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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## COUNCIL

Twenty - third Ordinary Session  
Geneva, October 17 to 18, 1989

## DETAILED REPORT

adopted by the CouncilOpening of the Session

1. The Council of the International Union for the Protection of New Varieties of Plants (UPOV) held its twenty-third ordinary session in Geneva on October 17 and 18, 1989.
2. The session was presided over by Mr. W.F.S. Duffhues (Netherlands), President of the Council.
3. The list of participants is given at Annex I to this report.
4. The indented paragraphs are taken over from the report on the decisions of the Council, which the latter adopted at its meeting of October 18, 1989 (document C/XXIII/13).

Adoption of the Agenda

5. The Council adopted the agenda as appearing in document C/XXIII/1 Rev.

Situation in the Legislative, Administrative and Technical Fieldsa. Statements by Representatives of States (Member States and Observer States) and International Organizations

6. The Council noted the declarations made under this agenda item.

The main information given under this agenda item is recorded below.

1. Statements by Representatives of Member States

7. South Africa.— As regards legislative and administrative developments, fees had been increased by 20% on average during the past year. In the related field of regulations on the seed and seedling trade, action was being taken to introduce variety lists for deciduous fruit trees, vine and potato.

8. The South African seed industry had been restructured and set up a new body, the South African National Seed Organization (SANSOR). One of the aims of SANSOR was to administer plant breeders' rights on behalf of its members and carry out the Seed Certification Scheme as legally prescribed by the Registrar of Plant Improvement as part of the rationalization of the Department of Agriculture of South Africa.

9. Between October 1, 1988 and September 30, 1989, 89 applications for protection had been filed (including 51 for South African varieties) and 54 titles of protection granted.

10. Germany (Federal Republic of).— As regards legislation, a preliminary decision had been reached on the question of the "farmer's privilege". The professional organizations had agreed to a draft law whose implications in terms of the scope of protection were the following: in future, only the holder of protection would be allowed to engage in the propagation of protected varieties of ornamentals, fruit species, road-side and ornamental trees and shrubs and forest trees and, subject to the principle of exhaustion, in the marketing, or importation to that end, of plants or parts of plants of such varieties. Acts carried out for private purposes were excluded from the scope of application of protection. In practice, the result was that the "farmer's privilege" would be maintained in respect of sexually reproduced species, potato and vine.

11. Bilateral cooperation in examination had been continued. The agreements concluded with the Netherlands and Sweden had been expanded to include other taxa.

12. During the past year, 1,005 applications for protection had been filed. To date, 3,405 varieties were protected. Since August 1988, protection was available for virtually the entire plant kingdom. In comparison with the previous situation, in which protection was granted primarily in respect of genera and species, not families, this had led to the submission of 35 additional applications.

13. A workshop on the examination of varieties of *Elatior Begonia* and *Pelargonium* had been held at Hanover on June 1 and 2. Its most significant result had been general acceptance of minimum distances in those species. The distances had been established so as to enable an average expert to identify each variety as being distinct. That principle was applied in the Federal Republic of Germany in respect of all species.

14. The twelfth Congress of the European Association for Research on Plant Breeding (EUCARPIA) had been held at Göttingen from February 28 to March 3, 1989. Within the framework of the Congress, a specialized symposium had been organized to examine intellectual property in relation to new plant material. The lectures had been published in the form of a book.

15. A study had been undertaken with a view to introducing a special system of protection for animal breeds. A system comparable to that of plant variety protection could be expected to take shape if the current study met with a favorable response.

16. Australia.- The implementation of the plant variety protection system was proceeding as scheduled. At present, it covered some 300 taxa, including most of the commercially important species. By March 1990, the system would be extended to all plant species.

17. The examination system adopted in Australia was operating satisfactorily. That could be explained by two main factors: first, field examination was carried out on the applicant's trials by the examiner of the Office of the Registrar of Plant Variety Rights and, secondly, trial results were published in an official journal, thereby giving interested parties a chance to object within a period of six months.

18. To date, a total of 123 applications had been received, 55 of which had been submitted during the past year. They covered 33 genera. Twenty-eight titles of protection had been granted so far. At present, some three quarters of the applications were submitted by foreign breeders, who were more familiar with the system of plant variety protection. The interest of Australian breeders in that system was growing very rapidly.

19. Special attention was being devoted to the breeding of new varieties of native species. The Australian authorities were looking into the possibility of concluding bilateral agreements for cooperation in examination with several member States in order to allow Australian breeders to enjoy protection in those States.

20. Belgium.- The list of protected taxa was currently being revised and consideration had been given to the extension of protection to more than 60 taxa. That called for a revision of agreements on cooperation in examination.

21. The threshold of 1,000 applications for protection had been overstepped in the past year. By August 31, 1989, 1,010 applications had been filed and 624 titles of protection granted, 364 of which were still in force. The titles granted covered 42 taxa (the law was currently applicable to 168 taxa).

22. Denmark.- Since the last session of the Council, protection had been extended to *Campanula* and *Clematis*, varieties of which were to be examined in the United Kingdom.

23. As from January 1, 1991, variety examination would have to be entirely financed from fees. Half the present deficit would have to be covered by January 1, 1990.

24. A new cooperation agreement had been concluded with Sweden on December 1, 1988; it had then been extended to other species on March 15, 1989. The agreement with the United Kingdom had been expanded on January 1, 1989.

25. The pilot project for the examination of varieties by breeders had been continued in 1989. Its results were to be evaluated and examined at the end of the month. Judging from experience, the examination of varieties by different persons at different locations did not produce immediately comparable results in spite of the improved technical guidelines.

26. The following table sums up the use of the plant variety protection system :

	1988	1989*
Number of applications for protection, including: - agricultural crops	244	200
- fruit crops	95	
- vegetables	3	
- ornamentals	5	
	141	
Number of certificates issued, including: - agricultural crops	165	198
- fruit crops	56	
- ornamentals	5	
	104	

\*up to September 22

27. As in many other countries, discussions were still under way with the Patent Office on possible solutions to the problem of the interface between plant variety protection and patents. Although those discussions had yet to produce results, they had helped to improve mutual understanding of the two systems.

