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# **International Community of Breeders of Asexually Reproduced Ornamental and Fruit Plants**

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## **CPVO Seminar on the Enforcement of Plant Variety Rights The Ornamental and Fruit Sector – The Breeders’ Perspective**

**Dr. Edgar Krieger  
Secretary General of CIOPORA**

**Hamburg, 25 May 2011**

# Agenda

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1. Introduction
2. Breeders' Rights
3. Some figures about Breeders' Fruits
4. Liability of Breeders' Partners
5. Breeders' Wishes

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# Introduction

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Effective protection of plant varieties requires a sufficiently broad scope of the right and effective enforcement tools.

- What is the situation in the EU
  - regarding the scope of protection?
  - regarding the enforcement tools?

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# Breeders' Rights

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Article 13 CPVR-Regulation 2100/94: The following acts in respect of variety constituents, or harvested material of the protected variety ..., shall require the authorization of the title-holder:

- (a) production or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting from the Community;
- (f) importing to the Community;
- (g) stocking for any of the purposes mentioned above

# Breeders' Rights

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What is protected?

- Propagating material?
- Article 13: The following acts in respect of variety constituents, or harvested material of the protected variety require the authorization of the title holder...
- Article 5 (3) CPVR: A plant grouping consists of entire plants or parts of plants as far as such parts are capable of producing entire plants, both referred to hereinafter as 'variety constituents'.

**Capable!** of producing entire plants

# Breeders' Rights



# Breeders' Rights

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- Variety Constituents and Harvested Material are protected under the CPVR law!
- The challenge:
  - The definition of variety constituents is not clear to all
  - The CPVR lacks a definition of harvested material!
  - Harvested material is protected only under conditions and limitations.
- Processed Material is unfortunately not protected



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Some figures about  
breeders` fruits

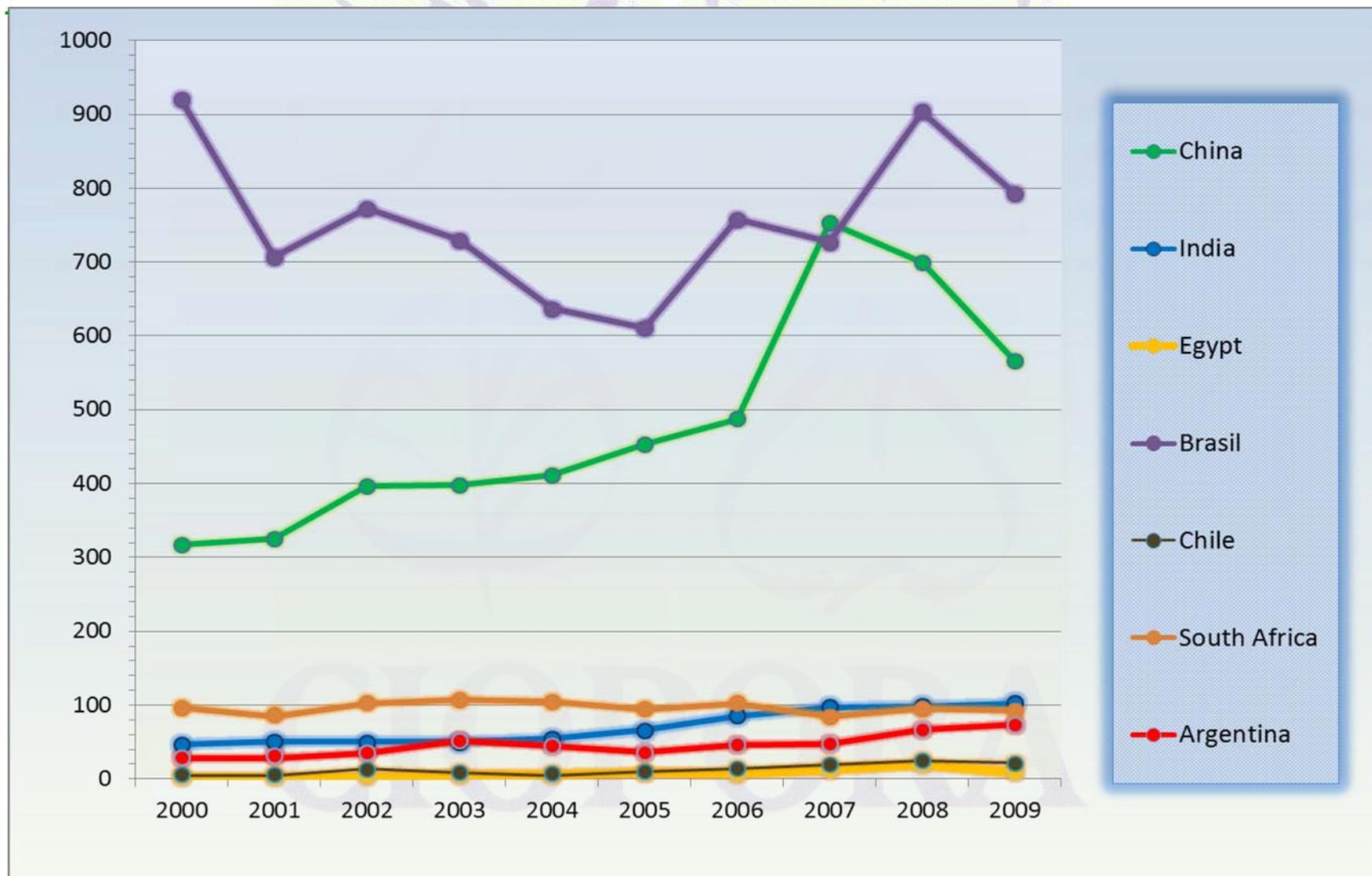
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# Import of juice to Germany 2010

