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**ORGANISATION MONDIALE DE LA PROPRIÉTÉ INTELLECTUELLE
WORLD INTELLECTUAL PROPERTY ORGANIZATION
ORGANIZACIÓN MUNDIAL DE LA PROPIEDAD INTELECTUAL**
GENÈVE / GENEVA / GINEBRA

**CONFÉRENCE DIPLOMATIQUE SUR CERTAINES QUESTIONS
DE DROIT D'AUTEUR ET DE DROITS VOISINS**

Genève, 2 - 20 décembre 1996

**DIPLOMATIC CONFERENCE ON CERTAIN
COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS**

Geneva, December 2 to 20, 1996

**CONFERENCIA DIPLOMÁTICA
SOBRE CIERTAS CUESTIONES DE DERECHO DE AUTOR
Y DERECHOS CONEXOS**

Ginebra, 2 a 20 de diciembre de 1996

COMPTES RENDUS ANALYTIQUES (COMMISSION PRINCIPALE I)

SUMMARY MINUTES, MAIN COMMITTEE I

ACTAS RESUMIDAS (COMISIÓN PRINCIPAL I)

*établis par le Bureau international
prepared by the International Bureau
preparadas por la Oficina Internacional*

Chairman: Mr. Jukka Liedes (Finland)

Secretary: Mr. Mihály Ficsor (WIPO)

First Meeting

Friday, December 6, 1996

Morning

Work program

1. The CHAIRMAN opened the meeting and expressed thanks for his election as the Chairman of Main Committee I of the Diplomatic Conference.
2. He noted that Main Committee I would deal with substantive provisions of the treaties to be considered by the Diplomatic Conference.
3. The Chairman pointed at the shortness of time available and the large number of Delegations and Observer Organizations participating in the work. He recalled that, during the WIPO consultation meetings before the Diplomatic Conference, there had been broad understanding that exceptional procedures might be necessary, such as limiting the time allowed for speakers, in order to tackle all the substantive issues. He further recalled that, in the work of the Committees of Experts, debates on any substantive issue always had taken several hours. He said that, following consultations with the Secretariat, provision had been made for Main Committee I to extend its working hours beyond the normal hours to include evening sessions the following week.
4. Taking into consideration the factors impacting on the work, he said that it had not been possible to draft a detailed work plan for the work of the Committee, but that certain general principles would be proposed, along with an outline of a work program, which would be a basis to begin the work. Noting that the Basic Proposal consisted of three texts, he suggested that the copyright treaty and the so-called "New Instrument" be opened for discussion first. Time might then be reserved for the third treaty after having discussed the two first treaties.
5. The Chairman identified the different types of clauses in the draft texts, namely, substantive clauses, which were operative clauses on rights and aspects of rights; so-called framework clauses, which established or defined the links between the proposed treaties and existing treaties, and those concerning the application, eligibility for protection, application in time; and preambles and titles of the treaties. He suggested that the work begin by dealing with substantive clauses, followed by framework clauses, and finally preambles and titles of the treaties.
6. He noted that, during the WIPO consultation meetings, especially the so-called "15 plus 15" meeting held the previous week, there had been a proposal to deal with certain issues concerning several treaties simultaneously, which had been called the "cluster approach."

He said that he favored such an approach, where, if certain issues in the two treaties were sufficiently similar, they would be discussed simultaneously. He suggested the following seven issues, which he thought to be common to the first two treaties, for simultaneous examination: the question of “publication,” “published” works, “published” phonograms and the place of publication; the right of reproduction; the right of distribution, including the right of importation; the right of rental; the right of communication, limited to its interactive aspects; technological protection measures and rights management information; and, finally, enforcement of rights.

7. He suggested, however, that the work begin in the order of the treaties, and on non-common issues; thus, work would begin on the copyright treaty concerning the following issues: computer programs (Article 4); databases (Article 5); abolition of certain non-voluntary licenses (Article 6); and duration of protection of photographic works (Article 11). He stated that he still had hesitations concerning how to proceed on limitations and exceptions, that is, whether that should be considered an eighth “common issue” or whether limitations and exceptions should be discussed treaty by treaty.

8. He stated that he would not yet propose separate, non-common issues concerning the “New Instrument,” since the work plan could be modified at any time. He accordingly proposed opening the discussion on the above-mentioned issues specific to the copyright treaty, and leaving it to informal consultations whether to continue by discussing limitations or exceptions, or, rather, whether to discuss other issues concerning rights first and then take up the issue of limitations the following week.

9. Mr. AYYAR (India) asked whether the discussion would begin with the subject of computer programs.

10. The CHAIRMAN stated that the work would begin with the four articles in the copyright treaty, namely, Articles 4, 5, 6, and 11, that were not linked to the second treaty. Thereafter, and in an order to be decided upon later, the common issues and the separate issues in the second treaty would be addressed.

11. He stated that it would be useful for Delegations to make clear when they would submit written proposals. It would be necessary to know which Delegations were considering written proposals, and of course it would be very useful to hear from the Delegations what the proposals were going to be. The principle set out in the Rules of Procedure, that is, that proposals should be written, should be followed, but in exceptional cases oral proposals might also be considered.

12. Mr. SABOIA (Brazil) congratulated the Chairman on his election, and asked for clarification concerning the procedure for submitting written proposals.

13. The CHAIRMAN stated that, while there was no express time limit, written proposals should be submitted as early as possible in order to be translated and distributed in due time in advance of their discussion in the Committee.

14. Mr. BOGSCH (Director General of WIPO) asked those Delegations which had already prepared amendments on any of the three treaties to file their amendments in writing with the Secretariat as soon as possible. He added that if, during the debate, an oral proposal was made

about which other Delegations felt that it could not be discussed intelligently without having it in writing, the Chairman should invite the Delegation making the proposal to file it in writing and, perhaps, come back to it once the written proposal was distributed.

15. M. SÉRY (Côte d'Ivoire), au nom du Groupe africain, félicite le président pour son élection. Il souhaite savoir comment sera traité le document portant les conclusions de la réunion du Groupe africain à Casablanca quant à sa mise en circulation aux délégations.

16. The CHAIRMAN stated that the reports of the WIPO regional consultation meetings had been made available, so that the positions of the various groups could be taken into account when discussing each issue.

17. Mr. KHLESTOV (Russian Federation) congratulated the Chairman on his election, and asked for clarification as to whether written proposals could be put forward on any topic at any time, or whether subject-specific time limits would apply.

18. The CHAIRMAN asked the Director General of WIPO to respond.

19. Mr. BOGSCH (Director General of WIPO) replied that the only workable practical rule was that written proposals should be submitted as soon as possible.

20. Mr. KHLESTOV (Russian Federation) noted that practice in other international organizations recognized a time limit on written proposals concerning particular subjects under discussion, in order to avoid reopening debates once a particular subject had been closed for discussion.

21. Mr. BOGSCH (Director General of WIPO) referred to Rule 29(3) of the Rules of Procedure, and stated that the general rule was that written proposals should be at the disposal of Delegations three hours before they were discussed. That meant that they should be filed at least five hours before they were to be discussed, because two hours were needed to translate and reproduce them. He noted that this rule was subject to modification by the Chairman.

22. Mr. AYYAR (India) asked for clarification concerning how the proceedings of Main Committee I would be recorded, and whether the Delegations would be able to review the report of proceedings. This was relevant, he said, because the "legislative history" was important for the interpretation of any final text to be approved.

23. The CHAIRMAN said that the Rules of Procedure contained appropriate provisions for that.

24. Mr. BOGSCH (Director General of WIPO) pointed out that any legislative history of the provisions to be adopted would be reflected in the summary minutes, and agreed with the statement of the Delegation of India concerning the importance of such history in interpreting the treaty language.

*Article 4 (Computer Programs) of the WCT**

25. The Chairman opened the floor for discussion on *Article 4 (Computer Programs) of the Draft Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works*.

26. Mr. AYYAR (India) proposed that, as this provision sought to incorporate the provisions of the TRIPS Agreement on computer programs, the same language should be used. He said that the use of identical language was particularly important because the TRIPS Agreement was subject to dispute-resolution mechanisms, and the use of different language in a different international treaty could give rise to problems of interpretation.

27. El Sr. ZAPATA LÓPEZ (Colombia) le informa a la Comisión que los países de América Latina y del Caribe han conformado un grupo de trabajo con el fin de coordinar sus posiciones respecto a los diferentes puntos contenidos en los proyectos de Tratados en estudio. Hablando en nombre del Grupo Latinoamericano y del Caribe, sugiere remplazar la palabra “están” por la palabra “serán”, en el Artículo 4 relativo a los programas de ordenador del proyecto de Tratado N° 1, a efecto de adecuar esta disposición a lo que sobre el particular contiene el Artículo 1 del Acuerdo sobre los ADPIC, y así evitar los inconvenientes de interpretación.

28. Mme AZANCOT (Israël) dit qu'elle partage l'opinion de la délégation de l'Inde. Elle estime que les dispositions de l'article 10 de l'Accord sur les ADPIC sont plus claires que la terminologie de l'article 4 du document CRNR/DC/4. Elle est de l'avis que l'expression “à toute forme” revêt une acception trop large. Elle suggère de substituer aux dispositions de l'article 4 celles de l'article 10 de l'Accord sur les ADPIC.

29. Mr. TIWARI (Singapore) expressed support for the statement of the Delegation of India, particularly that the TRIPS Agreement language should be strictly followed. He added that, if a broad interpretation were given to this Article, its meaning could be stretched to include non-literal aspects of a computer program, that is, the structure and organizational aspects. He took the view that such elements should not be included, as they were functional aspects of a computer program.

30. Mr. ABBASI (Pakistan) expressed the agreement of his Delegation with the statements of the Delegations of Singapore and India.

31. El Sr. SILVA SOARES (Brasil) apoya la propuesta presentada por la Delegación de Colombia en nombre del Grupo Latinoamericano y del Caribe.

32. Mr. SHEN (China) congratulated the Chairman on his election, and agreed to his proposal to discuss the copyright and neighboring rights treaties first. He noted that some countries were not yet members of the World Trade Organization, and therefore preferred the

* In the subtitles identifying the provisions under discussion, reference is made to the Articles of the WIPO Copyright Treaty (WCT) and of the WIPO Performances and Phonograms Treaty (WPPT) as adopted, and, where the numbering of the Articles has changed or where a draft provision has not been eventually adopted, also to the Articles of the draft Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works (“Draft Treaty No. 1”) and of the draft Treaty for the Protection of the Rights of Performers and Producers of Phonograms (“Draft Treaty No. 2”), respectively.

present wording of draft Article 4, not linked to the provision of the TRIPS Agreement dealing with the protection of computer programs.

33. Mr. KUSHAN (United States of America) expressed the support of his Delegation for the text of Article 4 as worded in the Basic Proposal. He stated that the protection of computer programs as literary works was made clear in the provision, and saw no problem in respect of compatibility with a similar provision in the TRIPS Agreement.

34. Mr. GYERTYÁNFY (Hungary) congratulated the Chairman on his election. He favored the wording of Article 4 in the Basic Proposal. He expressed the fear that use of the words “shall be” might lead to an *a contrario* interpretation to the detriment of existing protection of computer programs in countries party to the Berne Convention, and thought that the phrase “in any form” in the present text corresponded more fully to Article 2 of the Berne Convention.

35. Mr. REINBOTHE (European Communities) congratulated the Chairman on his election. He stated that the international copyright community had made clear that the Berne Convention protected computer programs, and expressed the view that the text of Article 4 as drafted in the Basic Proposal was preferable.

36. Mr. AYYAR (India) stated that Article 4 as included in the Basic Proposal could only be accepted if it could be interpreted as to have the same coverage as the corresponding article of the TRIPS Agreement.

37. Mr. HONGTHONG (Thailand) stated that there were two elements in the TRIPS Agreement missing from the current text of Article 4, namely, first, Article 10(1) and, second, Article 9(2) of the TRIPS Agreement concerning the non-protectability of ideas and mathematical concepts. He declared that his Delegation supported a strict adherence to the language of the TRIPS Agreement.

38. M. KANDIL (Maroc) félicite le président pour son élection. Il joint sa parole aux délégations précédentes pour appuyer l'idée selon laquelle l'article 4 du document CRNR/DC/4 devrait reprendre les critères développés à l'article 10 de l'Accord sur les ADPIC.

39. Mr. EKPO (Nigeria) congratulated the Chairman on his election, and stated that there might be a way to unite the present text of Article 4 with the text of the corresponding provision in the TRIPS Agreement in a satisfactory way.

40. Mme YOUM DIABE SIBY (Sénégal) se déclare favorable à la formulation de l'article 4 sous réserve de sa rédaction qui devrait s'inspirer davantage des dispositions de l'article 10 de l'Accord sur les ADPIC.

41. Mr. SØNNELAND (Norway) congratulated the Chairman on his election, and expressed support for the text of Article 4 as drafted in the Basic Proposal.

42. Mr. BAVYKIN (Russian Federation) congratulated the Chairman on his election. He stated that the Russian Federation planned to become a member of the World Trade Organization, but that it was not presently bound by the TRIPS Agreement. He said that his Delegation considered that Article 4 in its present form was acceptable.

43. M. RAGONESI (Italie) félicite le président pour son élection. Il déclare que sa délégation appuie le texte de l'article 4 tel que rédigé dans la proposition de base, et cela pour les raisons données par la délégation des Communautés européennes.

44. Mr. YAMBAO (Philippines) congratulated the Chairman on his election and stated that his Delegation preferred Article 10 of the TRIPS Agreement to the present text of Article 4.

45. El Sr. ANTEQUERA PARILLI (Venezuela) señala que existen tres posiciones principales respecto de este tema: la del Grupo Latinoamericano y del Caribe en cuanto a remplazar la palabra "están" por la palabra "serán," la de las delegaciones que apoyan la propuesta básica en su redacción actual y la de las delegaciones que desean que los programas de ordenador queden protegidos en los términos del Artículo 10 del Acuerdo sobre los ADPIC. Solicita que, no obstante la solución que se adopte, las Actas de la Conferencia consignen expresamente que la protección de los programas de ordenador no se limita a los programas que se creen en el futuro sino que los programas de ordenador ya están protegidos como obras literarias en virtud del Artículo 2 del Convenio de Berna.

46. El Sr. MEDRANO VIDAL (Bolivia) felicita al Presidente así como a los Vicepresidentes por su elección. Expresa su inquietud acerca de la redacción actual del Artículo en estudio relativo a los programas de ordenador en el sentido de que su interpretación podría presentar dificultades para los legisladores de su país y muy seguramente para los de otros países en desarrollo. Por consiguiente, sugiere que se establezca la protección en los términos del Artículo 10 del Acuerdo sobre los ADPIC.

[*Suspension*]

47. The CHAIRMAN summarized the decisions on Article 4 in stating that a proposal had been made to replace the word "are" by "shall." He said that a proposal had been made to adopt the text of Article 10.1. of the TRIPS Agreement, and also the opinion had been expressed that these two texts could be somehow merged. He opened the floor for discussions on *Article 5 (Collections of Data (Databases))*.

Article 5 (Collections of Data (Databases)) of the WCT

48. Mme YOUM DIABE SIBY (Sénégal) dit que sa délégation approuve la formulation de l'article 5 tel qu'il figure au document CRNR/DC/4.

49. Mr. AYYAR (India) stated that, as in the case of Article 4, his Delegation supported adoption of the corresponding text from the TRIPS Agreement. His Delegation viewed the language "in any form" as giving rise to possible ambiguity, and felt that it should be more specific. He asked for an interpretative statement that Articles 4 and 5 of the draft text were intended to establish the same levels of protection for computer programs and databases, no more and no less, than the TRIPS Agreement.

50. Mr. EKPO (Nigeria) stated that Article 5 as drafted in the Basic Proposal was acceptable to his Delegation.

51. Mr. ABBASI (Pakistan) supported adoption of the language of the TRIPS Agreement dealing with protection of databases, or, that the Chairman should give a clear and unequivocal statement as requested by the Delegation of India. He noted that the TRIPS Agreement used the term “compilations” while the present text used the term “collections,” which could have different meanings.

52. Mr. SILVA SOARES (Brazil) expressed support for the statement of the Delegation of India.

53. Mr. KUSHAN (United States of America) supported the statement of the Delegation of Senegal which had been in favor of the maintenance of Article 5 as drafted in the Basic Proposal. He added that, in the view of his Delegation, Article 5 was consistent with the TRIPS Agreement.

54. Mr. REINBOTHE (European Communities) expressed support for Article 5 as drafted in the Basic Proposal, which corresponded to the text of Article 10.2. of the TRIPS Agreement. He stated that his Delegation favored use of the word “right” in the present text, as opposed to the word “copyright” used in the TRIPS Agreement, as the former was more consistent with the approach of the European Community directive on the protection of databases, under which rights other than copyright might apply to a collection of data.

55. M. KANDIL (Maroc) dit se trouver confronter au même problème rédactionnel que pour l'article 4. Il souhaite que les dispositions de l'article 5 du document CRNR/DC/4 soient alignées sur celles de l'article 10.2) de l'Accord sur les ADPIC mais que le temps employé soit l'indicatif présent et non le futur.

56. Mr. TIWARI (Singapore) congratulated the Chairman on his election, and expressed the support of his Delegation for the wording of Article 5 in the Basic Proposal, subject to the understanding that it was intended to have the same coverage as Article 10.2. of the TRIPS Agreement. His Delegation saw no difference between the terms “compilation” and “collection” in respect of the legal protection of databases.

57. El Sr. MEDRANO VIDAL (Bolivia) expresa su preocupación acerca de la interpretación que se vaya a dar de los diferentes artículos de la propuesta de Tratado y al respecto propone se mantenga la redacción propia prevista en los proyectos de Tratados y se agregue, al final de cada artículo, las concordancias con los artículos correspondientes del Convenio de Berna o del Acuerdo sobre los ADPIC.

58. Mr. OPHIR (Israel) supported Article 5 as included in the Basic Proposal and the statement of the Delegation of the European Communities concerning the possible applicability of rights other than copyright to databases.

59. Mr. BAVYKIN (Russian Federation) expressed support for the proposed text of Article 5, and saw no difference between the word “compilation” and the word “collection.”

60. Mr. HONGTHONG (Thailand) took the view that the language of the TRIPS Agreement should be followed strictly, and that the word “rights” should be replaced by “copyright,” which was consistent with the protection of copyright under the Berne Convention.
61. Mr. YAMBAO (Philippines) supported the statement of the Delegation of Thailand.
62. Mme PARVU (Roumanie) déclare que sa délégation est favorable à la rédaction de l’article 5 du document CRNR/DC/4 et partage les considérations données par la délégation des Communautés européennes.
63. M. GOVONI (Suisse) déclare que sa délégation appuie pleinement le texte de l’article 5 du document CRNR/DC/4. Il relève que la formulation utilisée diffère de celle de l’article 10.2) de l’Accord sur les ADPIC en ce sens qu’elle est plus proche de celle employée dans la Convention de Berne. Il ajoute qu’elle ne donne pas lieu à des interprétations différentes.
64. El Sr. ANTEQUERA PARILLI (Venezuela) señala que el proyecto del Tratado en lo referente a las bases de datos es perfectamente concordante con una Decisión comunitaria, obligatoria para los cinco países del Pacto Andino, incluyendo el hecho de que la protección de las colecciones de datos está ya contemplada en el Convenio de Berna. También coincide con dicha legislación el hecho de que esta protección no sólo debe existir sin perjuicio del derecho de autor, sino también de otros derechos sobre las materias contenidas en la colección, relativos por ejemplo a la competencia desleal o la información confidencial.
65. Mr. GYERTYÁNFY (Hungary) expressed his Delegation’s support for Article 5 in its present wording. He referred to the prior intervention by the Delegation of Switzerland.
66. El Sr. TEYSERA ROUCO (Uruguay) felicita al Presidente por su elección. Manifiesta su pleno apoyo al Artículo 5 relativo a las bases de datos en su redacción actual.
67. Mme M’KADDEM (Tunisie) dit que sa délégation approuve la rédaction de l’article 5 telle qu’elle figure au document CRNR/DC/4 et partage l’opinion de la délégation de la Communauté européenne au sujet du mot “droit”.
68. La Sra. RETONDO (Argentina) se auna a la posición de las Delegaciones de Venezuela y Uruguay que abogan por la propuesta relativa a las bases de datos tal como está redactada en el proyecto de Tratado.
69. El Sr. ROGERS (Chile) reitera la posición de su Delegación de apoyar el Artículo 5 en su redacción actual.
70. Mr. KESOWO (Indonesia) congratulated the Chairman on his election. Regarding Article 5, he supported the intervention by the Delegation of Singapore. He also stated that, in respect to the words “in any form” in this Article, the Treaty should not extend beyond the standard established in the TRIPS Agreement.

71. M. MBON MEKOMPOMB (Cameroun) félicite le président pour son élection. Il déclare que sa délégation est favorable au maintien de l'article 5 tel qu'il figure au document CRNR/DC/4 et qui semble plus clair que le texte correspondant dans l'Accord sur les ADPIC.

72. Mr. MTETEWAUNGA (Tanzania) observed that most of the countries in the Conference had spent many years negotiating the TRIPS Agreement, and, in that regard, referred to Article 10 of the TRIPS Agreement on computer programs and compilations of data. He felt that any attempts to extend rights were not in harmony with the mandate of the Diplomatic Conference.

73. Mrs. DROZDOWSKA (Poland) stated that her Delegation supported the proposal in the draft Treaty. However, she proposed to delete the words "any rights" in the second sentence of Article 5, and substitute the words "the used works rights" in their place

74. M. TRAORE (Mali) indique que sa délégation approuve en partie la formulation de l'article 5 mais souhaite que la nature des droits soit précisée, à savoir les droits d'auteur. Il précise qu'il n'a pas mandat pour accepter d'inclure d'autres droits dans cet article.

75. M. KANDIL (Maroc) demande des éclaircissements sur l'étendue de l'expression "de tout droit", car s'agissant du droit *sui generis* des bases de données, il existe un projet de traité qui sera examiné.

76. The CHAIRMAN referred to the prior intervention by the Delegation of the European Communities. He said that the words "any rights" referred to rights which might be found in legislation in addition to copyright, including any *sui generis* right, or any right in the database or in the contents of the database, that is, the data or the material itself. He suggested that the clause was a "non-interference clause," in that the right in a literary or artistic work, and any other rights which might subsist in the materials in the database, were not interfering with each other; they existed independently of each other.

77. Mr. REINBOTHE (European Communities) referred to the words "without prejudice to any other rights" in Article 5, and stated that this notion did not extend the protection envisaged under Article 5.

78. Mr. AYYAR (India) asked the Chairman for clarification on the expression "any rights" in Article 5. He mentioned the Chairman's reference to the earlier intervention by the Delegation of the European Communities as well as his reference to the *sui generis* protection of databases, and, in that context, his Delegation wondered if the current treaty under consideration would extend protection to only copyright, or also to neighboring rights. He also asked whether the Conference would be creating minimum rights, common to all countries, or maximal protection. As an example, he referred to the *sui generis* protection of databases, and wondered if the Conference should work on the basis of a Directive which applied only in a specific region of the world.

79. The CHAIRMAN said that the difference between the expressions "*sui generis* protection" and "neighboring rights" was more of a question of semantics. He stated that any rights should be covered by the expression "any other rights." In response to the second question, he indicated that the Conference was negotiating on the basis of the tradition in the field of copyright and rights neighboring to copyright, negotiating a harmonization by having

as the main tool certain clauses on minimum rights, and only in a very few cases would the approach be a maximalist approach. There might already be certain clauses in the Berne Convention which did not represent in principle maximum protection, but if development leads to new things, it should be analyzed to determine whether it was covered by the clauses in the Convention or not. He said that he was referring to the well-known concept of reproduction, and perhaps to some other concepts.

80. He noted that, in the interventions which had just been made, reference had been made to the TRIPS Agreement. A number of Delegations had expressed their opinion in favor of the Article in the Basic Proposal, and different opinions as to the language of the Article had been expressed by some Delegations, notably regarding the words "any rights" and "are." He asked the Committee to consider whether it should proceed to another article, and then tackle the question of language as to a series of articles, or rather work on an article and then work on the language of that article in an article-by-article approach. He then adjourned the meeting.

Second Meeting

Friday, December 6, 1996

Afternoon

Articles 4 (Computer Programs) and 5 (Collections of Data (Databases)) of the WCT

81. The CHAIRMAN summarized the substantive discussions during the morning session on Articles 4 and 5. No conclusions had been reached, and he decided not to offer his conclusions yet; some questions regarding those two Articles were still unsettled. Concerning Article 4 (on computer programs), there had been a proposal to replace the word "are" by "shall." There had been a proposal to replace the language of the proposed Article 4 with the language of Article 10 of the TRIPS Agreement, and there had been another proposal to combine those two provisions. In his opinion, this latter proposal would require the taking of the element referring to "source or object code" and inserting it into the Treaty proposal, perhaps at the end. Regarding Article 5 (on databases) he observed that there had been broad support for the Article as it had been drafted. He noted that there had been a proposal to replace it with the language used in the TRIPS Agreement, and another according to which the reference to "copyright" subsisting in the data should replace a reference to "any rights." In both Articles 4 and 5, there was the expression "in any form." He said that that language was an attempt to get nearer to normal copyright language.

82. He referred to the question by the Delegation of India, and said that it had not been the intention to differ in the substance from the corresponding provisions in the TRIPS Agreement, but rather to modernize the language in line with traditional copyright language. Both Articles 4 and 5 were intended to be declaratory, and what they stated was already the fair interpretation of the relevant clauses in the Berne Convention. He said that it was too early to make a decision on the language of both Articles, but suggested that the Delegations should consult with each other, and, on the basis of their consultations, the language could be established later.

83. Mr. AYYAR (India) said that it should be clarified that the intention of Articles 4 and 5 was not to add to nor subtract from obligations under Article 10 of the TRIPS Agreement; Articles 4 and 5 were to be interpreted in the same manner as Article 10, and no extra obligations were understood to be imposed. If there was understanding about that, the language question could and should be solved accordingly. He noted that what was important here was the political question, rather than the language.

Article 6 (Abolition of Certain Non-Voluntary Licenses) of Draft Treaty No. 1

84. The CHAIRMAN opened the floor for discussion on *Article 6 (Abolition of Certain Non-Voluntary Licenses)*.

85. Mr. OPHIR (Israel) read out a proposal from his Delegation (document CRNR/DC/11). He said that his Delegation was looking for a reservation opting out of Article 6, and in doing so, it was necessary to make an amendment to Article 104 of the Administrative and Final Clauses as contained in document CRNR/DC/3 in order to allow for reservations to this Treaty. He said that the current provisions in the Berne Convention on non-voluntary licenses were preferable and fair, and all the more so if Article 7(2) were to be adopted in full.

86. The CHAIRMAN commented that the proposal by the Delegation of Israel would allow a reservation, and would imply that there would be no absolute obligation to abolish the non-voluntary licenses.

87. Mr. FICSOR (Assistant Director General of WIPO) announced that the Secretariat had received the proposal from the Delegation of Israel, and was in the process of preparing it as a formal document. On behalf of the Secretariat, he proposed a uniform and simplified system in referring to the draft treaties under discussion, which would be to refer to the Draft Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works as Draft Treaty No. 1, and to the Draft Treaty for the Protection of the Rights of Performers and Producers of Phonograms as Draft Treaty No. 2. Thus, for example, the title of the proposal by the Delegation of Israel would read as follows: "Amendment to Article 6 of Draft Treaty No. 1."