28. Lastly, it had been decided to restructure the services of the Ministry of Agriculture responsible for varieties, seed and seedlings. A new Plant Directorate would be in charge of the following main questions as from January 1, 1990: seed testing, seed certification, plant health, variety testing (including testing for the purposes of plant variety protection), gene technology as applied to plants.

29. Spain.- During the past year, the revision of the law on plant variety protection had been completed; the draft law had been submitted for comment to the various authorities concerned in the Ministry of Agriculture.

30. Fees had been increased by some 5%, with effect from January 1, 1989.

31. Protection had been extended to strawberry with effect from March 18, 1989. Plans were being made for the extension of protection to all vegetables and ornamentals. In that process, account would be taken of the scope for cooperation in examination. Protection should shortly be extended to cotton.

32. During the past year, 156 applications had been filed, thereby bringing the total to 1,128 since the entry into force of the law. The Plant Variety Protection Board would be meeting in the near future and was expected to grant some 120 more titles of protection.

33. United States of America.- On August 22, 1989, the Patent and Trademark Office had published the final version of the rules pertaining to the deposit of biological materials for patent purposes. Those regulations would take effect on January 1, 1990.

34. France.- As regards legal developments, case law was once again the focus of attention. In July of this year, the Court of Cassation handed down its decision concerning the question of the novelty of an inbred line of maize that had never been marketed as such, but which had been used as a component in hybrids that had been marketed. It confirmed the point of view of the Committee for the Protection of New Plant Varieties, according to which such a line lost its novelty the first time it was used in the commercial production of a hybrid.

35. With regard to the question of "custom cleaning" (cleaning by a cooperative of seed produced by a farmer to meet his own needs), it was recalled that, on September 13, 1988, the Court of Appeal of Nancy had upheld the decision handed down in the first instance in May 1987, considering that farmers had no right to produce seed of protected varieties on their own farms. That ruling had raised important issues. A sectorial agreement had been concluded under the auspices of the Ministry of Agriculture on July 4, 1989, between the national professional organizations concerned. Under the terms of the agreement, proceedings would not be instituted against farmers who cleaned food grain to obtain seed, provided that they used their own equipment or called upon another farmer by way of mutual assistance. However, the difficulties that persisted in spite of that agreement might lead the authorities to introduce stricter provisions in the form of legislation or administrative regulations.

36. The legal structure of the Group for the Study and Control of Varieties and Seed (GEVES), the body in charge of variety examination, had been modified so as to provide it with greater financial flexibility, while maintaining its scientific status within the National Institute of Agronomic Research.

37. A workshop on the examination of varieties of maize had been held at Versailles on October 2 and 3, 1989. Discussions had centered mainly on the use of new examination methods. It had been pointed out that such methods would not help to achieve a stable definition of minimum distances between varieties and the important characteristics considered in granting a title of protection. However, the use of those methods would establish the scientific credibility of the "right of dependency" which was to be introduced in the Convention.

38. In France also, thought was being given to the protection of intellectual property in relation to animals. The process was leading to consideration of a system akin to plant variety protection.

39. Hungary.- No changes had affected the system of plant variety protection in the past year.

40. Eighty patents had so far been granted for plant varieties. In 1989, 52 applications had been filed for 24 Hungarian varieties, 27 foreign varieties and one variety of joint breeding. In 1989, the Institute of Agricultural Qualification had carried out tests on varieties belonging to 26 species. In the case of maize, it had used not only morphological characteristics, but also electrophoresis in testing for distinctness and homogeneity.

41. The Institute of Agricultural Qualification had hosted a meeting of experts from various States members of the Council for Mutual Economic Assistance (CMEA), who had come to discuss the legal and technical aspects of plant variety protection. Their visit had been considered very useful and likely to promote accessions to the UPOV Convention.

42. Ireland.- No significant development was reported for the past year.
43. Israel.- The experience of 16 years since the entry into force of the law had shown the need to adopt measures aimed at preventing the submission of void applications. Applicants were now required to pay the fee for the examination of a variety, as well as registration fees, at the time of application. Furthermore, deadlines had been set for the submission of plant material for the purposes of variety examination. As a result, the number of applications received had been halved as compared with the same period in 1988.
44. The agreement with the Netherlands on cooperation in variety examination had entered into force during the year. Varieties of Aster were being tested at the request of the Netherlands, and examination reports on varieties of Gladiolus had been transmitted to the services of that country. On April 17, 1989, an agreement had been concluded with South Africa; the latter was to examine varieties of Lachenalia and chinchinchee on Israel's behalf.
45. Protection had so far been extended to 106 genera and species. Since the last session of the Council, 171 applications had been submitted, 142 of which related to ornamental varieties (84 of them submitted by Israeli breeders and 58 by foreigners). Titles of protection had been granted for 82 varieties (14 agricultural crops and vegetables and 68 ornamentals), only 24 of them to foreign breeders.
46. Italy.- Since the last session of the Council, 94 plant patents had been granted, principally for the following species: carnation, gerbera, wheat, lettuce, maize, apple, potato, peach, poplar, pea, tomato, rice, rose, soya bean.
47. Japan.- The work on the revision of the Convention had aroused great interest among professionals from agriculture, the seed trade, the chemical industry, etc. In view of their interest, the Ministry of Agriculture, Forestry and Fisheries had set up in September a Committee on Protection for Results of Biotechnology, composed of representatives of the interested circles, whose task was to study how the plant variety protection system should develop in the future. The Committee was to submit an interim report in January 1990.
48. The number of applications submitted each year since the enactment of the Seeds and Seedlings Law had been increasing steadily, totalling 3,734 by the end of August 1989.
49. New Zealand.- As intended, the system of protection was to be extended to fungi on the basis of an amendment to the relevant law.
50. The question of the "farmer's privilege" was currently the subject of very intensive discussion in New Zealand. Early in the year, the Plant Variety Rights Office had proposed that farmers should be denied the possibility of producing their own seed, because of the very small proportion of commercial seed they used and the resulting low returns to breeders; for example, the proportion was only 25% for the most widely grown variety of wheat. The farmers acknowledged that there was a problem for breeders and that that problem might have adverse consequences for the entire farming industry. However, they had not yet accepted the fact that the "farmer's privilege" must be removed.