Non-EU-Countries, Fruit and Vegetable <u>juice</u>		t
Brasilien	1978	243.600,9
Volksrepublik China	1978	34.481,9
Costa Rica		27.643,0
Türkei		19.859,5
Vereinigte Staaten von Amerika		16.803,5
Israel		15.972,6
Islamische Republik Iran	Non UPOV	8.941,5
Ukraine		8.615,1
Thailand	Non UPOV	8.059,6
Argentinien	1978	6.871,9
Republik Moldau		6.816,3
Kuba	Non UPOV	6.168,8
Serbien		5.116,3
Georgien		4.081,8
Rumänien		3.746,1
Südafrika	1978	3.019,0
Ecuador	1978	2.831,9
Chile	1978	2.813,6
Mexiko	1978	1.950,7
Indien	Non UPOV	760,1
Ägypten	Non UPOV	713,2
Aserbaidshjan		624,6
Peru	Non UPOV	582,1
Sri Lanka	Non UPOV	565,5
Sum		<b>430.639,5</b>
Others		<u>9.532,3</u>
Total		<b>440.171,8</b>

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- 440,000 tons of juice have been imported to Germany in 2010
  - 312,353 (71%) tons originate from non-UPOV members and UPOV 1978 members
  - Processed material (such as juice) is not protected in the EU nor in Germany
  - Breeders have no possibility to exercise their right on juice from fruits which originate from „illegal“ trees.
  - UPOV 1991 allows the protection of juice!

