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UPOV

CAJ/VI/8

ORIGINAL: French

DATE: October 17, 1980

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

Sixth Session

Geneva, November 13 and 14, 1980

EXPLANATORY NOTE ON THE RECOMMENDATION ON FEES
IN RELATION TO COOPERATION IN EXAMINATIONDocument prepared by the Office of the Union

1. At its fifth session, the Administrative and Legal Committee decided that the draft Recommendation on Fees in Relation to Cooperation in Examination should be submitted to the Council for adoption, in order to enable member States to take the measures necessary for its implementation as soon as possible. It also decided that it would consider the establishment of an explanatory note on the Recommendation at its sixth session, which among other things would deal with the procedure in special cases, such as those resulting from withdrawal of the application for protection. To this end it invited member States to send to the Office of the Union information on difficulties experienced so far (or apt to occur in the future) and on the way in which they had been (or could be) solved (see paragraph 14 of document CAJ/V/7).
2. The Office of the Union received observations from the Federal Republic of Germany in a letter dated May 5, 1980, which is reproduced in Annex I to this document. It communicated the observations to the other member States by Circular No. U 570-08.4, dated July 11, 1980, and invited those States to make any comments they might have on the matters mentioned by the Delegation of the Federal Republic of Germany. The Office of the Union subsequently received contributions from Belgium, Denmark, France, the Netherlands and the United Kingdom. They are reproduced in Annexes II to VI to this document.
3. The Recommendation on Fees in Relation to Cooperation in Examination, adopted by the Council at its fourteenth ordinary session, appears in Annex VII to this document.
4. In view of the varied nature of the replies sent in, the Office of the Union considered that an analysis of the various problems that arose and the various possible solutions to them, which would be based on the replies given, would provide a better basis for the discussion than a collated presentation of the actual replies. Such an analysis appears in the paragraphs below.

General Remarks

5. It is not sure that the explanatory note could ever cover all cases liable to arise, and indeed this does not seem necessary, as it would be sufficient for it to deal with the (specific) cases that would arise most often.

6. As the Delegation of the Netherlands mentioned, the effect of the new Recommendation is that the applicant for protection in a number of States represented by *n* would pay for the examination of his variety, if cooperation existed:

- an examination fee (corresponding to the total examination fees for the various growing cycles);
- *n*-1 administrative fees.

These fees would be collected ultimately by the authority of the State that had carried out the examination, some of them having passed through the authorities of other States. This is not affected by the State that examines the variety or by the State for which the examination is made or, in general, by the configuration of the specific case of cooperation. It ceases to be valid if one or more applications for protection are withdrawn before the final report is drawn up.

7. According to normal practice, the examination fee payable by the applicant has to be paid before the beginning of the corresponding growing cycle. According to Article 9 of the UPOV Model Agreement for International Cooperation in the Testing of Varieties, the considerations payable by the authority receiving the examination report to the authority having drawn up the report have to be paid after its receipt. With few exceptions, the date on which the applicant has to pay the administrative fee for the transmittal of the examination report is not yet specified in member States. These facts have to be taken into account in the drafting of rules on the payment of fees and considerations applicable in the case of withdrawal or rejection of the application for protection for which the examination fee has to be paid.

Anticipation

8. When there is more than one application for protection--filed in a number of States--and where cooperation in examination exists, the application for protection which is to be used as the basis for examination has to be determined ("basic application for protection"), or the State on behalf of which the examination is made ("originating State"), which comes to the same thing. The applicant for protection has to pay the examination fee in the originating State, which in turn pays the examining State--if the latter is not itself the originating State--a consideration equal to the examination fee applicable in the examining State. In the other States the applicant pays an administrative fee, whereupon those other States pay the examining State a consideration equal to the administrative fee (charged by the examining State). As for the proposal made by Belgium in respect of the case where the applicant for protection is a national of the examining State, reference is made to Annex II of this document.

9. Two possibilities were mentioned, notably by the Federal Republic of Germany.

10. The first possibility consists in giving priority to information relevant to the examination which is available to the examining State: the examining State determines the chronological order of the requests for the transmittal of examination results that have been made by other States, according to the dates of receipt, including the application for protection filed with its own authority, and examination is carried out on the basis of the first of them. This solution has an advantage in that the information issued by the examining State to the applicant for protection and to States requesting transmittal of examination results is final. It is favored by the Federal Republic of Germany, Belgium and France.

11. The second possibility consists in giving priority to the first application for protection. This solution is based on the fact that the examining State has access, either by way of the application for protection filed with its authority or by way of the first request for transmittal of examination results, to the list of applications for protection already filed. It is favored by the Netherlands.