51. An agreement on cooperation in examination was currently being drawn up with the United Kingdom to provide, inter alia, for New Zealand to examine varieties of indigenous species for the United Kingdom. Other member States had also been approached.

52. Lastly, responsibility for plant variety protection was to be transferred from the Ministry of Agriculture to the Ministry of Commerce. The idea was to bring all intellectual property systems under the same administrative umbrella, a step which was bound to produce advantages, not least because the Ministry of Commerce gave higher priority to the promotion of intellectual property than did the Ministry of Agriculture. Besides, that should make it easier to overcome the problem of relations between patents and plant variety protection.

53. The following table sums up the use of the system of plant variety protection for the year ending on September 30, 1989:

	Applications received	Titles granted	Titles in force
Arable crops and vegetables	6	4	53
Fodder crops	5	3	22
Ornamental plants	46	35	258
Fruit crops	28	8	39
Total (Preceding year)	85 (81)	50 (59)	372 (349)

54. Netherlands.— Special importance was being attached to the revision of the Convention and the debate on the interface between patents and plant variety protection.

55. As regards the first issue, the Netherlands was in favor of convening a diplomatic conference early in 1991, even if the bodies in charge of its preparation still failed to agree on the amendments proposed. Some of the proposals in question were considered to be of such importance that Dutch legislation was to be amended accordingly in the near future, before the Convention was revised. That applied to the extension of protection to the entire plant kingdom and the extension of the duration of protection.

56. With regard to the second issue, the Government of the Netherlands had submitted a memorandum to Parliament. The main conclusions set out therein were as follows:

(i) plant breeders' rights must be strengthened;

(ii) patented plant material must be freely available for research and development, and varieties thus created must be eligible for plant breeders' rights;



(iii) authorization by the patent holder, in the form of a license, must be obtained for the exploitation of a variety protected by a plant breeder's right;

(iv) the Patents Act must be modified in order to provide for compulsory licensing to subsequent breeders under reciprocal grant of a license under the plant breeder's right or against equitable remuneration, or a combination of both.

57. Following the extension of protection to 29 taxa in February, a further extension to 24 taxa had recently taken effect.

58. The application of the Convention to the whole plant kingdom highlighted the necessity of international cooperation in examination. In particular, consideration would have to be given to examination procedures relating to "new" species.

59. United Kingdom.- The Government had decided that examination would have to be self-financing with effect from April 1, 1990. The authorities were in the process of drawing up a new scale of fees.

60. The question of the "farmer's privilege" had also been raised in the United Kingdom; consultations had been initiated with the interested parties. A consensus appeared to be emerging in favor of controlling and limiting the exercise of that "privilege". The authorities in the United Kingdom intended to work out a position on the matter.

61. Over the past year, 556 applications had been submitted and 324 titles of protection granted, in other words, respectively 30 and 15% more than in the previous year.

62. Sweden.- No legislative changes had occurred during the past year.

63. A number of breeders had expressed interest in extending protection to Aronia, Hippophaë, Picea, Populus and Sorbus.

64. As regards the "farmer's privilege", the two major Swedish companies engaged in plant improvement had requested the Government to amend the legislation in force so as to exclude from that "privilege" farm-saved seed cleaned by professional cleaning firms. Their request had been submitted to the authorities and organizations concerned for comment.

65. Several bilateral agreements on cooperation in examination had been revised with a view to increasing the number of species examined for Sweden on that basis and adapting them to the agreements concluded between the States carrying out such examination. Negotiations were under way on the revision of the agreement concluded with France. An agreement had been concluded with Denmark and then revised shortly thereafter.

66. Switzerland.- No legislative or administrative changes had occurred during the past year.

67. So far, a total of 614 applications for protection had been submitted, including 85 that year, and 400 titles had been granted, 356 of which were still in force.

## 2. Statement by the Representatives of Poland

68. Poland's instrument of accession to the UPOV Convention had been signed by the Deputy Prime Minister for Agriculture on September 7, 1989. It had been deposited with the Secretary-General on October 11, which meant that Poland would become a member of the Union on November 11, 1989.

69. No legislative or administrative changes had occurred in the past year. The legislation applied to 225 taxa, in other words virtually all of those that were economically important in Poland.

70. Between the entry into force of the system of protection and October 10, 1989, 135 applications for protection had been submitted and 40 titles of protection granted.

## 3. Statements by Representatives of Non-Member States

71. Argentina.- Argentina was following with keen interest the work on the revision of the Convention aimed at strengthening the system of protection, and its national authorities and interested circles would, in due course, take such decisions as may be necessary to adapt national legislation to the new provisions of the Convention.

72. The seed trade was of great importance to Argentina, a country with a strong agricultural tradition. Accordingly, an agreement had been concluded with the European Communities to promote activities relating to seed in Argentina and cooperation between the two parties in that field. In practice, the agreement would involve trade missions and technical assistance missions, including in the field of legislation.

73. In that connection, the Law on Seed and Phylogenetic Creations together with its implementing decree had already been brought into conformity with the Convention. Indeed, the duration of protection had been extended to 20 years in respect of grapevine and trees and 15 years for other species. Studies had been undertaken with a view to optimizing the administration of the system of protection and thereby to provide more effective protection.

74. Austria.- At the twenty-fifth session of the Administrative and Legal Committee, the Delegation of Austria had requested the Office of the Union to read out the statement recorded below.

75. The Federal Government had submitted a draft law on plant variety protection to the National Council on June 6, 1989. The various political parties considered that preliminary discussions must be held before the actual parliamentary procedure was initiated. Despite the opposition sometimes reflected in the press, it was hoped that those discussions and that procedure would eventually lead to the passing of the law.

76. Austria would be submitting its law to the Council as soon as possible and would be seeking the latter's opinion on its conformity with the provisions of the Convention. The Federal Ministry of Agriculture and Forestry had undertaken preparations for Austria's accession to UPOV; the Federal Institute of Agriculture, which would subsequently be the body in charge of plant variety protection, was collaborating with the Ministry in that process. The law on plant variety protection and the country's accession to UPOV were due to take effect simultaneously, on July 1, 1990; however, it was uncertain whether that deadline could be met.