88. The CHAIRMAN asked the Committee if there were any objections to the proposed simplified format of labeling proposals for amendments.

89. Mr. SILVA SOARES (Brazil) supported the proposed format.

90. Mr. FICSOR (Assistant Director General of WIPO) added that, before any proposed document was sent for translation and reproduction, the Secretariat would obtain the clearance of the Delegation which had proposed it.

91. The CHAIRMAN noted that there was no objection to the simplified format for labeling documents, and it was therefore adopted.

92. Mr. CRESWELL (Australia) congratulated the Chairman on his election. His Delegation supported the proposal in Article 6(1), insofar as it intended to promote exclusivity of rights with regard to general or mainstream broadcasting. He saw this as an important adjunct to the

proposed new right of communication in Article 10. At the same time, he reserved the possibility of maintaining non-voluntary licenses for special broadcasting operations, in particular, broadcasting specifically directed to persons with a disability. He noted that Australian legislation provided for such a license, which served an important public interest. His Delegation also wished to preserve the possibility of legislation that would subject the exercise of the broadcasting right through collective administration to control regarding anti-competitive conduct. He stated that his Delegation understood that such a possibility already existed under the Berne Convention.

93. He acknowledged the suggestion in the notes to Article 6 in the Basic Proposal that special licenses could be dealt with under the so-called minor reservations discussed in the context of Article 12 in the copyright treaty. He said that his Delegation wished to reserve the possibility of proposing an amendment to Article 6(1) to allow the continuation of special licenses, depending on the outcome of the Committee's consideration of Article 12. The Delegation of Australia opposed Article 6(2) of the proposed text, on the grounds that it was not sought by any of the relevant copyright interests.

94. Mr. REINBOTHE (European Communities) stated that his Delegation considered Article 6 a useful provision, which corresponded to a proposal of the European Community and its Member States during the sessions of the Committees of Experts. He asked for further explanation of the doubts which had been expressed by some Delegations concurring the usefulness of this provision.

95. Mme YOUM DIABE SIBY (Sénégal) rappelle l'attachement de son pays aux droits exclusifs reconnus à l'auteur d'autoriser toute utilisation de son oeuvre ainsi qu'aux prérogatives dont l'auteur dispose pour négocier en toute liberté la juste rémunération due en contrepartie de son autorisation. Elle précise, sur cette base, que sa délégation est favorable à la suppression des licences non volontaires en matière de radiodiffusion. En revanche, elle s'oppose avec vigueur à la suppression des licences non volontaires en matière d'enregistrements phonographiques, craignant le déséquilibre qui pourrait résulter de cette suppression au profit des producteurs de phonogrammes et au détriment des auteurs.

96. Mr. GYERTYÁNFY (Hungary) expressed support for Article 6(1) as it appeared in the Basic Proposal, but opposition to Article 6(2). In the view of his Delegation, there was a basic difference in the economic position of the broadcasters as users, on the one hand, and of producers of sound recordings, on the other. In the second case, the abolition of the non-voluntary licenses now allowed under Article 13 of the Berne Convention could upset the existing market balance. Specifically, the failure of licensing negotiations, in the sound recording market, could lead to the restriction of the dissemination of musical works.

97. M. KANDIL (Maroc) déclare que sa délégation est favorable, sur le plan du principe, à l'abolition des licences non volontaires en matière de radiodiffusion. Il constate qu'il n'est pas fait mention des licences obligatoires dans le domaine de la retransmission par câble, telle que visée par l'article 11*bis* 2) de la Convention de Berne. Il indique que les délégations du Groupe africain réunies à Casablanca ont souhaité l'abolition des licences non volontaires dans un délai de cinq années.

98. Mr. KUSHAN (United States of America) expressed the support of his Delegation for the statement of the Delegation of Australia concerning the relationship between Article 6 and

Article 12. His Delegation supported Article 6(1) in its current form, favoring the three-year phase-out for non-voluntary licenses under Article 11*bis*(2) of the Berne Convention. By contrast, he proposed deletion of Article 6(2), since a non-voluntary license for mechanical reproduction of sound recordings had existed in his country since 1909. He noted that, in the United States of America, neither sound recording producers, nor authors, nor the music publishing industry, supported elimination of the mechanical license, which was to apply with respect to certain digitally delivered sound recordings as a key feature of recently enacted law of the United States of America regarding performing rights in sound recordings.

99. Mrs. DROZDOWSKA (Poland) expressed opposition to Article 6(1) and (2), citing the need to maintain non-voluntary licenses under Articles 11*bis* and 13 of the Berne Convention.

100. Mr. KIM (Republic of Korea) stated that any proposal for amendment to Article 6 was for the purpose of striking a balance between the countries with developed systems of collective management and the countries which had some problems with the collective management system. He supported a longer phasing-out period than that proposed in Article 6, since many countries needed time to adjust existing legal relations between right owners and users, and, further, because, in the view of his Delegation, non-voluntary licenses were not uniformly detrimental to the interests of right holders. While it was true that, under non-voluntary licensing schemes, authors did not have complete authority to control the utilization of works, it should also be taken into account that authors had a fair chance of acceptable remuneration which would not be possible without collecting societies, even with exclusive rights. He stated that non-voluntary licenses were not the best solution, but that they should be regarded as second best for the time being.

101. Mrs. TRAJKOVSKA (The former Yugoslav Republic of Macedonia) congratulated the Chairman on his election, and expressed support for the proposal made by the Delegation of Poland.

102. Mr. TIWARI (Singapore) referred to the earlier submission, by his Delegation, of a proposed amendment. He proposed that Article 6 be deleted, on the ground that abolition of compulsory licenses would be inconsistent with Article 1(2) of the Basic Proposal, which provided for the obligation of non-Berne members which would be Contracting Parties to the copyright treaty, to comply with, *inter alia*, Article 13 of the Berne Convention, which permitted compulsory licenses. In the event that the first proposal to delete Article 6 were not accepted, he made an alternative proposal according to which a grace period of seven years to phase out non-voluntary licenses should be allowed, rather than three years as in the Basic Proposal.

103. Mlle METOHU (Albanie) dit qu'elle approuve l'abolition des licences non volontaires en matière de radiodiffusion, prévue à l'article 6 du projet de traité n° 1 et regrète que la communication au public par fil et la réémission au sens de l'article 11*bis*1) de la Convention de Berne ne soient pas concernées par cette obligation d'abolition. Elle ajoute, en revanche, que sa délégation est opposée à la suppression des licences non volontaires en matière d'enregistrements phonographiques. Très attachée à la reconnaissance du droit exclusif des auteurs d'autoriser l'utilisation de leurs oeuvres, elle est de l'avis que le maintien de telles licences demeure le seul moyen pour les auteurs d'obtenir une rémunération équitable en cas d'échec des négociations avec les producteurs de phonogrammes.

104. Mr. SHEN (China) opposed the abolition of non-voluntary licenses, on the ground that the system of collective administration had not been yet perfected in his country, and that without such a system, it would be difficult to abolish non-voluntary licenses.

105. Mr. ABBASI (Pakistan) expressed opposition to Article 6, agreeing with the reasoning expressed by the Delegation of China.

106. Mr. AYYAR (India) supported deletion of Article 6.

107. Ms. DALEY (Jamaica) congratulated the President on his election. She stated that, while in favor of a broad grant of exclusive rights, her Delegation nonetheless favored maintenance of non-voluntary licenses, or at least, that a phase-out period longer than three years should be provided.

108. M. TRAORE (Mali) dit que sa délégation souscrit à l'esprit de l'article 6 du document CRNR/DC/4 en ce sens qu'elle est favorable au principe de la suppression des licences non volontaires. Il fait part de ses préoccupations quant à la durée de la période de transition qu'il souhaiterait être portée de trois à cinq ans.

109. El Sr. ZAPATA LÓPEZ (Colombia), en lo relativo a la propuesta de abolición de ciertas licencias no voluntarias, está de acuerdo con el párrafo 1) del Artículo 6 de la propuesta pero opta por la eliminación del párrafo 2).

110. La Sra. RETONDO (Argentina), no obstante que en su país las licencias no voluntarias nunca han sido utilizadas, acepta o bien que se eleven los plazos para su abolición o bien que se suprima el párrafo 2) del Artículo 6, en vista a lograr un consenso sobre este punto.

111. El Sr. ROGERS (Chile) apoya el Artículo 6 con sus párrafos 1) y 2), lo cual corresponde a lo contemplado en la legislación de su país.

112. Mr. SØNNELAND (Norway) supported abolition of non-voluntary licenses, but stated that his Delegation could accept a longer phase-out period.

113. La Sra. JIMÉNEZ HERNÁNDEZ (México) si bien expresa ciertas dudas de que este Artículo sea una enmienda al Convenio de Berna, está en posición de aceptarlo ya que las únicas limitaciones contempladas en la legislación de su país se basan en los Artículos 9.2) y 10 del Convenio de Berna y no en los Artículos 11bis 2) y 13 del mismo Convenio.

114. Mr. EL NASHAR (Egypt) congratulated the Chairman on his election, expressed support for the abolition of non-voluntary licenses, subject to a phase-out period of five years, and favored deletion of Article 6(2).

115. The CHAIRMAN stated that there seemed to be broad support for deletion of paragraph (2) of Article 6, but there was also some support for deletion of paragraph (1). He stated that Article 6 related to a bedrock principle of copyright, the principle that copyright is a bunch of exclusive rights. He favored leaving the Article aside for a later decision of the Committee, to permit informal negotiations among Delegations in an effort to find consensus. He stated that, on the basis of current information, there would be written proposals, and that a decision could be based on the text of such proposals without a new round of debate on them.

*Article 9 (Duration of Protection of Photographic Works) of the WCT
(Article 11 of Draft Treaty No. 1)*

116. The CHAIRMAN opened the floor for discussion on *Article 11 (Duration of the Protection of Photographic Works)* of Draft Treaty No. 1. He noted that there had been at least two rounds of discussion on this question in the preparatory stages on this Article, during which a clear opinion emerged that the protection of the photographic works should be of the same duration as the duration for literary and artistic works in general.

117. Mr. GYERTYÁNFY (Hungary) expressed support for the proposal, on behalf of a group of Central European countries, namely, Albania, Bulgaria, Croatia, the Czech Republic, Poland, Slovenia, The former Yugoslav Republic of Macedonia, and his own country.

118. El Sr. SILVA SOARES (Brasil), en lo relativo a la duración de la protección de las obras fotográficas, no estima conveniente que dicha disposición contenga referencias al Convenio de Berna y propone una redacción distinta de la contenida en la propuesta de Tratado: “With respect of photographic works, the term of protection granted under this Treaty shall be, at least, the life of the author, and fifty years after his death.”

119. Mr. REINBOTHE (European Communities) expressed support for Article 11.

120. Mr. KUSHAN (United States of America) supported Article 11 as drafted.

121. Mr. MTETEWAUNGA (Tanzania) supported the normalization of the term of protection for photographic works, but expressed a preference for a free-standing provision applying the life-plus-50-years formula.

122. Mr. EKPO (Nigeria) expressed support for Article 11 as drafted.

123. Mr. SØNNELAND (Norway) expressed support for Article 11 as drafted.

124. Mr. WIERZBICKI (New Zealand) congratulated the Chairman on his election, and expressed support for Article 11 as drafted.

125. Mr. HONGTHONG (Thailand) expressed support for Article 11 as drafted.

126. Mr. OMONDI-MBAGO (Kenya) congratulated the Chairman on his election, and expressed support for Article 11 as drafted.

127. Mr. YAMBAO (Philippines) expressed support for Article 11 as drafted.

128. The CHAIRMAN noted that there seemed to be agreement regarding the substance of Article 11, but that at least two Delegations favored another method to achieve the same result. He stated that the exact language could be agreed later.

[*Suspension*]

129. The CHAIRMAN announced the conclusion of the discussion on Article 11, and introduced the first group of joint issues, namely the cluster of issues concerning certain rights which were distribution-oriented.

*Article 6 (Right of Distribution) of the WCT (Article 8 of Draft Treaty No. 1);
Articles 8 (Right of Distribution) and 12 (Right of Distribution) of the WPPT
(Articles 9 and 16 of Draft Treaty No. 2)*

130. The CHAIRMAN opened discussion on *Article 8 (Right of Distribution and Right of Importation)* of Draft Treaty No. 1, and *Articles 9 (Right of Distribution and Right of Importation) and 16 (Right of Distribution and Right of Importation)* of Draft Treaty No. 2. He noted that those issues were part of traditional questions, involving distribution of physical copies, and importation of physical copies, of works, fixed performances and phonograms. He asked the Delegations to refrain from discussing the extent of protection of performers, that is, whether it should cover audiovisual fixations, an issue which would be discussed at a later stage. He drew attention to the two alternatives concerning the right of distribution, mentioning that Alternatives A and E were based on a high-level distribution right, the exhaustion of which would be regionally or nationally limited, and Alternatives B and F, in which the main principle would be that lawfully distributed copies could be distributed in the territory of all the Contracting Parties. He pointed out that Alternatives A and E had been presented in such a way that, along with the right of distribution with limited exhaustion, there was a proposal that a right of importation should also be recognized.

131. Mr. OKAMOTO (Japan) congratulated the Chairman on his election. He stated that his Delegation fully supported the recognition of a right of distribution in respect of both copyright and the rights of performers and producers of phonograms. Regarding the Alternatives, the Delegation supported Alternative B in Article 8, Alternative F in Article 9, and Alternative B in Article 16, that is, it supported the so-called distribution right with international exhaustion.

132. Mr. REINBOTHE (European Communities) stressed the importance of a distribution right. He referred to the fact that that right was not contained in the Berne Convention or the Rome Convention, and added that that gap should be eliminated. He mentioned that the European Community and its Member States had made proposals in the Committees of Experts preparing the draft treaties. He stated that those proposals continued to reflect the views of his Delegation.

133. Mr. CRESWELL (Australia) supported the adoption of a right of distribution for works and sound recordings, as reflected in Alternative B in Article 8 and Alternative B in Article 16. He said that his Delegation was opposed to Alternative A in those Articles because it believed that Contracting Parties should be able to choose the circumstances in which the right of distribution would be exhausted. He added that his Government could not accept the obligation included in Alternative A to introduce a right of importation.

134. Mr. AYYAR (India) stressed that his Government would find it very difficult to become party to a Treaty which contained an obligation to grant a right of importation. He underscored the lack of consistency between creating a right of importation, on the one hand, and free trade and the introduction of non-tariff barriers to trade, on the other. He said that he was not able to see the basic idea underlying the right of importation.

135. Mr. KIM (Republic of Korea) expressed his Delegation's support for Alternative B in Article 8, and Alternative B in Article 16.

136. Mr. ABBASI (Pakistan) also supported Alternative B in Article 8 and Alternative B in Article 16.

137. Mr. WIERZBICKI (New Zealand) supported the recognition of a distribution right. He noted that, even though New Zealand provided an importation right in its copyright legislation, that was a particularly sensitive issue for that country. Accordingly, his Delegation felt that the right of importation should continue to be a matter for national legislation, and that the Treaties should not provide such a right. He supported Alternative B in Article 8, Alternative F in Article 9 and Alternative B in Article 16.

138. Mme YOUM DIABE SIBY (Sénégal) déclare que sa délégation soutient la variante A de l'article 8 du projet de traité n° 1 et la variante E de l'article 9 du projet de traité n° 2.

139. Mr. YAMBAO (Philippines) stated that his Delegation believed that the right of importation was trade-restrictive, and that the issues could be appropriately handled by contract law, and therefore such a right was unnecessary in the Treaties. He supported Alternative B in Article 8, Alternative F in Article 9 and Alternative B in Article 16.

140. M. ETRANNY (Côte d'Ivoire) félicite le président pour son élection et dit que sa délégation est favorable à l'adoption de la variante A de l'article 8 du projet de traité n° 1 et à celle correspondante de l'article 9 du projet de traité n° 2. Il relève que le droit d'importation serait de nature à contrarier la liberté du commerce.

141. Mr. SØNNELAND (Norway) supported Alternative B in Article 8; in respect to neighboring rights, however, he favored the opposite alternative. He drew attention to the notes contained in paragraph 8.10, mentioning that the right of importation would not apply unless copies were marketed within a certain period of time. He said that his Delegation reserved its right to present a proposal for language at a later stage.

142. The CHAIRMAN asked for clarification from the Delegation of Norway, as to the understanding of its intervention, to the effect that the essence of the notes in paragraph 8.10 of Draft Treaty No. 1 were likewise applicable to the neighboring rights issues, and noted that the Delegation confirmed his understanding.

143. Mme DE MONTLUC (France) félicite le président pour son élection. Elle déclare que sa délégation appuie les observations présentées par la délégation des Communautés européennes. Elle souhaite qu'une modification terminologique soit apportée aux articles 8 et 9.1) du projet de traité n° 1 et à l'article 16.1)i) du projet de traité n° 2 qui consisterait à n'employer que le mot "exemplaires" et supprimer la référence faite à celui d' "original", puisqu'il s'agit du même concept.

144. Mme BOUVET (Canada) s'associe aux félicitations adressées au président. Elle indique que sa délégation est favorable à la variante B de l'article 8 du projet de traité n° 1, ainsi qu'à la variante F de l'article 9, et à la variante B de l'article 16 du projet de traité n° 2.

145. Mr. SHEN (China) said that his Delegation supported Alternative B in Article 8, Alternative F in Article 9 and Alternative B in Article 16.

146. Mr. TIWARI (Singapore) stated that his Delegation was against a right of importation, which clearly effected free trade, and that, in the interests of free trade, parallel imports should be permitted. Therefore, he supported Alternative B in Article 8, Alternative F in Article 9 and Alternative B in Article 16.

147. La Sra. RETONDO (Argentina), en lo relativo al derecho de distribución, reitera el apoyo de su Delegación a la Variante A del Artículo 8 del proyecto de Tratado N° 1, y a las Variantes E del Artículo 9 y A del Artículo 16, del proyecto de Tratado N° 2.

148. Mr. KUSHAN (United States of America) expressed his Delegation's support for both a right of distribution and a right of importation. The Delegation supported Alternative A in Article 8, Alternative E in Article 9 and Alternative A in Article 16. He emphasized the importance his Delegation attached to preserving the territorial nature of copyright and neighboring rights by permitting only national or regional exhaustion. He referred to the principle that Contracting Parties might limit the importation right with regard to importation by a person, solely for his personal or non-commercial use as part of his or her luggage.

149. He stated that his Delegation did not share the view that an importation right impaired free trade, but rather believed that it provided the opposite effect, and simply could not be called a barrier to trade. He stressed that the importation right was in reality a trade-facilitating or trade-promoting device, as it would permit territorial licensing which would allow a party to modify and target the deployment and distribution of copies of protected works. He stressed that, while his Delegation was willing to work to achieve a satisfactory solution on the issue, only anything based on Alternative A would, in the view of his Delegation, offer such a solution.

150. M. KANDIL (Maroc) déclare que sa délégation est favorable à la variante B de l'article 8 du projet de traité n° 1 et à la variante E de l'article 9 du projet de traité n° 2, ainsi qu'à la variante B de l'article 16 de ce même document.

151. M. TRAORE (Mali) félicite le président pour son élection et déclare partager la position exprimée par le délégué du Royaume du Maroc.

152. El Sr. SILVA SOARES (Brasil) expresa su apoyo a la Variante B del Artículo 8 del proyecto de Tratado N° 1, y a las Variantes F del Artículo 9 y B del Artículo 16, en lo relacionado con el proyecto de Tratado N° 2.

153. La Sra. JIMÉNEZ HERNÁNDEZ (México), en lo relacionado con el Artículo 8 del proyecto de Tratado N° 1, expresa su inquietud acerca de la Variante A que parece ser aplicable a las formas tradicionales de distribución de obras más que a las nuevas posibilidades tecnológicas y cuya aplicación se complicaría en los casos en los que las obras se pongan a

disposición del público por medios electrónicos, simultáneamente en todo el mundo. Expresa su inquietud en cuanto a oponerse a la importación de copias lícitas lo cual resultaría en una práctica restrictiva contraria a las normas de libre comercio y de protección al consumidor, pudiendo incluso limitar la explotación de la obra en perjuicio del autor. Por consiguiente, la Delegación de México aboga en favor de la Variante B del Artículo 8 que se adecua a la lógica de la globalización. Por las mismas razones, La Delegación de México opta por las soluciones contenidas en la Variantes F del Artículo 9 y B del Artículo 16, en lo que atañe al proyecto de Tratado N° 2.

154. Mrs. TRAJKOVSKA (The former Republic of Macedonia) supported Alternative A in Article 8, Alternative E in Article 9 and Alternative B in Article 15.

155. El Sr. ZAPATA LÓPEZ (Colombia) presta su apoyo a la Variante B del Artículo 8 del proyecto de Tratado N° 1 y a las alternativas F del Artículo 9 y B del Artículo 16, del proyecto de Tratado N° 2.

156. Mr. MTETEWAUNGA (Tanzania) stated that his Delegation supported the recognition of a right of distribution subject to international exhaustion, which meant that his Delegation supported Alternative B in Article 8, Alternative F in Article 9 and Alternative B in Article 16.

157. Mr. OMONDI-MBAGO (Kenya) indicated that his Delegation supported Alternative A in Article 8, Alternative E in Article 9 and Alternative B in Article 16.

158. El Sr. TEYSERA ROUCO (Uruguay) presenta la posición de su Delegación en cuanto al derecho de distribución. Con referencia al Artículo 8 del proyecto de Tratado N° 1, opta por la Variante A, y en lo relativo al proyecto de Tratado N° 2, opta por la Variante E del Artículo 9 y por la Variante A del Artículo 16.

159. M. MBON MEKOMPOMB (Cameroun) approuve la variante A de l'article 8 du projet de traité n° 1, à la variante F de l'article 9 et à la variante B de l'article 16 du projet de traité n° 2.

160. M. TOUIL (Tunisie) déclare que sa délégation est favorable à la variante A de l'article 8 du projet de traité n° 1, à la variante F de l'article 9 et à la variante B de l'article 16 du projet de traité n° 2.

161. Mr. HONGTHONG (Thailand) expressed his Delegation's support for Alternative B of Article 8, Alternative F in Article 9 and Alternative B in Article 16.

162. El Sr. ANTEQUERA PARILLI (Venezuela) aboga en favor de la Variante A del Artículo 8 del proyecto de Tratado N° 1, así como por las Variantes E del Artículo 9 y A del Artículo 16 del proyecto de Tratado N° 2.

163. The CHAIRMAN asked the Committee if there were any other Delegations that wished to take the floor on this question, and seeing none, he adjourned the meeting.

Monday, December 9, 1996

Morning

Work program

164. The CHAIRMAN summarized the discussions that had taken place on Friday, namely, an initial discussion on certain provisions in the copyright treaty: computer programs; collections of data (databases); abolition of certain non-voluntary licenses; and duration of the protection of photographic works, as well as an initial discussion on a group of articles in the copyright and neighboring rights treaties dealing with the rights of distribution and importation.

165. He recalled his proposal for the work program, and said that the priority should be on the substantive provisions proper. The last item in the work program would be the preambles and titles of the treaties. He recalled his proposal to examine provisions of the first two treaties which could be discussed simultaneously, such as the provisions on the notion and place of publication, the rights of reproduction, distribution, rental, communication to the public (at least the interactive part of it), the provisions on obligations concerning technological measures and rights management information, and provisions on enforcement.

166. He indicated that, based on informal consultations which had taken place since he made his proposals, the right of distribution would be discussed first, then the right of rental, including the definition of rental in the neighboring rights treaty. After that, initial discussion would take place on the rights of performers in their unfixed performances and the provisions on the right of modification, followed by a discussion on the term of protection. Then, a fourth “package” would consist of the following matters, grouped into three clusters: right of reproduction; right of communication and right of making available to the public, relating to both treaties, and then the notion and place of publication.

167. He stated that, as the work proceeded, he would offer further details including continuation of discussion on various substantive articles of the neighboring rights treaty, and then three more clusters: limitations and exceptions; technological measures and rights management information; and enforcement.

168. This program should be completed by Tuesday evening or at least by Wednesday, depending on how long time the different “packages” would take. Later, a seventh “package” would be discussed, namely, framework provisions of the two treaties, then the last small “package” would be the preambles and titles of the treaties. Finally, there would be a decision sought concerning how to discuss the draft treaty on intellectual property protection in respect of databases.

169. He noted that the Main Committee would have three sessions each day during the week, from 10 a.m. to 1 p.m., from 3 p.m. to about 6.15 p.m. and then an evening session from 8 p.m. to 10 p.m.. Such a schedule would make it possible to have regional group meetings in the mornings between 8 or 9 a.m. to 10 a.m., and, perhaps, during the lunch break, which would ensure that group meetings could take place systematically without causing any delay in the work of the Main Committee.

170. He suggested that initial discussions continue on different items in the order presented, that then conclusions be reached on different items in the order in which they were discussed, and that the text to be submitted to the Plenary be established by Wednesday morning.

171. He noted that the discussion on the rights of distribution and importation had been concluded, and, at an appropriate later time, decisions could be taken on the text concerning the said rights.

*Article 7 (Right of Rental) of the WCT (Article 9 of Draft Treaty No. 1);
Articles 9 (Right of Rental) and 13 (Right of Rental) of the WPPT (Articles 10 and 17 of
Draft Treaty No. 2)*

172. The CHAIRMAN opened discussion on *Article 9 (Right of Rental)* of Draft Treaty No. 1, and on *Articles 10 (Right of Rental) and 17 (Right of Rental)* of Draft Treaty No. 2.

173. He said that the notion and level of international recognition of the right of rental were well identified, and that there was no need to make extended remarks introducing the topic. He then declared the floor open on the question of the right of rental.

174. Mr. GYERTYÁNFY (Hungary), on behalf of a group of countries consisting of Albania, the Czech Republic, Romania, Slovenia, The former Yugoslav Republic of Macedonia, and his own country, stated that an exclusive right of rental was useful and desirable in Draft Treaty No. 1. As to the scope of the right, he said that the group opposed general restrictions other than those expressed in Article 9(3). As to the exceptions, he stated that the general provision in Article 12 was sufficient.

175. In respect of Draft Treaty No. 2, he again indicated the group's preference for Alternative B in Article 10, that is, a general rental right without the restriction applicable to audio performers. It also meant that, if such a right was to be accorded to the right owners, as he hoped, that again would be an argument concerning Article 9 of Draft Treaty No. 1, that is, to accord no less limited protection there. He stated that the group did not understand the justification for the discrimination in Alternative A against non-musical audio performers. Finally, he noted that, even though the respective national legislation of the countries in the group did not have a system such as that foreseen in Article 10(2), the group could accept such a provision in the Treaty. As to the definition of rental, the group opposed the proposed definition in Treaty No. 1, as practice and usage of market conditions could change soon. Nevertheless, the group supported in general a wider notion of rental under both Draft Treaty No. 1 and Draft Treaty No. 2.