12. With reference to the second solution, it should be kept in mind that there are two cases of cooperation:

(i) Cooperative examination is automatic, because bilateral agreements have been made for the species concerned or, failing such agreements, because a single State makes the examination on behalf of all the others (or at least for those States with which an application for protection has been filed). A typical case is that of the chrysanthemum, which is examined by the United Kingdom.

(ii) Cooperative examination is not automatic, because a number of States examine the species concerned, because no bilateral agreements have been made for the species concerned or because a non-examining State has made bilateral agreements for that species with a number of examining States. A typical case is that of the rose.

13. In the case of non-automatic cooperation, an examining State cannot always determine immediately which application for protection is the basic one. Assuming, for instance, that the first application for the protection of a rose variety is filed in Belgium, and that subsequent applications are filed, in chronological order, in Sweden, the Federal Republic of Germany, France, the Netherlands and the United Kingdom: Belgium and Sweden have a choice of four examining States and, in addition, an examining State may decide to entrust examination of the variety to another State, regardless of the chronological order of the applications filed in those two States. For instance, the Federal Republic of Germany may approach the United Kingdom on a date after that on which the United Kingdom arranged for the making of the examination for its own benefit.

14. The second solution in fact cannot be adopted unless it is accompanied by a rule of practice applicable in cases such as the one described above. The rule is bound to be that of giving priority to information relevant to the examination which is available to the examining State. One of the examples given by the United Kingdom is on these lines.

15. The question of anticipation also has an effect, in theory at least, on the matter of determining who is responsible for providing the plant material necessary for the examination. It could be argued that this is not a matter for the explanatory note on the Recommendation, and that it is independent of the solutions adopted for the payment of fees. In practice, the material ultimately has to be provided by the applicant or by one of the applicants. The function of States can therefore be confined to notifying their respective applicants of the State in which the variety is examined and of the conditions governing the supply of plant material. It would then be for the applicants to make the necessary arrangements between themselves.

Procedure in the Case of Withdrawal of an Application for Protection

16. There are three typical cases:

(i) the examination is made at the request of one other State only, and the application for protection in that State is withdrawn;

(ii) the withdrawn application is not the basic application;

(iii) the withdrawn application is the basic application.

17. The examination is made at the request of one other State only, and the application for protection in that State is withdrawn. The applicant for protection has to pay an examination fee, and the State requesting the examination results has to pay a consideration equal to the examination fee charged in the examining State, in respect of any examination [growing] cycle begun. This principle is unanimously accepted.

18. The withdrawn application is not the basic application. The solution advocated by the Federal Republic of Germany, Belgium, France (see paragraph 6 of document CAJ/V/4) and the Netherlands consists in not making the State that has requested transmittal of examination results pay the consideration corresponding to the administrative fee. The examining State is assured of remuneration for its work (by the originating State, in which the application for protection is not withdrawn, and possibly by the other States). According to the Federal Republic of Germany and France, the examination results should be returned if they have already been sent. According to the Netherlands, the applicant for protection is also exempted from payment of the administrative fee in the State in which he has withdrawn his application for protection.

19. It could be wondered whether this solution is really judicious: the administrative fee is intended to cover certain costs incurred by the examining State, such as the cost of correspondence, updating files and making or translating examination reports. The examining State will obviously have already incurred a large proportion

of those costs if the application is withdrawn at a late stage in the examination procedure, particularly if the file has already been made up for the benefit of the requesting State.

20. The withdrawn application is the basic application. Depending on the stage reached in the procedure, the applicant may already have paid one or more examination fees in the originating State, and it seems normal that that State should pay the corresponding considerations to the examining State.

21. The examination has to continue for the benefit of the other States that have requested examination results and, depending on the payments that have already been made or are owed by the originating State, it can happen that the examining State has not been fully rewarded for its work. For instance, if the basic application has been withdrawn in the course of the first growing cycle, the examining State will only have been paid a consideration equal to the examination fee corresponding to that cycle. It then has to be decided what the new basic application for protection and the new originating State are, whereupon the new originating State is responsible for completing the consideration payable to the examining State and for charging the applicant the corresponding examination fees, the latter payments replacing the administrative fee, as pointed out by the Netherlands.

22. It should be noted that, if the basic application is withdrawn during the last examination cycle, the new originating State and the applicant in that State will not have to make any payments. The arguments put forward in paragraph 19 above apply also to the case considered here, which means that it could be wondered whether an administrative fee should not be charged, if the circumstances should arise, in the new originating State.

Procedure in the Case of Rejection of an Application for Protection

23. As in the case of withdrawal, a distinction has to be made between rejection of the basic application and rejection of any other application.