77. Egypt.- The Delegation of Egypt had no specific statement to make on the agenda item under consideration. However, its participation in the session, following a request by the Deputy Prime Minister and Minister of Agriculture and Land Reclamation, reflected Egypt's interest in the protection of plant varieties.

78. Finland.- At the twenty-fifth session of the Administrative and Legal Committee, the Delegation of Finland had requested the Office of the Union to read out the statement recorded below.

79. As had been pointed out at the last ordinary session of the Council, the Ministry of Agriculture had come to the conclusion that legislation on plant variety protection could usefully be introduced in Finland. After consulting the Government bodies concerned, it had set up a committee in charge of drafting a law conforming to the Convention. The draft law in question would be ready by the spring of 1990.

80. Kenya.- Although Kenya had passed a Seed and Plant Varieties Act as early as 1972, it had only given effect to certain sections of it, notably those on inspection, testing and certification of seed. An attempt had been made to set up a harmonized system of variety evaluation as a prerequisite for marketing authorization. Yet, the chapter on plant variety protection was still the most controversial in the Act. The issues that had been raised were of a legal, administrative and technical nature, and of undeniable relevance in the context of a developing country. However, Kenya was committed to protecting the intellectual property rights of innovators. Accordingly, implementing regulations concerning horticultural crops had been drafted with the assistance of experts from France and submitted to the Attorney General for action. However, the system of protection had yet to be extended to other species.

81. In that connection Kenya wished to seek the assistance and advice of UPOV with a view to establishing an effective legal system and enjoying the benefits of the Convention.

82. Morocco.- Morocco was aware of the importance of plant variety protection for the development of agriculture, whose intensification depended, *inter alia*, on the use of high-yield varieties suited to local conditions. Accordingly, Morocco continued to promote research, both public and private. For example, mixed economy companies had been set up and authorized to pay royalties to national and foreign breeders. Furthermore, the Government was giving high priority to the development of seed and seedling control bodies, specialized training and the equipment of variety control laboratories and stations.

83. Philippines.- The Philippines was following UPOV's work with interest and hoped that the question of accession to the Convention would be considered once it had become more familiar with that work.

84. Republic of Korea.- The Republic of Korea was gratified by the fact that it had been invited to participate in the session and was anxious for UPOV's assistance in setting up a system of plant variety protection.

85. In that connection attention was drawn to three laws, namely, the Major Crops Seed Law, which provided a basis for the establishment and operation of

the Government organizations with exclusive responsibility for the propagation and distribution of quality seed of food crops; the Seeds and Seedlings Control Law, which was intended to protect growers against the adverse effects of poor quality seed or seedlings of major vegetable and fruit species and fungi; and the Patent Law, which provided for the granting of plant patents on asexually propagated plant varieties, with the exception of tuber plants, tuberous-rooted plants and bulbous plants.

86. The first two laws did not provide for the protection of breeders' rights. Besides, although several applications had been submitted, no plant patents had been granted as yet. Since 1984, the question of distinctness had posed a problem from the point of view of seed control. Consideration was therefore being given to the necessity and possibility of amending the above-mentioned laws with a view to promoting the development of varieties capable of adapting to changes in growing conditions and meeting the future needs of farmers. In that connection, UPOV's model law would no doubt provide useful guidance, and the assistance of UPOV and its member States would be welcome.

87. Czechoslovakia.- Czechoslovakia, which was represented at the Council for the first time, was contemplating accession to the Convention. Accordingly, the Czechoslovak authorities had discussed the draft law on the protection of plant varieties and animal breeds with UPOV representatives in Prague in December 1988 and subsequently at Geneva in September 1989. The draft had been found to be in conformity with the Convention, and the comments made on it related only to points of detail; they had been taken into account in the finalization of the draft.

88. The draft had been submitted to the Federal Assembly at the beginning of October 1989; the final reading was scheduled for November 14 and the law was expected to enter into force on January 1, 1990. Czechoslovakia planned to accede to the Convention in 1990; the Council's opinion on the law's conformity with the provisions of the Convention would be sought as soon as the law had been passed.

89. Turkey.- Commercial activity involving varieties, seed and plants was regulated by Law No. 308 of 1963 Concerning Registration, Control and Certification of Seed. In 1963, the Ministry of Agriculture, Forestry and Rural Affairs became a member of the International Seed Testing Association (ISTA). Over the past two years, the regulatory system had been revised following the opening up of the Turkish seed market and the decision to adopt international standards. The OECD schemes had gone into effect on May 16, 1989; also in May, the regulatory provisions had been approved by the competent OECD body.

90. The Government was giving high priority to plant variety protection, together with the adjustment of procedures, the promotion of the international seed trade and the promotion of the activities of private sector seed companies. However, the introduction of protection was not a simple matter. Now that the concept had been established, the law remained to be drafted and put into effect.

91. Turkey was aware of the fact that accession to UPOV would help it obtain better varieties and speed up the process of genetic improvement. In order to make headway, consideration was being given to the addition of another Article to Law No. 308, 1963, whereby the Government would be allowed to legislate by enacting regulations. A proposal to that effect had been submitted to the Ministry and experts were already at work on draft regulations.

#### 4. Statements by Representatives of Intergovernmental Organizations

92. European Communities (EC).- During the past year, the Commission's proposal for an EC Council Directive on the legal protection of biotechnological inventions, which had been made on October 21, 1988, had been examined in depth by the Council of Ministers and the European Parliament; the latter, however, had yet to express an opinion on the matter. It was recalled that the proposal was aimed at establishing a uniform interpretation of certain aspects of the European Patent Convention in order to promote the development of biotechnology within the Community.

93. The Commission's draft proposal for EC Council Regulations on Community breeders' rights had been the subject of in-depth consultations since January 1989, both among experts of member States of the Communities and among the non-governmental organizations concerned. Further consultations were to be conducted with government experts with the aim of submitting a proposal by the Commission to the Council of Ministers by the end of the year. One of the objectives was to bring the proposal into conformity with the present text of the Convention and, whenever predictable, with the new text that would result from its current revision. In that connection, the Commission thanked the Office of UPOV for its cooperation in the course of consultations.

