CIOPORA

International Community of breeders of asexually reproduced ornamental and fruit plants

Positions of CIOPORA regarding an Access-and-Benefit-Sharing-regime under the Convention of Biological Diversity

as adopted by the Annual General Meeting on 3 March 2009 in Campinas, Brazil

CIOPORA is the international association of breeders of asexually reproduced ornamental and fruit varieties, representing more than 130 members in more than 25 countries worldwide. CIOPORA supports the goals of the CBD, namely 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".

Breeders of the named varieties are one of the groups affected the most by any national or international ABS-regime while already efficient benefit-sharing mechanisms exist. Therefore CIOPORA supports a sectoral approach for defining an ABS-regime and/or single ABS-instruments:

I. Background on horticultural business

a. **Plant breeders do not destroy or remove valuable assets of biodiversity, but preserve and add to biodiversity**:
The efforts plant breeders are taking are very important for the conservation – and even further development – of biological diversity as well as the sustainable use of its components.
   - Some genetic resources became already extinct under natural conditions and are only still available because of efforts breeders (and others) have taken to preserve them at least in gene banks.
   - Many of the genetic resources breeders are using in their activities are already available in their own or other commercially available stocks and have been legally acquired prior to the enactment of any ABS-laws. So only in a limited number of cases breeders of asexually reproduced ornamental and fruit varieties need access to resources which will fall under future ABS regimes, for example because they can only be found under in-situ conditions in countries which are having ABS-laws in place.
   - New varieties usually have many advantages over older ones and the ones found in nature: they are – depending on the breeding target – better disease resistant (so less chemicals are needed in the growing process), less temperature sensitive, using less water in production (so supporting the goals of the 1999 UNECE 1999 Protocol on Water and Health), or better transportable (so growing in developing countries becomes easier). Additionally, they are adapted to the ever changing customers' demand.

b. **Plant-breeding and production is subject to huge interdependencies among all countries**: Most species have been moved and travelled through various countries since centuries and many of the varieties used today in flower and fruit production are the result of crossings of an often countless number of parent materials from different kinds of genetic origin. And many countries, especially also mega-divers countries, rely in their economy on the production of plants originating from third countries (e.g.

rubber tree produced among others in Thailand, Indonesia and Malaysia, but having its genetic origin in Brazil).

c. **Plant breeding is dominated by SMEs and public institutes**: Breeding of the most important ornamental species is carried out to a huge extent by private, often family-owned small and medium-sized companies, breeding of fruit species often in public institutes and universities (because of the high costs accrued by breeding of such species). Breeding of vegetatively reproduced ornamental and fruit varieties takes place all over the world, both in industrial nations as well as in developing or newly industrialized countries.

d. **The horticultural business is based on international partnership:** A substantial part of the plants are grown in various countries in Africa, South America and Asia. In many developing countries and newly industrialized countries horticulture is the fastest growing sector of the economy. And, in contrast to a very huge number of other products and especially agricultural products – the market for ornamentals is not regulated; for fruits hardly any regulations exist. Therefore ornamentals can be traded without any restrictions and trade barriers, what underlines their importance in international trade. This needs to be kept in mind when discussing any biodiversity regulations which might establish bureaucratic barriers and additional cost.

e. **Plant breeding is a highly sophisticated and cost-intensive business**. Intellectual property protection is not available for varieties already known or simply found in nature. So a breeder can and does not just take a plant found in nature, obtain an exclusivity right for it, multiply and earn money with it. Instead, it requires very specific botanical know-how, effort, time and money to develop a new, distinct plant variety. The methodologies can vary from crop to crop, but on average it needs 10,000 to 100,000 crosses and a period of 3 to 10 years to develop between 5 and 10 new varieties which might possibly be successful in the market (and might become protected by a Plant Breeders' Right).

f. **Access to cultivated plant varieties is unrestricted and easier than access to wild species.** Since the UPOV regime provides for the breeders' exemption, protected varieties can be used by all others for further breeding, thus unrestricted access exist for the benefit of society. But unrestricted access is indispensable not only to protected but also to wild species as it is the key for breeding activities and therefore for the preservation of and contribution to biological diversity.

II. Solutions for an International ABS Regime for our sector:

1. Access

Access to genetic resources is one requirement for plant breeding. Benefits, which might be shared, do only accrue if access is possible and also guaranteed by an international regime. Currently, the discussions tend to focus on benefit sharing, not on granting access. Additionally, the ongoing discussions and introduction of ABS laws create uncertainty among users of genetic resources and discourage breeders from seeking access to them. Therefore we urge Member States to agree on clear, non-discriminatory access rules creating legal certainty and clarity on the administrative procedure and responsible authorities. Given the realities in the ornamental and fruit breeding sector CIOPORA recommends unrestricted access to genetic resources used for the purpose of breeding.