176. Mme BOUVET (Canada) déclare que sa délégation appuie la proposition d'inclure un droit de location obligatoire pour les programmes d'ordinateur et pour les oeuvres musicales incorporées dans des phonogrammes seulement. Il conviendrait en conséquence de supprimer à l'article 9.2) le membre de phrase suivant : "les recueils de données ou d'autres éléments existant sous forme déchiffable par machine". Elle est de l'avis que dans ce dernier cas, le droit de location ne doit s'appliquer que dans les cas où il en résulte la réalisation d'un grand nombre de copies de nature à compromettre le droit exclusif de reproduction. Elle ajoute que

sa délégation est favorable à la variante A de l'article 10 du projet de traité n° 2, à savoir un droit ne s'appliquant qu'aux interprétations ou exécutions musicales fixées sur phonogrammes.

177. Mr. OKAMOTO (Japan) expressed support for the right of rental proposed in Article 9 of Draft Treaty No. 1 and Articles 10 and 17 of Draft Treaty No. 2. As to Article 9 of Draft Treaty No. 1, he said that his Delegation could be flexible in terms of the categories of works which should be covered. However, as to the rental rights in Draft Treaty No. 2, he expressed concern that there was a difference between the TRIPS Agreement and the proposed text, that is, the three-year limitation on maintenance of a system of equitable remuneration for the right of rental, which did not exist in the TRIPS Agreement. He stated that that would cause serious problems to the existing balance between neighboring rights owners and rental businesses. He stated that his Delegation would submit to the Secretariat an amendment to delete the relevant phrase from the Articles 10 and 17 of Draft Treaty No. 2.

178. Mr. AYYAR (India) accepted the Chairman's proposals as far as procedure was concerned, although he felt that it was overly optimistic. He suggested that, from Wednesday onwards, a timetable be established so that Delegations would know when a matter was to be concluded.

179. As far as the rental right was concerned, he noted that there was no definition of rental in Draft Treaty No. 1, while Draft Treaty No. 2 provided a definition. He suggested that the word "rental" be qualified throughout by the word "commercial" so as to ensure consistency with the TRIPS Agreement. He also suggested that it be clarified that commercial rental excluded public lending, and that the limitations provided for in the European Community directive concerning lending rights be included. He expressed the view that access to information should not be curtailed by the treaties, and in particular that distance education and life-long learning not be impaired.

180. On the subject of computer programs, he suggested that the language of the TRIPS Agreement be borrowed, or alternatively, that there should be some sort of agreement that the coverage of the provisions in the Treaty was the same.

181. He also questioned whether the TRIPS provisions on the right of rental should be exceeded, and stated the view of the Asian Group that they should not. He pointed out that the TRIPS Agreement provided for a review in the year 2000, and that it was too early to know how the right of rental would be functioning under the TRIPS Agreement. Thus, it would not be appropriate to establish a broader right under another treaty. He said that the "impairment test" had not yet been subject to adjudication.

182. He stated that the work of the WIPO Committee of Experts on the Settlement of Intellectual Property Disputes between States was inconclusive, and that some countries felt it would not be expedient to have two mechanisms for dispute settlement, one in WIPO and one in WTO. That was a further argument not to go beyond the TRIPS Agreement.

183. Mr. KIM (Republic of Korea) stated that it was difficult to categorize works protected by copyright at the present time, citing multimedia productions as an example, and that the provisions of the TRIPS Agreement concerning the right of rental should be adopted as a basis.

184. Mr. REINBOTHE (European Communities) stated that there was no rental right in the Berne Convention or in the Rome Convention, but that the right had been internationally recognized in the TRIPS Agreement. The European Community supported Article 9(1) of Draft Treaty No. 1 and Articles 10(1) and 17(1) of Draft Treaty No. 2, as well as Alternative B in Article 17(1). He stated that Draft Treaty No. 1 did not contain any definition for what constitutes rental, but Draft Treaty No. 2 did contain a definition. He suggested that, instead of a definition, the word “commercial” should be added before the word “rental” in both treaties, which would be consistent with the TRIPS Agreement.

185. He expressed support for the statement of the Delegation of Hungary, that is, that Article 9(2) of Draft Treaty No. 1 was unnecessary, and that the rental right should apply to all works without discrimination. He stated that the “impairment test” in Article 9(2) would not be appropriate, if it were desired to increase the protection of authors.

186. He made two points concerning details, first, that the formulation “collection of data or other material in machine-readable form” in Article 9(2) made reference to databases protected as works under Article 5, and, second, that the term “musical works embodied in phonograms” was too narrow, and that “works embodied in phonograms” should be preferred.

187. Mr. KUSHAN (United States of America) expressed his Delegation’s support for the inclusion of a rental right, as proposed in the two Draft Treaties. With respect to Article 9 in Draft Treaty No. 1, he believed that the text was intended to apply to databases under Article 5 of the same Draft Treaty. He said that his Delegation did not believe that the rental right there should apply to a work consisting of a motion picture preview clip or advertisement combined with a feature film and made available in a machine-readable form. In that regard, he felt that some clarifications in the scope of coverage of the Article might be needed.

188. He noted that it had also been suggested by other Delegations that the scope of the right be extended to non-musical works embodied in phonograms, and added that his Delegation could not support such an expansion of the scope of the rental right. He observed that musical works represented the content in the vast majority of phonograms, and that phonograms as such should remain the objects of the rental right. He also noted that Article 10 in Draft Treaty No. 2 raised the general question of the scope of protection for performers, namely whether or not it should be extended to audiovisual fixations. He was of the view that that Article, along with all other provisions related to the question of the scope of protection, should be addressed together, rather than separately.

189. He reiterated his support for Alternative A, as drafted, which included the limitation of coverage to musical performances and sound recordings. Finally, he supported Article 17 in Draft Treaty No. 2 as drafted.

190. Mme YOUM DIABE SIBY (Sénégal) estime regrettable que la notion de location ne soit pas définie dans le projet de traité n° 1, tout en relevant la nécessité de reconnaître un droit de location aux auteurs, aux artistes interprètes ou exécutants et aux producteurs de phonogrammes. Elle souhaiterait que des limites plus restrictives soient prévues à l’alinéa 2 de l’article 9 *in fine* du projet de traité n° 2. Elle ajoute que sa délégation est favorable à l’adoption de la variante B de l’article 10 du projet de traité n° 2.

191. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe, apoya de manera general un derecho exclusivo de alquiler para los titulares de ambos Tratados. No obstante, sugiere agregar un nuevo párrafo entre los actuales párrafos 2) y 3) del Artículo 9 del proyecto de Tratado N° 1, que se leería como sigue: “las disposiciones del párrafo 1 de este Artículo no se aplican a los arrendamientos cuyo objeto esencial no sea el programa de ordenador en sí.”

192. Mr. SHEN (China) felt that the right of rental was an important right, upon which there had been extensive discussions in China. He stated that his Delegation could support a rental right for authors of some categories of works. He proposed that the word “commercial” be added before the word “rental,” because the rental right should not be applied in respect of public libraries, schools, and scientific and research institutes. He felt that rental rights for authors required further study, but he considered them acceptable concerning computer software and multimedia products. However, as to performers and producers of phonograms, his Delegation was not in favor of granting a right of rental.

193. M. ETRANNY (Côte d’Ivoire) indique que sa délégation appuie le principe de l’introduction d’un droit de location dans le projet de traité n° 1. Il souhaiterait que la notion de location y soit défini à l’article 9. Il émet des réserves quant aux exceptions prévues à l’alinéa 2 de l’article 9. Il ajoute que sa délégation appuie la variante B de l’article 10, et l’article 17 du projet de traité n° 2.

194. Mr. CRESWELL (Australia) stated that his Delegation supported Article 9 in Draft Treaty No. 1, insofar as it proposed a mandatory rental right coextensive with that provided for in the TRIPS Agreement. His Delegation was also able to support the “TRIPS plus” element of a mandatory right for musical works embodied in phonograms and would go further by proposing extension of the right to literary works so embodied. He noted that no definition of the term “rental” was proposed in Draft Treaty No. 1, although a definition was proposed in Draft Treaty No. 2. He said that, on the understanding that, in keeping with the Berne Convention, Draft Treaty No. 1 would seek to avoid definitions, Australia would not insist on inclusion of a definition in that Treaty. However, he urged that, as in the TRIPS Agreement, the word “commercial” be inserted in front of the word “rental,” to avoid any possibility that public lending or cost-recovery fees charged by public libraries might attract the operation of the proposed rental right.

195. He said that, in paragraph (2) of Article 9, his Delegation was opposed to the inclusion of the words “collections of data or other material in machine-readable form.” He observed that the Chairman’s notes justified the inclusion of those words by reference to alignment with the database treaty, which presupposed agreement on rights that had yet to be agreed on, and that, therefore, it was premature to extend the mandatory rental right to such a category of materials. He believed that the final sentence in Article 11 of the TRIPS Agreement should be included in Article 9 of Draft Treaty No. 1, which would exempt from the mandatory rental right computer programs that were incorporated in other things, such as a car. Regarding Draft Treaty No. 2, he supported the terms of Article 17(1) and reserved his Delegation’s position with regard to Article 17(2).

196. M. PALENFO (Burkina Faso) fait part du soutien de sa délégation pour la reconnaissance d’un droit général de location en faveur des auteurs, des artistes interprètes ou exécutants et des producteurs de phonogrammes. Il signale que la législation de son pays

confère un droit de location aux auteurs. Sa délégation est opposée aux exceptions prévues à l'alinéa 2 de l'article 9 du projet de traité n° 1, et souhaite que soit incluse une définition du concept de location qui tienne compte de l'objectif visant un avantage économique ou commercial, direct ou indirect. Il appuie à ce sujet la position exprimée par la délégation de la Communauté européenne. S'agissant du projet de traité n° 2, sa délégation est favorable à la variante B de l'article 10 et à l'article 17.

197. Mr. SØNNELAND (Norway) presented his Delegation's full support for what had been said by the representative of the Delegation of the European Communities. He supported paragraph 9(1) in Draft Treaty No. 1, and Articles 10(1) and 17(1) of Draft Treaty No. 2. He strongly supported Alternative B, granting rental rights for performances fixed in any medium. He also supported the word "commercial" being inserted in the definition of rental for the same reasons as presented by the Delegation of Australia. He was of the opinion that Article 9(2) was not needed; if, however, Article 9(2) were retained, he favored the views put forward by the Delegation of Australia, concerning rental of computer programs.

198. Mr. WIERZBICKI (New Zealand) stated that his Delegation agreed with the comments made by the Delegation of the European Communities concerning the definition of "rental" being in one treaty and not the other. It also agreed with the suggestion made by the Delegation of the European Communities that "commercial" should be added before "rental" in respect to Article 9(1) of Draft Treaty No. 1. He also said his Delegation agreed with the comment expressed in the intervention by the Delegation of the United States of America regarding Article 10 of Draft Treaty No. 2, in that there might be conflict between the rights given to copyright owners and the rights given to producers of phonograms, and that, therefore, there needed to be compatibility. He strongly favored the impairment test in that area, and considered that Article 9(2) should be equivalent to Article 11 of the TRIPS Agreement. Regarding Articles 10 and 17 of Draft Treaty No. 2, he supported Alternative A.

199. Mr. EKPO (Nigeria) expressed his Delegation's support for the inclusion of rental rights in both Draft Treaty No. 1 and Draft Treaty No. 2, although that was a "TRIPS plus element." He shared the position expressed by the Delegation of Burkina Faso, which requested that the concept of rental be defined. He supported Alternative B in Articles 10 and 17 of Draft Treaty No. 2.

200. Mr. TIWARI (Singapore) stated that Singapore was concerned with the extension of the right of rental beyond what had already been agreed under the TRIPS Agreement. He pointed out that the TRIPS Agreement had been concluded only two years ago, and developing countries had a transitional period of five years until January 1, 2000, to implement the obligations under that Agreement. It was too early to extend those rights without seeing how they actually would work under the TRIPS Agreement. He observed that the proposed provisions were aimed at conferring rental rights for all categories of works and not just computer programs, films and sound recordings, and that that would go beyond Articles 11 and 14 of the TRIPS Agreement. He also noted that the Basic Proposal did not provide for an exemption in respect of computer programs, where the essential object of the rental was not the program, although there was such an exception in Article 11 of the TRIPS Agreement. He supported the suggestions to include such an exemption. There was no definition of rental in Draft Treaty No. 1. Any such definition should be confined to commercial rental, and it should be made clear that the right of rental should not effect public lending by libraries and similar non-profit lending. He noted that a definition of rental was provided in Article 2(f) of Draft

Treaty No. 2, and in Articles 10 and 17 in Draft Treaty No. 2, he said that, in Article 10, “TRIPS and Rome plus” protection was proposed.

201. In respect of paragraph (2) of Articles 10 and 17, he was concerned with the attempt to deviate from what was in Article 14.4. of the TRIPS Agreement concerning a phasing-out period. He believed that a three year phasing-out period was not justifiable and each Contracting Party should be left to decide on its own whether and when to do away with any system of equitable remuneration. The abolition of any such system would, as in Article 6 on the abolition of non-voluntary licenses, require the existence of an effective collective administration system which was not yet fully implemented in many developing countries.

202. El Sr. PROAÑA MAYA (Ecuador) opina que el derecho de alquiler en lo referente al derecho de autor es una nueva figura tanto en las legislaciones nacionales como en la legislación positiva internacional. Juzga necesario agregar la palabra comercial, de manera a salvaguardar los derechos de la cultura y la educación pública.

203. M. GOVONI (Suisse) déclare que sa délégation est favorable à la reconnaissance d’un droit exclusif de location dans les deux traités. Il partage l’opinion de la délégation de la Communauté européenne pour réexaminer l’alinéa 2 de l’article 9 du projet de traité n° 1. Il est de l’avis qu’une définition de la notion de location n’est pas nécessaire; toutefois, il souhaiterait voir ajouter l’adjectif “commercial” au mot “location”. Il ajoute que sa délégation opte pour la variante B de l’article 10 du projet de traité n° 2.

204. M. TRAORE (Mali) dit que sa délégation est favorable à la reconnaissance d’un droit de location en faveur des auteurs, des des artistes interprètes ou exécutants et des producteurs de phonogrammes. Il indique qu’elle partage l’opinion de la délégation de la Côte d’Ivoire sur la nécessité de définir le concept de location à l’article 9 du projet de traité n° 1. S’agissant de l’article 10 du projet de traité n° 2, il est favorable à la variante B et à l’article 17 tel qu’il est libellé.

205. Mr. HONGTHONG (Thailand) referred to Article 9 of Draft Treaty No. 1, and said that his country was still in the “honeymoon period” with the TRIPS Agreement, and, as such, was not eager to search for any other rights. He stressed that rental rights should be limited to commercial rentals. Regarding Draft Treaty No. 2, he preferred Alternative A in Article 10, and accepted Article 17 as currently drafted.

206. M. KANDIL (Maroc) souligne l’appui de sa délégation quant à l’inclusion d’un droit exclusif de location dans les deux traités. Il partage les observations des délégations qui ont évoqué l’absence de définition de la location et le besoin d’y remédier dans le projet de traité n° 1. S’agissant du projet de traité n° 2, il dit que sa délégation est favorable à la variante B de l’article 10 et approuve l’article 17 dans son intégralité.

207. Mr. OPHIR (Israel) said that his Delegation generally supported the recognition of rental rights. He preferred that a definition of rental rights be included in both treaties. It should make clear that the rental right did not include lending rights, as that term was contemplated in Note 2.21 of document CRNR/DC/5. With regard to Article 10(1), he supported Alternative B.

208. Mr. EL NASHAR (Egypt) indicated that Egypt was in agreement with the general principle of the rental right, but would rather see a clear definition of the word “rental” in both Draft Treaties. He also suggested that the word “commercial” be added so that there would not be any confusion between what was meant by rental, and other forms of lending. He preferred Alternative B in Draft Treaty No. 2.

209. M. HENNEBERG (Croatie) déclare que sa délégation est favorable à la variante B de l’article 10 du projet de traité n° 2.

210. Mr. YAMBAO (Philippines) expressed his Delegation’s support for the grant of rental rights, which should be limited to commercial rentals. He stressed that his Delegation was not ready to adopt rules or create obligations beyond those existing in the TRIPS Agreement.

211. The CHAIRMAN noted that there had been some support that, in Draft Treaty No. 1, the right of rental should cover all categories of works. There were, however, differing opinions on the scope of the right of rental. He noted one Delegation’s opinion that the rental right should not go beyond the TRIPS Agreement, another’s that the categories comprised should include not only musical works on phonograms but also other works on phonograms, and still another’s that the right of rental should extend to literary works. There was support for a definition of rental in both Draft Treaties. He pointed out, however, that there was no tradition of having a series of definitions in the copyright conventions. He noted the suggestion that the word “commercial” be used with rental, and wondered if that would satisfy those Delegations which sought a definition of rental.

212. He said that there had been clear support for including the language of the TRIPS Agreement, which excluded computer programs when they were not an essential object of the act of rental. He noted that there had been some discussion concerning paragraphs (2) of Articles 10 and 17 of Draft Treaty No. 2 concerning the question of the phasing-out period of the system of the right of remuneration, but he added that it was too difficult, for the time being, to formulate a set of proposals on that item. He urged the Delegations to conduct private consultations concerning the right of rental.

Article 6 (Economic Rights of Performers in their Unfixed Performances) of the WPPT

213. The CHAIRMAN introduced the “third cluster” of items to be discussed by the Committee, consisting of the following items in Draft Treaty No. 2: Article 6 (Economic Rights of Performers in their Unfixed Performances); Article 8 (Right of Modification); Article 15 (Right of Modification); and Article 21 (Term of Protection). He opened the floor for discussion on *Article 6 (Economic Rights of Performers in their Unfixed Performances)*.

214. M. GOVONI (Suisse) déclare que sa délégation appuie la variante B de l’article 6 du projet de traité n° 2. Quant à la portée des droits énoncés dans cet article, il fait observer que les droits prévus pour les artistes interprètes ou exécutants sur leurs interprétations ou exécutions non fixées n’englobent pas la réémission et la retransmission par fil d’une émission de radiodiffusion; toutefois la deuxième phrase du point i) de cet article apparaît comme un éclaircissement à ce sujet. Il est de l’avis que ces droits devraient s’étendre à ceux expressément exclus de cet article parce que les auteurs bénéficient déjà de tels droits pour lesquels existent des systèmes de gestion collective. La mise sur pied de systèmes identiques

pour les artistes interprètes ou exécutants serait souhaitable. Il conviendrait que les droits prévus à l'article 6 soient donc élargis.

215. The CHAIRMAN stated that the wish of the Delegation of Switzerland could be achieved by deleting from paragraph (i) the text beginning with the word "except" and up to the word "performance." Accordingly, the "except" clause would be deleted.

216. He reminded the Delegations that there was no need to comment on Alternatives A and B concerning audio-visual fixations, which would be discussed later.

217. Mme BOUVET (Canada) propose d'inclure à l'article 16 une disposition permettant aux artistes interprètes ou exécutants d'obtenir une compensation pour l'exécution en public, la radiodiffusion ou la communication de leurs fixations non autorisées de leurs interprétations en direct.

218. Mr. CRESWELL (Australia) expressed opposition to the proposal of the Delegation of Switzerland to delete the words "except where the performance is already a broadcast performance."

219. Mr. SØNNELAND (Norway) expressed support for the proposal of the Delegation of Switzerland, but added that his Delegation could also accept the Article as drafted.

220. The CHAIRMAN stated that there were proposals from the Delegations of Canada and Switzerland, which would be taken into account when drafting Article 6. He then opened the floor for discussion on *Article 8 (Right of Modification)* and *Article 15 (Right of Modification)*. Under the Basic Proposal, both performers and producers of phonograms would be granted an exclusive right to authorize or prohibit any modification of the result of their performances and phonograms, respectively.

Articles 8 (Right of Modification) and 15 (Right of Modification) of Draft Treaty No. 2

221. Mme YOUM DIABE SIBY (Sénégal) se demande si la reconnaissance d'un droit de modification en faveur des artistes interprètes ou exécutants ne ferait pas double emploi avec celle du droit de reproduction. Elle s'interroge également sur la relation des articles 5 et 15 du projet de traité n° 2 et pense que le droit de modification conféré aux producteurs de phonogrammes prévu à l'article 15 pourrait avoir pour incidence de limiter les effets du droit moral des artistes interprètes ou exécutants énoncés à l'article 5.

222. The CHAIRMAN stated that the right of modification was a part of the economic rights for performers and producers of phonograms, and that the right of reproduction in some cases and the moral rights in the case of performers might have the same function. He pointed out that there might also be, however, cases where the right of modification could and should be considered separately, for example, where a live performance was modified without fixation while still being performed, since the right of reproduction would not apply in such a case. He added that, in cases where the performance was already fixed and then modified, it was probably impossible to modify the performance without also reproducing it.

223. As far as moral rights were concerned, he said that modification would imply any change or alteration and said that moral rights would apply only in cases where altering is detrimental or prejudicial to the honor and reputation of the performer. He added that although such modifications are “modifications” in the sense of the right of modification, also moral rights were applicable in respect of them.

224. Mr. KIM (Republic of Korea) expressed doubts as to whether adequate justification had been presented for the creation of a new right of modification, which was different from the rights of translation and adaptation. He said that the right of reproduction was probably a better vehicle to protect the rights of performers and producers of phonograms against modifications.

225. Mr. TIWARI (Singapore) opposed Articles 8 and 15, which were unnecessary in the light of the availability of rights of reproduction, distribution and communication to the public, and because adaptations and alterations were already protected as original works under the Berne Convention.

226. Mme DE MONTLUC (France) partage les remarques du président et relève que, compte tenu de l'évolution des techniques numériques, il est nécessaire de prévoir un droit de modification en faveur des artistes interprètes ou exécutants parce que les situations évoquées ne sont pas couvertes par le droit de reproduction.

227. M. RAGONESI (Italie) appuie l'inclusion du droit de modification tel qu'il figure à l'article 8 du projet de traité n° 2.

228. Mr. STARTUP (United Kingdom) stated that his Delegation was not convinced that a right of modification was justified, in the light of its uncertain scope and the unclear relationship with the right of reproduction. He said that, to the extent that the new right would go beyond the scope of the reproduction right, it would extend rights into areas covering very much less substantial parts of works than were usually considered to be covered by existing rights. He added that the new right would also seem to have implications for the field of copyright and would risk creating an imbalance between the two areas.

229. Mr. KEMPER (Germany) expressed doubts concerning the need for a right of modification, and said that the phenomena intended to be covered could be addressed through proper application of the right of reproduction.

230. M. DEBRULLE (Belgique) fait part de l'appui de sa délégation pour reconnaître un droit de modification en faveur des artistes interprètes ou exécutants. Avec les techniques numériques, il est possible notamment de reconstituer une interprétation complète avec les caractéristiques de l'artiste en partant d'une image isolée. Il n'est pas certain que le droit de reproduction s'applique à cette forme d'exploitation des interprétations ou exécutions, dans la mesure où la reproduction suppose qu'une partie substantielle de l'interprétation soit reproduite. Il considère donc opportun de reconnaître un droit de modification aux artistes interprètes ou exécutants, de définir la notion de modification, et d'éviter que ce droit ne porte sur des éléments appartenant au domaine public.

231. Mr. SØNNELAND (Norway) expressed support for the recognition of a right of modification, and favored Alternative B of Articles 8 and 15.

232. Mr. CRESWELL (Australia) expressed hesitation concerning the right of modification, particularly in the light of the words in Article 14 “in any manner or form” in respect of the right of reproduction. He expressed concern regarding the possible implications for the principle of substantiality in determining whether there had been room for the exercise of the reproduction right; there would be difficulties, if use of a sound recording which was insubstantial, and, therefore, not covered by the reproduction right, was nevertheless covered by the proposed modification right. He said that the principle of substantiality might also apply to this new right, but it seemed also open to the argument that the reproduction right was so comprehensive that the only application left for the modification right was to alterations of insubstantial amounts of sound recordings.

233. Mr. OLSSON (Sweden) supported the right of modification, because his Delegation was not convinced that the right of reproduction, or moral rights of performers, would cover modifications in a context of digital use. He asked for clarification concerning the relationship between modifications and adaptations, arrangements, compression techniques and so on.

234. El Sr. VÁZQUEZ (España), se expresa a favor del reconocimiento de un derecho exclusivo de modificación de los artistas intérpretes o ejecutantes, con preferencia por la Variante B. Considera que se debería suprimir la palabra “musicales” de la Variante A. Se auna a las Delegaciones que solicitan una definición más clara del término modificación.

235. Mr. KUSHAN (United States of America) stated that his Delegation could accept deletion of the proposed right of modification provided it were clearly understood that an active sampling or modifying of a portion of a sound recording would constitute an act that fell within the scope of the reproduction right.

236. Mr. ABBASI (Pakistan) expressed support for the statement of the Delegation of Singapore, that is, that there was inadequate justification for the establishment of a new right of modification. He expressed his Delegation’s view that no modification could take place without a corresponding fixation, thus the right of reproduction inevitably extended to all modifications of performances and sound recordings.

237. The CHAIRMAN stated that there were two positions, namely, support and opposition, for the proposed right of modification. Among the supporters, there was sentiment for a need for clarification as to the definition of modification.

238. Mr. HENNESSY (Ireland) stated that the proposed right of modification could not be separated from the right of reproduction, and thus favored further study of the proposed right.

239. Mr. AUER (Austria) opposed the proposals concerning the right of modification for the reasons stated by the Delegations of the United Kingdom and Germany, and because, in the view of his Delegation, the proposed right would not extend to unfixed performances, which were dealt with in Article 6.

240. Mr. GYERTYÁNFY (Hungary) expressed opposition to the recognition of a right of modification, since the acts involved were connected to the right of reproduction, and because the possible implications for such phenomena as parody were not at all clear.

241. Mr. OKAMOTO (Japan) expressed opposition to the proposed right.

242. Mr. HONGTHONG (Thailand) expressed the opposition of his Delegation to the proposed right of modification.

243. Mme PARVU (Roumanie) est favorable à l'octroi d'un droit de modification pour les artistes interprètes ou exécutants, tel que prévu à la variante B de l'article 8 du projet de traité n° 2. Elle partage les observations présentées par les délégations de la France et de la Belgique à ce sujet.

244. Mlle DALEIDEN (Luxembourg) appuie l'inclusion d'un droit de modification en faveur des artistes interprètes ou exécutants, et se prononce pour la variante B de l'article 8 du projet de traité n° 2.

245. The CHAIRMAN adjourned the meeting.

Fourth Meeting

Monday, December 9, 1996

Afternoon

Work program

246. The CHAIRMAN suggested a modification to the work program. He proposed to begin discussion of a "package" of provisions common to Draft Treaty No. 1 and Draft Treaty No. 2, namely, the right of reproduction, the right of communication, the right of making available to the public, and the notion and place of publication. He hoped that discussion on those items could take place during the afternoon and evening sessions, so that treaty language for those items could be prepared.