# Processed Vegetables, Fruits & Nuts Import Value - 2000-2009 in Mio € (to EU)



# Imports to Germany 2010 from outside the EU

## Apples, Pears, Quinces

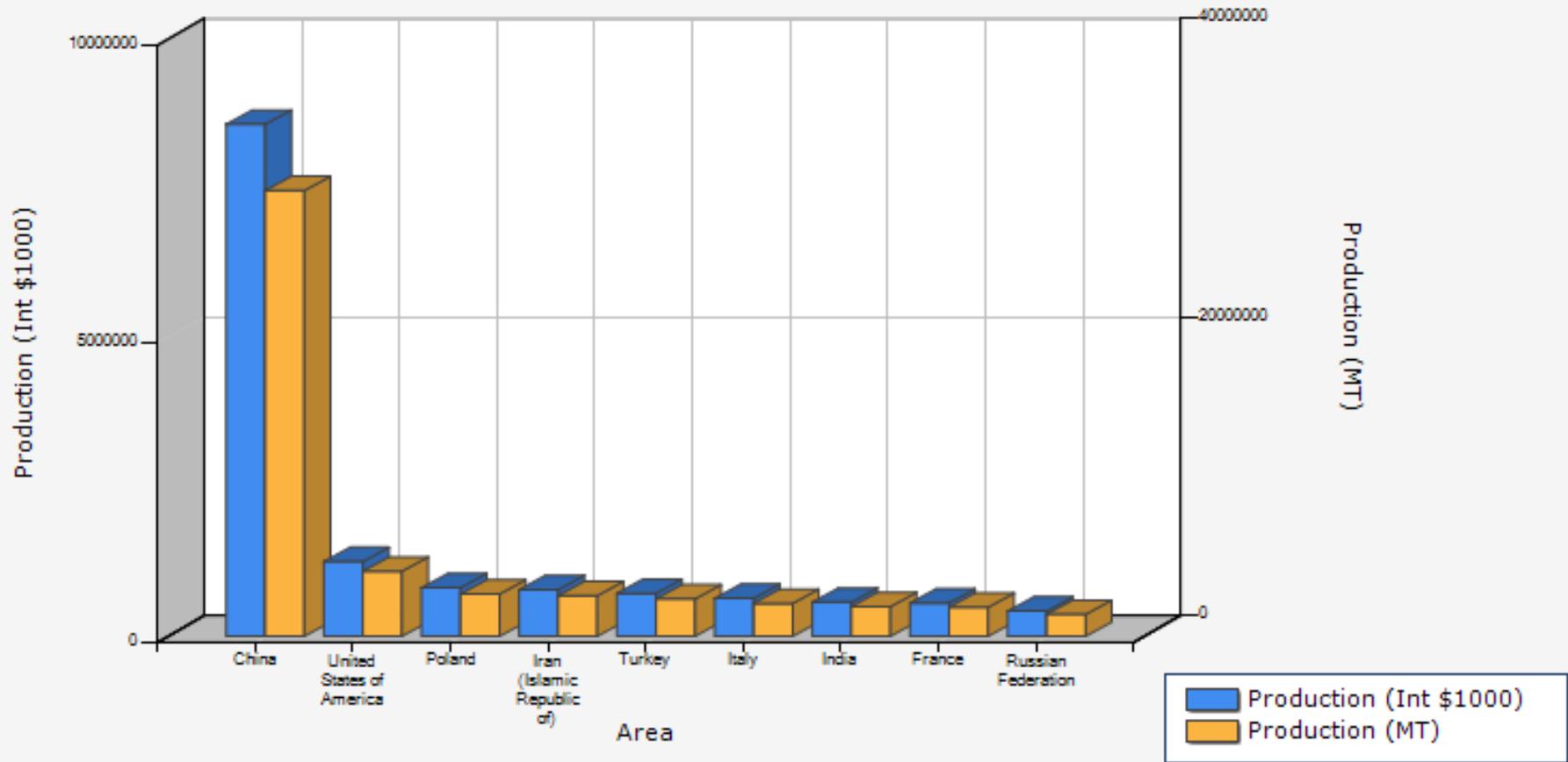
Länder	Import: Weight	Import: Value
	t	Tsd. EUR
2010		
Argentinien	23.335	20.720,00
Brasilien	14.681	12.125,00
Chile	26.542	27.739,00
China	3.920	3.589,00
South Africa	32.716	33.206,00
New Zealand	38.122	39.379
Sum	<b>139.316</b>	<b>136.758</b>
Others outside EU 27	<b>5.652</b>	<b>4.873</b>
<b>Total</b>	<b>144.968</b>	<b>141.631</b>

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# Productions of Apples 2008