24. The considerations set forth in paragraphs 17 and 20 to 22 apply also to the case of rejection of the basic application: the originating State pays the examining State for any examination cycle completed or started, as the applicant for protection has paid the corresponding examination fees in advance in the originating State.

25. In the case of rejection of any other application, a distinction may be made between two types of reason, and different rules may be worked out:

(i) the reason for rejection is independent of the examination of the variety, for instance it has been found that the variety is no longer new or that the applicant is not eligible for protection;

(ii) the reason for rejection does result from examination of the variety, for instance the first examination cycle has shown that the variety is not homogeneous.

When rejection is independent of the examination of the variety, the State that has requested examination results may be exempted from payment of the consideration corresponding to the administrative fee, and the applicant may be exempted from payment of the administrative fee itself. This corresponds to the solution set forth in paragraph 18 above for the case of withdrawal of an application that is not the basic application. On the other hand, when the rejection is pronounced on the basis of interim examination results, the consideration and the fee would have to be paid. In the majority of cases, moreover, these results become final, as it is unlikely that one State would pronounce rejection and another decide to continue examination. No problem arises when rejection is pronounced on the basis of final results, corresponding to an examination of normal duration, as the cooperation contract has been completely fulfilled.

26. The payments should also be made when the request for transmittal of examination results is made after the results have been collected (request for transmittal after the date of completion of the examination) and when the results cause the application to be rejected. A question was raised in connection with this case by the Delegation of Denmark (see Annex III).

Procedure in the Case of Withdrawal (or Rejection) of an Application and Filing of a New Application

27. Reference is made here to item 4 of the letter from the Delegation of the Federal Republic of Germany (Annex I): the simplest solution is to handle the new application without taking any account of the old one.

[Annexes follow]

LETTER, DATED MAY 5, 1980, FROM MR. H. KUNHARDT,
OF THE FEDERAL PLANT VARIETIES OFFICE OF THE
FEDERAL REPUBLIC OF GERMANY, TO THE OFFICE OF THE UNION

Subject: Recommendation on Fees in Relation to Cooperation in Examination

...

1. The Question of Time Sequence

A problem has arisen, as regards whether a request for examination results involves an examination under paragraph (1) (taking over of results) or paragraph (2) (examination carried out on request) of the above-mentioned Recommendation, that can be explained in the following example:

A variety is the subject of an application for protection filed with Authority B on January 1. An application for protection is filed in respect of the same variety with Authority A on February 1. Authority B requests the examination results from Authority A on March 1.

What is Authority A to enter on the reverse of the Model Form for the Request of Examination Results? There are two possible alternatives in the case referred to:

- I. Since an application for protection had already been filed in respect of the variety with Authority A since February 1 at the time of the request from Authority B (March 1), Authority A informs Authority B that "The examination of the variety will be undertaken as from ... on the basis of an application or a request already submitted."
- II. Since the application for protection filed with Authority B is earlier than that filed with Authority A, Authority A informs Authority B that "The examination of the variety will be undertaken as from .. on the basis of your request."

The question of which alternative is to be chosen will be important in future to decide whether the fixed consideration under paragraph (1)(a) of the Recommendation or the full examination fee under paragraph (2)(a) is to be charged. The question of the fees which the applicant has to pay in the State of Authority B (paragraphs (1)(b) and (2)(b) of the Recommendation) also depends on this.

To date, the Federal Plant Varieties Office has acted in accordance with alternative I in all those cases in which it has carried out an examination as Authority A, for the following reasons:

(a) The answers on the reverse of the Form for the Request of Examination Results ("... an application or a request already submitted") appeared to assume that whether the request lead to the taking over of results or an examination carried out on request depended on the date of the request from Authority B and not on the date of the application with Authority B, particularly since that date does not in fact need to be given by Authority B in the last sentence but one of the request (page 1 of the form). We therefore assumed that the procedure described above corresponded to the general understanding of all the member States concerned.

(b) At the time we received the application (February 1 in the above example), we are not aware that Authority B is also going to request the examination results from us. The application is therefore dealt with in accordance with the general rules, i.e.

(aa) the breeder who has filed the variety with us is required to send to us for examination the requisite propagating material on the basis of his application.

(bb) The breeder is required to pay the full examination fee and not only an administrative fee for the taking over of results available as a result of examination by another Office.

If then, subsequently (March 1 in the above example), an Authority B requests examination results, we assume with respect to that Authority B that the variety was already being processed at our Office at that time. If we had based ourselves on the date of the application being received by Authority B (January 1 in the above example), the following problems would have arisen: we would have to have cancelled the procedure that had already been put in hand. The breeder would no longer be required to submit propagating material to us on the basis of his application since it would be the task of Authority B to request its submission. In addition, according to our existing cost regulations, the breeder would not be required to pay the full annual examination fee but simply a once-only administrative fee on receipt of the final examination results. It therefore appeared to us that administrative reasons also spoke in favor of our procedure.