2. The concept of benefit-sharing

CIOPORA believes that already sufficient mechanisms for benefit-sharing exist.

a. First of all, new **varieties are a benefit for society as such** because of their improved traits (temperature resistance, less water usage, different look, better vase-life etc.). So breeders improve and increase the gene-pool of those countries, where a new variety is introduced, which by the way is one of the reasons why countries provide for plant variety protection.

b. **The system is already balanced by international interdependencies**. Given the interdependencies described above we believe that additional access and benefit sharing mechanisms at least in the ornamental and fruit breeding business would create a lot of additional bureaucracy for all parties involved (thus increasing cost and therefore might prevent research projects) but would overall not create proportional gaining for anybody. Most countries will not be in a pure provider or user position, but will be both. Also countries viewing themselves as being a major source of genetic resources might realize that their economy is relying heavily on products which have their genetic origin in other countries.

c. **Additionally, legal mechanisms in international conventions provide already for benefit-sharing**: The **breeder's exemption** in Article 15 (1) (iii) of the UPOV 1991 Act provides that the breeder's right shall not extend to "acts done for the purpose of breeding other varieties". So each (protected) variety is freely accessible and can be used by any third party for further breeding. The (improved) gene-pool is a source for any breeder for breeding other varieties – a major difference for example to patents. This free access to protected varieties for breeding purposes is a very important form of benefit-sharing and this approach is unique for the sector of plant breeding, no other industry knows this form of benefit-sharing institutionalized by law. Different from and as an advantage to simple monetary benefit-sharing it provides the potential to creating additional value. But the breeder's exemption also reflects and acknowledges that unrestricted access to any kind of genetic resources as breeding material is essential to ensure future progress in breeding, which, again, is to the benefit of the society as whole. By additional ABS rules the strange situation would be created, that protected varieties (in which a lot of R & D has been invested) are freely accessible for breeding, but wild varieties would be not. For all these reasons CIOPORA agrees with UPOV that no additional ABS-regulations are necessary; otherwise additional barriers to progress and utilization of genetic resources will be established.

d. **In a very practical manner benefit-sharing is executed by the creation of business opportunities for producers**: Breeders grant growers, who often are located in developing countries, the right to use a protected variety, grow and sell plants and hereby "utilize" its genetic resource (against payment of a license fee). It should be noted in this regard that license fees are the smallest (financial) part of the value added chain compared to the profits of growers and traders of the plant. The production of ornamentals and fruits has considerably positive effects on the economy of the production areas. It creates numerous year-round jobs in these countries. This results in a continuous, regular income and therefore is a stabilizing factor for whole families. Due to this fact not only single companies but many families and the society as such is benefiting. Additional (monetary) benefit-sharing obligations will have negative rather than positive effects: These payments will directly or indirectly have to be rendered by the producers – who in their majority are located in developing and newly industrialized countries and an additional

3. Comments on single ABS-instruments

Since from CIOPORA's perspective already sufficient benefit-sharing is carried out in the ornamental and fruit breeding business, no additional legal instruments which are designed to ensure compliance with ABS rules need to be introduced. Nevertheless CIOPORA regards it to be necessary to comment on some instruments already under discussion:

a. Obligations on disclosure of origin/source/legal provenance are neither useful nor practical:

For technical reasons identification of the exact geographic origin of the material used for breeding might be difficult or even impossible. First, it will be difficult to determine, when and where biological material has developed its distinctive traits. And often the same genetic resources can be found in different countries. Secondly, many plants have been transferred around the world over the course of sometimes many hundreds or even thousands of years. Most plants are grown today in countries (regardless to their level of industrialization or biological diversity) which are not the places of origin. Finally, many varieties which are used today for plant production are the result of crossing and recombination of very many different parent plants (with different genetic origin). It would be extremely difficult and a huge administrative burden to find ABS solutions for all the different sources.

Additionally, often resources are used which are not in the public domain but owned by public or private entities (e.g. research institutes, gene banks, breeding companies). In many cases no records are kept of the original source, since no need existed to keep such records in the past. And, in some cases the material was obtained under a contract containing confidentiality clauses; disclosure of the origin then would result in a breach of contract.

Therefore any obligations to disclose the genetic origin, source or legal provenance is neither useful nor practical.

b. **Also a certificate of origin/source/legal provenance/compliance is no adequate tool to monitor or enforce compliance with ABS-rules:**

CIOPORA strongly doubts that any advantages a certification system might have will be able to outweigh the downsides respectively if it even will be possible to create a workable system. First, since the genetic origin often is unclear, it cannot be certified. Second, the introduction and maintenance of such a system would generate enormous cost. The question of how this shall be financed has not been addressed yet. Additionally, such a system will impose high additional bureaucratic hurdles in international business. Any transaction where a good containing genetic resources is involved would be subject to legal uncertainty instead of increased certainty. CIOPORA believes that the complexity of questions relating to a certification system is heavily underestimated. Availability, determinability, ways of acquisition and use of genetic resources vary greatly for different resources but also different sectors. It would often be unclear, in which cases a certificate would be necessary. Every day millions of transaction with goods containing genetic resources take place, it will be extremely difficult to define, for which of these transactions a certificate will be necessary (e.g. for each plant sold in a supermarket, each bottle of perfume, each apple, each bottle of wine?) as well how and by whom all these certificates shall be rendered.