Top production - Apples - 2008

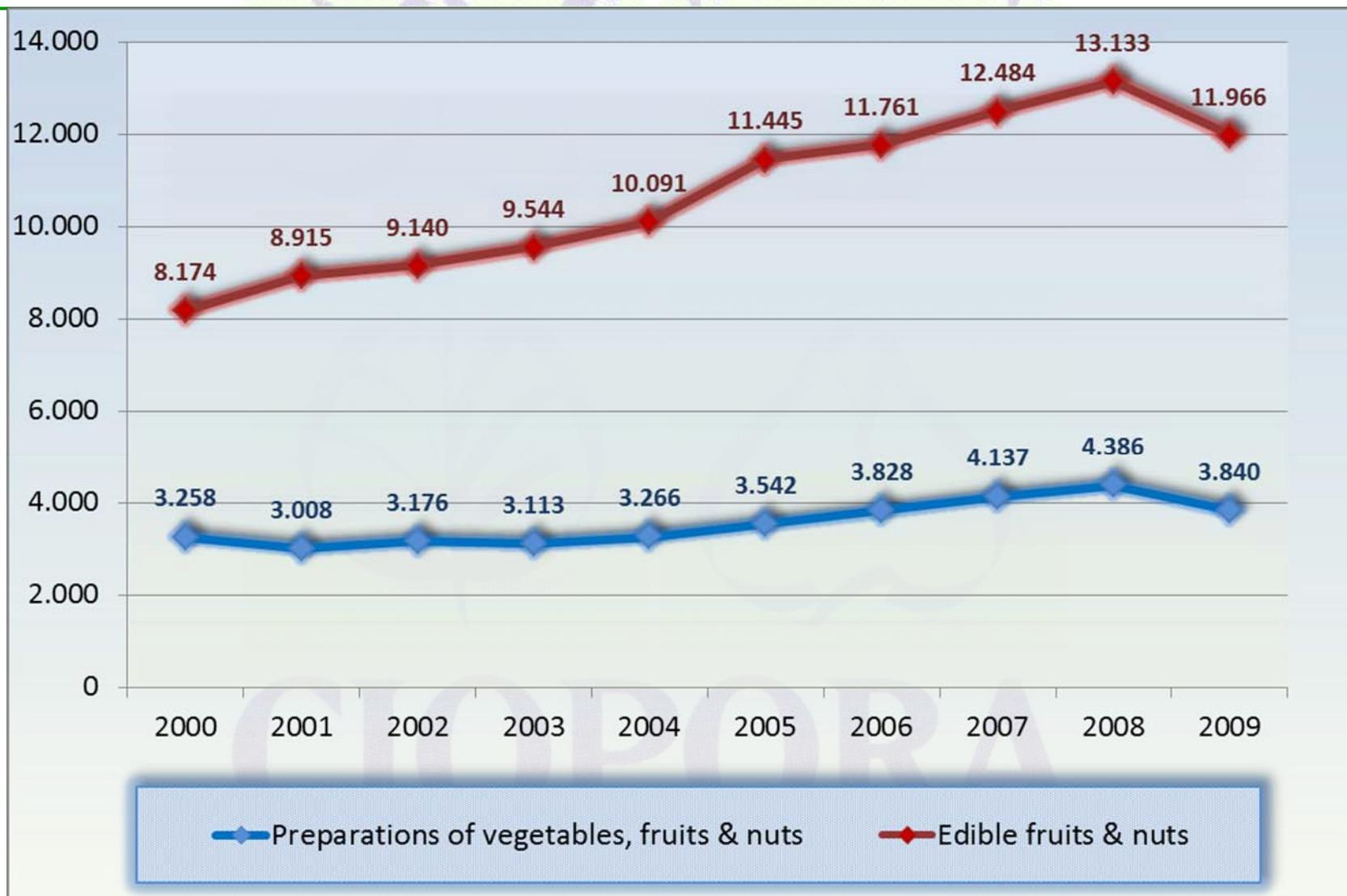


# Production of Apples 2008

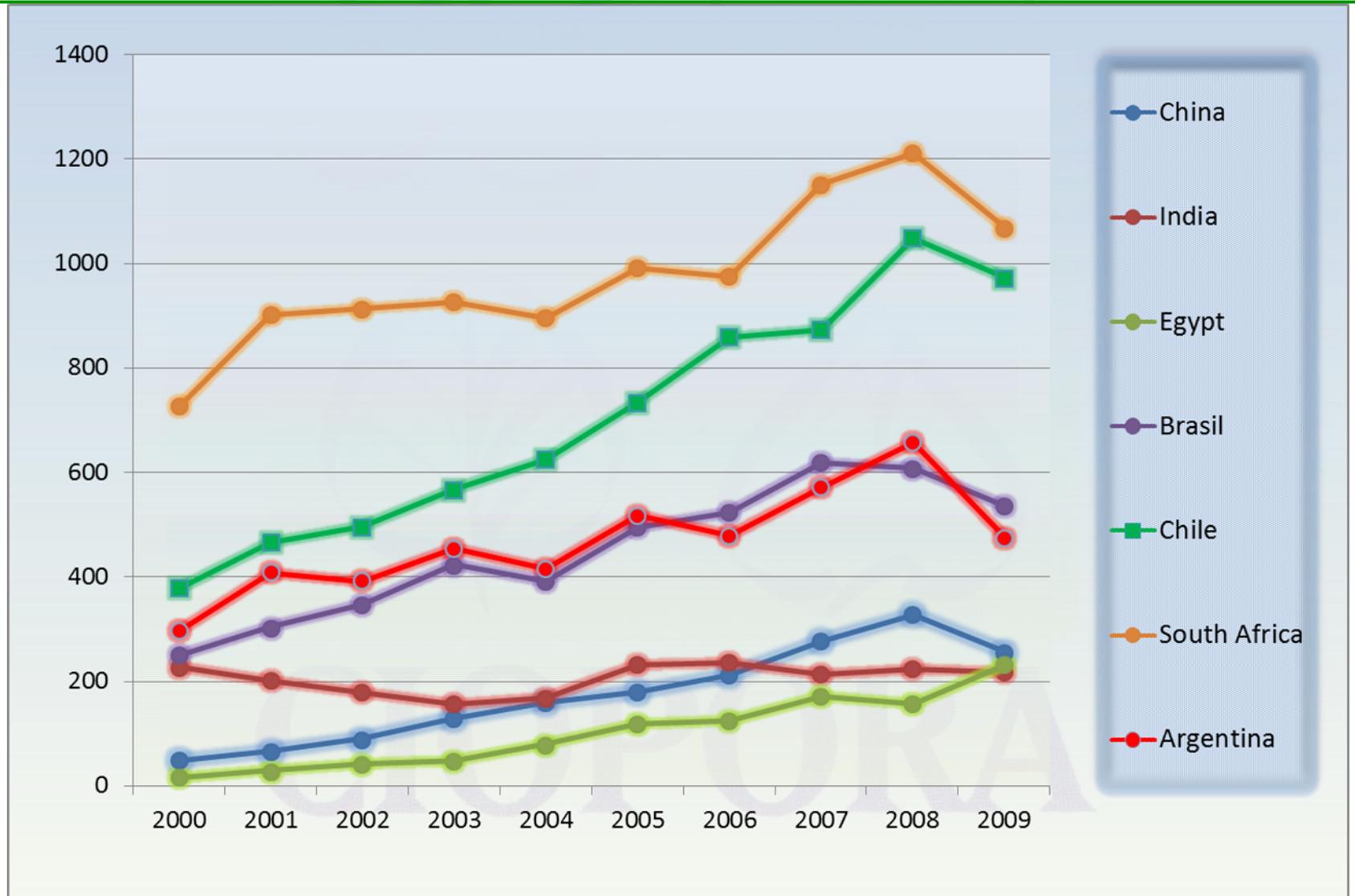
Rank	Area		Production (MT)				
1	China	<b>1978</b>	29.851.163		50,16%		
2	USA	<b>1991</b>	4.358.710				
3	Poland	<b>EU</b>	2.830.870			4,76%	
4	Iran	<b>Not UPOV</b>	2.718.775		4,57%		
5	Turkey	<b>1991</b>	2.504.490				4,20%
6	Italy	<b>EU</b>	2.208.227			3,71%	
7	India	<b>Not UPOV</b>	1.985.000		3,34%		
8	France	<b>EU</b>	1.940.200			3,26%	
9	Russia	<b>1991</b>	1.467.000				2,40%
10	Chile	<b>1978</b>	1.370.000		2,30%		
11	Argentina	<b>1978</b>	1.300.000		2,18%		
12	Brazil	<b>1978</b>	1.124.155		1,89%		
13	Germany	<b>EU</b>	1.046.995			1,76%	
14	Japan	<b>1991</b>	840.100				
15	South Africa	<b>1978</b>	770.741		1,30%		
16	Spain	<b>EU</b>	687.500			1,16%	
17	Ukraine	<b>1991</b>	719.300				1,21%
18	South Korea	<b>1991</b>	635.000				
19	Pakistan	<b>Not UPOV</b>	582.512		0,98%		
20	Hungary	<b>EU</b>	568.600			0,96%	
	TOTAL		59.509.338	100,00%	<b>66,72%</b>	15,60%	7,81

Source: FAOSTAT

# EU-27 Import Value of Fruits & Nuts - 2000-2009 in Mio €



# Edible Fruits & Nuts Import Value - 2000-2009 in Mio € (to EU)



# Liability of Breeders' Partners

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German Supreme Court: X ZR 93/04,  
Decision of 14 February 2006 „Melanie“

- A specialized enterprise producing goods, which can infringe IP rights of third parties, must check the existence of such IP rights and must make sure that his goods do not infringe such rights (= compliance-check).
- **No excuse of a grower „I didn't know!“**