Article 7 (Scope of the Right of Reproduction) of Draft Treaty No. 1; Articles 7 (Right of Reproduction) and 11 (Right of Reproduction) of the WPPT (Articles 7 and 14 of Draft Treaty No. 2)

247. Seeing no objection, the CHAIRMAN introduced the discussion concerning the right of reproduction in the two treaties: *Article 7 (Scope of the Right of Reproduction)* of Draft Treaty No. 1 and *Articles 7 and 14 (Right of Reproduction)* of Draft Treaty No. 2. In Article 7 of Draft Treaty No. 1, and in the corresponding Articles of Draft Treaty No. 2, it was proposed that the Contracting Parties agree that the right of reproduction included direct and indirect reproduction, whether permanent or temporary and in any manner or form. He pointed out that the expression "in any manner or form" included the storage of a work in any electronic medium, as well as such acts as uploading and downloading a work to or from the memory of a computer. He said that digitalization, that is, the transfer of a work embodied in an analog medium to a digital one, always constituted an act of reproduction.

248. He pointed out that the first element in Draft Treaty No. 1 was the explicit inclusion of direct and indirect reproduction, including the element of distance, that is, that the distance between the original and the copy in respect of an act of reproduction was irrelevant. He said that the second element in the proposal was intended to clarify the widely held understanding that both permanent and temporary reproduction constituted reproduction within the meaning of Article 9(1) of the Berne Convention. He stated that the objective of the proposal to include provisions on the right of reproduction in the draft treaties was to ensure that the right would be interpreted fairly and in reasonable uniformity in all important aspects, as dictated by the need for legal certainty and predictability in the application of laws.

249. The Chairman continued to explain that the second paragraphs of the Articles concerning the right of reproduction contained certain permissible exceptions or limitations to the right of reproduction, the purpose of which was to make it possible to exclude from the scope of the right of reproduction acts of reproduction which were not relevant in economic terms, that is, cases of reproduction that had no independent function as an exploitation of the work. He emphasized that Article 7(2) of Draft Treaty No. 1 and the corresponding Articles of Draft Treaty No. 2 were not intended to limit in any sense the application of the general provisions on limitations and exceptions found in Article 12 of Draft Treaty No. 1, the corresponding Articles of Draft Treaty No. 2, and Article 9(2) of the Berne Convention. He said that Article 7(2) of Draft Treaty No. 1 and the corresponding provisions of Draft Treaty No. 2 had been drafted as a guideline for national legislators, which meant that all existing exceptions and limitations in national copyright laws which were based on Article 9(2) of the Berne Convention might continue to exist. This was also true in respect of systems based on the concept of “fair use” or “fair dealing” and of systems based on sectorial limitations of rights.

250. He stated that he might make further declarations on the interpretation and contents of the proposed Articles, if necessary, following the discussions.

251. Mr. CHEW (Singapore) stated that his Delegation did not oppose Article 7(1), including its extension of the right of reproduction to include temporary reproduction subject to appropriate limitations. He stressed that, for certain legitimate activities, fair use should be allowed, including browsing the Internet, and activities of a facilitative nature which had no economic value apart from facilitating transmission of a work. He stated that, for that purpose, his Delegation had submitted a proposal amending Article 7(2) so that to make such activities lawful (document CRNR/DC/12, page 2). In his view, the present Article 7(2) did not make clear that such activities were allowed. He added that no new right should unduly interfere with the existing rights of fair use and other legitimate activities.

252. The CHAIRMAN said that there was no need to discuss fair use or any other existing limitation on rights based on Article 9(2) of the Berne Convention, because the proposal in Article 7(2) did not exclude any such limitations.

253. Mr. REINBOTHE (European Communities) pointed out that paragraph (1) of Article 7 was a clarification only, and said that this fact might be better reflected by modifying the last part of paragraph (1) to read, instead of “shall include direct and indirect reproduction,” rather, “includes direct and indirect reproduction.” That change, and corresponding changes in the related provisions of Draft Treaty No. 2, would make clear that the right of reproduction did not prevent activities without any economic significance. He stated that appropriate exceptions and limitations would remain possible, and that the framework, structure and scope

of Article 9 of the Berne Convention was to be maintained and respected. He said that his Delegation had no final views on Article 7(2), but that it took the view that clarity was needed on that paragraph with respect to its nature, scope and added value.

254. Mr. ABBASI (Pakistan) withdrew his previous statement, following clarification that existing fair use provisions under Article 9(2) of the Berne Convention would not be brought into question by the proposed right of reproduction.

255. The CHAIRMAN repeated that there was no intention to preclude existing limitations in national laws based on Article 9(2) of the Berne Convention.

256. Mr. NØRUP-NIELSEN (Denmark) congratulated the Chairman on his election, and stated that his Delegation supported the proposed Article 7(1), which was in line with the domestic law of his country and with the directives of the European Community.

257. He expressed, however, doubts concerning Article 7(2). He saw no reason why the transient and incidental acts mentioned in that provision should be made dependent on the application of exceptions. He proposed deletion of paragraph (2) of Article 7 and an addition to Article 7(1) stating that temporary reproduction made for the sole purpose of making a work perceptible, or reproduction of a purely transient or incidental character, as part of a technical process, did not constitute reproduction within the meaning of Article 9(1) of the Berne Convention. He stated that that change could be made to the existing text of Article 7(1) or as an agreed statement of the Conference. He said that protection should be strengthened in the new digital situation, but at the same time it should not go too far.

258. Mme BOUVET (Canada) déclare que sa délégation ne peut pas accepter l'article 7 du projet de traité n° 1. Dans sa forme actuelle, cette disposition n'offre pas toute la souplesse nécessaire pour permettre aux législateurs et aux tribunaux nationaux de déterminer la portée du droit de reproduction à l'ère des techniques numériques. Compte tenu de l'importance et des incidences de ce droit vis-à-vis des créateurs, des intermédiaires et des usagers, elle estime qu'il serait prématuré d'inclure une telle disposition dans un autre traité d'autant plus que la Convention de Berne offre assez de souplesse pour appréhender la reproduction des oeuvres de quelque manière et sous quelque forme que ce soit. S'agissant du projet de traité n° 2, elle souhaite que le libellé des dispositions relatives aux droits des producteurs de phonogrammes et des artistes interprètes ou exécutants soient conformes, respectivement, aux articles 10 et 7 de la Convention de Rome.

259. Mr. BOUWES (Netherlands) expressed support for the clarification to the right of reproduction offered by Article 7(1), which left intact the right of reproduction in Article 9(1) of the Berne Convention, covering only reproductions with economic significance, whether temporary or not. The reproduction right should not extend beyond its natural borders, and a balance should be sought between all interests involved.

260. Mr. KUSHAN (United States of America) said that the Chairman's explanation concerning Article 7 had confirmed that the treaties as presently drafted were structured in a manner which authorized exemptions permitting certain temporary reproductions made while browsing the Internet and transmitting copyrighted works from point to point. He stated that his Delegation believed it appropriate to allow Contracting Parties to exempt from the reproduction right temporary copies made in the normal course of operation of devices, such

as CD players, computers and equipment used to communicate information and other material in the course of an authorized use. He noted that domestic law of his country incorporated a similar concept in the context of computer programs copied as an essential step in the use of the program in a computer.

261. Turning to the specific language of the Article, he expressed support for paragraph (1) of Article 7 as drafted, stating that it was a useful clarification of the scope of the reproduction right under Article 9(1) of the Berne Convention. With regard to paragraph (2) of Article 7, his Delegation supported clarifications to the text to resolve some ambiguities pointed out by other Delegations. One ambiguity was the meaning of the word “transient,” and he said that it might be preferable to make the entire paragraph relate to exceptions for “temporary” reproductions. He also questioned the meaning of the words “incidental nature,” and sought clarification that the reference was intended to refer to the steps that occurred automatically when a work was made available to the public through a digital network.

262. With respect to the proposal from the Delegation of Singapore, he said that his Delegation appreciated the intent of the proposal, but he did not believe that the proposed text would help, and he expressed a preference for the text of the Basic Proposal.

263. Mr. OLSSON (Sweden) expressed support for Article 7(1) of Draft Treaty No. 1 and the corresponding provisions of Draft Treaty No. 2, but said that his Delegation had difficulties with Article 7(2) which would require recognition that a reproduction took place in the cases mentioned therein. He gave three reasons, first, that the acts mentioned there had no economic significance; second, that those acts were not really reproductions, and, third, that there were sensitive political considerations related to future acceptance of the Treaties. Consequently, his Delegation preferred to delete Article 7(2).

264. Mr. KIM (Republic of Korea) commented on Article 7(2) of Draft Treaty No. 1 and the corresponding provisions of Draft Treaty No. 2 by stating that, unless the normal exploitation of works and all the legitimate interests of the authors were affected or prejudiced, rightholders would not insist on the exclusive right of reproduction as far as economic rights were concerned. He called attention to paragraph 7.07 of the Chairman’s notes, which stated that the purpose of Article 7(2) was to make it possible to exclude from the scope of the right of reproduction such acts of reproduction that were not relevant in economic terms. From that note, he said, it was evident that there was every reason to confine the exclusive right of reproduction to situations involving economic importance. He understood that the act of browsing or providing telecommunications facilities had economic value in a number of cases; however, no distinction could realistically be made between one having economic significance and another having none. He said that rightholders could identify economic damage only after the act had taken place, and that, in those circumstances, his Delegation did not believe that the act of browsing or providing telecommunications facilities should be covered by the exclusive right of the reproduction with no exceptions.

265. Mr. STARTUP (United Kingdom) supported the position of the Delegation of the European Communities on Article 7(1), clarifying that temporary reproductions were covered by the right of reproduction in Article 9(1) of the Berne Convention, a position which was reflected in the domestic law of his country. He added that the right should not have the effect of inhibiting activities incidental to otherwise authorized uses of works, and which were in themselves of no economic significance. He said that the three-step test in Article 12(1)

seemed relevant for that purpose, and that, while some clarification was needed, Article 7(2) appeared to do no more than elaborate how the test could be applied in this particular area; it did not limit the application of the test in Article 12(1).

266. M. RAGONESI (Italie) approuve l'article 7 du projet de traité n° 2 et partage la position de la délégation de la Communauté européenne au sujet de l'alinéa 1) de cet article.

267. Mr. VISSER (South Africa) stated that Article 7(1) of Draft Treaty No. 1 was declarative of the domestic law of his country, but that his Delegation had difficulties with Article 7(2), which seemed to create many practical problems. He said that the nature of the Internet was such that transactions often took place across national borders. If one country had enacted the limitation in Article 7(2) and another had not, the problem of conflict of laws would arise. He proposed that the limitations covered by Article 7(2) should not be optional but rather mandatory. For that reason, he expressed interest in the proposal put forward by the Delegation of Singapore.

268. Mme DE MONTLUC (France) indique que sa délégation partage l'opinion exprimée par la délégation des Communautés européennes au sujet de l'alinéa 1) de l'article 7 du projet de traité n° 1. Elle souligne que sa remarque vaut *mutatis mutandis* pour le projet de traité n° 2. Elle ajoute qu'il serait utile toutefois de clarifier que la reproduction peut s'effectuer de quelque manière ou sous quelque forme que ce soit, qu'elle soit permanente ou temporaire. S'agissant de l'alinéa 2) de l'article 7, elle estime qu'il est tout à fait pertinent dans la mesure où il laisse aux législateurs nationaux suffisamment de flexibilité pour apprécier des situations où les reproductions temporaires faites au cours d'une utilisation identique pourraient bénéficier d'un régime d'exceptions, ou des situations où une reproduction temporaire aurait pour seul but de permettre la communication au public d'oeuvres ou d'objets protégés respectivement par le droit d'auteur ou par les droits voisins.

269. Mr. CRESWELL (Australia) said that much ink and paper had been outlaid on the question whether Article 7(1) clarified Article 9(1) of the Berne Convention or enlarged it. While note 7.06 said that the two limbs of Article 7 were within a fair interpretation of Article 9 of the Berne Convention, he said that in note 7.14 it was stated that "today the countries of the Berne Union may interpret the right of reproduction in different ways."

270. He said that there was no necessary inconsistency in the statements in the notes, just that Article 7 might constitute an enlargement or extension of Article 9(1) in the eyes of some countries, but not of some others. He said that the question was whether it was desirable to mark out the territory covered by Article 9(1) of the Berne Convention with greater precision than its existing terms. He saw two elements in Article 7(1) which were not expressly contained in Article 9(1) of the Berne Convention, namely, that the reproduction right applied alike to direct and to indirect copying and to copies regardless of whether they were permanent or temporary. Bearing in mind the discussion of Articles 4 and 5, the use in the draft of "shall" in front of "include" suggested that the Chairman took the view that the Article expanded the existing reproduction right. If, at least, some Member States of the Berne Union took that view, it would leave little alternative but to treat it as such. While the first element did not raise problems for his Delegation, it felt that the articulation of the exceptions to the right of reproduction needed more attention. The proposed wording of Article 7(2) would give neither right owners nor users the necessary reassurance. Recalling that limitations on the right of reproduction should not be more extensive than Article 9(2) of the Berne Convention, his

Delegation proposed that Article 7(2) of Draft Treaty No. 1 should expand on the existing right of reproduction by qualifying, in whatever way seemed fit, any new right or expansion of an existing right, conferred by Article 7(1).

271. Mr. FICSOR (Assistant Director General of WIPO) pointed out that, if a provision used present tense—such as “is” or “are”—instead of “shall” language—such as “shall be”—it indicated more clearly that what was involved was the declaration of an already existing legal situation. He added that, however, the use of “shall” language did not necessarily mean that the contrary was the case, that is, that the legal situation reflected by the provision did not exist yet and that it was just introduced by the provision. The “shall” language is simply the generally applied language of legal provisions, irrespective of whether they are constitutive, declarative or interpretative.

272. He said that Article 9(1) of the Berne Convention was the best example for what he had referred to. It had only been included into the text of the Berne Convention at the 1967 Stockholm revision conference. It was absolutely clear for all the Member States of the Berne Union that the obligation included in it—to grant an exclusive right of authorization for reproduction—was not a new one, and was not to be introduced by Article 9(1), it had always existed since the adoption of the Convention in 1886. Article 9(1) only stated explicitly what had already been included in the Convention implicitly but beyond any doubt; and still “shall” language was used in it.

273. He stressed that Article 7(1) of Draft Treaty No. 1 was similar, in its nature, to Article 9(1) of the Berne Convention. It simply clarified, in certain respects, what had already been provided for in Article 9(1) of the Berne Convention in general, namely, that reproduction “in any manner or form” was covered by the right of reproduction; it clarified that, within the full coverage of that right indicated by the expression “in any manner or form,” also both direct and indirect reproductions and both permanent and temporary reproductions were covered. Article 7(2) as included in the Basic Proposal was also nothing more than the identification of some special cases of exceptions, which could actually already be applied under the general provisions of Article 9(2) of the Berne Convention. Providing for such specific exceptions seemed appropriate; on the contrary, any provision which would provide that certain reproductions were not recognized as reproductions would be in obvious conflict with Article 9(1) of the Berne Convention.

274. Mr. SØNNELAND (Norway) stated that Article 9(1) of the Berne Convention included both permanent and temporary reproduction, and that his Delegation supported Article 7(1) of Draft Treaty No. 1 and Article 14(1) of Draft Treaty No. 2, with the modification proposed by the Delegation of the European Communities. He proposed deletion of Articles 7(2) and 14(2) to be replaced with a text making clear that temporary reproduction made for the sole purpose of making a work perceptible, or of a purely transient or incidental character as a part of a technical process, did not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention.

275. Mr. SHEN (China) stated that the coverage of Article 7 should be studied further, particularly whether it covered temporary or transient reproduction.

276. M. HENNEBERG (Croatie) est de l'avis que l'article 7 du projet de traité n° 1 est une interprétation de l'article 9 de la Convention de Berne. Il propose d'ajouter le mot "exclusif" pour qualifier le droit de reproduction.

277. Mr. EKPO (Nigeria) supported Article 7(1), but stated that the proposal of the Delegation of Singapore concerning Article 7(2) should be the basis for a solution.

278. Mr. SILVA SOARES (Brazil) supported Article 7(1), but stated that Article 7(2) should be studied further.

279. M. DEBRULLE (Belgique) déclare que sa délégation approuve l'alinéa 1 de l'article 7 du projet de traité n° 1 et les dispositions correspondantes dans le projet de traité n° 2, qui sont en conformité avec sa législation nationale. Il soutient la proposition de la délégation des Communautés européennes concernant l'amendement technique de ces dispositions.

280. S'agissant de l'alinéa 2 de l'article 7 du projet de traité n° 1, il est de l'avis que la condition "que la reproduction ait lieu au cours d'une utilisation de l'oeuvre qui est autorisée par l'auteur ou admise par la loi", associée à l'idée de préjudice économique, permet de différencier les reproductions ayant une incidence économique sur l'exploitation normale des oeuvres de celles ayant un caractère exclusivement technique. Sous réserve de quelques modifications, le délégué appuie cet alinéa ainsi que celui correspondant dans le projet de traité n° 2.

281. M. GOVONI (Suisse) souligne l'importance de clarifier la portée du droit de reproduction dans la Convention de Berne comme cela est fait à l'alinéa 1 de l'article 7 du projet de traité n° 1 et de préciser que ce droit englobe également la reproduction directe et indirecte ainsi que son caractère temporaire. Il ajoute qu'il partage les préoccupations exprimées par les délégations du Danemark, de la Suède et de la Norvège. Il conçoit mal une reproduction de caractère éphémère rendant une oeuvre perceptible et n'ayant pas de valeur économique. Il est favorable à la suppression de l'alinéa 2 de l'article 7 tel que proposé dans le projet de traité n° 1.

282. The CHAIRMAN stated that deletion of Article 7(2) would not affect the existing legal situation under Article 9(2) of the Berne Convention, and that everything in Article 7(2) of Draft Treaty No. 1 was considered to be covered by Article 12 of the same Draft Treaty.

283. Mr. AYYAR (India) stated that Article 7(2) could not be deleted unless Article 7(1) were also deleted, because, once Article 9(1) of the Berne Convention were clarified through Article 7(1), it would also be necessary to clarify the scope of limitations under Article 7(2). He added that national legislators should have flexibility to craft limitations and exceptions to rights once the marketplace effects of digital technologies emerged.

284. M. KANDIL (Maroc) déclare que sa délégation appuie l'article 7 tel qu'il figure au projet de traité n° 1. Il émet toutefois certains doutes quant à l'alinéa 2 de cet article, sur le fait de laisser au législateur national le soin de fixer des limitations, d'autant plus qu'il s'agit de réseaux numériques faisant fi des frontières. Comme l'a souligné la délégation de l'Afrique du Sud, cela peut être une source de conflit de loi. Il est de l'avis également que le caractère "éphémère ou accessoire" ne constitue pas une raison suffisante pour justifier une atteinte au droit des auteurs d'autoriser la reproduction de leurs oeuvres.

285. Mr. OKAMOTO (Japan) said that the matters covered in Article 7 should be left to national legislation.
286. Mr. WIERZBICKI (New Zealand) expressed support for the statement of the Delegation of South Africa concerning the transnational nature of digital technology and the doubt whether Article 7(2) adequately took that into account.
287. El Sr. ZAPATA LÓPEZ (Colombia) se manifiesta en favor del derecho exclusivo de reproducción previsto en los dos proyectos de Tratados y apoya en particular el párrafo 2) del Artículo 7.
288. Mlle DALEIDEN (Luxembourg) dit que sa délégation souscrit à la position de la délégation des Communautés européennes sur l'alinéa 1 de l'article 7 du projet de traité n° 1. S'agissant de l'alinéa 2 de cet article, elle partage l'opinion émise par la délégation de la Belgique, à savoir une certaine flexibilité donnée au législateur national ainsi qu'un équilibre entre les divers intérêts en jeu. Elle est d'accord avec l'inclusion de quelques modifications dans le texte à la seule unique fin d'être plus précis.
289. La Sra. JIMÉNEZ HERNÁNDEZ (México) comparte la opinión expresada por las Delegaciones de África del Sur, Brasil y México conforme a la cual la limitación establecida por el párrafo 2 del Artículo 7 no debería dejarse a las legislaciones nacionales sino establecerse claramente en el Tratado. Ésta sería la única forma de asegurar una real armonización y evitar una interpretación fragmentada del derecho de reproducción, elemento de suma importancia en el marco de los Tratados en estudio. A continuación, manifiesta su desacuerdo con la propuesta que consiste en eliminar el párrafo 2 del mismo Artículo, lo cual considera llevaría a una interpretación excesivamente ampliada del derecho de reproducción y rompería con el equilibrio de otros Artículos como el 3 relativo a publicación o el 10 relativo al derecho de comunicación.
290. The CHAIRMAN stated that he had not suggested deletion of Article 7(2).
291. Mr. YAMBAO (Philippines) supported the right of reproduction as proposed, and sought clarification on the relationship between the rights of reproduction and modification.
292. El Sr. TEYSERA ROUCO (Uruguay) aboga en favor de las disposiciones relativas al ámbito del derecho de reproducción en los dos proyectos de Tratados, pero manifiesta ciertas reservas acerca del párrafo 2 del Artículo 7, considerando que, conforme al Artículo 20 del Convenio de Berna, se trata de ampliar o de interpretar el ámbito del derecho de reproducción consagrado en el Artículo 9.1) del mencionado Convenio.
293. Mr. OPHIR (Israel) supported Article 7(1), and stated that an amended Article 7(2) should be moved to Article 12.
294. El Sr. PROAÑO MAYA (Ecuador) si bien apoya el Artículo 7 del proyecto de Tratado N° 1, expresa el deseo que se mejore la redacción de su párrafo 2) relativo a la reproducción provisional que en su forma actual resulta ambiguo.

295. Mr. HONGTHONG (Thailand) stated that Article 7 in its current form was not acceptable.

296. Mr. MTETEWAUNGA (Tanzania) stated that the right of reproduction was of paramount importance, and should not be left to national legislation.

297. The CHAIRMAN noted that Article 7(1) of Draft Treaty No. 1 and 14(1) of Draft Treaty No. 2 were endorsed by an overwhelming majority of Delegations, but there had been some references to need for drafting improvement. Concerning paragraph (2) of Article 7 and the corresponding provisions of Draft Treaty No. 2, it seemed that there were two main groups of opinions: first, that the language in paragraph (2) should be improved, particularly that, in cases which clearly were without any economic significance for the right holder's interests, there should be flexibility not to apply the principle of paragraph (1); second, there was also a suggestion that paragraph (2) should be made mandatory so that it would be an obligation for Contracting Parties to introduce legislation according to which certain operations were not relevant, or were outside the scope of application of the provisions on the right of reproduction. There was still another position, according to which the entire paragraph (2) and the corresponding paragraphs of Draft Treaty No. 2 could be deleted. In that case, there should be an agreed statement on the functioning of the right of reproduction in certain cases, indicating that certain acts were not relevant for the application of the right of reproduction.

298. Since it seemed that the objectives of the Delegations were identical or very similar to each other, he proposed that informal consultations take place to resolve the differences in approach, and that the Committee return to the right of reproduction when written proposals had been submitted.

Article 8 (Right of Communication to the Public) of the WCT (Article 10 of Draft Treaty No. 1); Articles 10 (Right of Making Available of Fixed Performances) and 14 (Right of Making Available of Phonograms) of the WPPT (Articles 11 and 18 of Draft Treaty No. 2)

299. The CHAIRMAN opened the floor for discussions on *Article 10 (Right of Communication) of Draft Treaty No. 1 and Articles 11 (Right of Making Available of Fixed Performances) and 18 (Right of Making Available of Phonograms) of Draft Treaty No. 2*. He pointed out that the first part of Article 10 extended the right of communication to the public to those categories of works that presently were outside the scope of the right of communication in the Berne Convention, and that the second part of that Article covered the making available of works by providing access to them in interactive systems. He emphasized that that might as well fall within a possible interpretation of the present provisions on the right of communication to the public in the Berne Convention, and that the purpose of the proposed provision was to remove any uncertainty in that respect. Several comments, made at the Diplomatic Conference and in other fora, indicated that that was probably one of the most important Articles in the Treaties, because it governed situations which were every day phenomena in the world of communication networks. The relevant act in relation to the second half of the Article was the act of making available, that is, the decision to make a given work available, not the mere provision of server space, communication connections or facilities for the carriage and routing of signals. It was also irrelevant whether copies were made available to the user or whether the protected subject matter would simply be made perceptible to the users. As regards the provisions in Articles 11 and 18 of Draft Treaty No. 2, he pointed

out that they covered only the right of communication in interactive networks, and that the right of communication to the public was broader in Draft Treaty No. 1, in which respect he referred to the analysis in the Notes of the Basic Proposals.

300. Mr. OKAMOTO (Japan) supported Article 10 of Draft Treaty No. 1 and Articles 11 and 18 of Draft Treaty No. 2 which was, in the view of his Delegation, the most important set of proposals in all three treaties, in respect of the digital age.

301. Mr. KUSHAN (United States of America) expressed support for Article 10 of Draft Treaty No. 1 and Articles 11 and 18 of Draft Treaty No. 2, concerning the rights of communication to the public and making available to the public, which were key to the ability of owners of rights to protect themselves in the digital environment. He stressed the understanding—which had never been questioned during the preparatory work and would certainly not be questioned by any Delegation participating in the Diplomatic Conference—that those rights might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles were covered by such rights.

302. As to Articles 11 and 18 of Draft Treaty No. 2, he said that his Delegation strongly supported the granting of exclusive rights to performers and producers, but stated that the exclusive rights should be tailored carefully to address particular problems of digital communications that threatened existing markets for exploitation of sound recordings. That would include not only on-demand services but also subscription services structured so as to interfere with a normal exploitation, as dealt with in recently enacted legislation in his country concerning performing rights. He stated that record companies should be able to prevent transmissions that had the same effect as distribution of copies of sound recordings by virtue of their content and scope. He, therefore, suggested that the right be modified to some extent while giving Contracting Parties flexibility in defining its scope. He added that his comments on that point also applied to the provisions of Draft Treaty No. 2 concerning broadcasting, and that his Delegation would make specific proposals when those provisions were discussed. Finally, he expressed support for Alternative A in Article 11, which confined that Article to musical performances fixed in phonograms.

303. Mr. GYERTYÁNFY (Hungary) expressed support for both parts of Article 10, namely the extension of the coverage of the right of communication to all categories of works, as well as the interpretation of that notion to include providing access to works from different places and at different times. He stated that, because of the immense number of parallel communications, “the public” had to be widely interpreted. Thus, he proposed that the words “members of” should be included before the words “the public.”

304. He also supported Articles 11 and 18 of Draft Treaty No. 2. He referred to the explanation of the second part of Article 10 of Draft Treaty No. 1, according to which the provision did not cover broadcasting, but only situations where the element of the individual choice was decisive. He said that that interpretation should also apply to Articles 11 and 18 of Draft Treaty No. 2. In that Treaty, the different uses should be limited clearly, namely the cases under Articles 11 and 18 and the cases under Articles 12 and 19. He stated that pay-TV and pay-radio programs did not entail individual choice of a work or a performance, and therefore should not be included in the scope of the right of making available to the public.

305. Mr. KIM (Republic of Korea) expressed support for Article 10 of Draft Treaty No. 1 and Articles 11 and 18 of Draft Treaty No. 2, but stressed that what counted was the initial act of the making available of a work, not the mere provision of server space, communication connections or facilities for the carriage and routing of signals.

