Selecting plant material for breeding programmes, what rules apply?
Focus on international biodiversity legislation

More and better food, nicer flowers with long shelf lives, more oil content; this could be realized by improved plant varieties, so plant breeding. Plant breeding entails combining the best characteristics in one plant. This can only be done if enough variation in plants is available.
Plant breeders get the variation mostly from other commercial varieties or breeding material, but sometimes also from older land races and crop wild relatives. To get access to the materials and know the right and obligations to use the plant materials in plant breeding one should be aware of intellectual property legislation as well as biodiversity legislation.

With regard to Intellectual Property legislation one should know if obligations exist with regard to the use of those varieties for research and breeding. In case of plant variety protection according to the UPOV Convention, the breeders' exemption exists. This allows plant breeders to use protected varieties for further breeding without any obligations to the owner of the original variety. In case of patents, this is not automatically true. In that case you need to follow the rules in the country you work and deal with the rights of the patent owner.

Biodiversity legislation should also be checked to know if plants could be used in plant breeding and under what conditions. Two international conventions on biodiversity legislation exist that may have impact on the use of genetic material. The first is the Convention on biological Diversity (CBD) with its' Nagoya Protocol (NP) and the second one the International Treaty on Plant Genetic Resources for Food and Agriculture (IT PGRFA) with its' Multilateral System. The goals of the CBD and the IT PGRFA are the conservation and sustainable use of genetic resources or plant genetic resources for food and agriculture respectively, as well as access and fair and equitable benefit-sharing.
The frameworks are set, but the implementation is still ongoing or being revised. At this moment for example the scope of the conventions is discussed. Is Digital Sequence Information (DSI) part of the scope yes or no? It is important not to only look if it is part of the scope, but also what the implications would be. In case it is/would be included, innovation will be hampered as the exchange of information is going to be very complicated and possibly be expensive.

Unlike with UPOV, where legislations are checked to be in line with the convention, national implementation of the NP and the IT PGRFA is not harmonized. This means that every country gives its' own interpretation to the legislation. The seed sector is of the opinion that good attention should be given in such legislation on the scope. It should only include natural resources and no man made (commercial) products. Furthermore, it should be only on physical materials and not on DSI. In addition, it should be avoided to include retroactivity in the legislation as this gives a lot of legal uncertainty.
To get access and develop appropriate benefit sharing agreements, it is also important to have clear application processes. It should be possible to go though them in a timely manner and deal with realistic expectations.

The ABS procedures of the IT PGRFA, which are at this moment only applicable to 64 crops, fit the needs and practices of the plant breeding sector best. Ministries of agriculture are in charge and do understand the sector well. It deals with a level playing field because of the use of a standard contract, the Standards Materials Transfer Agreement (SMTA). With that long negotiation processes are avoided. It recognizes the value of the breeding exemption. So in case a new product is free for research and breeding only voluntary benefit-sharing is required. In case you use more accessions from the system, the benefit-sharing obligations do not accumulate. Lastly, benefit-sharing obligations ends after the product is put on the market, meaning that those people that use the marketed product do not have any further benefit-sharing obligations.
With regard to those reasons, the plant breeding sector therefore would prefer to work with the IT PGRFA for all breeding activities, rather than with the CBD and the NP.

In the second part of the presentation some thoughts are given on the relationship between biodiversity legislation and IP legislation. Is it comparable, is it different and how to take care that those regulations do not unnecessarily interfere? The analysis indicated that ABS legislation is different from IP legislation; it has a different scope, it deals with different actors and is has different objectives. Therefore, it is suggested to implement the both legislations separately, but in a mutually supportive manner. With regard to the latter, it is important to recognize the breeders' exemption as a form of benefit-sharing. Furthermore, it is important that the farmers' rights as described in the IT PGRFA and plant breeders' rights defined in UPOV are implemented in a supportive manner respecting both.