94. Organisation for Economic Co-operation and Development (OECD).- As regards the OECD schemes for the certification of seed intended for international trade, Australia, Finland and Turkey (members of the OECD) had extended their application. Morocco and Uruguay had joined the schemes, Costa Rica had submitted an application for admission and Zimbabwe was in the process of doing so.

95. From a technical point of view, post-control procedures were currently being reviewed with a view to reconciling divergences that had been observed in their application in certain member States. Furthermore, Rules for the certification of additional hybrids had been developed. Standards were being worked out for cereals. Progress had been slower in the case of oil seed crops, because of the needs to address both the self-incompatibility and the cytoplasmic male sterility hybridization methods.

96. A study had been undertaken in the OECD on biotechnology and its impact on agriculture. Furthermore, the OECD was devoting increasing attention to environmental issues. A working group responsible for integrating agricultural and environmental policies was being revived under the aegis of the Environment Committee with the cooperation of the Committee for Agriculture.

97. European Patent Organisation (EPO).- The European Patent Organisation thanked UPOV for allowing the European Patent Office to take part in its meetings, including its work on the revision of the Convention. Such work was being followed with keen interest because the revision was liable to interfere with the European Patent Convention (EPC) and with the practice of the European Patent Office (EPO). The latter was governed by Article 53(b), which excluded plant varieties from patentability on account of the existence of the UPOV Convention.

98. According to the European Patent Office, three of the proposed provisions clashed with basic principles of patent law, namely, the stipulation of the prohibition of the choice of a system of protection (Article 1, paragraph 1);

the definition of "variety" (Article 2(ii)); and the limitation of the effects of other industrial property rights on the exploitation of varieties protected under the UPOV Convention.

99. The prohibition of the choice of a system of protection, which found confirmation in Article 53(b) of the EPC, dated back to a time when the description of an invention generally lacked the clarity and detail needed to meet the established reproducibility standards. The situation had changed, however, not least because the description could now be supplemented by the deposit of a living organism. The prohibition of the choice of a system of protection, set out rigidly in the UPOV Convention, appeared to go against the general trend in industrial property law, particularly in the light of the work carried out by WIPO on a draft treaty on the harmonization of patent law. The lifting of that prohibition would by no means imply opening the system of patents to plant varieties, but would allow national or regional sovereignty to strike the most appropriate balance, taking account of the interests of the parties concerned.

100. The definition of "variety", read together with the prohibition of the choice of a system of protection, had implications for the system of patents since it would define not only the scope of application of the UPOV Convention, but also the extent of exclusion from patentability. The EPO was concerned about certain restrictive elements, namely, the lack of linkage between the definition of a variety and the conditions of eligibility for protection set forth in Article 6; the inclusion of parts of plants in the definition, which would consequently extend to cell lines and protoplasts, i.e. material which, like microorganisms, traditionally fell into the category of patentable inventions. The EPO understood the breeders' interest in a form of protection covering cellular material that could be used for reproductive purposes without going through the field cultivation stage. In its opinion, however, such protection should be afforded on the basis of the definition of the scope of protection, not the definition of "variety."

101. The purpose of proposed Article 5(5) was to defeat such economic advantages as may be derived from research and development in the field of genetic engineering likely to lead to new genetic components and the insertion of such components into cells and plants derived from those cells.

102. If no satisfactory solution could be worked out with regard to the definition of "variety" and if the prohibition of the choice of a system of protection were maintained, interpretation of Article 53(b) of the EPC, concerning the exclusion of plant varieties from patentability, could be expected to disregard the revision of the Convention and continue on the basis of the 1961 text of the UPOV Convention; the latter dated back to the same period as the Strasbourg Convention of 1962, which had unified certain elements of patent law and served as a basis for Article 53(b) of the EPC.

##### 5. Statements by Representatives of International Non-Governmental Organizations

103. International Association of Horticultural Producers (AIPH).- AIPH actively supported UPOV, for example by encouraging States that were not members of UPOV, but represented in AIPH, to join UPOV and, in cooperation with the Committee of Agricultural Organisations in the European Economic Community (COPA), by promoting the harmonious development of Community breeders' rights in relation to the UPOV Convention. AIPH realized that lengthy discussions on

details might jeopardize prospects for the adoption of a satisfactory new treaty and that developments in the field of biotechnology called for adequate protection. AIPH hoped that compromise solutions could be worked out on the main points at issue, such as the "farmer's privilege" and minimum distances between varieties. It was in favor of maintaining the prohibition of double protection.

104. International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL).- ASSINSEL considered that self-financing of the system of plant variety protection, as mentioned by several delegations of member States, might be an excellent objective, but that it should not necessarily entail an increase in fees. In that connection, consideration should be given to reorganization of the work of the services concerned and cooperation with the users of the system. Furthermore, ASSINSEL was prepared to cooperate with interested parties in States contemplating accession to UPOV in setting up a system of protection.

105. International Chamber of Commerce (ICC).- The ICC's participation in the session was a reflection of its support for UPOV's current work, especially that related to the revision of the Convention, whose objectives and general thrust it approved. The ICC, which had expressed its views in detail at the Fourth Meeting with International Organizations, simply wished to draw attention to the points, which, in its opinion, deserved further consideration: the definition of "variety" and "material"; the interface between plant variety protection and patents, and the establishment of a balanced overall system; the redrafting and simplification of Article 13, concerning variety denomination.

106. International Community of Breeders of Asexually Reproduced Ornamental and Fruit-Tree Varieties (CIOPORA).- CIOPORA had clearly stated its views on the revision of the Convention at the Fourth Meeting with International Organizations and now wished to confine itself to a general policy statement. CIOPORA had always considered that plant variety protection should be integrated in the overall system of industrial property protection and suggested that patents could serve the purpose, subject to minor modifications such as the deposit of samples. Although the general course of events had taken a different turn, recent technological and legal developments had proved the veracity of CIOPORA's theory. Since history could not be rewritten, CIOPORA wished to see UPOV develop and grow stronger. However, it must not remain entrenched in a defensive position for fear of having its authority undermined as a result of the above-mentioned developments.