306. Mr. CRESWELL (Australia) expressed support for the proposals under discussion, the main field of application of which was the transmission of text and images. He noted that, whether intentionally or fortuitously, the new right could also resolve any doubt that broadcasting to the public by satellite was subject to copyright control. In that regard, he noted that the definition of broadcasting in Article 2(g) of Draft Treaty No. 2 expressly affirmed that satellite broadcasting was covered, and he recalled that the question of the application of Article 11*bis* of the Berne Convention to satellite broadcasting had been on the agenda of the Committee of Experts.

307. He referred to minor technical changes to the references in Article 10 of Draft Treaty No. 1 that his Delegation had already raised in earlier consultations. He also proposed deletion of the words “the rights provided for in” immediately preceding the references to Articles of the Berne Convention, to ensure that the possibility of statutory licenses for retransmission of broadcasts was not prejudiced by the new right. He noted that Article 10 proposed a right in respect of two disparate activities, i.e., making a work available and communicating it, and his Delegation supported extension of copyright control in both cases, and was inclined to think that the separation of the treatment of the two activities, as was done in the existing neighboring rights treaties, might facilitate the understanding and assessment of the obligations proposed. Thus, he suggested relocating the words after “including” to a separate paragraph and, perhaps, rewording the title of the Article to include a reference to “making available.” His Delegation would also propose insertion into Article 10 of the words “by wire or wireless means” after the words “communication to the public,” in order to negate any possibility that the Article might introduce a display right. He noted that such a right had been considered early in the discussions leading to the Conference and had been rejected for lack of support. He stated that Article 12 of Draft Treaty No. 1 on exceptions and limitations had a bearing on Article 10, and that his Delegation reserved its position on exceptions to Article 10 pending discussion of Article 12.

308. Mr. CHEW (Singapore) expressed concern that the creation of an expanded communication right conferring a digital transmission right would create uncertainty for both copyright owners and users. It was, he said, not entirely clear whether the activities were strictly limited to interactive on-demand type of access to works through computer networks, and that certain non-interactive activities, including broadcasting and cable transmission, were excluded. He said that his Delegation was especially concerned that a broad right of communication would, as in the case of Article 7 on the right of reproduction, expose innocent carriers of information over such networks to liability for the transmission of such information. To accommodate the needs of such on-line and other service providers, he noted that his Delegation had proposed an amendment to Article 10 to include a new paragraph, which read “the mere provision of facilities for enabling or making any such communication shall not constitute an infringement.” Finally, he stated that it was not clear how Article 10 related to the other Articles, such as Articles 3, 7 and 8 of Draft Treaty No. 1, which seemed to deal with similar activities, and, thus, there appeared to be an overlap of such rights.

309. Mr. REINBOTHE (European Communities) stated that Article 10 of Draft Treaty No. 1 and Articles 11 and 18 of Draft Treaty No. 2 were cornerstones of the so-called “digital agenda.” He noted that Article 10 was based on the present structure of the Berne Convention, and that there was a clear distinction in Article 10 between the traditional right of communication to the public and the interactive parts of the right, in the second part of that Article. He pointed out that the right of making available only covered truly interactive services, but the Notes in 11.06 and 11.08 concerning Draft Treaty No. 2 seemed to suggest something different, that is, that near-to-interactive services were also covered by the right of making available. He stated that his Delegation believed that near-to-interactive services were not covered by the right of making available, because services provided on a subscription basis were not nearer to being interactive only because of the subscription aspect. Finally, he stated that the three Articles should be brought closer into line, and therefore he suggested to add the words “to the public” after the words “making available” in Articles 11 and 18 of Draft Treaty No. 2, because Article 10 of Draft Treaty No. 1 correctly used the expression “making available to the public.”

310. Mlle MESSAOUI (Albanie) approuve l’article 10 du projet de traité n° 1 dans la mesure où il complète utilement le droit de communication, prévu à l’article 11 et des autres articles de la Convention de Berne, en l’étendant à toute les catégories d’oeuvres et en visant expressément la transmission à la demande. Elle considère que la transmission en ligne d’une oeuvre, y compris celle à la demande, relève du droit de communication au public assorti du droit de reproduction, lorsque l’oeuvre est reproduite dans la base de données d’origine et qu’une copie est effectuée par le destinataire. Elle attire l’attention sur le fait que la distinction traditionnelle entre communication publique et privée perd de sa netteté en raison du nombre massif de communications en ligne entre deux personnes, et qu’il convient de circonscrire étroitement le domaine des transmissions qui, n’ayant pas un caractère public, échapperaient à l’application de ce droit.

311. S’agissant de l’article 11 du projet de traité n° 2, elle est favorable à l’octroi, en faveur des artistes interprètes ou exécutants, d’un droit exclusif d’autoriser la mise à la disposition du public, par fil ou sans fil, de leurs prestations fixées dans le cadre d’une transmission à la demande. Elle est également favorable à l’octroi d’un tel droit à l’égard des producteurs de phonogrammes. Elle ajoute que ce droit doit être limité strictement à la transmission à la demande; elle en exclut les autres types de transmission et notamment le service multi-canaux pour lequel le radiodiffuseur détermine la composition des programmes transmis. Elle précise que dans ce cas ce service ne permet pas aux particuliers de commander telle ou telle oeuvre mais de leur transmettre des programmes les plus diversifiés possible.

312. Mme YOUM DIABE SIBY (Sénégal) est favorable à l’article 10 du projet de traité n° 1 qu’elle juge indispensable pour compléter les dispositions existantes en matière de droit de communication, pour couvrir de nouvelles formes de communication telles que la transmission en ligne ou celle faite à la demande. Elle indique également que sa délégation est favorable à la variante B de l’article 11, ainsi qu’à l’article 18 du projet de traité n° 2.

313. Mr. SØNNELAND (Norway) supported Article 10 of Draft Treaty No. 1. In respect of Articles 11 and 18 of Draft Treaty No. 2, he supported the exclusive rights of permitting truly interactive on-demand services for producers of phonograms and performers, and supported Alternative B of Article 11. He added, however, that, for cultural policy reasons, his Delegation reserved its position concerning the scope of exclusive rights in Draft Treaty No. 2.

In cases where phonograms were included in radio and television productions, later offered on-demand by public broadcasters, and where the use of phonograms played a minor role, his Delegation preferred to see exceptions to the exclusive right providing for payment of an equitable remuneration.

314. Mr. YAMBAO (Philippines) supported the recognition of a general right of communication. He also supported the statement of the Delegation of Singapore with respect to interactive service providers. He noted that, subject to possible modification of treaty language and taking into account some specific requirements under national law of its country, his Delegation generally supported Article 10 of Draft Treaty No. 1, as well as Article 11, Alternative B, and Article 18 of Draft Treaty No. 2.

315. Mr. SHEN (China) supported the recognition of a general right of communication to the public, subject to limitations in national law.

316. M. ANDRÉ ROCH PALENFO (Burkina Faso) indique que sa délégation appuie le principe de la reconnaissance, pour les auteurs, d'un droit exclusif de communication au public de leurs oeuvres, quelle qu'en soit la catégorie et, en particulier, pour les cas de transmission à la demande. Il est d'accord avec la rédaction de l'article 18 tel qu'il figure dans le projet de traité n° 2 et préfère la variante B de l'article 11 de ce même projet de traité.

317. La Sra. RETONDO (Argentina) destaca que el elemento determinante en el marco del derecho de comunicación consagrado en el Artículo 10 del proyecto de Tratado N° 1, es la puesta a disposición de la obra, lo cual no queda claro en la redacción actual del Artículo. Propone, por consiguiente, modificar su redacción de tal forma que los autores gocen del "derecho exclusivo de autorizar la puesta a disposición de la obra para su comunicación al público por medios alámbricos o inalámbricos".

318. El Sr. PROAÑO MAYA (Ecuador) considera que el derecho de comunicación, conjuntamente con el derecho de reproducción, son los dos más importantes del Tratado, y que su alcance debe ser establecido en un acuerdo de carácter internacional y no a discreción de las legislaciones nacionales.

319. M. TOUIL (Tunisie) est favorable à l'article 10 du projet de traité n° 1 ainsi qu'à la variante B de l'article 11 du projet de traité n° 2. S'agissant de la formulation des articles 11 et 18 du projet de traité n° 2, il souhaite qu'il soit tenu compte de l'amendement proposé par la délégation des Communautés européennes.

320. El Sr. ANTEQUERA PARILLI (Venezuela) señala que existe una Decisión andina obligatoria para los países del Acuerdo de Cartagena, que consagra un derecho exclusivo de comunicación pública que comprende cualquier forma de comunicación al público por cualquier medio o procedimiento conocido o por conocerse, lo cual es perfectamente compatible con la propuesta contenida en el Artículo 10 del proyecto de Tratado N° 1. Se refiere a continuación a los Artículos 11 y 18 del proyecto de Tratado N° 2, que consagran un derecho exclusivo limitado a los casos de puesta a disposición de la interpretación o del fonograma por pedido o por demanda, rigiendo en los demás casos el principio del derecho a remuneración.

321. The CHAIRMAN stated that it seemed that the right of communication in Draft Treaty No. 1 and the right of making available in Draft Treaty No. 2 had gained broad support, subject to certain drafting proposals. It seemed that there was a general opinion that the notion of public should be widely interpreted.

322. He noted that there had been references in several interventions to the right of broadcasting, and that there should be further clarification concerning the distinction between the right of communication and the right of making available of phonograms and fixed performances to the public. He stated that Draft Treaty No. 1 would have no effect on the specific provisions in the Berne Convention concerning broadcasting, and that this should be made clear in the drafting process.

323. As far as Draft Treaty No. 2 was concerned, there would be specific, separate provisions on broadcasting, on the one hand, and on the right of making available to the public, on the other. A clear distinction should be maintained between those acts. He referred to a suggestion that the Article on the right of communication in Draft Treaty No. 1 should be renamed, which should be considered when consultations on the possible contents of the provisions took place.

324. The Chairman then adjourned the meeting.

Fifth Meeting

Monday, December 9, 1996

Evening

Article 3 (Notion and Place of Publication) of Draft Treaty No. 1; Article 2(e) (Definition of Publication) of the WPPT

325. The CHAIRMAN introduced the discussion on *Article 3 of Draft Treaty No. 1 (Notion and Place of Publication)*, and on *the definition of "publication" in Article 2(e) of Draft Treaty No. 2*, saying that the intended purpose of Article 3, like the purpose of Article 3(3) of the Berne Convention, was solely to effect the functioning of the international system of protection under the Convention. Article 3 was not intended to govern the general question of applicable law, nor in any way to determine the person responsible for any act that constituted publication. The sole purpose, was, rather, to serve as an element in the structure of clauses and provisions which governed the application of the Berne Convention. The notion of publication, as proposed to be completed in Draft Treaty No. 1, determined criteria of eligibility for protection, and the notion of publication had a function when determining the country of origin under the rules of the Berne Convention; thus, the notion of country of origin had some important technical functions.

326. He stated that the notion of publication in Draft Treaty No. 2 was necessary also to determine the criteria of eligibility for protection. In addition, the notion of publication had a function when the Article on the term of protection was applied, where one of the facts which

established the starting moment of the calculation of the term of protection was the act of publishing or publication.

327. Mr. HENNESSY (Ireland) stated that the European Community and its Member States were not convinced of the need for Article 3 of Draft Treaty No. 1 or the definition in Draft Treaty No. 2, and preferred not to expend valuable time on a discussion of those questions.

328. Mr. KUSHAN (United States of America) supported Article 3 as a helpful clarification of the meaning, in the digital context, of the concept of publication as used in the Berne Convention. He said that his Delegation believed it important to make clear that both paragraphs in Article 3 related solely to the question of whether a work had been published for purposes of determining the country of origin of the work. Nothing in the Article would limit the flexibility of Contracting Parties in defining publication for purposes of their own domestic laws. He added that his Delegation also thought that it should be made clear that a work was to be considered to be published only if its copies had been made available with the author's consent, and he proposed stating this explicitly in the text just as it was stated in Article 3(3) of the Berne Convention.

329. La Sra. JIMÉNEZ HERNÁNDEZ (México) expresa su inquietud respecto de los Artículos 3 y 10 del proyecto de Tratado N° 1, que no establecen diferencia entre los actos de publicación y comunicación. Muestra su conformidad con la redacción del Artículo 10 siempre que en el Artículo 3, relativo a la publicación, se incluya la noción de almacenamiento y se sustituya el término “acceder” por la expresión “obtener ejemplares tangibles de”, con el propósito de evitar la confusión con el concepto de comunicación.

330. Mr. CRESWELL (Australia) supported the proposal in Article 3 of Draft Treaty No. 1, in principle, since it seemed to recognize the realities of on-line publication. He added, that, however, given the last sentence of Article 3(3) of the Berne Convention, namely that communication by wire of a work was not to be treated as a publication, Article 3 of the Treaty must make it clearer that it was confined to a process in which copies could be obtained. As an alternative to the proposal of the Delegation of Mexico, he drew attention to the wording of Article 2(e) of Draft Treaty No. 2, which suggested a possibility in that it required copies to be offered to the public, rather than made available. He suggested that that might be a way of reinforcing the idea that not merely copies for viewing, but also copies for obtaining, taking away or downloading, were aimed at. He said that there was no reference, in Article 2(e) of Draft Treaty No. 2, to fixing the place of publication, and asked for a clarification of the reasons for the omission.

331. M. GOVONI (Suisse) indique que sa délégation partage l'avis de la délégation de l'Irlande.

332. Mr. GYERTYÁNFY (Hungary) stated that the main problem was the use of the same wording in Article 3 of Draft Treaty No. 1 for a notion of publication, and for the kind of immaterial dissemination treated in Article 10. He said that it was a contradiction to speak about publishing in non-tangible form, which would contradict the second part of Article 3(3) of the Berne Convention. Concerning the proposal of the Delegation of Mexico to include certain references to the necessity of storage and of access to, or the possibility to obtain, copies, he doubted that that would solve the problem of a possible incoherence or contradiction with the present text of the Berne Convention. Concerning the suggestion of the

Delegation of Australia to insist on the mentioning of copies in the text as an important part of the formula, the problem was that copies were practically always available in on-line dissemination of works. If, as the Chairman said, the purpose of Article 3 of Draft Treaty No. 1 and Article 2(e) of Draft Treaty No. 2 was only to establish the point of attachment and eligibility criteria, that is, to help establish which was the country of origin in case of works and productions protected by the two treaties, then, he asked, why not to say so explicitly. Accordingly, he expressed support for the proposal made by the Delegation of the United States of America, to restrict the scope of the two paragraphs to the purposes just mentioned.

333. Mr. EKPO (Nigeria) supported the proposal of the Delegation of the United States of America.

334. Mr. OKAMOTO (Japan) said that Article 3 of Draft Treaty No. 1 and Article 2(e) of Draft Treaty No. 2 were acceptable to his Delegation. Since the question of the availability of copies, as an aspect of the definition of publication, was related to the definition of reproduction, he suggested discussing the two definitions together.

335. The CHAIRMAN stated that there was a division of opinion concerning the Articles under consideration, and that there was no need for further discussion until clear options were identified.

Article 17 (Term of Protection) of the WPPT (Article 21 of Draft Treaty No. 2)

336. The CHAIRMAN suggested to begin the discussion of *Article 21 of Treaty No. 2 (Term of Protection)*. He stated that it was suggested that the international protection of performers and producers of phonograms should be 50 years, and that publication should be the act from which the term of protection of a phonogram or performance was counted.

337. Mr. KUSHAN (United States of America) supported Alternative A of Article 21, and said that his Delegation would propose a technical amendment to follow more closely the style of the Berne Convention regarding the term of protection of cinematographic works.

338. Mr. YAMBAO (Philippines) stated that his Delegation favored Alternative B of Article 21.

339. Mr. CRESWELL (Australia) supported the 50-year term of protection with one qualification, namely, that, insofar as Article 21 proposed that the commencement of the term of protection of published phonograms be the year of publication, it appeared to exceed the requirements of the TRIPS Agreement. He was of the view that the commencing of the term from the year in which the performance was given, or the phonogram was made, was the appropriate method.

340. M. SÉRY (Côte d'Ivoire) dit que sa délégation appuie la variante B de l'article 21 du projet de traité n° 2.

341. Mr. EKPO (Nigeria) supported Alternative B of Article 21 with the modification proposed by the Delegation of Australia.

342. La Sra. RETONDO (Argentina), en lo relacionado con el Artículo 21 del proyecto de Tratado N° 2, es partidaria de mantener el texto de la propuesta que constituye un avance sobre las disposiciones existentes.

343. M. PALENFO (Burkina Faso) est en faveur d'une période de protection de 50 ans qui constitue un progrès important par rapport à celle de 20 ans prévue par la Convention de Rome, et appuie donc la variante B de l'article 21 du projet de traité n° 2.

344. El Sr. PROAÑO MAYA (Ecuador) expresa su apoyo al texto de la propuesta relativa a la duración de la protección, que está conforme con la disposición de la Decisión 351 del Acuerdo de Cartagena, y opta por la Variante B.

345. M. TRAORÉ (Mali) indique que sa délégation partage l'opinion de la celle du Burkina Faso et retient aussi la variante B de l'article 21 du projet de traité n° 2.

346. Mr. MANYONGA (Zimbabwe) expressed support for Alternative B of Article 21.

347. M. MBON MEKOMPOMP (Cameroun) dit que sa délégation est du même avis que les délégations du Burkina Faso et du Mali.

348. Mr. REINBOTHE (European Communities) stated that the European Community was in favor of Alternative B in Article 21. With respect to the starting date of the term of protection, he suggested adding to the notions contained in the draft Article also the notion of communication to the public, so that another alternative starting point could be possible. In addition, it should be added "whichever of these dates is earlier." Specifically, he suggested to introduce in paragraph (1), after the first word "was," the word "lawfully," to read "was lawfully published," and, after the word "published," to introduce the following words: "or lawfully communicated to the public, whichever is the earlier." The rest of the text of paragraph (1) would stand as it was. He suggested introducing a similar change in paragraph (2) of Article 21; after the third word "was," "lawfully" would be inserted, and, after the next word "published," the words "or lawfully communicated to the public, whichever is the earlier" would be added.

349. Mr. OPHIR (Israel) supported Alternative B of Article 21, as well as the proposal of the Delegation of the European Communities.

350. Mr. SØNNELAND (Norway) supported Alternative B of Article 21 and the proposal of the Delegation of the European Communities.

351. M. GOVONI (Suisse) déclare que sa délégation est favorable à la variante B de l'article 21. Il ajoute qu'en ce qui concerne le point de rattachement pour cette période de protection de 50 ans, elle appuie la proposition faite par la Délégation de l'Australie consistant à retenir la fixation de l'interprétation et non la publication de l'interprétation fixée.

352. Mr. SHEN (China) supported a period of protection of 50 years for performers and producers of phonograms, and expressed support for Alternative B of Article 21. He agreed with the proposal, made by the Delegation of the European Communities, that the protection

should be calculated from the authorized publication or the first lawful communication to the public, whichever was the earlier.

353. El Sr. UGARTECHE VILLACORTA (Perú) nota que la ley de su país, recientemente adoptada, prevé un período de protección de 70 años *post mortem*, razón por la cual apoya la propuesta contenida en el Artículo 21 del proyecto de Tratado N° 2, optando por la Variante B.

354. Mr. ABBASI (Pakistan) supported the proposal for a 50-year term of protection, and supported Alternative B of Article 21.

355. Mr. YAMBAO (Philippines) asked for clarification from the Delegation of the European Communities concerning the insertion of the word “lawfully.”

356. Mr. REINBOTHE (European Communities) stated that the insertion of the word “lawfully” was intended to make the date of publication an alternative to trigger out the commencement of protection. For that reason, he said, it was important that the act of publication be done lawfully, in other words, with the consent of the right holder. Otherwise, the term of protection could begin without the consent of the right holder, which was not desirable.

357. The CHAIRMAN stated that the discussion had revealed that the 50-year term of protection was acceptable, and the discussion would now concentrate on the starting point of the calculation of the term of protection. There was a proposal to follow the TRIPS Agreement and the Rome Convention for fixing a starting point, there would be a technical amendment to the provision to introduce criteria closer to Article 7(2) of the Berne Convention, and there was a proposal according to which the word “lawfully” and the criterion of communication to the public should be inserted with the element indicating that the calculation would start from whichever event was earlier.

358. He then adjourned the meeting.

Sixth Meeting

Tuesday, December 10, 1996

Morning

Article 2 (Definitions) of the WPPT, Article 15 (Right to Remuneration for Broadcasting and Communication to the Public) of the WPPT (Articles 12 and 19 of Draft Treaty No. 2)

359. The CHAIRMAN opened the floor for discussion on *Articles 2 (Definitions), 12 (Right to Remuneration for Broadcasting and Communication to the Public) and 19 (Right to Remuneration for Broadcasting and Communication to the Public) of Draft Treaty No. 2.*

360. He said that the definitions aimed at taking into account the present structure of the rights at the international level, specifically the structure of the Rome Convention, but they had

been modernized and completed with new elements, especially a definition of broadcasting, and a definition of communication to the public. In Articles 12 and 19, there were provisions on the right of remuneration of performers and producers of phonograms for the direct or indirect use of phonograms published for commercial purposes for broadcasting and for any communication to the public, which was broader than the corresponding provision in Article 12 in the Rome Convention. In paragraph (3) of each of those Articles, reservations were allowed taking into account the different levels of development of such rights on national level, but the possibility had not been designed exactly in the same way as in the corresponding clauses in the Rome Convention. In paragraph (4) of each of those Articles, there was a clause which exempted from the possibility of reservations cases where the broadcasts or communications might only be received on the basis of subscription and against payment of a fee. In addition, he referred to Article 25, where the technical aspects of reservations had been regulated.

361. Mr. GYERTYÁNFY (Hungary), speaking on behalf of Slovenia, Romania, The former Yugoslav Republic of Macedonia, Croatia and his own country, supported Articles 12 and 19 in the Basic Proposal of Draft Treaty No. 1, and especially paragraph (1) of each of those Articles. He said that he could also accept the extension of the rights granted in those provisions to the indirect use of certain phonograms, but he suggested to delete paragraphs (3) and (4) of the said Articles, since the Delegations for whom he spoke did not consider any reservations necessary. As to the definitions, he stated that he did not have any comment at that stage of the debate.

362. Mr. REINBOTHE (European Communities) supported the draft with respect to the definitions contained in Article 2(g) and (h), but he added that it should be made clearer in Article 2(g) that that definition also included terrestrial encrypted broadcasting signals. He, therefore, suggested to modify the text, after the first part of the sentence, so that it would read as from the word “transmission,” “as described in the previous sentence.” That would entail deletion of the two words “by satellite.”

363. He expressed support to Articles 12 and 19, but believed that they should be merged. Both Articles spoke about a single equitable remuneration, but that would only make sense if the two Articles were merged, like in the Rome Convention. That would be without prejudice to performing artists that owned independent rights. With respect to paragraph (2) of Articles 12 and 19, he felt that the sense of the last sentence of that paragraph should be reconsidered and that it might have to be deleted. He agreed with the view that no reservation should be allowed. In that case, it would be only consequent to delete not only paragraph (3), but also paragraph (4). He also felt that it would be clearer if, after the first sentence, instead of saying “in availing itself of this possibility...” and so on, one would say “if a Contracting Party avails itself of this possibility, any other Contracting Party may apply...” and so on. Also with respect to paragraph (4), if that paragraph were to be maintained, he had doubts as to its scope of application. He believed that the reference to subscription would not be appropriate, as it could not be used as an appropriate standard. At the very least, one should insert the word “direct” in the first line after the word “any,” so that it would read “broadcasting or any direct communication...” He repeated, however, that his Delegation was in favor of deleting paragraphs (3) and (4).

364. Mr. EKPO (Nigeria) said that his Delegation had no problem in accepting the definition of “broadcasting” in Article 2(g). With regard to Article 2(h), it would accept the intended

definition at the given stage of the debate, because it believed it would be an improvement. With regard to Articles 12 and 19, he asked for an explanation of the phrase “single equitable remuneration.” It should be clarified whether it referred to a one-off payment or to one payment to be divided between performers and producers of phonograms. He drew attention to the silence on the issue of broadcasting of recordings of performances of folklore, and questioned whether such broadcasting should not be mentioned in the Treaty. Concerning Article 2(h), he stated that his Delegation supported Alternative B and reserved its position to continue discussions on the proposals regarding reservations in Articles 12 and 19.

365. Mr. KUSHAN (United States of America) expressed general support for the provisions of paragraphs (1) to (3) of Article 12 and 19 of Draft Treaty No. 2. He stated that, for his country, if rights of broadcasting and public performance were to be included in that treaty, the provisions of paragraph (3) would be essential. Paragraph (4), with respect to subscription services, created significant concerns on the part of his country, in that it was over-inclusive as it did not permit sufficient flexibility for countries to provide appropriate exemptions to the right of remuneration with respect to certain types of subscription services, and in that it was, at the same time, under-inclusive because it failed to give adequate protection for those types of subscription services which, by nature of their programming structure, warranted exclusive rights. He said that his Delegation would propose some changes to those provisions after it had had a chance to fully consider the comments that had been made during the discussions. He added that the question of definitions should be addressed after the substantive work had been finished, and that his Delegation would give its possible comments at that point.

366. Mr. WIERZBICKI (New Zealand) stated that his Delegation agreed with the thrust of the comment made by the Delegation of the European Communities in respect of satellite broadcasting, and that it would propose that the words “by satellite,” as the Delegation of the European Communities had suggested, be deleted. In terms of the suggested re-wording proposed by that Delegation, he said that his Delegation reserved its position, as it would be comfortable with simply deleting those words. In respect to Article 2(h), he asked whether, instead of reading “of a performance, or the sounds,” it would not be better to read “of a performance or the sounds of a performance or the representation of sounds.”

367. Mme YOUM DIABE SIBY (Sénégal) propose de mentionner à l'article 2 a) du projet de traité n° 2 les “artistes de variétés de cirque”, estimant qu'ils ont leur place dans le présent contexte. Elle suggère de supprimer à l'article 2 b) de ce même projet le membre de phrase “ou la partie sonore de ou l'autre de celles-ci” pour éviter de penser que la définition du phonogramme ne s'étend pas à la bande sonore d'un film exploitée séparément. Elle précise que sa délégation est favorable à la variante B de l'article 2 c).

368. Quant à l'article 2 d), elle propose de définir le “producteur de phonogramme” comme celui qui prend l'initiative de la responsabilité juridique de la fixation, ce qui aurait pour avantage de distinguer les deux opérations de production et de fabrication. Elle souligne que sa délégation soutient la reconnaissance d'un droit à rémunération au titre de la radiodiffusion et de la communication au public et approuve les articles 12 et 19 du projet de traité n° 2.

369. The CHAIRMAN declared that he would take note of those positions and comments concerning the definitions in Article 2 (a), (b), (c) and (d), which would be discussed in detail later.

