in their national legal framework of relevance to farmers' rights. Following conclusion of the legal assessment, community representatives devise a strategy to implement tailored interventions, focusing on the recognition of farmers' customary right to save, use, exchange and sell their farm-saved seeds and the right to participate in decision-making on matters related to the conservation and sustainable use of PGRFA. The representatives then meet with local Members of Parliament and government official, calling for the adoption of a national action plan to implement farmers' rights and review national legislation on IPRs and seed certification.



5 Farmers relying on international mechanisms to implement their rights

Farmer communities and organizations can get support from international mechanisms for their livelihoods and conservation projects. For instance, the **Benefit-Sharing Fund** allocates the funds acquired through operation of the Multilateral System to projects designed to support farmers and breeders globally, including research and development and conservation projects. The Benefit-Sharing Fund is mandated to prioritize projects that support not only the conservation and sustainable use of agricultural biodiversity, but also the **livelihoods of farmers and rural communities**, particularly farmers in developing countries who still conserve and sustainably utilize PGRFA in their fields (ITPGRFA Art. 13.3).

The international agricultural research centres of the **Consultative Group on International Agricultural Research (CGIAR) Consortium**, national agricultural authorities and research institutes, universities, and farmers' organizations are often intermediaries between the Benefit-sharing Fund and farmer communities (although there have been cases of direct contribution to farmers on the ground). For instance, the third project cycle of the Benefit-Sharing Fund resulted in a series of **specific benefits reaching farmers** including:

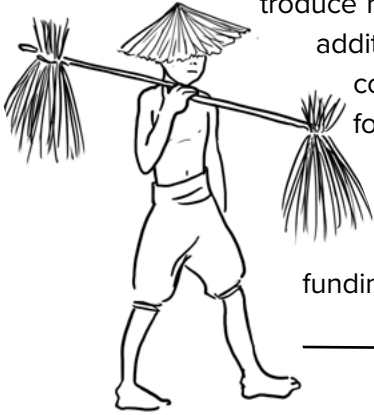
- Increased availability and distribution of improved planting material resulting from the funded projects, including climate-smart varieties;
- Reintroduction of locally adapted underutilized crops and repatriation of local varieties from international or national collections;
- Assistance in the creation of community seed banks;
- Establishment of farmer field schools; and
- Improved skills and knowledge in relation to PGRFA conservation and management.

Further, to enhance collaboration and recognition of their efforts, farmers have also contributed their traditional varieties to the ex situ collections of CGIAR centres or national organizations, to be held in trust for future generations.

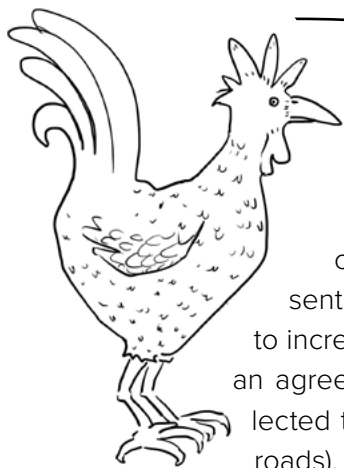
The projects of the Benefit-Sharing Fund have produced benefits to farmers, including distribution of improved planting material and assistance in the creation of community seed banks and farmer field schools.

In practice...

A farmers' community signs a repatriation agreement with a CGIAR centre to reintroduce rice varieties that were no longer available locally, as well as acquire additional varieties. The agreement includes provisions on setting up a community seed bank to strengthen the community's conservation efforts and training of community members to PGRFA conservation and management. The community and the CGIAR centre, in cooperation with the university of the region, develop a project aiming to expand their efforts to apples and ground nuts, and applied for funding from the Benefit-Sharing Fund.



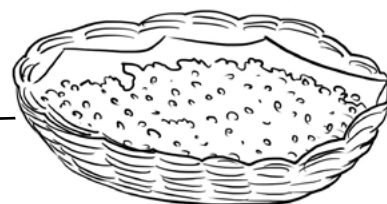
6 Self evaluation



Scenario: A farming community has developed a unique variety of rice and has been cultivating it using traditional practices and seed-saving techniques, supporting the livelihoods of its members but also producing global benefits with regard to biodiversity conservation and food security. The levels of production have however been falling. An NGO representing the farmers had approached the regional government to seek support to increase the production. In order to do this, the government had entered into an agreement with the NGO and a foreign-owned company that had been selected to develop mechanised farming and infrastructures (including dams and roads), with government funding. The company has started to experiment with intensive production methods and planted different rice varieties, in contrast to the traditional methods used by local farmers. Farmers raise a number of concerns, including that the methods used by the company may affect the purity of the seed variety. In addition, the company signals its intention to file a patent concerning the seed variety which the community believes will adversely impact its members' customary rights. The farmers also underscore that they are not happy about how benefits, including the profits, are being shared under the agreement and about the lack of meaningful consultation during the negotiations of the agreement. The community expresses the wish to: i) set up a conservation area and acquire different varieties of rice but lacks funding for this; and ii) preserve the rice variety for future generations by placing them in a dedicated structure abroad. The national legal framework of the country where the community is based does not currently address the protection of farmers' rights but the government is planning to develop a new agricultural policy.

If you were to advise the farmers in this scenario,

- How can they protect their traditional practices and seed-saving techniques while sharing in the profits made by the company?
- How could they protect their seed variety?
- How could they be involved in the making of the new agricultural policy?
- How could they get support to set up a conservation area?