In the meantime, we have learnt that at least one further member State of the Union has opted for the above alternative II. We feel it would be useful to discuss this question in order to achieve a uniform procedure.

2. Time Sequence of a Number of Requests

The need to settle the question in paragraph 1 also concerns the time sequence of requests from a number of Authorities (B, C, D) received by Authority A since, in this case, great importance attaches to whether Authority B, C or D is responsible for submitting the propagating material.

In any event, it must be ensured that the reply given by Authority A on the reverse of the Form for the Request of Examination Results remains unchanged. It would lead to considerable procedural difficulties, at least for Authority B, if the reply given to Authority B were to be subsequently amended, as a result of later requests from further member States received by Authority A.

3. Procedure where an Application is Withdrawn

This question is first to be cleared up bilaterally between the member States. It would, however, seem desirable to achieve a common understanding for the long term.

We have proceeded to date in those cases in which we have been the examining Authority, Authority A, in essentially the same way as described by the French Delegation in document CAJ/V/4, paragraph 6, as follows:

(a) We carry out the examination exclusively at the request of Authority B.

(aa) The breeder withdraws his application from Authority B after we have already started our examination. In such cases, we ask Authority B for the examination fee for the examination year concerned.

(bb) The breeder withdraws his application and Authority B advises us of the withdrawal before an examination year has begun. In such cases, we make no charges to Authority B. This procedure complies with our national regulations on fees.

(b) We carry out the examination as a result of an application filed with our Office or with a third Authority C and the applicant withdraws his application with Authority B before Authority B can process the examination results to arrive at a decision and Authority B advises us thereof.

(aa) The examination results have already been forwarded. In such cases, we request Authority B to return the examination results and make no charges to Authority B.

(bb) The examination results have not yet been forwarded. We do not communicate the results (even if we have already compiled them for Authority B) and make no charges to Authority B.

4. Procedure where an Application is Withdrawn and a New Application Subsequently Filed

It is possible, and happens in practice, that an application is withdrawn and the variety subsequently submitted again to the same Authority for protection if, in the meantime, no circumstances detrimental to novelty have occurred. In such cases, we have to treat the second application legally as a completely new application. The date of the application is that of the renewed application, whereby the date of the earlier application is disregarded completely. This question can also be of importance, where examination results for the variety are requested from another Authority, for the points made in paragraphs 1 to 3 above. We feel that in such a case the second application should be dealt with quite distinctly from the earlier application filed with the same authority. For that reason, we consider it necessary that the matter be clarified between the member States.

[Annex II follows]

MINISTERE DE L'AGRICULTURE

BRUXELLES, le 24-07-1980
Rue de Stassart, 36

ADMINISTRATION

de

L'AGRICULTURE et de L'HORTICULTURE

Monsieur H. MAST

Secrétaire général adjoint

U.P.O.V.

34, Chemin des Colombettes

Ch-1211 Genève 20 SUISSE

VOTRE LETTRE DU

VOS REFERENCES

NOS REFERENCES

ANNEXES

RR/106.92.52/367

OBJET : Note explicative sur la recommandation concernant les taxes en rapport avec la coopération en matière d'examen.

Monsieur le Secrétaire général adjoint,

J'ai bien reçu votre circulaire n°U 570 du 11.07.1980 relative à l'objet sous rubrique et je vous en -08.4 remercie.

Le S.P.O.V. a déjà eu l'occasion d'approuver, comme les autres Etats de l'Union, le projet de recommandation sur les taxes en rapport avec la coopération en matière d'examen, figurant à l'annexe III de votre circulaire, et suggère de soumettre ce projet dans sa forme actuelle au Conseil. D'autre part le S.P.O.V. tient à remercier le Dr M. H. Kunhardt pour avoir préparé, à l'intention des autres Etats membres une note analytique sur les problèmes qui pourront surgir lors de la mise en application de la recommandation.

Cette note appelle les remarques suivantes :

1) Question de l'antériorité

Le Service appuie la pratique adoptée par le Bundessortnamt, pour résoudre le problème illustré par l'exemple donné dans sa lettre. Dans le cas de deux ou de plusieurs demandes de protection pour la même variété, on pourrait préférer que l'Autorité ayant la première enregistré une demande de protection, soit responsable de la fourniture du matériel d'identification et paie la taxe d'examen prévue dans l'Etat de l'Autorité A, qui effectue l'examen.