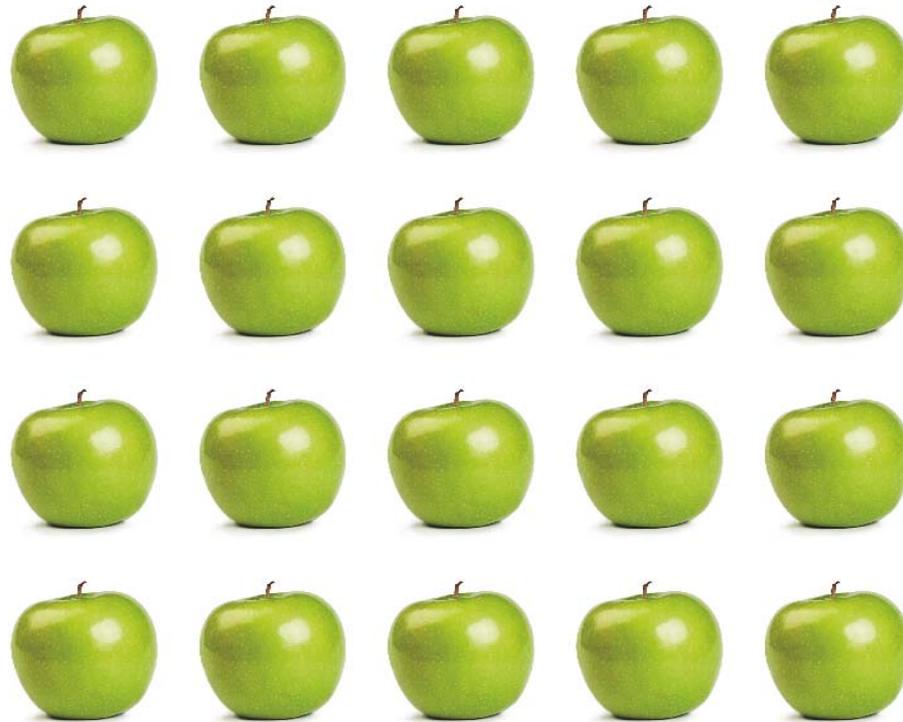
# Liability of Breeders' Partners

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## More „Melanie“

- An enterprise trading with goods is obliged to carefully **check** (not ask !) with its supplier whether such necessary compliance-check has been carried out.
- If he does not check with his supplier, he has to do the check himself.
- This particularly holds true for dealers who purchase goods from abroad, since especially in such case it is possible that the producer of the goods or other members of the trade chain did not see any cause to check the goods with regard to domestic IP rights.
- A dealer must not put a product into circulation unless he can reasonably assume that the necessary check of IP compliance has been carried out at least once.
- **No excuse of the trade:** „I thought I had a reliable supplier!“
- **How far must the trade go in its compliance-check?**

# FIND THE FAULT!



**THE FAULT IS** THAT THREE OF THE APPLES HAVE BEEN HARVESTED FROM TREES, WHICH HAVE BEEN PROPAGATED WITHOUT A PROPER LICENSE.

Dealing with unlicensed propagating material of a protected variety, and the harvest obtained from it, is a Plant Breeders' Rights infringement. It can have **serious consequences** for your company and is a **criminal act** in many countries. Make sure that you deal with legal plant material only. Be aware that anybody in the whole value chain can be held liable for a Plant Breeders' Rights infringement. For more information please visit: [www.ciopora.org](http://www.ciopora.org)



# Apple-figures

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- Royalty for the production of one apple tree: 0.40-2.00 EUR
- Sales-price of an apple tree: average 5.50 -7.00 EUR
- Trees on one hectare: 1.666 – 3,300
- Tree production per year : average 30-40 kg
- Commercial life of an apple tree: 12 – 15 years
- Harvest per ha per year: 55-60 tons (at 1,666 trees/ha)
- Price paid to the apple grower: 0.27 – 0.45 EUR/kg
- Price of apples for the end-consumer: 1.99 – 2.99 EUR/kg
  
- No. of apple pies eaten by Germans per year? Don't know!
- Number of worms in the apples? Don't know!