370. Mr. CRESWELL (Australia) stated that his Delegation supported the general thrust of Articles 12 and 19, but it also supported the Delegation of the United States of America in insisting on the inclusion of the possibility of reservation in paragraph (3) of each of those Articles. Regarding drafting, he supported the proposal by the Delegation of the European Communities that there be a merger of Articles 12 and 19 to make the provisions more cohesive and understandable. That would also clarify the meaning of the words “single equitable remuneration.” He questioned the need for the reference to “reproductions of such phonograms” which seemed to have been carried over from Article 12 of the Rome Convention, and which did not seem to be appropriate any longer, as well as the need for the preceding words “published for commercial purposes.” It would be sufficient to refer to the use of phonograms without further qualifying words. Regarding the definitions, he said that his Delegation wished to record its agreement with what it understood to be the proposal by the Delegation of the European Communities with regard to Article 2(g); his Delegation did not think that the reference to encrypted broadcasts should be confined to satellite broadcasts, because some encrypted transmissions were undertaken by means of microwave.

371. M. ETRANNY (Côte d’Ivoire) appuie la formulation de l’article 2 g) du projet de traité n° 2 en faisant observer que la définition proposée à cet article élargit et actualise la définition de radiodiffusion de la Convention de Rome. Il est favorable à la variante B de l’article 2 h), mais dit partager les préoccupations de la délégation du Nigéria concernant les articles 12 et 19 du projet de traité n° 2.

372. Mr. OKAMOTO (Japan) stated that his Delegation, in principle, supported Articles 12 and 19 of Draft Treaty No. 2, but wished to put on record the clarification that transmission to the public of an interactive nature was not to be covered by the remuneration rights for communication to the public in Articles 12 or 19, but was to be covered by the exclusive rights of making available to the public under Articles 11 and 18.

373. Mr. SØNNELAND (Norway) said that his Delegation supported the amendments proposed by the Delegation of the European Communities concerning the definitions in Article 2(g) and (h). Regarding Articles 12 and 19, he stated that his Delegation supported the proposal put forward by the same Delegation for the merger of Articles 12 and 19 and the deletion of paragraph (3) and consequently also paragraph (4).

374. Mr. MTETEWAUNGA (Tanzania) expressed support for the stand and explanation given by the Delegation of Nigeria regarding Article 2(g) and (h), and Articles 12 and 19. Regarding Article 2(h), he said that his Delegation supported Alternative B.

375. Mr. SHEN (China) supported the definitions in Article 2(g) and (h), and, regarding communication to the public, Alternative B. As for Articles 12 and 19, his Delegation supported the provisions in the Basic Proposal, and it did not agree to the deletion of paragraphs (3) and (4).

376. M. TRAORÉ (Mali) partage les observations des délégations du Nigéria et de la Côte d’Ivoire dans leur ensemble. Il approuve l’article 2 g) tel qu’il figure au projet de traité n° 2 ainsi que la variante B de l’article 2 h) et l’article 19. Il estime toutefois que l’article 12 ne semble pas prendre en compte les interprétations ou exécutions non fixées sur des phonogrammes publiés à des fins de commerce et réserve en conséquence sa position à ce sujet.

377. M. PALENFO (Burkina Faso) dit que la définition de la radiodiffusion, telle que proposée à l'article 2 g) du projet de traité n° 2, a le mérite de compléter celle de l'article 3, alinéa f) de la Convention de Rome en tenant compte de l'évolution numérique des images et des sons, et que sa délégation y est favorable. S'agissant de la communication au public, il est en faveur de la variante B de l'article 2 h) qui prend en compte les prestations audiovisuelles. Il regrette toutefois l'absence d'autres définitions dans cet article, telles que celle de la reproduction, de la fixation audiovisuelle ou de la modification.

378. En ce qui concerne la rémunération au titre de la radiodiffusion et de la communication au public de phonogrammes du commerce, il indique que sa délégation approuve le contenu des articles 12 et 19 qui, l'un et l'autre, étendent le droit à rémunération aux utilisations indirectes. Cependant, il se dit préoccupé par la possibilité qui existe de formuler des réserves et propose de les supprimer car, à l'instar de la Convention de Rome, ceci apparaît comme une faiblesse du système proposé.

379. M. GOVONI (Suisse) précise que sa délégation approuve la reconnaissance d'un droit à rémunération au titre de la radiodiffusion et de la communication au public en faveur des artistes interprètes ou exécutants et des producteurs de phonogrammes. Il regrette que ce droit n'ait pas été pris en considération pour les vidéogrammes publiés à des fins de commerce.

380. En ce qui concerne les articles 12 et 19 du projet de traité n° 2, il partage l'opinion, et s'y rallie, de la délégation des Communautés européennes. Il estime que le point faible de ces dispositions demeure les réserves qu'elles comportent et il est de l'avis de les supprimer. Il se réfère aux justifications données au paragraphe 12.08 du document CRNR/DC/5 de leur non-application dans le cadre d'un service d'abonnement et pense que ces raisons sont valables pour d'autres utilisations.

381. Mme BOUVET (Canada) appuie les alinéas 1), 2) et 3) des articles 12 et 19 du projet de traité n° 2 en souhaitant conserver le droit de formuler des réserves. Elle souhaite le retranchement de l'alinéa 4 des articles 12 et 19.

382. M. MBON MEKOMPOMB (Cameroun) déclare souscrire pleinement aux définitions proposées aux points a), g) et h) de l'article 2 du projet de traité n° 2, ainsi qu'à la variante B des points c) et h) de ce même article portant diverses définitions. Quant aux alinéas 3, respectivement, des articles 12 et 19, il dit partager les observations faites par les délégations du Nigéria et de la Côte d'Ivoire au sujet des bénéficiaires du droit à rémunération qui y est prévue. Il regrette cependant qu'un tel droit n'ait pas été envisagé en matière de copie privée. Il réserve ses remarques au sujet de l'article 25 du projet de traité n° 2 pour le moment.

383. Mr. OPHIR (Israel) declared that his Delegation supported the definition in Article 2(g), as well as the definition in Article 2(h) where it opted for Alternative B. It also fully supported Articles 12(1) and (2), and 19(1) and (2), but it felt that paragraph (3) should be reconsidered in both Articles.

384. The CHAIRMAN recalled that the question of reservations had been touched by several Delegations and there seemed to be two positions; the first being that the possibility for reservations should be deleted, and the second being that it should be maintained. Paragraph (4) on a right of remuneration without the possibility for reservations seemed also to

be subject to opposition. There had been only limited support for the provision as it had been proposed. Concerning the definitions, it seemed that the definition of broadcasting should be amended to include terrestrial broadcasting in the middle part of the definition. There was a drafting proposal to merge Articles 12 and 19, and there had been some comments on the language in paragraph (2) of Articles 12 and 19. There had been a remark, made by one Delegation and supported by another, concerning the condition referring to phonograms published for commercial purposes. The Conference should consider whether or not that prerequisite should be kept.

385. As to the question of what a “single equitable remuneration” meant, he stated that those words really would not make sense if the Articles concerned were separate and that they should not by any means indicate that the remuneration should be a one-off payment. In response to the question posed by the Delegation of Nigeria regarding the silence of Article 12 concerning performances of expressions of folklore, he declared that, if the definition of “performers” in Article 2(a) were approved by the Conference, it would be clear that performances of folklore would fall under the right of remuneration.

386. El Sr. PROAÑO MAYA (Ecuador) se refiere al Artículo 2 del proyecto de Tratado N° 2, y propone sustituir en la definición de la “fijación” la expresión “sonidos o imágenes” por “sonidos y/o imágenes”. En cuanto a la definición del productor de fonogramas, sugiere la siguiente redacción: “la persona natural o jurídica bajo cuya responsabilidad o iniciativa se fijan por primera vez los sonidos de una ejecución o interpretación...”.

387. El Sr. VÁZQUEZ (España) se adhiere a la declaración de la Delegación de Ecuador y además, propone añadir el concepto de incorporación “acabada o finalizada” a la definición de la fijación del Artículo 2.c).

388. La Sra. RETONDO (Argentina), en lo referente a la definición de “fonograma”, está de acuerdo con la primera parte de dicha definición. En cuanto a la segunda parte, acepta la idea de excluir las fijaciones audiovisuales, salvo en los casos en que dichas fijaciones se hagan en base a un fonograma publicado. Se auna a la declaración de la Delegación de España relativa a la definición de la “fijación” en cuanto a añadir el concepto de incorporación acabada o definitiva de sonidos. Finalmente, apoya las propuestas emitidas por las Delegaciones de Ecuador y España de definir el productor de fonogramas como la “persona natural o jurídica bajo cuya responsabilidad e iniciativa se fijan por primera vez ...”.

389. Ms. DALEY (Jamaica) proposed that, in the definition of “performers” in Article 2(a), the word “interpret” be deleted at least in the English text, as this might lead to a broad application in English speaking countries. She believed that the words “otherwise perform” would be sufficient as a catch-all phrase.

390. Mr. WIERZBICKI (New Zealand) reserved his position regarding audiovisual fixations and raised the question whether, in Article 2(a), it was intended that the definition should include news readers in radio or television, which might follow from the use of the word “declaim.” He also asked for clarification of the fact that, in Article 2(b), the last phrase seemed to negate part of Article 2(c). In regard to Article 2(c), he asked for the exact parameters of the word “perceived.” Concerning the definition of “producer of phonogram” in Article 2(d), he questioned whether that was the person that first fixed the sound, for example, the technician, or the person who made the necessary arrangements for fixing the sound, who

were to be considered the producer. Finally, he asked whether it was envisaged that substantial modifications by way of remastering or digitizing existing phonograms, for example, from vinyl to CD, would be eligible as “first fixation.”

391. The CHAIRMAN responded that the term “declaim” was found in the corresponding definition in the Rome Convention and it had been used in Draft Treaty No. 2 in order to ensure that every category of performers which were covered by the Rome Convention would also be covered by Draft Treaty No. 2, but a modernization could be considered if the Conference so wished. Concerning the definition of “producer of a phonogram” he was of the opinion that the expression “who first fixes” contained a reference to the person who took the initiative and who had the responsibility of the fixation being made, rather than the technician who made the fixation, but it might be considered whether language should be found which would make that more clear.

392. Mr. CRESWELL (Australia) suggested that, in the definition of “fixation,” the word “appropriate” in front of the word “device” be replaced by the word “any,” in order to avoid any judgment as to what was suitable rather than what was technically necessary to accomplish perception, reproduction or communication. In paragraph (f) of Article 2 containing the definition of “rental,” he suggested that the word “consideration” be replaced by some other word importing the idea of profitable remuneration, in order to avoid that cost-recovery fees which were not imposed for the purpose of earning any profit would trigger the application of the rental right. He pointed out that the definition was confined to phonograms, and added that, although his Delegation reserved its position concerning Article 10 of the Draft Treaty, the outcome of the discussions of the Conference on that Article might have implications on the definition.

393. Mr. GYERTYÁNFY (Hungary) believed that it should be made clear that, if the sound part of an audiovisual fixation was published for commercial purposes, it should fall under the definition of a “phonogram.” He supported the proposal made by the Delegation of Ecuador regarding a more explicit definition of “producer of phonogram” and stated that he also would welcome any explanation or view on a possible protection of remastering or remixing of phonograms.

394. El Sr. UGARTECHE VILLACORTA (Perú) propone la siguiente definición del artista intérprete o ejecutante: “persona que representa, canta, lee, recita, interpreta, o ejecuta en cualquier forma, una obra literaria o artística o una expresión del folclore, así como el artista de variedades y de circo”. Asimismo, sugiere se defina el fonograma como “los sonidos de una ejecución o de otros sonidos o de representaciones digitales de los mismos, fijados por primera vez de forma exclusivamente sonora; las grabaciones gramofónicas, magnetofónicas y digitales son copias de fonogramas”. En cuanto a la fijación, propone definirla como la “incorporación de signos, sonidos, imágenes o la representación digital de los mismos, sobre una base material que permita su lectura, percepción, reproducción, comunicación o utilización”. Finalmente, con respecto al productor de fonogramas, propone la siguiente definición: “aquella persona natural o jurídica bajo cuya iniciativa, responsabilidad y coordinación se fijan por primera vez los sonidos de una interpretación o ejecución u otros sonidos o representaciones digitales de los mismos”.

[Suspension]

395. Mr. CHEW (Singapore) suggested that, in the definition of “broadcasting” in Article 2(g), the words “public reception” be replaced by the words “reception by the public,” because, although the words “public reception” appeared in the equivalent definition in the Rome Convention, that word might be misinterpreted to be an act of public exhibition. Regarding Articles 12 and 19, he said that his Delegation associated itself with the views expressed by the Delegation of Australia, and that it was strongly in favor of retaining the possibility of reservations in Articles 12(3) and 19(3) and deleting Articles 12(4) and 19(4).

396. El Sr. ALVAREZ (Costa Rica) desea incluir a los locutores en la definición del artista del Artículo 2(a). Apoyando la propuesta emitida por la Delegación de Ecuador relacionada con la definición de la “fijación”, sugiere que la fijación consista en la “incorporación de sonidos, de imágenes o de sonidos e imágenes.”

397. M. DEBRULLE (Belgique), se référant à l’article 2 b) du projet de traité n° 2, est d’accord avec les motifs justifiant les termes “représentation de sons” dans cet article. Il fait part de ses préoccupations quant à leurs effets sur le champ d’application de la Convention de Rome où il pourrait être soutenu, *a contrario*, que la définition du phonogramme prévue dans cette convention ne vise pas les fixations de représentation de sons. Quant à l’article 2 c), il propose d’ajouter les mots “d’une séquence finalisée” après le mot “incorporation” afin d’identifier plus objectivement le lieu de la fixation.

398. Mr. OLSSON (Sweden) referred to the question regarding the exclusion of audiovisual fixations from the concept of “phonogram,” and expressed a preference for excluding the last part of Article 2(b), namely from the words “an audiovisual fixation” to the end.

399. Mme DE MONTLUC (France) dit que sa délégation partage les observations présentées par les délégations de la Suède, de l’Équateur, de l’Espagne et de la Belgique.

400. Mr. STARTUP (United Kingdom) agreed that there might be need of some clarification of the scope of the definition of “phonogram,” as it needed to be clear, for instance, that the sound tracks of films, when detached from the film, that is, when issued as a sound recording, should qualify as phonograms. However, he considered it very important to maintain the clear distinction between phonograms, on the one hand, and audiovisual works, on the other.

401. Mr. SØNNELAND (Norway) supported the intervention by the Delegation of Sweden.

402. The CHAIRMAN stated that he would not point out all the opinions put forward and supported by different Delegations, but that he would only mention a couple of suggestions. It had been stated that the definition of “performers” should be made broader, to cover variety and circus artists. Concerning the definition of “phonogram,” the second half of that definition was subject to doubts, and it seemed that there was reason to consider whether the sound part of an audiovisual fixation, when published separately, should be treated as a phonogram. It was suggested to delete the whole of the second half of the definition, but there were also other ideas put forward. Due note had been taken of the proposals offered concerning the expressions and language to reflect “representation of sounds.” There were also some

suggestions concerning the definition of “fixation.” One was to replace the word “appropriate” by a more suitable expression. Concerning the definition of “producer of phonogram” in Article 2(d), there had been several suggestions to improve the definition by making it include criteria referring to the responsibility, initiative and, perhaps, coordination of the recording. Certain proposals had been made in writing and more would come, and, when they would be available, the Committee would be able to produce the final versions of the definitions.

Article 5 (Moral Rights of Performers) of the WPPT

403. The CHAIRMAN opened the floor for discussion on *Article 5 of Draft Treaty No. 2 (Moral Rights of Performers)* by stating that the Article had been designed according to the structure and language of the clause on moral rights of authors in Article 6*bis* of the Berne Convention.

404. M. KEMPER (Allemagne) est favorable à la rédaction de l'article 5 du projet de traité n° 2, notamment de l'alinéa 3) qui offre aux États contractants suffisamment de flexibilité pour régler dans leur législation nationale les moyens de recours pour sauvegarder les droits reconnus par ledit article, comme par exemple la possibilité de prévoir des arrangements contractuels sur des modifications d'une exécution qui ont été consenties par les parties.

405. Mr. OLSSON (Sweden) stated that his Delegation supported the proposal on moral rights in Article 5 in the Basic Proposal, and that it associated itself with the remarks made by the Delegation of Germany. He said that he considered that right indispensable in view of the digital use of performances. He pointed out that that right had existed for 35 years in the national law of his country where it had proved itself useful without creating any problems. He added that his Delegation associated itself with the remarks in point 5.07 of the notes in the Basic Proposal regarding the possibility of transferring moral rights.

406. Mr. TARKELA (Finland) noted that his Delegation was in favor of Article 5. He referred to the intervention by the Delegation of Sweden which had noted that the provisions on moral rights in the national law of that country had not caused any difficulties, and he stated that the situation in Finland was similar to that in Sweden.

407. Mme DE MONTLUC (France) déclare que sa délégation appuie fermement le principe de la reconnaissance d'un droit moral en faveur des artistes interprètes ou exécutants. Elle est favorable à la variante B de l'article 5.1) du projet de traité n° 2, soulignant les difficultés de plus en plus grandes pour distinguer les prestations sonores de celles audiovisuelles en raison des nouvelles techniques en présence. Elle fait observer que l'alinéa 3) de l'article 5, qui prévoirait la possibilité pour l'artiste interprète ou exécutant de renoncer à son honneur et à sa réputation, serait difficile à mettre en oeuvre sauf à nier le principe même du droit moral.

408. Mr. KUSHAN (United States of America) confirmed his Delegation's position on the question of moral rights, that the economic rights granted in the Treaty satisfactorily addressed the interests of performers, and that moral rights should not be included in the Treaty.

409. Mr. STARTUP (United Kingdom) stated that, while his Delegation was in favor of performers achieving appropriate recognition for their work, it felt that that could better be

guaranteed through the exercise of economic rights, and through contractual arrangements, and, therefore, it felt that moral rights were unnecessary for that purpose and should not be included in the Treaty. He was of the opinion that the right as currently set forth was very wide in its scope and that its implementation would be impractical. He mentioned that, even in those countries where moral rights were granted to performers, their application was often limited by practical considerations, noting as an example the impossibility of identifying a large number of performers in an orchestra whose performance was included in a broadcast. He pointed out that, in the countries where moral rights were not granted, such as the United Kingdom, there was appropriate recognition of performers. He expressed his Delegation's belief that the Treaty should not include a right which could not in practice be strictly applied.

410. El Sr. UGARTECHE VILLACORTA (Perú) opina que, dada la naturaleza del derecho moral de paternidad, éste no debería agotarse, incluso después de la extinción de los derechos patrimoniales.

411. Mr. RAGONESI (Italy) referred to the reasons embodied in the interventions by the Delegations of France and Sweden, and supported the provision as contained in the Basic Proposal. He added that his Delegation also agreed that the means of safeguarding moral rights be governed by national legislation.

412. Mr. NØRUP-NIELSEN (Denmark) supported the inclusion of Article 5 in Draft Treaty No. 2. He stated that such a provision was necessary; it created a climate of respect for the work of performers, which was even more necessary in the digital environment. He drew attention to the fact that his country had had such protection for performers in its laws for many years, and it had caused no problems.

413. Mr. WIERZBICKI (New Zealand) explained that the issue of moral rights was important for his country, because it had recently introduced explicit protection for the moral rights of authors and directors. It had, therefore, not had a lengthy period of experience to know how well the new provisions were functioning there. He declared that, when the discussions got to Article 25, he would suggest that a reservation be possible for the entirety of Article 5. He added that, in the future, when New Zealand had more experience with moral rights, it could possibly give more favorable consideration to Article 5.

414. Mr. SHEN (China) stated that his Delegation supported the proposed moral rights for performers and, more particularly, Alternative B.

415. El Sr. EMERY (Argentina) apoya la inclusión de los derechos morales en el proyecto de Tratado N° 2 resalta que la posición de su Delegación, que logró consenso en el Grupo Latinoamericano y del Caribe, se asemeja bastante al texto presentado por la Oficina Internacional al Comité de Expertos. No obstante, con el fin de lograr un entendimiento entre quienes se oponen y quienes favorecen los derechos morales, hace una propuesta basada en cuatro principios. Primero, afirmar el derecho del artista intérprete o ejecutante a reivindicar que se indique su nombre, derecho que subsistirá aún después de la muerte del artista. Segundo, esta indicación podría omitirse cuando dicha omisión fuera impuesta por la modalidad de la utilización de la interpretación. En tercer lugar, cuando se trate de orquestas, coros o grupos con designación colectiva, podría indicarse el nombre colectivo, pero en este caso o si hay omisión de los nombres de los artistas, la identificación a los efectos de la gestión colectiva o de los acuerdos de negociación colectiva debería hacerse por otros medios.

Finalmente, los artistas gozarán del derecho a oponerse a todo tipo de distorsión, mutilación u otra modificación no autorizada, por lo cual se abre un campo de posible negociación.

416. Mr. GYERTYÁNFY (Hungary), speaking on behalf of the group of countries consisting of Albania, Bulgaria, the Czech Republic, Croatia, The former Yugoslav Republic of Macedonia, Latvia, Slovenia, Romania, and his own country, referred to the views expressed by the Delegation of France concerning the moral rights of performers. He strongly supported the inclusion of Article 5 in what he described as its “Berne-like formulation.” He was also of the view that moral rights should be non-transferable, as they were closely attached to the personality of the performer, and he was in favor of the extension of those rights to audiovisual performers as well.

417. Mr. HONGTHONG (Thailand) strongly opposed the inclusion of a provision on moral rights.

418. El Sr. ROGERS (Chile) apoya la consagración de los derechos morales para los artistas intérpretes o ejecutantes, optando por la Variante B del Artículo 5 del proyecto de Tratado N° 2. Señala que su Delegación está considerando la propuesta presentada por la Delegación de Argentina con miras a apoyarla.

419. Mr. CHEW (Singapore) opposed the inclusion of an Article on moral rights. He pointed out that the proposed Article was modeled on Article 6*bis* of the Berne Convention, which, he noted, was not part of the required obligations under the TRIPS Agreement. He also noted that performers did not enjoy any moral rights under the Rome Convention. He said that his Delegation shared the views expressed in the interventions by the Delegations of the United States of America and the United Kingdom, in that, at the moment, there was no necessity to protect moral rights of performers.

420. Mr. SØNNELAND (Norway) strongly supported the inclusion of Article 5 as drafted, to be applicable to all performers. He stated that the legislation of his country had provided such rights for 35 years, which had not raised any problems.

421. M. GOVONI (Suisse) se joint aux délégations qui se sont exprimées en faveur d’un droit moral pour les artistes interprètes ou exécutants. Il approuve l’article 5 du projet de traité n° 2 et opte pour la variante B de l’alinéa 1) de cet article. Le fait que le problème de l’inaliénabilité et du transfert des droits ne soit pas réglé dans cette disposition est appréciable. La flexibilité permet de tenir compte de tous les intérêts en cause.

422. Mr. BOUWES (Netherlands) supported the protection of moral rights. He stated that moral rights protection was part of the legislation of his country. He stressed that moral rights protection should exist, however, only under the condition that the exercise of those rights should not be unreasonable, and that such conditions would be a matter for national legislation.

423. El Sr. VÁZQUEZ (España) aboga por la inclusión de los derechos morales para los artistas intérpretes o ejecutantes, en la Variante B del Artículo 5 del proyecto de Tratado N°2.

424. Mr. EKPO (Nigeria) fully supported the Article as drafted, and noted that the legislation of his country contained such rights. He pointed out that paragraph (3) of the Article gave

national legislatures the power to safeguard the rights under the Article. He supported Alternative B.

425. Mr. YAMBAO (Philippines) supported Article 5 as drafted, and Alternative B. He drew attention to the fact that the Philippines had long recognized moral rights of performers.

426. El Sr. MEDRANO VIDAL (Bolivia) apoya la inclusión de los derechos morales en el presente proyecto de Tratado así como la propuesta presentada por la Delegación de Argentina. Destaca que dicho derecho debe durar la vida del autor y *post mortem*.

427. M. ETRANNY (Côte d'Ivoire) indique que, dans le domaine artistique, il existe encore bon nombre d'artistes interprètes ou exécutants qui attachent beaucoup plus d'importance à leur honneur et réputation qu'à des considérations purement matérielles. Il se réjouit qu'un droit moral pour les artistes interprètes ou exécutants soit prévu dans le projet de traité n° 2 et dit qu'il est favorable à la variante B de l'alinéa 1 de l'article 5.

428. Ms. PHILLIPS (Ireland) supported the principle of moral rights for performers, but noted that the points made by the Delegation of the United Kingdom, in respect to the practical application of those rights, were interesting.

429. Mr. EL NASHAR (Egypt) stated that his Delegation supported the inclusion of Article 5 in Draft Treaty No. 2, and it favored Alternative B.

Seventh Meeting

Tuesday, December 10, 1996

Afternoon

Article 5 (Moral Rights of Performers) of the WPPT (continuation)

430. The CHAIRMAN opened the floor to continue the discussion on Article 5 (Moral Rights of Performers) of Draft Treaty No. 2.

431. M. DEBRULLE (Belgique) appuie la reconnaissance, au niveau international, d'un droit moral pour les artistes interprètes et exécutants. Il note que la mise en oeuvre de ce droit moral doit être laissée aux Parties contractantes comme indiqué à l'alinéa 3) de l'article 5 du projet de traité n° 2. Il pense qu'il serait vain pour la présente commission de se pencher sur la possibilité de renoncer à l'une ou l'autre prérogative couverte par le droit moral.

432. Mme YOUM DIABE SIBY (Sénégal) est favorable à la reconnaissance d'un droit moral pour les artistes interprètes ou exécutants et appuie la variante B de l'alinéa 1) de l'article 5 du projet de traité n° 2. Elle approuve également l'alinéa 3) de ce même article.

433. El Sr. ZAPATA LÓPEZ (Colombia) resalta que la legislación de su país otorga derechos morales a los artistas intérpretes o ejecutantes en la misma medida en que lo hace para los autores. Se les reconocen los derechos de paternidad, integridad, modificación incluso el de

retracto, siempre que la interpretación se malogre de manera tal que cause un perjuicio al honor o a la reputación del intérprete o al mérito de la interpretación. No comparte la preocupación expresada por algunas Delegaciones de que haya inconveniente en la forma y en las posibilidades de reconocimiento de un derecho moral en los casos en que la interpretación está hecha por varios artistas que participan en un coro o una orquesta, puesto que en estos casos la legislación nacional exige que una persona sea responsable del ejercicio de este derecho moral como representante del grupo. Por estas razones, la Delegación de Colombia apoya plenamente el reconocimiento de este derecho, en la alternativa B. Se auna a la propuesta presentada por la Delegación de Argentina en la medida en que sea una propuesta de base a la que se puedan agregar otros criterios.

434. Mr. CRESWELL (Australia) expressed the doubts of his Delegation about the justification for moral rights for performers, and referred to the reasons given in the intervention by the Delegation of the United Kingdom.

435. El Sr. ALVAREZ (Costa Rica) apoya la propuesta presentada por la Delegación de Argentina sobre los derechos morales de los artistas intérpretes o ejecutantes, porque contiene elementos jurídicos que coinciden con las disposiciones pertinentes de la legislación nacional de su país.

436. El Sr. ANTEQUERA PARILLI (Venezuela) señala que la decisión comunitaria que obliga a los cinco países del Acuerdo de Cartagena, contiene la obligación de consagrar derechos morales a los artistas intérpretes o ejecutantes en consonancia con la Variante B del Artículo 5 del proyecto de Tratado N° 2, lo cual concuerda igualmente con lo dispuesto en la legislación de Venezuela. Sin embargo, considera que la propuesta presentada por la Delegación de Argentina constituye una buena fórmula hacia un entendimiento entre posiciones contrapuestas, sin perjuicio de que muchas legislaciones superen los niveles de protección previstos en dicha propuesta.