CIOPORA also doubts that certification laws could be properly enforced. National checkpoints in user countries will not be able to identify the origin of a genetic resource and therefore control if it is correctly declared as originating from a CBD member state with, a member state without ABS and certification legislation or even a non member state.

c. Interlinking of ABS-requirements and intellectual property rights

For many of the ABS measures a linkage with intellectual property rights is discussed. So some parties claimed that a disclosure of origin/source/legal provenance and the submission of a certificate of origin/source/legal provenance, PIC and/or MAT should become mandatory in applications for intellectual property rights such as patents or plant variety rights.

CIOPORA strictly recommends to refraining from any such linkage and respecting the existing international treaties on intellectual property rights:

a. The UPOV Convention establishes the prerequisites of intellectual property protection for plant varieties. As such prerequisites UPOV solely stipulates novelty, distinctness, uniformity and stability, plus a suitable denomination. CIOPORA agrees with UPOV that a condition “disclosure of origin” for protection additional to the named criteria would violate the UPOV Convention and would therefore not be acceptable. The same is true for other requirements such as submission of a certificate of origin/source/legal provenance, PIC and/or MAT.

b. Additionally any such linkage would run counter to the concepts of intellectual property rights. These concepts have been well developed over decades. Their aim is to provide an incentive for innovators to creating something new and sharing these new developments with society. Based on the particular legislatory intention for each of the intellectual property rights, the prerequisites of protection are defined. The intention for creating plant variety rights was that society has a vital interest in the development of new varieties with enhanced characteristics (shape, taste, yield, vase-life, resistance against diseases etc.). By introducing such rights countries also would like to provide an incentive for the introduction of foreign varieties into their countries, thus obtaining access to superior varieties and widening their gene-pool (their biodiversity) for the benefit of their people. Society also has of course an interest in the protection of biodiversity. But breeders do not harm biodiversity with their activities; they rather add biodiversity with the creation of new varieties. And this interest of protecting biodiversity is not linked in any regard to intellectual property rights. Therefore biodiversity matters should not be mingled with intellectual property matters; instead both topics should be regulated separately.

c. Additionally, from a practical point of view, such linking would overburden the authorities responsible for granting IP-rights by far: They are neither equipped technically nor by manpower to do the necessary checking: First, how should they determine whether a genetic resource is involved which falls under the scope of the CBD? A resource involved can be originating from a non CBD-member state, from a member state without ABS-laws, be acquired legally from an ex-situ source, be in possession of the applicant since pre-CBD times etc. Also they cannot be expected to examine whether access to genetic resources was gained in accordance with the respective applicable law. How should authorities in countries of IP-application check, whether ABS laws in the named providing countries exist and what is required by such laws? How shall the validity of any

certificate or PIC or MAT be verified? All such requirements would be hardly manageable and generate enormous cost.

d. **Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT)**

CIOPORA supports principles of transparency and ethical behaviour; nevertheless, the requirements of formalized PIC and MAT for plant breeding purposes make any research and development projects even more complicated and expensive. Breeders especially question any advantages and gains of instruments like PIC and MAT for the ornamentals and fruit breeding industry given its particularities as described above. Again, introduction of such instruments might lead to many uncertainties. To implement the CBD provisions, which in general require PIC and MAT, one could consider a rule in ABS laws and the International Regime granting PIC automatically by law when access is sought for the purpose of breeding asexually reproduced ornamental and fruit plants, and requiring no additional MAT in these cases.

4. No retroactive effects of any ABS-regime

It has already been stated by parties that any ABS-regime should not be applied to material received before the CBD went into force. This position defines only a minimum requirement. It should go without saying, that no obligation in any ABS-regime (like disclosure, certificate, PIC/MAT etc.) should be introduced for material acquired not only before the CBD came into force but before such a new rule will become legally binding for individuals in the respective countries. Any other rule would violate basic principles of the rule-of-law, especially the prohibition of retroactive effects of laws.

III. Summary

Since in the sector "breeding of asexually reproduced ornamental and fruit varieties" already the CBD goals are met, CIOPORA asks the parties to find ABS-solutions tailored for different sectors, which for the ornamentals and fruit breeding sector

- Ensure non-discriminatory, transparent, fast and legally secure access to genetic resources;
- Do not introduce on top of the breeder's exemption (Art. 15 (1) (iii) UPOV 1991) and other already today implicitly exercised benefit-sharing any additional benefit-sharing obligations;
- Do not introduce any additional administrative elements for access to and utilization of genetic resources (like disclosure of origin, a certificate, formalized PIC and MAT or the linkage of any such instrument to the granting of IP-rights).

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