# Financial calculation per hectare, low level:

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- One time 666 EUR royalties for the trees (1,666 trees by 0.40 EUR)
- Growers' income from apples:
  - Per year: 13,500 EUR (50 tons, 0.27 EUR/kg)
  - Per life time of the apple trees: 202,500 EUR (15 years)
- Endconsumer-price of the apples:
  - per year: 100,000 EUR (50 tons, 1.99 EUR/kg)
  - per lifetime of the trees: 1,500,000 EUR
- Money earned in the trade-chain: 1,300,000 EUR
- **Portion of royalty at growers income: 0.33%**

# Financial calculation per hectare, high level:

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- One time 6,600 EUR royalties for the trees (3,300 trees by 2.00 EUR)
- Growers' income from apples:
  - Per year: 36,000 EUR (80 tons, 0,45 EUR/kg)
  - Per lifetime of the apple trees: 432,000 EUR (12 years)
- Value of the apples:
  - per year: 240,000 EUR (80 tons, 2.99 EUR/kg)
  - per lifetime of the trees: 2,880,000 EUR
- Money earned in the trade-chain: 2,448,000 EUR
- **Portion of royalty at growers income: 1.5%**

# Liability of Breeders' Partners

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„Ebay“, „Internet-Auction I“, I ZR 304/01 of  
11 March 2004

- Intermediaries, whose services are being used by a third party to infringe the rightholder's industrial property right, are liable if they have reasonable means to stop the trade with the infringing goods.
- Is the service-provider aware of an infringement (here: of a trademark), he must not only stop the concrete offer, but must also undertake all technically possible and reasonable steps to prevent further infringements.
- **How far must auctions go to stop infringements?**

# Liability of Breeders' Partners

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- Enforcement Directive 2004/48/EC:
  - Article 8 (1) (c): Information on the origin and distribution networks of the goods which infringe an intellectual property right shall be provided by the infringer and/or any other person who: ... (c) was found to be providing on a commercial scale services used in infringing activities ...
  - Article 11: ... Member States shall also ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe an intellectual property right, ...



# Effective enforcement tools

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- Sufficient information and access
- Fast proceedings
- Specialized Courts
- Full compensation of costs
- Effective border measures
- Deterrent sanctions

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# Effective enforcement tools

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## Greenhouses and samples

- Right holders must be granted **access to greenhouses** to count and inspect plants and **collect samples**
- There is only a short period between an infringement of a PBR (e.g. illegal propagation) and the sales of the infringing plants, thus fast **provisional measures** to preserve evidence are necessary.



# Effective enforcement tools

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## Right to information

- The trade with ornamental and fruit plants is very international and so there are widespread sources of propagating material
- Right holders must be able to get **access to information** on the illegal sources of propagating material and about the recipients of illegal material



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# Effective enforcement tools

## Procedural challenges

Trade with ornamental and fruit plants is a very fast business; often huge intermediaries, providing services and market space to sellers, are involved in the chain

Plant Breeders' Rights law is a special and complex legal topic. It requires legal expertise as well as know-how on plant breeding and growing

## Solutions

### **Preliminary injunctions**

Right holders must be able to stop alleged infringements quickly on the spot of the sellers or the intermediaries

### **Specialized Courts**

The effective enforcement of Plant Breeders' Rights requires specialized courts.

# Effective enforcement tools

## Procedural challenges

Often only parts of costs are covered since calculation bases on amount of dispute; but proceedings need specialized lawyers (charging per hour)

Trade with ornamental and fruit plants is very international

## Solutions

### **Full compensation of costs**

Infringer need to be obliged to compensate all costs incurred by proceedings

### **Effective border measures**

Instruments to control import and export of illegal plant material are necessary.

Customs authorities need to have sufficient knowledge on plants and Plant Breeders' Rights

# Effective enforcement tools

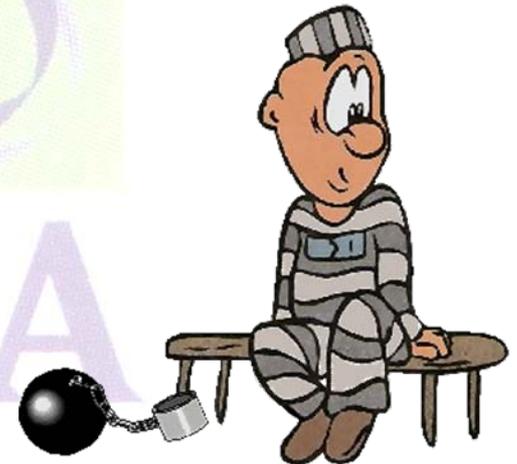
## ➤ Financial consequences (Damages)