437. M. TRAORÉ (Mali) précise que sa délégation est en faveur de la reconnaissance d'un droit moral pour les artistes interprètes ou exécutants et approuve, en ce sens, la variante B de l'article 5.1) du projet de traité n° 2.

438. Ms. KADIR (Trinidad and Tobago) explained that moral rights for authors were part of the legislation of her country, and that it had proven useful. She supported the inclusion of a provision on moral rights for performers, but stated that her Delegation was considering the proposed amendments put forward by Argentina and Mexico concerning Article 5.

439. Mr. MTETEWAUNGA (Tanzania) stated that his country was in the process of enacting a new copyright law, which would deal with copyright, neighboring rights and folklore, and that the draft law contained a provision on moral rights for performers. He, therefore, supported the inclusion of Article 5 and Alternative B.

440. Mr. AUER (Austria) supported Article 5 as drafted, but with the understanding, as indicated in the intervention by the Delegation of the Netherlands and by others, that it would be a matter of national legislation to determine the conditions of reasonable exercise of those rights. He noted that his country had introduced in its legislation protection of moral rights of performers in 1936.

441. Mr. OMONDI-MBAGO (Kenya) expressed his Delegation's support for the protection of moral rights of performers, and indicated its preference for Alternative B.

442. Ms. DALEY (Jamaica) stated that the question of moral rights for performers was important, and that her Delegation was considering the amendments to Article 5 proposed by Argentina and Mexico.

443. Mr. OPHIR (Israel) stated that Draft Treaty No. 2 was concerned with certain minimum rights, in which the overriding issues concerned the economic rights of performers. He said that his Delegation felt that the introduction of moral rights into Draft Treaty No. 2 might cloud or even confuse the dominant issue of performers' economic rights. He emphasized that a clear distinction should be maintained between authors' rights in the area of copyright, to which moral rights might properly pertain, and of neighboring rights, such as performers' rights, where it was felt that such rights were not relevant. He pointed out that to treat moral rights as one of the minimum requirements of Draft Treaty No. 2 was a mistake. He proposed to remove Article 5 in its entirety from Draft Treaty No. 2, and supported the intervention by the Delegation of the United Kingdom.

444. El Sr. ESPINOZA PAO (Nicaragua) hace énfasis en la necesidad de consagrar en este foro los derechos morales de los artistas intérpretes o ejecutantes, derechos que ya se encuentran contemplados en algunas legislaciones nacionales. Al respecto, considera que la propuesta emitida por la Delegación de Argentina constituye una fórmula conciliadora y que debería ser estudiada detenidamente por las demás Delegaciones.

445. Mlle DALEIDEN (Luxembourg) fait observer que toute spécification dans une position normative en constitue une exception. Sur cette base, sa délégation appuie la variante B de l'article 5.1), ayant pour objectif une protection de droit moral aussi étendue que possible.

446. La Sra. ROMERO ROJAS (Honduras) felicita al Presidente por su elección. Aboga en favor del reconocimiento de los derechos morales para los artistas intérpretes o ejecutantes en la forma de la Variante B del Artículo 5 del proyecto de Tratado N° 2, y se propone analizar la propuesta de la Delegación de Argentina con el fin de apoyarla en su momento.

447. El Sr. UGARTECHE VILLACORTA (Perú) apoya la inclusión de derechos morales para los artistas intérpretes o ejecutantes en la forma de la Variante B del Artículo 5, y se propone considerar la propuesta presentada por la Delegación de Argentina.

448. El Sr. TEYSERA ROUCO (Uruguay) apoya la inclusión del derecho moral de paternidad en favor de los artistas intérpretes o ejecutantes y está dispuesto a aceptar la propuesta de la Delegación de Argentina con la salvedad que en el literal relativo al derecho al respeto se utilice la expresión de la versión española es decir "graves" y no la utilizada en la versión en inglés.

449. Mr. SHINAVENE (Namibia) supported inclusion of the Article on moral rights for performers, and expressed preference for Alternative B.

450. Mrs. MOULD-IDDRISU (Ghana) said that Ghana was in the process of amending its copyright law. She supported the African position, which was to include moral rights for

performers, since folklore was an integral part of African culture. She also expressed her support for Alternative B.

451. The CHAIRMAN noted that there had been broad support for the inclusion of Article 5 in Draft Treaty No. 2. He pointed to the amendment proposed by the Delegation of Argentina, and said that there had been support for that from many Delegations. He also noted that there had been opinions opposed to moral rights for performers. There had been one opinion that moral rights for performers could be secured through economic rights, and another opinion expressing the possibility of logging a reservation concerning the entire Article on moral rights, although the latter was not supported by any other Delegation. The transferability of moral rights had been discussed, with some provisions on the possibility of the right holder not to exercise his or her moral rights. He said that it would be necessary to study further the proposed amendment from the Delegation of Argentina, and it was possible that there might be other proposals.

Work program

452. The CHAIRMAN asked the Committee for comments on how the Committee should proceed in establishing texts of the Treaties. He suggested that one way to proceed was to go article by article, wherein each article would be prepared after the discussions by the Committee, with alternatives, perhaps in square brackets, and taking into consideration the various amendments proposed relative to that article. An alternative way to proceed would be for the Chairman to create new texts of the Treaties after the first round of discussion. He indicated that such new versions of the texts could be completed by him during Thursday evening.

453. Mr. AYYAR (India) stated that it had been interesting to hear all of the various opinions of the Delegations on the articles discussed thus far. He pointed out that similar opportunities had been presented to the Delegations in October and November. He asked the Chairman for clarification as to his proposed time frame, pinpointing whether it was really realistic for the Chairman to create new, consolidated texts during Thursday evening. Otherwise, if those new texts were not available until Monday of next week, the Committee would have insufficient time to consider them. He proposed that the article-by-article approach might be more efficient.

454. The CHAIRMAN assured the Committee that he could produce the new texts during Thursday evening, so that they could be available on Friday. In that way, the Committee could start its discussion on Friday, private consultations and group activities could continue on Saturday, and a plenary session of the Committee could be held on Sunday.

455. Mr. FICSOR (Assistant Director General of WIPO) confirmed that, if the new texts were received by the Secretariat by 2 a.m. on Friday morning, it would distribute the new texts, in six languages, on Friday.

456. Mr. CRESWELL (Australia) asked the Chairman for clarification as to whether the new texts to be prepared by the Chairman would become the basis for further discussions, and thus displace the existing texts, and whether the new texts would incorporate the proposed

amendments thus far submitted, thus superseding them, and incorporate as well the Chairman's understanding of the discussions.

457. The CHAIRMAN stated that all proposed amendments would stay on the table. Elements from those amendments would be incorporated into the new texts, consistent with an assessment of what would be possible and realistic, based on the discussions of the Committee. He noted that some amendments had only been presented orally, but those orally proposed amendments which had been supported by other Delegations would be taken into consideration in the new texts. He stressed that written proposals for amendments would more efficiently facilitate the work of creating the new texts.

458. M. SÉRY (Côte d'Ivoire) fait part de ses préoccupations quant à l'horaire de travail envisagé et demande au Président de préciser ses intentions sur le déroulement des débats. Il souligne l'importance de laisser également du temps pour permettre les réunions des différents groupes et leur concertation.

459. Mme YOUM DIABE SIBY (Sénégal) indique qu'elle partage les préoccupations de la délégation de la Côte d'Ivoire et se demande si l'horaire de travail proposé laissera suffisamment de libre à l'examen des diverses propositions d'amandements.

460. The CHAIRMAN inquired of the Chairman of Main Committee II as to whether that Committee was prepared to commence its deliberations.

461. Mr. SUAREZ (Brazil) responded that Main Committee II was ready to commence its work immediately.

462. The CHAIRMAN noted that the Drafting Committee could not meet yet until there was a text to review. He was of the opinion that the schedule for Main Committee I was clear, and said that he would make a statement at the beginning of each session as to what the schedule of the Committee would be.

463. Mr. ENTCHEV (Bulgaria) supported the schedule of work proposed by the Chairman, and thanked the other Delegations for their flexibility. Regarding the issue of audiovisual fixations, where there was an expected division, he suggested that the Delegations could merely indicate whether they were for or against, rather than go to length to explain their position. He also suggested that, where there was a proposal which had substantial support, such as the proposed amendment by the Delegation of Argentina on Article 5 of Draft Treaty No. 2, it might be more efficient to establish a working group, which could propose a text, and thereby speed up the process.

Performers' rights in audiovisual recordings

464. The CHAIRMAN opened the floor for discussion on *performers' rights in audiovisual recordings* which he referred to as a horizontal question, as well as one of the most crucial issues in Draft Treaty No. 2. He mentioned that Alternatives A and B were found in many Articles in Draft Treaty No. 2, confining protection to only musical performances, or extending protection to any fixations of performances. He noted that the issue had been presented in paragraphs 2.11 to 2.18 in the notes to the Basic Proposal for Draft Treaty No. 2. He said that

many Delegations had thus far expressed their preferences for either Alternative A or Alternative B, but that every Delegation had not been systematically invited to express its opinion. He proposed that the Committee deal with the whole audiovisual question, as an entity or horizontal issue, and after the whole matter had been thoroughly discussed, the Committee should decide upon a form and method to deal with the question.

465. Mr. KUSHAN (United States of America) stated that his country had worked closely with many other countries over the past few years to develop Draft Treaty No. 2 to protect audio performers and producers of phonograms, and that the Treaty was of crucial importance. The protection it would offer the sound recording industries was absolutely essential for those industries to prosper in the new digital age. A number of countries had pressed to expand the Treaty to cover performers of audiovisual works, rather than keeping the Treaty limited to sound recordings. He stressed that his country had consistently opposed extension of the Treaty in such a manner, and that it would continue to do so, unless serious problems that existed in making such extension were addressed. He saw two possibilities in that regard. Either the scope of the Treaty should be limited to exclude audiovisual performers, or an alternative approach should be developed that would permit the existing different systems to coexist.

466. He said that his Delegation had developed a proposal that would accomplish that latter objective. The proposal had four interrelated and essential elements. First, the proposal would grant foreign performers statutory protection in the United States of America for their core economic rights. Those core economic rights were the rights of fixation, reproduction, distribution and making available to the public. The rights of modification and moral rights should be omitted. Second, each country should have flexibility under the Treaty as to how rights were to be implemented. With respect to its domestic performers, a country could implement the treaty obligations in a manner that would be consistent with its own existing system. He mentioned as an example that performers in the United States of America would realize their rights through the system of that country, which was based on collective bargaining agreements. Foreign performers, on the other hand, would receive specific statutory rights. The third element of his Delegation's proposal was that the Treaty should contain provisions on transfers of rights. It should permit performers to freely transfer their economic rights. It would provide protection to performers beyond that provided by the Rome Convention, by allowing rights to continue to exist even after the performer consented to the fixation of his performance. Under the proposal, a presumption would apply that those rights were transferred to the producer once the performer agreed to participate in a film. The performer and producer would, however, be free to agree otherwise. The fourth element of the proposal would require each country to treat performers from other countries at least as well as it treated its own performers. The Delegate indicated that his country would accept material reciprocity with regard only to the broadcasting right.

467. He felt that that proposal offered a workable solution. If accepted as part of the Treaty, it would ensure meaningful protection for audiovisual performers around the world and would avoid extreme differences in the levels of protection from country to country. He emphasized that the proposal would also significantly increase the likelihood that the United States of America would be able to join the Treaty, and to extend benefits to both audio and audiovisual performers from foreign countries. He added that a failure to obtain such a compromise solution or an alternative that would simply allow the United States of America to take

reservations on the question of protection for audiovisual performers could make it difficult, if not impossible, for the United States of America to accept and ratify the Treaty.

468. He said that his Delegation's willingness to put forward a proposal along those lines represented a major shift in the position of his country. He underscored that it was for the first time that the United States of America had been prepared to provide specific statutory rights to performers from other countries, and he strongly urged the Committee to give the proposal serious and favorable consideration.

469. Mr. REINBOTHE (European Communities) took the position that the coverage of the rights of performing artists in audiovisual performances was extremely important, and had even gained a political dimension. He noted that the proposal made by the European Community and its Member States was well known. It was contained in Alternative B throughout the Basic Proposal for Draft Treaty No. 2. He said that his Delegation believed that no distinction and no discrimination should be made between performers' rights with respect to sound performances and audiovisual performances. He indicated that, at the same time, his Delegation was ready to accommodate other parties' needs, and that there was a readiness to arrive at a compromise which was appropriate to as many Contracting States as possible.

470. He pointed out that, in the Basic Proposal, there were three alternatives for the treatment of that question, and one was already a compromise and was contained in Article 25 of Draft Treaty No. 2. He felt that the ideas which the Delegation of the United States of America had just offered in that respect were very interesting. Some of those ideas had already surfaced in a slightly different context in the negotiations leading to the TRIPS Agreement. He felt that all those ideas deserved discussion. He indicated that the ideas in the proposal by the Delegation of the United States of America had two things in common: they had never been introduced in the discussions in the Committees of Experts which prepared the Conference; and they were not contained or reflected in the Basic Proposal which formed the basis of the discussions at the Diplomatic Conference. He stated that the European Community considered it somewhat difficult, at this late stage, to introduce new elements into the discussions. He reserved the right to ask detailed questions to the Delegation of the United States of America once his Delegation had better understood the proposal, and he expressed the hope that it would be spelled out in a written proposal.

471. He observed that the possibility to apply a reservation, which was contained in Article 25, as Alternative C, might indicate the right direction. He stated that his Delegation was not in favor of reservations in treaties. On the other hand, he pointed out that there was already one reservation contained in the Basic Proposal. He said that informal consultations on Article 25, Alternative C, confirmed that that might be the most pragmatic, the least complicated and the most flexible way out of the problem, and that his Delegation had been thinking about turning Article 25, Alternative C, into an *à la carte* reservation, which meant that the approach taken by that Alternative would be more flexible. He indicated his Delegation's understanding that Article 25, Alternative C, as drafted, provided Contracting States with a possibility to make a reservation with respect to audiovisual performances on all the Articles listed there, or on none of those Articles. He believed that that provision could be made more flexible by leaving it up to Contracting States to decide as to which Articles the reservation would apply. Thus, Contracting States would be free to decide whether they would apply a reservation to Articles 7, 8, 9, 10, 11 and Article 21(1), and possibly also to Article 5.

472. He added that, in that context, it should be made clear that a Contracting State that would apply such a reservation should not be entitled to national treatment for those rights upon which it had invoked the reservation. He underscored that such a flexible reservation possibility could be used by each Contracting State in a different way, in a way to accommodate its own needs in harmony with its own stage of protection for performing artists in the audiovisual field.

473. Mr. AYYAR (India) noted the diversity of views expressed in the Diplomatic Conference as well as in the preparatory work of the Committees of Experts, on the issue of audiovisual rights for performers. He pointed out that, when one talked of cinema, there was no single cinema, but rather there were in fact many different types of cinema. Thus, there was commercial cinema, real cinema and so on. He observed that obligations and liabilities in the world of commercial cinema were handled mostly by contractual relationships, and to replace such contractual relationships by legislative regulations would be extremely difficult.

474. To resolve that question within the Diplomatic Conference, he offered two alternatives. The first one was to exclude audiovisual protection altogether, which, he said, would be in conformity with the established practice in the international regime of copyright and neighboring rights where minimum rights were being covered. He added that nothing would prevent a country or group of countries from conferring a higher level of protection than the required minimum. The second alternative was to include audiovisual fixations, but to allow Contracting States an unfettered right of reservation. He felt that that would allow his country to have discussions with its performers and film industry, and to progressively develop a legislative framework as the commercial practices changed.

475. He noted with interest the proposal by the Delegation of the United States of America. Referring to the point made by the Delegation of the European Communities that the ideas in the proposal by the Delegation of the United States of America had never been introduced in the discussions in the Committee of Experts, he said that one needed to draw a distinction between the work of the Committee of Experts and the work being done in the Diplomatic Conference. The Committee of Experts was a committee of experts and no more; it had no political mandate. Nothing precluded a Delegation to introduce at the Diplomatic Conference new proposals or to raise issues connected with the subject of discussions.

476. Mr. GYERTYÁNFY (Hungary), speaking on behalf of the Group of Central European countries and the Baltic States, supported the position of the European Community and its Member States on the scope of coverage of Draft Treaty No. 2, and supported Alternative B in all places where it appeared. He expressed his readiness to study the proposal by the Delegation of the United States of America.

477. Mr. OKAMOTO (Japan) said that, in regard to Article 6 on economic rights for unfixed performances, his Delegation strongly supported Alternative B, because, as far as unfixed performances were concerned, there seemed to be no reason to make any distinction or discrimination between musical performances and non-musical performances. As to Alternatives A and B for fixed performances, he stated that his Delegation reserved its position. He added that his Delegation supported Alternative C in Article 25 on reservations, and indicated that his Delegation would consider the proposal made by the Delegation of the United States of America seriously.

478. El Sr. PROAÑO MAYA (Ecuador) se refiere a la propuesta presentada por la Delegación de los Estados Unidos de América relativa a la protección del sector audiovisual y expresa el deseo que sea presentada formalmente por escrito a las demás Delegaciones de tal forma que la puedan analizar y estudiar, y lograr a través de ella un punto de entendimiento.

479. Mme DE MONTLUC (France) rappelle que depuis 1961, année de la conclusion de la Convention de Rome, la situation juridique des artistes interprètes ou exécutants de l'audiovisuel a peu évolué sur le plan international alors que les techniques nouvelles dans le monde du cinéma et de l'industrie de l'audiovisuel se sont considérablement développées. Il a été décidé au sein des comités d'experts qu'un nouvel examen de la situation des auteurs et des producteurs de phonogrammes était devenu nécessaire. Elle souhaite que des propositions puissent s'articuler autour de droits réels opposables à tous avec un niveau homogène au plan international. Elle est de l'avis que la proposition contenue dans les textes de base, qui sont issus des travaux des années passées, constitue le point de départ des débats en cours au sein de cette commission.

480. El Sr. ZAPATA LÓPEZ (Colombia) comparte plenamente las opiniones expresadas por la Delegación de las Comunidades Europeas y por la de Francia y hace hincapié en la necesidad de dispensar una protección adecuada y amplia a los artistas intérpretes o ejecutantes. Estima que en la nueva era de la información, si bien los países en vía de desarrollo no desempeñarán un papel importante como proveedores de redes y servicios, serán unos enormes proveedores de contenido. Considerando que, tanto obras protegidas por el derecho de autor como interpretaciones artísticas, producciones fonográficas y producciones audiovisuales, circularán por esas redes, resulta indispensable prever un conjunto de derechos efectivos e interrelacionados que protejan a los artistas así como a los productores. Destaca la imperiosa necesidad de lograr una solución de compromiso para lograr un equilibrio entre los diferentes intereses, insistiendo en que no sólo los grandes mercados sino también los países en vía de desarrollo tienen un real interés en proteger eficazmente a sus artistas y las producciones audiovisuales.

481. M. ETRANNY (Côte d'Ivoire) déclare qu'il est favorable à la reconnaissance d'un droit pour les artistes interprètes ou exécutants sur la fixation audiovisuelle de leurs prestations. Il se réserve d'apporter certaines observations par la suite.

482. Mr. OPHIR (Israel) underscored that any Treaty to which the United States of America was not a Contracting Party would be inefficient and probably a mistake. He said that his Delegation looked forward to seeing the proposal by the Delegation of the United States of America, and to working with that Delegation to reach an acceptable compromise.

483. The CHAIRMAN suggested that written proposals be submitted, translated and distributed, and that, after private consultations and group meetings, the issue of audiovisual coverage of Draft Treaty No. 2 would be taken up again by the Committee.

[*Suspension*]

Article 10 (Limitations and Exceptions) of the WCT (Article 12 of Draft Treaty No. 1); Article 16 (Limitations and Exceptions) of the WPPT (Articles 13 and 20 of Draft Treaty No. 2)

484. The CHAIRMAN opened the floor for discussion of *Article 12 (Limitations and Exceptions) of Draft Treaty No. 1, and Articles 13 and 20 (Limitations and Exceptions) of Draft Treaty No. 2*. He observed that paragraph (1) of Article 12 of Draft Treaty No. 1 dealt with limitations on and exceptions to the rights granted to authors of literary and artistic works which were permissible under the proposed Treaty, while paragraph (2) dealt with limitations and exceptions which were permissible when the Contracting States were applying the Berne Convention. In both paragraphs, there were the three conditions which had been laid down in Article 9(2) of the Berne Convention concerning the right of reproduction, that is: (1) the limitations or exceptions had to concern only certain special cases; (2) they might never conflict with the normal exploitation of works; and (3) they might not unreasonably prejudice the legitimate interests of authors.

485. He mentioned that note 12.05 in the Basic Proposal concerning Draft Treaty No. 1 contained an interpretation of those provisions. In note 12.04, there was a remark which referred to Article 13 of the TRIPS Agreement, where the same conditions had already been incorporated as general principles governing any limitations on or exceptions to rights. He felt that the introduction of that kind of Article would mean that all limitations and exceptions which were permissible under the Berne Convention would survive and continue to exist on the national level, if they were in conformity with Article 9(2) of the Berne Convention concerning the right of reproduction and if they were in conformity with the corresponding provisions in Article 13 in the TRIPS Agreement. He stated that those conditions would apply to any additional aspects of protection in the new Treaty.

486. He pointed out that in note 12.06 there was a reference to the so-called minor exceptions. Those exceptions were based on an understanding of the Conferences in Brussels, in 1948, and in Stockholm, in 1967, as reflected in the reports of those Conferences. It was not intended to prevent Contracting States from applying any limitations and exceptions traditionally considered acceptable under the Berne Convention. There was therefore no intention in the draft Treaty that the so-called minor exceptions should be excluded. He added that, generally speaking, the important limitations and exceptions that were considered permitted under the Berne Convention would still be permissible under the new Treaty, for example, when relating to education, scientific research, the need of the general public for information to be made available in libraries and persons with a handicap that prevented them from using ordinary sources of information.

487. He pointed out that in Draft Treaty No. 2, Articles 13 and 20 dealt with limitations and exceptions. In paragraphs (2) of those Articles, there was a clause that was similar to the clauses in Article 12 of Draft Treaty No. 1, which included the three-step test. In paragraphs (1), there was a clause which corresponded to Article 15(2) of the Rome Convention and the effect of that clause would be that Contracting Parties could in their national legislation provide the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provided for the protection of copyright in literary and artistic works.

488. Mr. KUSHAN (United States of America) expressed his Delegation's support for the inclusion of Article 12 in Draft Treaty No. 1, and Articles 13 and 20 in Draft Treaty No. 2, and suggested changes to two words in paragraph (1) to make the text reflect Article 9(2) of the Berne Convention. The first change was to delete the word "only," and the second change was to change the word "the" to the word "a," so that the phrase "conflict with the normal exploitation" would read "conflict with a normal exploitation." The proposed changes related to both Draft Treaties. He said that it was essential that the Treaties permit application of the evolving doctrine of "fair use," which was recognized in the laws of the United States of America, and which was also applicable in the digital environment. In particular, he stressed that the provisions of Article 12 should be understood to permit Contracting Parties to carry forward, and appropriately extend into the digital environment, limitations and exceptions in their national laws which were considered acceptable under the Berne Convention. Those provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that were appropriate in the digital network environment.

489. Mr. NØRUP-NIELSEN (Denmark) supported the inclusion of the Article on limitations and exceptions, but expressed doubts as to the necessity of paragraph (2). He pointed out that the three-step test had originated in Stockholm in 1967, mainly in response to the emerging phenomena of photocopying. He was not sure that that test was appropriate in the digital world. He observed that the Conference had strengthened the protection of basic rights, such as the rights of reproduction and making available to the public, but he felt that the new rules should not be a "straight jacket" for existing exceptions in areas that were essential for society. He gave as examples education, scientific research, library activities and the interest of persons with handicaps. He, therefore, suggested that the Conference adopt an agreed statement to clarify the need and importance of the limitations and exceptions of which he spoke above. He also supported the amendment proposed by the Delegation of the United States of America on limitations and exceptions.

490. Mr. AYYAR (India) supported the amendment proposed by the Delegation of the United States of America, and stressed that there should be no ambiguity about the applicability of all limitations and exceptions under the Berne Convention, which were not limited to those enumerated in Article 9(2) of the Berne Convention. He underscored the Chairman's statement that all of the exceptions and limitations under the Berne Convention would survive in the new Treaties. He emphasized that the change from a physical format to a digital format should not in any way curtail the various limitations applicable to science, research, education, public interest, public lending, and, further, that there should be scope for national legislation to make such alterations as might be necessary.

491. Mr. KIM (Republic of Korea) expressed his Delegation's support for the proposal by the Delegation of Singapore, and the proposal by the United States of America. He proposed the deletion of paragraph (2) of Article 12 of Draft Treaty No. 1, referring to it as no more than a repetition of paragraph (1), which might cause unreasonable burdens on Contracting States. Regarding Articles 13 and 20 of Draft Treaty No. 2, he strongly preferred the language which appeared in the Rome Convention.

492. Mr. TIWARI (Singapore) referred to the support from the Delegations of the Republic of Korea and the United States of America for Singapore's earlier proposed amendment to paragraph (1) of draft Article 12. He stressed that the language in the TRIPS Agreement and in the Berne Convention should be strictly followed to avoid unintended consequences. He

asked for clarification as to whether Article 12 applied to all rights granted in Draft Treaty No. 1, including those that provided for specific exemptions or limitations, and to Article 13 on technological measures and Article 14 on rights management information. He noted that the three-step test taken from Article 9(2) of the Berne Convention was limited to the right of reproduction; therefore, it produced a narrowing or restrictive effect. He supported the proposal by the Delegation of the Republic of Korea to delete paragraph (2) of Article 12, because it was inconsistent with the commitment to balance copyright laws, where exceptions and limitations adopted by the Conference were narrowed, and protection was made broader. He cited as examples the following Articles of the Berne Convention which would be narrowed by paragraph (2) of Article 12: Articles 2(4), 2(8), 2*bis*(1), 10(1), 10*bis*(1), 10*bis*(2) and 11*bis*(2). He also felt that paragraph (2) of Article 12 might be contrary to Article 20 of the Berne Convention which prohibited provisions in the Treaties which were contrary to the Berne Convention. He indicated that his foregoing comments on Article 12 applied likewise to Articles 13 and 20 of Draft Treaty No. 2. He asked whether the language of Article 15 of the Rome Convention might provide an alternative for allowing exceptions.

493. Mr. GYERTYÁNFY (Hungary) aligned his Delegation with the concerns expressed by the Delegations of Norway, India and other countries regarding paragraph (2) of Article 12. He stated that the paragraph could be interpreted to restrict existing exceptions under the Berne Convention relative to existing rights, such as in respect to public performance. He supported the deletion of paragraph (2), or, alternatively, an agreed statement declaring that it did not touch upon existing rights and exceptions under the Berne Convention.