Il faudra cependant éviter que l'Autorité A ne subisse des perturbations ou des retards lors de l'instruction de la demande déposée dans son propre Etat, occasionnés par une demande d'examen antérieure, mais éventuellement tardive en provenance d'un autre Etat.

Eu égard à ce qui précède, le Service propose ce qui suit :

./..

- a) Dans le cas de deux ou de plusieurs demandes de protection, y compris celle déposée dans l'Etat de l'Autorité A, l'Autorité ayant introduit la première demande d'examen, ou l'Autorité A ayant reçu sa demande de protection avant l'introduction des demandes d'examen des autres Etats, serait responsable de la fourniture du matériel d'identification ; cette même Autorité paierait ou ferait payer la taxe d'examen exigible dans l'Etat de l'Autorité A, qui effectue l'examen.
- b) En plus dans le cas où le demandeur de la protection dans les divers Etats aurait la nationalité de l'Autorité A, celle-ci demanderait au demandeur le paiement de la taxe d'examen prévue dans son Etat. Les autres Autorités paieraient la taxe administrative de 300 à 400 F.S. à l'Autorité A.

2. Procédure en cas de retrait d'une demande.

Le Service peut approuver les points de vue adoptés sous 3,a et 3,b de la lettre du Dr M.H. Kunhardt.

3. Procédure en cas de retrait d'une demande et de nouveau dépôt.

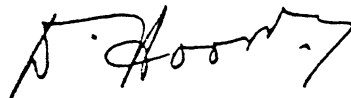
Le Service est d'avis que dans ce cas la deuxième demande doit être considérée comme une demande entièrement nouvelle et qu'il faut instruire celle-ci de façon totalement indépendante de la première demande déposée auprès du même service.

Veuillez agréer, Monsieur le Secrétaire général adjoint, l'expression de mes sentiments très distingués.

Au Nom du Ministre :

Pour le Directeur général ;

f L'Ingénieur en Chef-directeur,



ir. J. RIGOT.

[Annex III follows/
L'annexe III suit/
Anlage III folgt]

PLANTENYHEDSNÆVNET

ANNEX III/ANNEXE III/ANLAGE III

Teglværksvej 10 - Tystofte

DK-4230 Skælskør

Telefon (03) 59 61 41

14. July 1980

PN/80 - 313

UPOV

34, chemin des Colombettes

1211 Geneve 20

Att.: Vice Secretary - General Dr. H. Mast

Dear Dr. Mast,

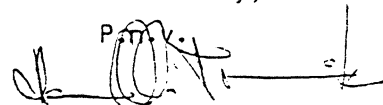
Re: Recommendation on Fees in Relation to Cooperation in Examination.

With reference to my letter PN/80 - 279 of June 27, 1980 and my phonecall in the beginning of July I forward you a few additional items, which should be discussed in connection with the fee-questions in the next CAJ-session. As it was agreed in the April session that you should draw up a list of problems to be discussed I forward you only additional items to the list, but also refer to document CAJ/V/4, dated March 14, 1980.

- a) The priority given requests of examination reports for the same variety from several countries.
- b) The priority given in case not all requests are withdrawn before the examination is completed, e.g. withdrawals of requests no 1 and no 3 before the 2nd examination period begin, whereas requests no 2 and no 4 remain in force.
- c) The examination fee to be paid by the applicant in case of several applications (of the same variety), but only one test and a negative examination report.
 - i) The requests made before examination is carried out.
 - ii) The request(s) made after examination report is available.

As I thank you for your acceptance of my late submitting of comments to the item in question, I remain

Yours sincerely,



Hanne M. Frederiksen

f/Flemming Espenhain

[Annex IV follows/
L'annexe IV suit/
Anlage IV folgt]

ANNEX IV/ANNEXE IV/ANLAGE IV

ANNEXE A LA LETTRE, EN DATE DU 9 JUILLET 1980, de M. M. SIMON,
SECRETAIRE GENERAL DU COMITE DE LA PROTECTION DES OBTENTIONS VEGETALES DE LA FRANCE,
AU SECRETAIRE GENERAL ADJOINT DE L'UNION

EXEMPLES DE DROITS D'EXAMEN POUVANT ETRE PERCUS
DANS LES CAS DE RETRAIT DE DEMANDES D'ACHAT DE RESULTATS

Situation de la variété	Droit à verser normalement 1 = droit annuel	Droit à verser selon le cas du retrait				
			1ère année en cours ou 1ère année terminée	2ème année en cours ou 2ème année terminée	dossier non transmis	dossier transmis ✓
		a - 1	a - 2	a - 3	a - 4	a - 5
Inscrite ou protégée dossier disponible	1 + 1	-	-	-	néant	1 + 1
2ème année d'étude	1 + 1	-	-	1 + 1	-	-
1ère année d'étude	1	-	1	-	-	-
Pas encore en essai	néant	néant	-	-	-	-