107. CIOPORA was in favor of leaving the Convention very open and flexible; such a system should facilitate the accession of many countries to UPOV. Future developments would not necessarily be biased towards patents simply because UPOV allowed plant varieties to be protected either by breeders' rights or by patents. Indeed, many varieties were based on an improvement that would not satisfy the inventive activity requirement under patent law.

108. CIOPORA also wished to stress the need to integrate the discussions currently under way, be it in UPOV, in WIPO or in the EC. Discussions on amendments that might usefully be made to the European Patent Convention could also be added to the list. In that connection, CIOPORA welcomed the convening of the session of a joint UPOV/WIPO expert committee and hoped that its outcome would be useful for the protection of plant varieties and biotechnologies alike.

109. Association of Plant Breeders of the European Economic Community (COMASSO).— COMASSO was following with keen interest the work on the revision of the Convention and parallel initiatives, especially the Commission's draft proposal for EC Council Regulations on Community breeders' rights and the Commission's proposal for an EC Council Directive on the legal protection of biotechnological inventions. COMASSO's objective was to secure protection that would be both suited to each subject matter to be protected and balanced. The balance must be struck both within UPOV, in relation to patents, and under the system of patents, in relation to UPOV. Member States would be ill advised to contemplate or adopt measures relating to the two systems of protection which did not guarantee that balance.

110. The delegation of COMASSO had listened with interest to the representatives of member States speaking on the extension of protection in the field of ornamental plants. It had taken note of the observations made on the "farmer's privilege" and observed that the latter reflected a perfectly legitimate assessment of the situation; it wished to stress that an assessment concerning agricultural crops identical to the one that had been made in relation to ornamental plants would be just as legitimate. In that sense, the extension of protection in the field of ornamental plants was bound to be only a first step.

b. Data Assembled by the Office of the Union on the State of Protection in Member States and Cooperation Between Them

111. The Council also noted the contents of documents C/XXIII/5, 6 and 7.

Report by the President on the Work of the Thirty-Ninth and Fortieth Sessions of the Consultative Committee

112. The Council noted the report on the work of the thirty-ninth session of the Consultative Committee as given in paragraph 3 of document C/XXIII/3 and also the oral report by the President on the work of the fortieth session. That session took place on October 16 and had been mainly devoted to the preparation of the current session of the Council.

113. On the basis of a recommendation made by the Consultative Committee, the Council:

(i) proposed to Mr. Barry Greengrass an extension of his contract as Vice Secretary-General up to December 1, 1991;

(ii) requested the Secretary-General to make arrangements for Mr. Greengrass to be promoted to the same level as the WIPO Deputy Director Generals as of November 1, 1989.

114. The Council also expressed its appreciation to Mr. Greengrass for the work done and the activities undertaken within the last 15 months.

Report by the Secretary-General on the Activities of the Union in 1988 and in the First Nine Months of 1989

115. The Council unanimously approved the report by the Secretary-General on the activities of the Union in 1988 and in the first nine months of 1989 as contained in document C/XXIII/2 and document C/XXIII/3.



Progress of the Work of the Administrative and Legal Committee

116. The Council unanimously approved the report on the progress of the work of the Administrative and Legal Committee as contained in document C/XXIII/9. It also noted the oral report given by Mr. J.-F. Prevel (France) on the twenty-fifth session of the Administrative and Legal Committee, of which he had been the ad hoc Chairman.

Progress of the Work of the Technical Committee and of the Technical Working Parties; Report on the Workshops on Variety Examination Held in 1989

117. The Council unanimously approved the reports on the progress of the work of the Technical Committee and of the Technical Working Parties, and the reports on the Workshops on variety examination held in 1989 as contained in document C/XXIII/10 and its two supplements (document C/XXIII/10 Add. 1 and document C/XXIII/10 Add. 2).

118. The Council noted that the question of the setting up of an international variety denomination database would be taken up by the Office of the Union in the context of the documentation to be prepared for the consideration of the question of interactive access to international data (paragraph 4 of document C/XXIII/10 Add. 2).

119. The Council noted that the proceedings of some of the workshops on variety examination which had taken place in 1988 and 1989 had already been published or were in the course of being published. It further noted that it was the intention of the Office of the Union to publish summary reports in a standardized format in "Plant Variety Protection."

120. The Council finally noted with approval the plans for the future work of the Technical Committee and the Technical Working Parties.

Report by the President on the Fourth Meeting with International Organizations

121. The Council noted the oral report by the President on the proceedings of the fourth Meeting with International Organizations.

122. In this context the Council discussed whether the documentation for the preparatory meetings for the revision of the UPOV Convention should be distributed to the interested international non-governmental organizations to enable them to present their views thereon. It agreed that the organizations should be given that opportunity before the documents for the Diplomatic Conference would be finalized, and that relevant decisions in this respect should be taken at the appropriate time by the preparatory meetings.

Examination and Approval of the Program and Budget of the Union for the 1990-91 Biennium

123. Discussions were based on document C/XXIII/4 and its supplement (document C/XXIII/4 Add.).

124. The Council unanimously adopted the program and budget of the Union for the 1990-91 biennium as proposed in document C/XXIII/4, subject to the following amendments:

(i) under the heading "Aims of the Program," paragraph 2(x) would read: "to examine various possibilities for the legal protection of innovations in the field of genetic engineering and biotechnology, and to observe developments relating to the legal protection of innovations relating to animals";

(ii) the contribution units for 1990 and 1991 would be maintained at the same level as for 1988 and 1989, with the balance of 22,000 francs for each of 1990 and 1991 to be taken from the reserve fund;

(iii) the decision to entrust the preparation of the Diplomatic Conference to preparatory meetings for the revision of the UPOV Convention would call for adjustments to be made to the draft program and budget for the 1990-91 biennium, the costs of the meetings being covered from the budget item "Administrative and Legal Committee."

125. The scale of the contributions payable by member States in the month of January of each of the years 1990 and 1991 as approved by the Council is reproduced in Annex II to this document.

