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Subject: Plant Variety Right Law of Serbia
Attachments: CIOPORA comments on the Law of Serbia for the Protection of Plant Varieties
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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)

Mr. Doug Waterhouse, President of the Council

Mr. Keun-Jin Choi, Vice-President of the Council

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Dear Sirs,

For the preparation of the next extraordinary meeting of the Council on 11
April 2008 please find attached our letter of today to Dr. Slobodan
MILOSAVLJEVIC,

Minister for Agriculture, Forestry and Water Management of the Republic of
Serbia.

We would kindly like to ask you to share our comments with the Council
members.

We are looking forward to meeting with you next week.

Best Regards,

Dr. Edgar Krieger

Executive Secretary

CIOPORA

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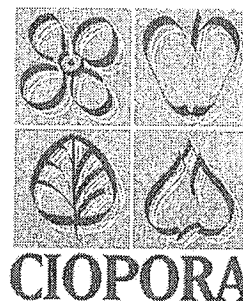
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Communauté Internationale des Obtenteurs de Plantes Ornementales et fruitières de Reproduction Asexuée



His Excellency
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Hamburg, 28 March 2008

CIOPORA comments on the Law of the Republic of Serbia on the Protection of Plant Breeders' Rights

Dear Dr. Milosavljevic,

Our association is the recognized International Community of Breeders of Asexually Reproduced Ornamental and Fruit Varieties. Our membership currently covers some twenty-five countries disseminated on the five continents and our members representing an overwhelming percentage of plant patents and plant breeders' rights certificates granted under the UPOV system world wide.

CIOPORA is very much appreciative on the fact that Serbia intends to adopt and ratify the UPOV 1991 Convention and – as a precondition to this – to orient its Plant Breeders' Right law towards the UPOV 1991 Convention.

CIOPORA is pleased to comment on the draft Law and therefore submits the following comments and proposals:

1. DURATION OF PROTECTION (Article 22)

Considering the enormous financial investments which have to been taken to breed a new and adopted variety, it is advisable to extend the duration of the protection in Article 22 of the Law to **25 years** respectively **30 years** for vines and trees.

In this respect it is very important to recognise that such an extension for the vast majority of varieties will have no consequences. The vast majority of ornamental and fruit varieties have a rather short commercial life due to the rapid exchange of varieties in the market. It is only the exceptional, long-living varieties which would benefit from such extension. For such varieties it is necessary to have a sufficient period of protection, because they earn most of the return on investment for the

whole breeding program of the breeder. Additionally, it is justified to say that because of there excellence these varieties deserve a longer protection.

2. SCOPE OF THE BREEDER'S RIGHT (Article 25)

- 2.1 The main ambition of the breeders of ornamental and fruit varieties is to create new varieties of pot plants, cut flowers and fruits. Breeders of such varieties have to be able to exercise their right (and notably collect their royalties) at the stage where the added value of the variety is normally expressed – which is the end-product *per se* for most cut flowers and fruit varieties. Thus, the essence of protection for such categories of new products must bear on the **manufacture (reproduction/ propagation), offering for sale, sale, exporting, importing and USE for commercial purposes** of the whole protected variety, including harvested material. Any protection for vegetatively-reproduced plants falling short of such a scope is not sufficient.
- 2.2 CIOPORA submits to include into Article 25 of the Law the provision of Article 14 (3) of the UPOV 1991 Convention (protection of products made directly from the harvested material). More and more processed products of protected varieties are marketed, e.g. juice, canned fruit and fruit-salad etc. It is easy to evade the Plant Variety Law by processing the illegally obtained harvested material outside the territory of Serbia and import the so produced products into the country.
- 2.3 CIOPORA appreciates the adoption of the principle of dependency instituted by the 1991 UPOV Convention for "*essentially derived varieties*".

However, CIOPORA recommends to delete in the description of an essentially derived variety the last half-sentence of No. 1) of the Law

1) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety

A comparison of the wording of the current sub-paragraphs 1) and 3) of the description shows that these two sub-paragraphs might be inconsistent in regard to the clause "*retaining the expression of the essential characteristics*". While sub-paragraph 3) allows an unlimited number of differences (as long as they result from the act of derivation), sub-paragraph 1) seems to set a limit. Many member states of UPOV, inter alia the European Community, have avoided said inconsistency by leaving out the second half-sentence in sub-paragraph 1).