Solutions

- The farmers are entitled to the protection of their traditional practices and seed-saving techniques and to sharing in the profits made by the company. **Direct negotiations with the government and the company** could result in amending the agreement to ensure the community receives the benefits it considers fair and equitable including an appropriate share of the profits. Such negotiations however can be challenging, given the asymmetry in negotiating power of those involved. The community may also wish to consider the **development of a community protocol**. This process may take time but it could serve as an opportunity for the community to articulate its values, define its priorities regarding expected benefits, and thus strengthen its position vis-à-vis other actors.
- To protect their customary rights in relation to the rice variety, the community is entitled to: i) indicate to the company their **opposition to the filing of a patent** and express preparedness to fight the filing on legal grounds; ii) include in the above-mentioned community protocol clear provisions on their traditional varieties and their customary rights, including to save, use, exchange, and sell farm-saved seed; and iii) **advocate with the government** for the recognition and protection of their customary rights in the national legislation and any future contracts with third parties, by campaigning for the inclusion of supporting provisions in the agricultural policy.
- The farmers are entitled to be involved in the making of the new agricultural policy. To encourage implementation of farmers' rights in their country, the community may consider **building alliances with expert organizations** to get support in understanding and assessing opportunities and constraints in their national legal framework of relevance to farmers' rights. The legal assessment should in particular review national practices against a combination of international environmental law and international human rights law standards, including the State's obligation to promote and protect farmers' rights based on the ITPGRFA, provisions on the right to food, and the Declaration on the Rights of Peasants. Conclusion of the legal assessment could be followed by a process to gather the community's views in relation to the proposed agricultural policy, including consideration for the particular needs of women in order to ensure their participation. The process could result in **strategic interventions with local Members of Parliament and government officials** to argue that the government should develop a national action plan to implement farmers' rights and review national legislation on IPRs and seed certification.
- The community may seek support for their conservation project by entering into an **agreement with a national agricultural authority or research centre, or a CGIAR centre**. The community is, for instance, entitled to the repatriation of traditional varieties and the distribution of additional ones. It may also wish to seek support for the establishment of community-based structures such as a seed bank and a farming field school, and training in PGRFA conservation and management. The community in collaboration with its partners could also apply for funding support through the Benefit-Sharing Fund.



7 Resources

A. Acronyms

CBD	Convention on Biological Diversity
CGIAR	Consultative Group on International Agricultural Research
DNA	Deoxyribonucleic acid
FAO	Food and Agriculture Organization of the United Nations
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPRs	Intellectual Property Rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
NGO	Non-governmental organization
PGRFA	Plant genetic resources for food and agriculture
UPOV	International Convention for the Protection of New Varieties of Plants

B. List of boxes

- Box 1.** Definitions and explanations of key terms relevant to PGRFA
- Box 2.** Key treaties for farmers' rights and benefit-sharing
- Box 3.** United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas

C. List of international sources

i) International treaties

- International Covenant on Economic, Social and Cultural Rights (1966)
- International Convention for the Protection of New Varieties of Plants (1991)
- Convention on Biological Diversity (1992)

- International Treaty on Plant Genetic Resources for Food and Agriculture (2001)
- Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (2010)

ii) Decision, report and resolutions under CBD and ITPGRFA and by the FAO

- FAO Conference, Resolution 3/91 (1991)
- CBD Conference of the Parties, Agricultural biological diversity: review of phase I of the programme of work and adoption of a multi-year work programme, Decision V/5 (2000), Appendix
- ITPGRFA Governing Body, Third Session, T/GB-3/09/Report (2009)
- ITPGRFA Governing Body, Implementation of Article 9, Farmers' Rights, Resolution 8/2013 (2013)
- ITPGRFA Governing Body, Implementation of Article 9, Farmers' Rights, Resolution 5/2015 (2015)
- ITPGRFA Governing Body, Implementation of Article 9, Farmers' Rights, Resolution 7/2017 (2017)

iii) Other international human rights instruments

- FAO Council, Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (2004)
- United Nations General Assembly UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (2018) UN Doc A/RES/73/165

iv) Report of the Special Rapporteur on the Right to Food

- UN General Assembly, Report of the Special Rapporteur on the right to food, Olivier De Schutter 'Seed Policies and the Right to Food: enhancing agrobiodiversity and encouraging innovation' (2009) UN Doc A/64/170

D. Additional sources

FAO, n.d., *Plant genetic resources - use them or lose them*, Rome, http://www.fao.org/fileadmin/templates/nr/documents/CGRFA/factsheets_plant_en.pdf

FAO, 2017, *Module V – Farmers' Rights*, Rome, <http://www.fao.org/3/i7820EN/i7820en.pdf>.

Thiele, G., 1999 'Informal Potato Seed Systems in the Andes: Why are They Important and What Should we Do with Them?' 27(1) *World Development* 83-99.

Tsioumani, E., 2014, *Exploring Benefit-Sharing from the Lab to the Land (Part I): Agricultural Research and Development in the Context of Conservation and Sustainable Use*, BeneLex Working Paper 4, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2524337.

Tsioumani, E., 2014, *Benefit-sharing and Farmers Rights*, BeneLex Blog, <https://benelexblog.wordpress.com/2014/05/13/benefit-sharing-and-farmers-rights/>.

Tsioumani, E., 2016, *Access to Markets for Smallholders and Fair and Equitable Benefit-sharing: Mapping the Linkages*, BeneLex Blog, <https://benelexblog.wordpress.com/2016/10/10/access-to-markets-for-smallholders-and-fair-and-equitable-benefit-sharing-mapping-the-linkages/>.

Zaid, A., Hughes, H.G., Porceddu, E., and Nicholas, F., 2001, *Glossary of Biotechnology for Food and Agriculture – A Revised and Augmented Edition of the Glossary of Biotechnology and Genetic Engineering*, Rome, FAO, www.fao.org/docrep/004/y2775e/y2775e00.htm.