#### Plan for the Medium-Term 1992-95

126. Discussions were based on document C/XXIII/11.

127. The Council unanimously noted the plan for the medium term as outlined in document C/XXIII/11.

#### Calendar of Meetings in 1990

128. Discussions were based on document C/XXIII/8.

129. The Council unanimously adopted the calendar of meetings as outlined in document C/XXIII/8.

#### Designation of Auditor

130. Discussions were based on document C/XXIII/12.

131. The Council, noting that the governing bodies of WIPO had renewed the mandate of Switzerland as auditor of the accounts of WIPO, unanimously decided to renew the mandate of Switzerland as auditor of the accounts of UPOV up to and including the year 1993.

132. The Council asked the Secretary-General to thank the Swiss authorities on behalf of the Council for their cooperation.

#### Election of a Chairman and a Vice-Chairman of the Technical Committee

133. The Council unanimously elected Dr. G. Fuchs (Federal Republic of Germany) and Miss Jutta Rasmussen (Denmark) as Chairman and Vice-Chairman of the Technical Committee, respectively, for a term of three years, expiring at the end of the twenty-sixth ordinary session of the Council, in 1992.

134. The Council noted that since its inception, the Technical Committee had been chaired by specialists of agricultural crops, that there was an increasing number of applications for protection for horticultural crops and that, consequently, the problems associated with those crops acquired increasing importance. It was suggested that consideration should be given at the next occasion to electing a chairman from among experts in the horticultural sector.
135. The Council requested the delegation of the United Kingdom to convey to Dr. J.K. Doodson its appreciation for the work he had carried out during his term of office.

Election of a Chairman and a Vice-Chairman of the Administrative and Legal Committee

136. The Council unanimously elected Mr. J.-F. Prevel (France) and Mr. H. Kunhardt (Federal Republic of Germany) as Chairman and Vice-Chairman of the Administrative and Legal Committee, respectively, for the same term of office as mentioned above.
137. The Council requested the delegation of Sweden to convey to Mrs. C. Holtz its appreciation for the work she had carried out during her term of office.

Election of a Chairman of the Technical Working Party for Agricultural Crops

138. The Council unanimously elected Dr. M.S. Camlin (United Kingdom) as Chairman of the Technical Working Party for Agricultural Crops for the same term of office as mentioned above.
139. The Council requested the delegation of Ireland to convey to Mr. D.P. Feeley its appreciation for the work he had carried out during his term of office.

140. This report has been adopted by correspondence.

[Annexes follow]

ANNEX I/ANNEXE I/ANLAGE I

LIST OF PARTICIPANTS/LISTE DES PARTICIPANTS/TEILNEHMERLISTE

I. MEMBER STATES/ETATS MEMBRES/VERBANDSSTAATEN

AUSTRALIA/AUSTRALIE/AUSTRALIEN

Mrs. K.H. ADAMS, Registrar, Plant Variety Rights, Plant Variety Rights Office,  
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DENMARK/DANEMARK/DAENEMARK

Mr. F. ESPENHAIN, Chairman, Plant Novelty Board, Statens Planteavlkontor,  
Skovbrynet 18, 2800 Lyngby

FRANCE/FRANKREICH

M. J.F. PREVEL, Directeur, Bureau de la sélection végétale et des semences,  
Ministère de l'agriculture, 5/7, rue Barbet de Jouy, 75007 Paris

Mlle N. BUSTIN, Secrétaire général, Comité de la protection des obtentions  
végétales, Ministère de l'agriculture, 11, rue Jean Nicot, 75007 Paris

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ITALY/ITALIE/ITALIEN

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JAPAN/JAPON/JAPAN

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NETHERLANDS/PAYS-BAS/NIEDERLANDE

Mr. W.F.S. DUFFHUES, Director, Forestry and Landscaping, Ministry of Agriculture and Fisheries, Griffioenlaan 2, P.O. Box 20023, 3502 LA Utrecht

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Ms. Y.E.T.M. GERNER, Legal Adviser, Ministry of Agriculture and Fisheries, Bezuidenhoutseweg 73, The Hague

NEW ZEALAND/NOUVELLE-ZELANDE/NEUSEELAND

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SOUTH AFRICA/AFRIQUE DU SUD/SUEDAFRIKA

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SWITZERLAND/SUISSE/SCHWEIZ

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Mr. J. ARDLEY, Deputy Controller, Plant Variety Rights Office, White House Lane, Huntingdon Road, Cambridge CB3 0LF

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II. OBSERVER STATES/ETATS OBSERVATEURS/BEOBACHTERSTAATEN

ARGENTINA/ARGENTINE/ARGENTINIEN

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M. R. LAKHDAR, Ingénieur en chef, Chef de la Division des contrôles techniques et phytosanitaires, DPVCTRF, B.P. 1308, Rabat

Dr G. PIETSCH, Ingénieur agronome, Expert de la GTZ, Service de contrôle et de certification des plantes, B.P. 6437, Rabat

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TURKEY/TURQUIE/TUERKEI

- Dr. N. DEMIR, Assistant Undersecretary, Ministry of Agriculture, Forestry and Rural Affairs, Tarim Bakanligi, Ankara
- M. A. ALGAN, Conseiller, Mission permanente de la Turquie auprès de l'Office des Nations Unies à Genève, 28, chemin du Petit-Saconnex, 1211 Genève 19, Suisse

III. INTERGOVERNMENTAL ORGANIZATIONS/  
ORGANISATIONS INTERGOUVERNEMENTALES/  
ZWISCHENSTAATLICHE ORGANISATIONEN

COMMISSION OF THE EUROPEAN COMMUNITIES (CEC)/COMMISSION DES COMMUNAUTES EUROPEENNES (CCE)/KOMMISSION DER EUROPÄISCHEN GEMEINSCHAFTEN (KEG)

- Dr. G. HUDSON, Head of Division, Legislation on plant products and animal nutrition, Directorate General for Agriculture, Commission of the European Communities, 120, rue de la Loi, 1049 Bruxelles, Belgique

EUROPEAN PATENT ORGANIZATION (EPO)/ORGANISATION EUROPEENNE DES BREVETS (OEB)/EUROPÄISCHES PATENTAMT (EPA)

- Mrs. L. GRUSZOW, Principal Administrator, International Legal Affairs, Erhardtstrasse 27, 8000 Munich 2, Federal Republic of Germany