- 1 = Droits "D.H.S." d'une année ou montant équivalant au droit d'achat si celui-ci doit être réduit par rapport aux droits d'examen.
- 1 + 1 = Droits "D.H.S." de deux années ou montant équivalant au droit d'achat si celui-ci doit être réduit par rapport aux droits d'examen.
- a - 1 = Cas d'une demande suivie d'un retrait dans les 8 à 20 jours, cas peu fréquent mais ayant déjà existé.
- a - 2 = Si le retrait intervient au cours de la 1ère année d'examen, il paraît normal de faire payer le droit annuel car tout le processus d'étude de la variété a été lancé.
- a - 3 = Même remarque que pour a - 2, en faisant payer les deux droits annuels.
- a - 4 = Si l'avis de retrait parvient avant la transmission du dossier, on peut considérer que l'offre d'achat est annulée.
- a - 5 = Si l'avis de retrait parvient après la transmission des résultats et du dossier correspondant, le contrat entre les deux parties (offre d'achat - vente) a été rempli et paraît difficilement dénonçable.

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Annex IV/Annexe IV/Anlage IV
page 2/Seite 2

ANNEXE A LA LETTRE, EN DATE DU 1er AOUT 1980,
DE M. M. SIMON, SECRETAIRE GENERAL DU COMITE
DE LA PROTECTION DES OBTENTIONS VEGETALES DE LA FRANCE,
AU SECRETAIRE GENERAL ADJOINT DE L'UNION

MINISTERE DE L'AGRICULTURE

COMITE

DE PROTECTION
DES OBTENTIONS VÉGÉTALES

OBJET : RECOMMANDATION SUR LES TAXES EN RAPPORT AVEC LA COOPERATION EN
MATIERE D'EXAMEN

Lettre en date du 5 mai 1980 de Monsieur KUNHARDT

OBSERVATIONS FRANCAISES

- I Question de l'antériorité
Dans l'exemple cité notre préférence va pour la solution 1 qui donne priorité aux informations recueillies dans le pays A chargé de la conduite de l'examen préalable.
- II Ordre d'antériorité dans le cas de plusieurs demandes d'examen
Le raisonnement tenu au point I devrait pouvoir être retenu pour ce point II à savoir, devrait être prise en compte la première date de réception effective de la demande dans le pays A.
- III Procédure en cas de retrait d'une demande
Il convient de se reporter au document français transmis le 9 /07/1980. qui développe une approche sensiblement comparable à celle développée dans le document allemand .

Paris le 26 Juillet 1980

[Annex V follows/
L'annexe V suit/
Anlage V folgt]

ANNEX TO THE LETTER, DATED AUGUST 6, 1980, FROM Mr. K. A. FIKKERT,
LEGAL ADVISER, MINISTRY OF AGRICULTURE AND FISHERIES OF THE NETHERLANDS,
TO THE VICE-SECRETARY GENERAL OF THE UNION

In relation to the technical cooperation and the fees involved, the following groundpattern seems to be appropriate:

For the sake of granting P.B.R. for one variety in n countries, for which these countries use only one technical examination, performed by one of them:

the applicant shall pay:

n x application fee

1 x examination fee (+1350 Sw. fr.)

(n-1)x administrative fee (300 á 400 Sw. fr.)

the country conducting the test shall collect:

1 x application fee

1 x examination fee

(n-1)x administrative fee

the (n-1) countries, not conducting the test, shall collect:

(n-1)x application fee

Which application should be considered as the first one? This question is of importance in connection to the fees and to the ascertainment of the relevant material.

In relation to further applications for the same variety, the earliest filed application should be considered as the first one. Such a determination, which depends only on facts, is in the interest of the transparency of a plural procedure. It can prevent possible complications in answering the questions: "Which (kind of) fee is due in each of the concerned countries" and "which sample is the relevant one". In a country where the application has the earliest filing date, the applicant has to pay the examination fee of that country, in the other countries their respective administrative fees. For all applications, the material belonging to the firstly filed application is the relevant material.

Since the applicant has to indicate earlier applications for the variety, an authority can very well establish whether the application is the first one or not and, subsequently, what fee the applicant is due.

If a first application is withdrawn, the second will take its place: as far as the examination fee is not (to be) paid as a result of the withdrawn application, it should be paid as a result of the new "first application". No administrative fee is due anymore for that particular application.

When should fees be due?

- application fee: with the filing of the application;
- examination fee: for each testing period, as soon as a test will start;
- administrative fee: as soon as the testing authority starts drawing up the report, no matter it is a positive or negative one.