- Infringers weight their profit against their risk
- The risk to be caught and the damages payable must overweight the potential profits
- Damages must be deterrent to the infringer and must make up for the losses of the right holder

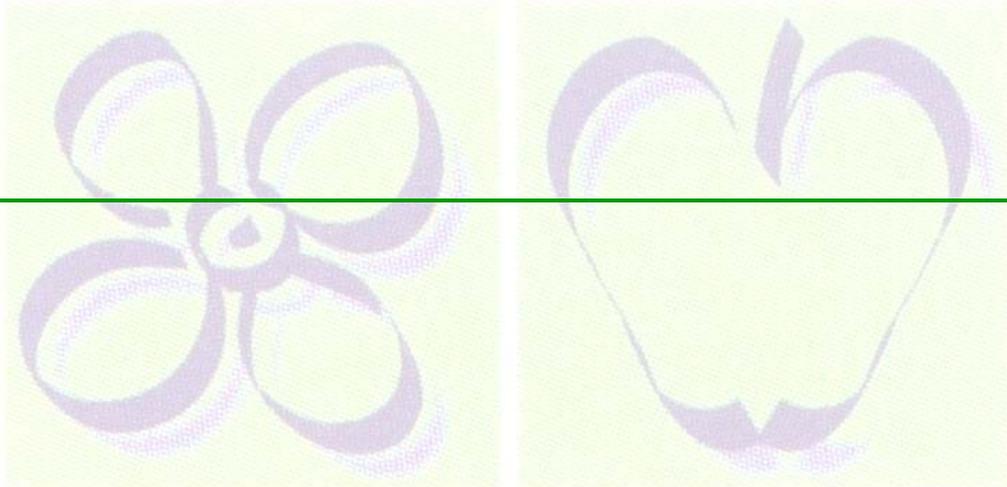


## ➤ Criminal sanctions

- Infringement of Plant Breeders' Rights should be treated as a criminal act as it is comparable with theft, misappropriation and fraud.







# Thank you

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# Breeders' Wishes

Press release – 21. January 2010

Successful custom actions against illegal carnations

Recently Dutch customs at Amsterdam Schiphol airport have seized six flower shipments containing Colombian carnations. ....

CIOPORA's comments:

- The flowers were in transit to Russia and were confiscated on the basis of a Community Plant Variety Right
- Do we feel safe?

Latest News :

Osmocote Europe celebrates its 40th Europe anniversary

## Ecuador studies the possibility of establishing direct flights to Russia

by Ron van der Ploeg

QUITO, Ecuador, December 16, 2009: Following his state visit to Russia, Ecuador's president Mr. Rafael Correa has announced that his country will start direct cargo flights to Russia to serve the export of fresh cut flowers. Executive president Ignacio Pérez Arteta of industry body Exopflores says that to date there are no direct flights to Russia adding that the government and the Ecuadorian flower industry are seriously looking at the possibilities. Pérez emphasizes on the necessity of a minimum of two direct flight per week. "It will give Ecuadorian exporters major, quick and cheap access to the Russian market. The plans for direct flights is at a moment that Russia is gaining importance as export destination for roses Made in Ecuador. Besides, we can save up to 25% of custom fees."

Pérez points out that the passage of Ecuadorian flowers through Amsterdam reduces the shelf life of cut flowers. Ecuadorian flowers at present have to travel to Amsterdam (Netherlands) where they are trucked to Moscow. Upon arrival the shelf life of the flowers has already decreased significantly, so Russian vendors can not send them to other Russian cities. The high cost of road transport from Amsterdam to Moscow adds to the total transport costs. Flowers that travel via Amsterdam to Russia are up to 30 to 35 percent more expensive", Pérez added.

The plan for direct flight to Russia is part of a very positive evaluation of president Correa's official visit to Russia from October 29 to 31. Rafael Correa is the first Ecuadorian leader ever to visit Russia although Ecuador and Russia maintain a 65 years of bilateral diplomatic relations. "Russia is our biggest export market for bananas and cut flowers," said Correa, who also mentioned the series of agreements signed with the Russian government during his visit. He explained that among the agreements signed with Russia is one that avoids double taxation for Russian investments, which will hopefully attract more Russian investors.

Ecuador is the world's fourth-largest exporter of flowers. Revenues from flower exports accounted for \$ 450 million in 2008. Russia purchases slightly more than 10% of Ecuador's roses.



Flora Culture International online and February issue