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)/ORGANISATION DE COOPERATION ET DE DEVELOPPEMENT ECONOMIQUES (OECD)/ORGANISATION FUER EUROPÄISCHE WIRTSCHAFTLICHE ZUSAMMENARBEIT UND ENTWICKLUNG (OECD)

- Dr. J.-M. DEBOIS, Head of Section, Directorate for Food, Agriculture and Fisheries, Organisation for Economic Co-operation and Development, 2, rue André-Pascal, 75775 Paris Cedex 16, France

EUROPEAN FREE TRADE ASSOCIATION (EFTA)/ASSOCIATION EUROPEENNE DE LIBRE-ECHANGE (AELE)/EUROPÄISCHE FREIHANDELSASSOCIATION (EFTA)

- Mr. G. ASCHENBRENNER, First Assistant, Legal Affairs, European Free Trade Association, 9-11 rue de Varembe, 1211 Geneva 20, Switzerland

IV. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS/  
ORGANISATIONS INTERNATIONALES NON GOUVERNEMENTALES/  
INTERNATIONALE NICHTSTAATLICHE ORGANISATIONEN

INTERNATIONAL ASSOCIATION OF HORTICULTURAL PRODUCERS (AIPH)/ASSOCIATION INTERNATIONALE DES PRODUCTEURS DE L'HORTICULTURE (AIPH)/INTERNATIONALER VERBAND DES ERWERBSGARTENBAUS (AIPH)

- Mr. J.N. KRAS, Secretary, Committee of Novelty Protection, AIPH, Postbus, 2300 PH Leiden, Netherlands



INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY (AIPPI)/  
 ASSOCIATION INTERNATIONALE POUR LA PROTECTION DE LA PROPRIETE INDUSTRIELLE  
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 FRUIT TREE VARIETIES (CIOPORA)/COMMUNAUTE INTERNATIONALE DES OBTENTEURS DE  
 PLANTES ORNEMENTALES ET FRUITIERES DE REPRODUCTION ASEXUEE (CIOPORA)/  
 INTERNATIONALE GEMEINSCHAFT DER ZUECHTER VEGETATIV VERMEHRBARER ZIER- BZW.  
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ASSOCIATION OF PLANT BREEDERS OF THE EUROPEAN ECONOMIC COMMUNITY (COMASSO)/  
 ASSOCIATION DES OBTENTEURS DE VARIETES VEGETALES DE LA COMMUNAUTE ECONOMIQUE  
 EUROPEENNE (COMASSO)/VEREINIGUNG DER PFLANZENZUECHTER DER EUROPAEISCHEN  
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Mr. J.E. VELDHUYZEN VAN ZANTEN, Director, Zaadunie B.V., P.O. Box 26, 1600 AA Enkhuizen, Netherlands

INTERNATIONAL FEDERATION OF THE SEED TRADE (FIS)/FEDERATION INTERNATIONALE DU  
 COMMERCE DES SEMENCES (FIS)/INTERNATIONALE VEREINIGUNG DES SAATENHANDELS (FIS)

Dr. A. MENAMKAT, Assistant Secretary General, FIS, Chemin du Reposoir 5-7, 1260 Nyon, Switzerland

INTERNATIONAL CHAMBER OF COMMERCE (ICC)/CHAMBRE DE COMMERCE INTERNATIONALE  
 (CCI)/INTERNATIONALE HANDELSKAMMER (IHK)

Dr. R.C.F. MACER, Consultant, ICI Seeds, Jealott's Hill Research Station, Bracknell, Berkshire, RG12 6EY, United Kingdom

V. OFFICERS/BUREAU/VORSITZ

Mr. W.F.S. DUFFHUES, Chairman  
Mr. R. LOPEZ DE HARO Y WOOD, Vice-Chairman

VI. OFFICE OF UPOV/BUREAU DE L'UPOV/BUERO DER UPOV

Dr. A. BOGSCH, Secretary-General  
Mr. B. GREENGRASS, Vice Secretary-General  
Mr. A. HEITZ, Senior Counsellor  
Dr. M.-H. THIELE-WITTIG, Senior Counsellor  
Mr. Y. HAYAKAWA, Associate Officer

VII. INTERNATIONAL BUREAU OF WIPO/BUREAU INTERNATIONAL DE L'OMPI/  
INTERNATIONALES BUERO DER WIPO

Dr. T.A.J. KEEFER, Director and Controller, Budget and Finance Division  
Mr. A. HARGREAVES, Head, Budget and Systems Section

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

## CONTRIBUTIONS OF MEMBER STATES

(in Swiss francs)

<u>1988</u> <u>Actual</u>	<u>1989</u> <u>Actual</u>	<u>Member States</u>	<u>Number</u> <u>of Units</u>	<u>Approved 1990-91 Budget</u>	
				<u>Payable in</u> <u>January 1990</u>	<u>Payable in</u> <u>January 1991</u>
-	-	Australia	1.0	43,512	43,512
65,270	65,270	Belgium	1.5	65,270	65,270
65,270	65,270	Denmark	1.5	65,270	65,270
217,560	217,560	France	5.0	217,560	217,560
217,560	217,560	Germany, Fed. Rep. of	5.0	217,560	217,560
21,756	21,756	Hungary	0.5	21,756	21,756
43,512	43,512	Ireland	1.0	43,512	43,512
21,756	21,756	Israel	0.5	21,756	21,756
87,024	87,024	Italy	2.0	87,024	87,024
217,560	217,560	Japan	5.0	217,560	217,560
130,536	130,536	Netherlands	3.0	130,536	130,536
43,512	43,512	New Zealand	1.0	43,512	43,512
-	-	Poland	0.5	21,756	21,756
43,512	43,512	South Africa	1.0	43,512	43,512
43,512	43,512	Spain	1.0	43,512	43,512
65,270	65,270	Sweden	1.5	65,270	65,270
65,270	65,270	Switzerland	1.5	65,270	65,270
217,560	217,560	United Kingdom	5.0	217,560	217,560
217,560	217,560	United States of America	5.0	217,560	217,560
<u>1,784,000</u> =====	<u>1,784,000</u> =====		<u>42.5</u> ====	<u>1,849,268</u> =====	<u>1,849,268</u> =====

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Ende des Dokuments]