Examples.

(Country A performs the tests)

1. Application only in country B.

Payments

- a. with the filing of the application:
 - applicant to B: application fee of country B
- b. when the first testing period starts:
 - applicant to B: examination fee of country B for the first testing period;
 - B to A: examination fee of country A for the first testing period;
- c. when the second testing period starts:
 - applicant to B: examination fee of country B for the second testing period;
 - B to A: examination fee of country A for the second testing period.

In case the application is withdrawn, B is due to A the fees for the testing which has already been started or concluded.

2. First application in country B, second in country A.

Payments

- a. with the filing of the respective applications:
 - applicant to B: application fee of country B;
 - applicant to A: application fee of country A;
- b. when the first testing period starts:
 - applicant to B: examination fee of country B for the first testing period;
 - B to A: examination fee of country A for the first testing period;
- c. when the second testing period starts:
 - applicant to B: examination fee of country B for the second testing period;
 - B to A: examination fee of country A for the second testing period;
- d. when the report will be drawn up:
 - applicant to A: administrative fee of country A.

In case the application is withdrawn in country A, but maintained in country B, the applicant is no administrative fee due to A. After all, country A will get its reimbursement through B.

In case the application is withdrawn in country B, but maintained in country A, the applicant is due to A, instead of the administrative fee, the examination fee of country A for that part of the test for which he is no fee due to B. (as a result of his former application in B).

3. First application in country A, second in country B.

Payments

- a. with the filing of the respective applications:
 - applicant to A: application fee of country A;
 - applicant to B: application fee of country B;
- b. when the first testing period starts:
 - applicant to A: examination fee of country A for the first testing period;
- c. when the second testing period starts:
 - applicant to A: examination fee of country A for the second testing period;
- d. when the report will be drawn up:
 - applicant to B: administrative fee of country B;
 - B to A: administrative fee of country A.

In case the application is withdrawn in country A, but maintained in country B, the applicant is due to B, in stead of the administrative fee, the examination fee of country B for that part of the test for which he is no fee due to A (as a result of his former application in A). B is due to A, in stead of the administrative fee of A, the examination fee of country A for the above mentioned part of the test.

In case the application is withdrawn in country B, but maintained in country A, the applicant is no administrative fee due to B and B is no administrative fee due to A.

4. First application in country B, second in country C.

Payments

- a. with the filing of the respective applications:
 - applicant to B: application fee of country B;
 - applicant to C: application fee of country C;
- b. when the first testing period starts:
 - applicant to B: examination fee of country B for the first testing period;
 - B to A: examination fee of country A for the first testing period;
- c. when the second testing period starts:
 - applicant to B: examination fee of country B for the second testing period;
 - B to A: examination fee of country A for the second testing period;
- d. when the report will be drawn up:
 - applicant to C: administrative fee of country C;
 - C to A: administrative fee of country A.

In case the application is withdrawn in country C, but maintained in country B, the applicant is no administrative fee due to C and C is no administrative fee due to A.

In case the application is withdrawn in country B, but maintained in country C, the applicant is due to C, in stead of the administrative fee, the examination fee of country C for that part of the test for which he is no fee due to B (as a result of his former application in B). C is due to A, in stead of the administrative fee of A, the examination fee of country A for the above mentioned part of the test.

ANNEX VI/ANNEXE VI/ANLAGE VI



THE PLANT VARIETY RIGHTS OFFICE

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FROM THE CONTROLLER

Our ref: PVA 422A
Your ref: U 570
-08.4

29 July 1980

Dr H Mast
Vice Secretary-General
UPOV
34 chemin des Colombettes
1211 Geneve 20

Dear Dr. Mast,

RECOMMENDATION ON FEES IN RELATION TO COOPERATION IN EXAMINATION

I refer to your letter of 11 July with which you enclosed the contribution from the Federal Republic of Germany and the Recommendation on Fees.

Perhaps I may say at the outset that I do not think any Recommendation on Fees can, or should, attempt to deal with every case which might arise. It should be a "Recommendation" in the true sense of the word and its terms will suffice in the majority of cases. In a minority of cases, the terms of the Recommendation may not suffice but it is I think not beyond UPOV to draw up a code which might be used in conjunction with the Recommendation. I will comment on this later but may I first of all comment on Mr Kunhardt's letter.

All Member States requesting reports for another Member State are using the same forms and the requesting State(s) must give the date on which the application was filed with them. If chrysanthemums are taken as an example, Authority A would be the UK and for the sake of illustration, the Netherlands might be B and the Federal Republic C. The following situations might then arise.