3. EXHAUSTION OF THE BREEDER'S RIGHT (Article 27)

The UPOV 1991 Convention, which has otherwise brought improvements to the 1978 Act, has introduced the principle of "exhaustion" of the breeder's right. This principle has unfortunately been drafted in a too general way.

To provide the breeders of vegetatively propagated ornamental and fruit varieties parity with owners of patents as required under Art 27 (3) b of the TRIPS-Agreement it is necessary that the exhaustion exists only for the specific field of use for which the breeder has licensed his variety and only for the specific territory where the licensed title is valid.

CIOPORA would therefore like to propose the following wording for Article 27 of the Law:

The Plant Breeders' Right shall not extend to acts that have been performed with the express authorization of the holder of the right and within such conditions and limitations as said holder may have made his authorization subject to.

4. Assignment and contractual License (Article 29)

4.1 In Article 29 a clear differentiation should be made between the *transfer* of a Plant Breeders' Right and the *licensing* of the right. The word "transfer" is commonly used for a complete transfer of the right from the original title holder to a new title holder. "Licensing" means that the title holder authorizes a third party to carry out some of his exclusive rights, while keeping the ownership of the PBR title.

4.2 Additionally, Article 29 paragraph 3 of the Law imposes a huge burden to the title holders when making it compulsory for them to send a copy of any license contract to the authority, as holders of PVR titles grant numerous licenses. CIOPORA therefore recommends to delete this obligation from the Law.

5. JURIDICAL PROTECTION OF THE BREEDER (Articles 39 – 43)

According to Article 30 (1) (i) of the UPOV 1991 Convention each contracting party shall provide for appropriate legal remedies for the effective enforcement of breeders rights.

5.1 CIOPORA recommends to include into Article 39 of the Law the right of the title holder to enter the premises of the supposed infringer and to take samples of material, which supposedly infringes a Plant Breeders' Right, in order to secure evidence. Without having such rights the title holder has no chance to enforce his PBR because he cannot prove the infringement. Additionally, the title holder must get access to information about the suppliers and purchasers of the infringing material.

5.2 While Articles 42 and 43 enumerate some cases which commit an offence we are unable to find a penal sanction for an infringement of a Plant Breeders' Right.

Article 41 of the TRIPS Agreement provides that members of the WTO '*shall ensure that enforcement procedures are available under their law so as to permit **effective action** against any act of infringement of intellectual property rights covered by this Agreement,...*

Additionally, Article 61 of the TRIPS Agreement points out that the WTO members shall provide for criminal procedures and penalties.

CIOPORA believes that penal sanctions for infringements should be provided for in the Plant Breeders' Rights Law of Serbia, over and above civil sanctions.

5.3 Finally, CIOPORA strongly recommends to include into the Law customs measures relating to Plant Breeders' Rights or at least to include a link to the respective customs law. This is indispensable for the enforcement of the exclusive right of the title holder to *export and import*.

Production and trade with ornamental and fruit plants and its harvest is very international and not limited to the territory of one country only. In order to enable the right holders to effectively enforce their rights, effective border measures are indispensable. The practice shows that especially by border controls numerous infringements of Plant variety Rights can be detected. Without implementing border measures for Plant Variety Rights, no effective enforcement is provided for and Article 30 (1) (i) of the UPOV 1991 Act is not complied with.

6. Numbering of paragraphs

Finally, CIOPORA proposes to explicitly identify the important paragraphs and subparagraphs in each Article with numbers or characters in order to avoid misunderstandings and misinterpretations.

We would be grateful if you would take the before mentioned changes and amendments into consideration and keep us updated on the development of the Law so that we may supplement our present comments if necessary.

Additionally, we would be grateful if your ministry would provide us with a list of the applicable fees and a copy of the application forms.

Respectfully yours,

CIOPORA



Dr. Edgar Krieger
Executive Secretary

CC: UPOV Office
UPOV Council