- I. Application filed in UK 1.1.80
 " " " Federal Republic (C) 8.1.80
 " " " Netherlands (B) 15.1.80

We would complete the forms sent by B and C to the effect that tests would be undertaken on the basis of an application already submitted (in this case the application submitted to the PVRO).

- II. Application filed in UK 8.1.80
 " " " Federal Republic (C) 1.1.80
 " " " Netherlands (B) 21.1.80

The form to the Federal Republic would be completed to the effect that tests and trials would be undertaken on the basis of their request

/OVER

The form to the Netherlands would be completed to the effect that tests would be undertaken on the basis of a request already submitted.

In both I. and II. above, the fee position should be clear. In case I., the applicant would be asked by the UK (Authority A) to pay the fee; in case II. the applicant should be asked by the Federal Republic (Authority C) to pay the fee and the UK and Netherlands authorities (A and B) should not ask the applicant to pay a fee to them.

In the circumstances of case I., no difficulties could arise but difficulties could arise in case II. if there had been a human error and Authority C (the Federal Republic) found in say April 1980 that it had not sent its form to the UK (Authority A). The position in the Netherlands would not be embarrassed but that in the UK could be because plant material might have been requested on UK's priority, planted and the fee for the first testing period charged. In such a circumstance, we could not return the form to the Federal Republic. The position would have to be explained and the UK's priority as originally recorded for dealing with the case would in my view have to continue. The UK would collect the second testing fee from the applicant and the Federal Republic would not ask for any fees. To switch horses in mid-stream in such a circumstance would be confusing in the extreme and must be avoided. But this cannot be catered for in a Recommendation and we must either resolve to deal with the exceptions by the use of good common sense or draw up a Code.

The problem of withdrawals of applications has been raised in the past. What we must achieve is that if any work has been undertaken against an application filed only in one Member State, that work must be paid for. Let me illustrate my point -

- I. UK (Authority A) tests a chrysanthemum variety only for Authority B. In the middle of the second testing period, the application is withdrawn but the testing fee for that second period must be paid by Authority B.
- II. UK (Authority A) tests a chrysanthemum variety for Authorities B and C. Authority C withdraws its request in the middle of the second testing period but the application still proceeds for B. Authority B will pay the second testing fee and since A has thus received a fee for its work, no fee for the second testing period would be payable by Authority C.

In conclusion, I would like once more to emphasise the importance which the UK attaches to the adoption at the next UFOV Council meeting of the Fees Recommendation. Only through this can the maximum international co-operation in examination be achieved.

Yours sincerely,
Patrick Murphy
P W Murphy

RECOMMENDATION ON FEES IN RELATION TO COOPERATION IN EXAMINATION

adopted by the Council at its fourteenth ordinary session

The Council of the International Union for the Protection of New Varieties of Plants,

By virtue of Article 21(h) of the International Convention for the Protection of New Varieties of Plants (hereinafter referred to as "the Convention"),

Having regard to Article 30(2) of the Convention,

Having regard to the agreements on cooperation in examination already concluded between member States on the basis of the UPOV Model Agreement for International Cooperation in the Testing of Varieties,

Considering it of the utmost importance that cooperation in examination be based on a uniform and clearly defined system of fees and considerations,

Considering that the experience of cooperation in examination acquired on the basis of the aforesaid agreements makes it desirable to replace the Resolution on Fee Questions adopted during its seventh ordinary session, in October 1973 (document UPOV/C/VII/23), by the following,

Recommends to the member States of the Union that they establish or amend, as the case may be, their national plant variety protection legislation or practice, on the one hand, and the agreements on cooperation in examination, on the other hand, in accordance with the following principles.

(1) Where the authority of one member State of the Union ("Authority B") takes over an examination report established by the authority of another member State of the Union ("Authority A") for the purposes of its own procedure or of a procedure before a third authority:

(a) Authority B shall pay a fixed consideration equivalent to 350 Swiss francs to Authority A;

(b) in the State of Authority B, the applicant for the protection of the variety to which the examination report relates

(i) shall be exempted from the examination fee, and

(ii) shall be charged an administrative fee which shall at least correspond to the consideration referred to in subparagraph (a) above.

(2) Where Authority A conducts an examination at the request of Authority B:

(a) Authority B shall pay to Authority A a consideration equal to the appropriate examination fee payable in the State of Authority A;

(b) in the State of Authority B, the applicant for the protection of the variety to which the examination report relates shall be charged an amount which shall, as far as possible, correspond to the consideration referred to in subparagraph (a) above.

(3) Member States of the Union shall, as a target fee at least for the economically most important genera and species, fix the fee for the national examination period of two years or growing cycles at an amount corresponding to about 1350 Swiss francs unless special reasons justify the fixing of a different fee level.