494. Mr. REINBOTHE (European Communities) stressed that the Conference must achieve a fair balance between rights and interests, including flexibility for Contracting States in their defining the scope of rights. He felt that the clauses on exceptions and limitations were important in achieving those objectives, and that such clauses should be based as closely as possible on Article 9(2) of the Berne Convention and Article 13 of the TRIPS Agreement.

495. Mr. WIERZBICKI (New Zealand) supported the changes to two words in paragraph (1) by the Delegation of the United States of America. He also indicated that his Delegation's acceptance of paragraph (2) was subject to the understanding that the provision did not affect any of the current limitations or exceptions provided under the Berne Convention.

496. Mr. MTETEWAUNGA (Tanzania) supported the provisions in Article 12 in Draft Treaty No. 1 and Articles 13 and 20 in Draft Treaty No. 2. He added that his Delegation had no objections to the proposed amendment by the Delegation of the United States of America.

497. Mr. OLSSON (Sweden) stated that his Delegation supported Article 12 with the amendments proposed by the Delegation of the United States of America. He added that his Delegation also favored an agreed statement by the Conference to the effect that Contracting States should be entitled to provide in their national legislation for the type of traditional limitations and exceptions permissible under the Berne Convention, such as education, scientific research, library activities and the interests of persons with handicaps.

498. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe, apoya el Artículo 12 sobre limitaciones y excepciones bajo el entendido que este Artículo debe aplicarse en el sentido de no aceptar la incorporación de nuevas limitaciones o

excepciones que nos se encuentren en el Convenio de Berna para los derechos previstos en dicho Convenio, y para los nuevos derechos contenidos en el presente proyecto de Tratado aceptar limitaciones o excepciones según los mismos criterios que los contenidos en el Convenio de Berna, es decir que no atenten a la explotación normal de la obra ni causen perjuicios injustificados a los intereses legítimos del autor.

499. M. MBON MEKOMPOMB (Cameroun) déclare que sa délégation approuve l'article 12 du projet de traité n° 1 et les articles 13 et 20 du projet de traité n° 2. Il exprime sa satisfaction quant à la faculté qui est laissée aux législations nationales de pouvoir déterminer le champ d'application de ces articles. Il estime qu'il est indispensable de se référer à la Convention de Berne et à l'Accord sur les ADPICS et fait observer qu'il conviendrait d'éviter l'instauration de plusieurs variantes, réserves et limitations qui seraient de nature à entraîner une multitude de niveaux de protection dans le monde, surtout au moment de la mondialisation des modes d'exploitation. Dans ce sens, il est nécessaire d'encourager la volonté de développer et d'assurer la protection des artistes interprètes ou exécutants d'une manière aussi efficace et uniforme que possible.

500. Mr. SHEN (China) said that his Delegation in principle could support the proposals put forward by the Delegations of India, Sweden, the Republic of Korea and the United States of America. Regarding Article 12, he supported the view of the Delegation of the Republic of Korea that it should be shortened because there were already explicit provisions of that kind in the Berne Convention. Regarding Draft Treaty No. 2, he supported the current wording.

501. Mr. SØNNELAND (Norway) expressed his Delegation's support for the amendment proposed by the Delegation of the United States of America. He referred to the interventions by that Delegation and the Delegation of Denmark regarding the traditional limitations and exceptions under the Berne Convention. He supported the interventions by the Delegations of Denmark and Hungary concerning Article 12(2), as well as the intervention by the Delegation of Sweden regarding an agreed statement on the traditional limitations and exceptions under the Berne Convention.

502. Mme YOUM DIABE SIBY (Sénégal) exprime ses préoccupations quant à l'article 12 du projet de traité n° 1. Selon les dispositions de cet article, les législations nationales peuvent contenir des limitations et exceptions portant sur l'ensemble des droits conférés par le traité, à condition de ne pas restreindre la protection déjà reconnue dans la Convention de Berne. Elle fait observer que, dans cette Convention, les seules limitations visent le droit de reproduction, et que l'instauration de niveaux de protection différents dans les pays serait source de difficultés qu'il convient d'éviter. Elle propose en conséquence de prévoir un niveau de protection standard, minimum, de nature à ne pas compromettre les droits reconnus aux auteurs. Elle ajoute que certaines de ses remarques s'adressent aussi aux articles 13 et 20 du projet de traité n° 2.

*Eighth Meeting
Tuesday, December 10, 1996
Evening*

Article 10 (Limitations and Exceptions) of the WCT (Article 12 of Draft Treaty No. 1) and Article 16 (Limitations and Exceptions) of the WPPT (Articles 13 and 20 of Draft Treaty No. 2 (continuation))

503. The CHAIRMAN opened the floor to continue the discussion on Article 12 of Draft Treaty No. 1 and Articles 13 and 20 of Draft Treaty No. 2.

504. El Sr. ROGERS (Chile), en lo que atañe al Artículo 12, apoya la posición expresada por la Delegación de Colombia en nombre del Grupo Latinoamericano y del Caribe. Sin embargo, destaca que su Delegación no se encuentra en posición de aceptar la inclusión de disposiciones que permitan a los Estados incorporar nuevas limitaciones o excepciones no previstas actualmente en el Convenio de Berna. Por esta razón propone revisar el alcance del Artículo 12 o, en su defecto, apoyaría la propuesta que consiste en suprimir el párrafo 2 de dicho Artículo.

505. Mr. BOUWES (Netherlands) supported all of the proposals thus far which sought to maintain the existing exceptions and limitations, as they reflected the necessary balance between all the various interests. He felt that it was too early to determine in detail which specific exceptions and limitations were needed in the digital environment, that that question required further study, and that Article 12(1) provided the necessary framework. He stressed his Delegation's belief in the importance of copyright and neighboring rights in the digital environment, and, at the same time, of the accessibility of information under reasonable conditions.

506. Mr. HONGTHONG (Thailand) expressed his Delegation's support for the interventions by the Delegations of India, the Republic of Korea, Singapore and the United States of America, regarding paragraph (1) of Article 12. Regarding paragraph (2) of that Article, he supported its deletion, and referred to the interventions by the Delegations of the Republic of Korea and Singapore.

507. Mr. STARTUP (United Kingdom) supported the principles underlying Article 12 of Draft Treaty No. 1, and the inclusion of similar provisions in Draft Treaty No. 2, which he felt were based on the well established principles of the Berne Convention and the TRIPS Agreement. He said that his Delegation was willing to look at minor drafting amendments to align the provisions more closely with those two agreements. He stated that his Delegation understood the concerns of those who wished to apply *mutatis mutandis* such limitations and exceptions, which traditionally were considered acceptable under the Berne Convention, to the digital environment. He took note of the point in note 12.08, but also drew attention to the other principle set out in 12.08, that, in the digital environment, what might formerly have been minor reservations might in reality undermine important aspects of protection. He also noted that the contrary might also be true, namely that, in the digital environment, some acts might prove to be of no economic significance and would, therefore, meet the conditions of the three-step test.

508. El Sr. SILVA SOARES (Brasil), se auna a la posición expresada, respecto del Artículo 12, por la Delegación de Colombia en nombre del Grupo Latinoamericano y del Caribe así como por la Delegación de Chile, y la extiende a los Artículos 13 y 20 del proyecto de Tratado N° 2.

509. Mr. TARKELA (Finland) supported Article 12 of Draft Treaty No. 1 and Articles 13 and 20 of Draft Treaty No. 2. He felt that it was important for the Treaties to be adopted to make it possible to preserve the balance between the right holders' interests, on the one hand, and the interests of the general public and society, on the other hand. He supported the views expressed by the Delegations of Denmark, Norway, Sweden, the United States of America and other countries who had emphasized the need for Contracting States to be able to continue the application of limitations and exceptions traditionally acceptable under the Berne Convention. He also joined previous Delegations that had called for an agreed statement by the Conference on limitations and exceptions which served the needs of education, scientific research, library activities and the interests of persons with handicaps.

510. Mr. CRESWELL (Australia) supported the inclusion of paragraph (1) of Article 12 and an agreed statement regarding Draft Treaty No. 1. He felt that paragraph (2) of that Article should be deleted, and he referred to the prior interventions which had called for its deletion. He also referred to prior discussions on minor reservations, and noted that, in conjunction with the debate on Article 6, his Delegation had reserved its position regarding a special broadcasting license, since Article 6 had proposed the abolition of such licenses. He suggested that such a license would be in keeping with the agreed statements adopted in Brussels in 1948 and in Stockholm in 1967, and he asked that the concern of his Delegation be taken into account. Regarding Draft Treaty No. 2, he said that his Delegation supported paragraph (1) of Articles 13 and 20, but was still considering the benefits of adopting a restatement of Article 15(1) of the Rome Convention. He suggested for consideration the possibility of merging Articles 13 and 20 into one common provision.

511. Mr. YAMBAO (Philippines) agreed with the changes proposed by the Delegation of the United States of America in Article 12(1) of Draft Treaty No. 1, and supported Articles 13 and 20 of Draft Treaty No. 2, as drafted or as merged into a common provision. He expressed his Delegation's support for the principle that Contracting States be able to provide in their national legislation limitations and exceptions to rights granted in the Treaties. He also underscored the Chairman's observations in note 12.09 regarding the need to balance protection against important values in society including the interests of education, scientific research, the need of the general public for information available in libraries and the interests of persons with handicaps that prevented them from using ordinary sources of information.

512. Mr. HENNESSY (Ireland) noted that the matter of limitations and exceptions was one which his country felt was particularly important in the digital environment. He supported the principles underlying the Basic Proposal, in that he believed that the existing texts balanced the interests of right holders and society at large, and that they should, subject to minor amendments, be acceptable. He saw, however, some merit in the proposals regarding the clarification of the position of existing exceptions referred to by a number of Delegations.

513. The CHAIRMAN recalled that the Committee would come back to those issues and decide on the language to be proposed after having analyzed the possible written proposals and

the interventions and suggestions made. He noted that, during the discussion, some proposals had been made relating to the drafting and perhaps also the contents of the provisions. The Delegation of the United States of America had proposed that the word “only” be deleted from paragraph (1) of Article 12, a proposal that was supported by several Delegations, and it had proposed that the words “the normal exploitation” should be changed to “a normal exploitation.” Doubts had also been expressed concerning the need for paragraph (2) of Article 12. In several Delegations’ interventions, there had been elements which indicated that those Delegations were offering statements which included an understanding of how the Articles on limitations and exceptions should be interpreted and applied, and, towards the end of the discussion, the idea of a possible agreed statement was developed. He thought that there were elements in many interventions from which an agreed statement could be made.

514. He noted the clear opinion, expressed by some Delegations, that the provisions on limitations and exceptions in Draft Treaty No. 1 should not make possible limitations which were new and not allowed under the Berne Convention. He felt that it had to be made very clear that it would not be possible, and it was not even legally thinkable, that the Treaties would open new limitations concerning the rights provided in the Berne Convention.

Articles 11 (Obligations concerning Technological Measures) and 14 (Obligations concerning Rights Management Information) of the WCT (Articles 13 and 14 of Draft Treaty No. 1); Articles 18 (Obligations concerning Technological Measures) and 19 (Obligations concerning Rights Management Information) of the WPPT (Articles 22 and 23 of Draft Treaty No. 2)

515. The CHAIRMAN opened the floor for discussions on *Articles 13 (Obligations Concerning Technological Measures) and 14 (Obligations Concerning Rights Management Information) of Draft Treaty No. 1 and the corresponding provisions in Articles 22 and 23 of Draft Treaty No. 2*, by stating that those issues had already been discussed during the preparatory work. The provisions on obligations concerning technological measures were based on the proposals presented by certain Governments in the preparatory process, and those Articles were identical in the two Treaties. Some changes had been introduced compared to the provisions proposed by those Governments and the European Community and its Member States in the course of the preparatory work, taking into account the international discussion and the comments made in the course of the preparatory work in the Committees of Experts. Article 14 on obligations concerning rights management information and the corresponding Article in Draft Treaty No. 2 were a simplified version of the proposal made by the Delegation in the course of the preparatory work in the Committees of Experts. Some elements had been removed, and a definition of rights management information had been inserted and redefined compared to the provisions found in the proposals and national bills. The changes aimed at having a more narrow scope of application and at streamlining the provisions.

516. He said that it would be advisable to consider at least one further element which would narrow the scope of application of the obligations concerning rights management information, namely the connection of the acts concerned to an infringement.

517. Mrs. MOULD-IDDRISU (Ghana) recalled that at the meetings of the Committees of Experts, the Delegation of her country had made very forceful representations concerning

Article 13 of Draft Treaty No. 1 and Article 22 of Draft Treaty No. 2, asking for their deletion, because they were vague, because they would lead to confusion and because developing countries would be unable to implement such provisions. She said that the African Group and her Delegation wished to register most strongly their protest against the inclusion of those Articles in their present form. If the adoption of those Articles was not deferred for further discussion, at least their paragraph (3) should be redrafted to replace the words “the primary purpose” with the words “the sole purpose.”

518. Mr. KIM (Republic of Korea) referred to the written proposals of his Delegation, which intended to address the concern on possible abuses of technological measures by authors or other right holders. Contracting Parties should be given discretionary power to impose conditions on the technological measures which were aimed at protecting the materials or works which were not supposed to be protected. He mentioned, as an example, a library which was exempted from liability, civil or criminal, for the reproduction of works for archival purposes and for public lending of works. The general public could copy parts of its material or articles in the library. Even such occasional copying would not be possible, due to technological measures, and the user would have no other choice than to buy the whole book or other material, which most individuals could not afford. Libraries or the general public would not have a technology expert who could circumvent the technological measures in order to have a look at the whole copy, the material or article, even if that were permitted. He pointed at the important role of libraries in education and research and stressed that the digital environment should not change the role of libraries in society. Exceptions and limitations which were permitted in the analog environment should also be respected in a digital environment. He pointed out that his Delegation’s proposal would fulfill the very aim of protecting materials enjoying copyright protection, and clear away the concerns which had been raised by hardware manufacturers, telecommunication industries, education institutes and public libraries, and it would make sure that the general public would not be kept out of track in the information society.

519. Mr. VISSER (South Africa) recalled that his country’s problems with Articles 13 and 22 had been raised on a number of occasions in the Committees of Experts and other meetings. He associated himself with the remarks made by the Delegation of Ghana, and added that, because of the difficulties with the current wording of Articles 13 and 22, there was a danger that no provision could be adopted relating to technological measures, and he strongly believed that those Articles addressed a real problem. He said that, for that reason, he would propose in writing that the obligation should simply be that Contracting Parties must provide adequate legal protection and effective remedies against the circumvention of certain technological measures, which should have three characteristics; first, they should be effective technological measures; second, they should be used by right holders in connection with the exercise of their rights under the Treaties; and, third, they should restrict acts which were not authorized by the right holders or not permitted by law.

520. In respect of Article 14 on rights management information, he said that he would like to see the ambit of Article 14 expanded to include more than electronic rights management information, because he saw no justification for limiting the provision in that respect, and he supported the Chairman’s suggestion that the obligations be linked to limitations and exceptions.

521. Mr. EKPO (Nigeria) supported the interventions by the Delegations of Ghana and South Africa and the amendment that the Delegation of South Africa would submit. With regard to Article 14 of Draft Treaty No. 1 and Article 23 of Draft Treaty No. 2, he said that his Delegation shared the view that those Articles should not be restricted to electronic information, and it, therefore, proposed that the word “electronic” in the two Articles be deleted.

522. Mme YOUM DIABE SIBY (Sénégal) partage l’opinion exprimée par les délégations du Ghana et de l’Afrique du Sud. Toutefois, elle estime qu’il conviendrait de modifier les dispositions des textes de base portant sur les obligations relatives aux mesures techniques. Elle est de l’avis qu’il peut être délicat de laisser aux États le soin d’établir les mesures techniques nécessaires pour assurer la protection la plus appropriée. Elle préférerait l’instauration d’un minimum de protection internationale. Quant aux obligations relatives à l’information sur le régime des droits, prévues par l’article 14 du projet de traité n° 1 et par l’article 23 du projet de traité n° 2, elle déclare que sa délégation est favorable à la suppression des membres de phrases “sous forme électronique” figurant à l’alinéa 1)i) de ces deux articles.

523. Mrs. BOUVET (Canada) stated that her Delegation was of the view that provisions on technological protection measures and rights management information could play a useful role in both Treaties, and it fully supported their inclusion. She added, however, that some wording in Article 13 of Draft Treaty No. 1 and Article 22 of Draft Treaty No. 2 would not be acceptable to her country. Although a number of safeguards had been built into the wording of those Articles, they still posed two types of problems: first, that the wording would create problems for producers and sellers of equipment which might have a significant non-infringing use but which could also be used to defeat copyright protection—in that context, the words “or primary effect” in paragraph (3) of Article 13 were particularly problematic; second, the draft provisions could interfere with access to works in the public domain or restrict access under fair use or fair dealing provisions or of specific exceptions which were consistent with the Berne Convention and the proposed Treaty.

524. She said that her Delegation was aware that a number of Delegations and non-governmental organizations were working on language which would greatly reduce the problems she had mentioned, and some of the language looked very promising. She stated that her Delegation supported the inclusion of provisions on rights management information in both Treaties. Among other things, the protection of the identity of the author could provide a useful supplement to the moral right of attribution under the Berne Convention and the proposed similar right in Draft Treaty No. 2. Nothing in the Treaties should require the inclusion of rights management information. The current wording made its inclusion completely voluntary, that might, however, have to be made even clearer. Furthermore, provisions on rights management should not impose unreasonable burdens or technical problems for intermediaries, such as broadcasters.

525. Mr. KUSHAN (United States of America) stated that his Delegation strongly supported the inclusion of provisions concerning technological measures in both treaties. Without the safeguards of such provisions, right holders would make neither their works nor their phonograms available on the Internet. Those provisions were critical if the Internet were to develop into a fully mature and truly global market place for information and entertainment products for consumers in countries around the world. He said that his Delegation also strongly supported the inclusion of provisions on rights management information in the

Treaties, but that it would recommend certain amendments and clarifications. He supported the view expressed by the Delegation of Canada that one of such amendments should be to include a provision making it clear that Contracting Parties could not require rights holders to provide rights management information. He referred to his Delegation's intention to propose certain changes in the scope of the coverage of the provision, for example, to ensure that the correction of inaccurate information by a right holder would not be treated as a prohibited act. He added that his Delegation believed that the provision should also address the problem of filing fraudulent rights management information with a public authority.

526. Mr. TIWARI (Singapore) stated that his Delegation would propose an amendment to Article 13(3) of Draft Treaty No. 1 by deleting the expressions "primary purpose" and "primary effect" and replacing them with the terms "sole intended purpose." He believed that that amendment would provide an appropriate balance between the need to safeguard the interests of rights holders against protection-defeating devices and the need to ensure that *bona fide* legitimate manufacturers and users of general-purpose equipment would not be exposed to liability for the possible use of such devices for illegitimate purposes. He said that his Delegation also shared the concern that the Article could outlaw copying for personal, scientific and educational uses.

527. In addition, he stated that the proposed Article created uncertainty as to whether it would still allow restrictions which allowed so-called reverse engineering or decompilation of computer programs, as found in the domestic legislation or case law in a number of countries, including the United States of America, Japan and the Member States of the European Community. He said that his Delegation believed that it would be dangerous to conjecture about the future based on a series of assumptions about how the technology would develop and effect copyright owners. It would be preferable to depend on existing laws and remedies to address each specific circumvention technology as it would arise, if existing law would prove inadequate. The proposed amendment, modeled after the software directive of the European Community, struck, in the view of his Delegation, the right balance and was consistent with the overall copyright policy of advancing the progress of science and recognizing the impact such a provision would have on product innovation and creativity in the manufacturing industry.

528. Regarding Article 14 on obligations concerning rights management information, he said that his Delegation was concerned over the scope of the provision and had, therefore, proposed that some form of limitation and exception be provided. When the right owner's permission was served to use a part of the work, there would be no issue, but the concern was when parts of a work were used or dropped without authorization from the right owner. In that case, the provision might impede the ability to create new multimedia works as compilation and would restrict the individuals' ability to use portions of copyrighted works for private purposes. It had also been argued that, unless copies were distributed in some manner, there would be no prejudice from the mere removal or alteration of any rights management information. The scope of liability should also not be based on mere knowledge of unauthorized removal or alteration or of unauthorized distribution or communication to the public of such information. It should be made clear that liability would only attach to those who transmitted such information in furtherance of actual copyright infringement or for the purpose of such furtherance, as in the proposed legislation of the United States of America. He called for further study of the provision and stated that the same comments would apply, *mutatis mutandis*, to Articles 22 and 23 of Draft Treaty No. 2.

529. Mr. REINBOTHE (European Communities) stated that his Delegation considered Article 13 of Draft Treaty No. 1 and Article 22 of Draft Treaty No. 2 particularly important in order to ensure the effective protection of works and other subject matter in the new digital environment. The wording of those provisions were a substantial improvement with respect to previous proposals, including the one tabled by the European Community and its Member States. He said that his Delegation was aware of the need to achieve the right balance of rights and interests, and of the need to avoid any prejudice to activities and devices which served legitimate purposes. He underlined the importance of the element of knowledge, and of the link to an infringement of the rights concerned. Moreover, when seeking the right balance in those provisions, the elements of primary purpose and primary effect needed to be carefully assessed, and the provisions should possibly be simplified, without undermining their efficiency. He expressed interest in the suggestions made by the Delegation of South Africa.

530. Regarding Article 14 of Draft Treaty No. 1 and Article 23 of Draft Treaty No. 2, he found the provisions on rights management information somewhat complicated, but he said that they served a very useful purpose, even though in their present wording they might be too wide in scope and not sufficiently defined. He believed, therefore, that, in paragraph (1), a link to the preparation or facilitation of an infringement was needed, and, furthermore, a link would be appropriate to the violation of other legal obligations, such as with respect to remuneration rights, for example, by adding at the end of paragraph (1) the words “knowing that by so doing they are enabling or facilitating an infringement of any of the rights provided for under this Treaty.” A similar reference could be made to the violation of other legal obligations.

531. Ms. DALEY (Jamaica) stated that her Delegation wished to suggest certain minor amendments to the wording of the provisions on technological measures in Article 13 of Draft Treaty No. 1 and Article 22 of Draft Treaty No. 2. The first amendment was solely for the purpose of grammatical consistency, namely that paragraph (1) in both Articles be amended by deleting the words “to know” and replacing them with the words “for knowing” so that it would read “by any person knowing or having reasonable grounds for knowing.” Secondly, she suggested that paragraph (3) of both Articles 13 and 22 be amended by deleting the words “any of the acts covered by” and replacing them with the words “the contravention of, or the infringement of,” so that the portion of the sentence would read “mechanism or system that prevents or inhibits the contravention of, or the infringement of, the rights under this Treaty.” She said that, in the view of her Delegation, the formulation “any of the rights covered by the rights under the Treaty” was too broad and unprecise and its proposed amendment would not contravene the basic intention of the Article.

532. Mr. WIERZBICKI (New Zealand) expressed support for Article 13, but subject to some points of concern to his Delegation. He said that his comments would apply equally to the similar provision in Draft Treaty No. 2. He referred to the words in the first line: “Contracting Parties shall make it unlawful,” and said that that language, in his interpretation, would require Contracting Parties to make that a criminal offense. He said that that caused difficulty for his Delegation because the equivalent provision in the national legislation of his country made that a civil offense, something for the right holders to enforce rather than imposing that obligation on the state. Secondly, he raised the question of the language of “primary purpose or primary effect,” and pointed out his Delegation’s concern with that language because it seemed to ignore the knowledge element. He suggested that, instead, the language should be “where it is known or there is reason to believe that it is to circumvent any process....” He felt that that

language would make it more precise and related to the knowledge requirement. Regarding Article 14 of Draft Treaty No. 1 and the equivalent Article of Draft Treaty No. 2, he again raised the issue of the language “make it unlawful,” and stressed that that would have to be a civil offense rather than a criminal offense. He proposed that the words “and/or” be added at the end of clause (1)(i), and that the word “electronic” be added after the word “means” in the first line of paragraph (2).

533. M. ETRANNY (Côte d’Ivoire) partage les observations des délégations du Ghana, du Nigeria, du Sénégal, et de l’Afrique du Sud, et appuie entièrement l’amendement proposé par la délégation de l’Afrique du Sud.

534. El Sr. ZAPATA LÓPEZ (Colombia), expresándose en nombre del Grupo de América Latina y del Caribe, destaca que los países de esta región reconocen que las medidas vinculadas a las obligaciones relativas a las medidas tecnológicas así como las medidas relacionadas con las obligaciones sobre la gestión de derechos concurrirán a un mayor respeto de los derechos previstos en los Tratados en estudio. Sin embargo, manifiesta el deseo que la versión español del Artículo relativo a las obligaciones relacionadas con las medidas tecnológicas sea adaptada en conformidad con la versión en inglés del mismo Artículo. En lo que atañe a las obligaciones relativas a la información sobre la gestión de derechos, propone que se adicione en el Artículo 14 1) ii), después de las palabras “comunique al público”, la expresión “o ponga a disposición”.

535. Mr. STARTUP (United Kingdom) observed that the provisions on technological measures were an essential underpinning of copyright and neighboring rights in the digital age. He felt that the basic proposal on that issue was similar in many respects to provisions already in the United Kingdom law, and, as such, was a good basis for such a provision. He recognized that there were concerns about possible effects on legitimate activities, and expressed his Delegation’s willingness to look at the drafting to see if it could be clarified in that respect. He was of the opinion that the provisions on rights management information were similarly of importance in the context of electronic reproduction and transmission. He stated that the scope needed to be narrowed, in particular by establishing an explicit link with the infringement of rights. He, therefore, supported the proposal made by the Delegation of the European Communities. He suggested that one further improvement might be to look at the definition itself of rights management information.

536. Mr. SCHONEVELD (Australia) stated that his country was in principle supportive of Article 13 of Draft Treaty No. 1, but, like others, had some concerns that the current language might unwittingly restrict access to material in circumstances where it was not subject to copyright. He suggested that the Article contain adequate language to deny its application in regard to access to copyright material the free use of which was sanctioned by law, so as to confine its operations to clear cases of intended use for copyright breaches. He said that his comments in respect of Article 13 also applied in respect of Article 22 of Draft Treaty No. 2. He added that his Delegation also supported inclusion of a provision on rights management information, such as those in Article 14 of Draft Treaty No. 1, but felt that it was more desirable that the provision specifically provide for a link between the authorized removal or alteration and an act of copyright infringement. He felt that in Article 14(1) of Draft Treaty No. 1, some points of detail in drafting needed further clarification, and, in that regard, asked whether distribution extended to rental, and whether communication to the public was included under the Article, yet broadcast was not.

537. Mr. SØNNELAND (Norway) was, in general, in favor of the provisions on obligations concerning technological measures and rights management information. However, he agreed with those who had proposed narrowing the scope of those provisions, for the main reason that such provisions should not prevent legitimate use of works, for example, private and educational uses, and use of works which had fallen into the public domain.

538. Mrs. KADIR (Trinidad and Tobago) supported the amendments proposed by the Delegation of Jamaica regarding Articles 13 and 22, to provide more precision in those Articles.

539. Mr. KEMPER (Germany) joined those Delegations which had considered that the scope of the provisions in question should be narrowed. Specifically regarding the legal quality of sanctions, that is, the remedies that would be provided, he referred to the intervention by the Delegation of New Zealand, to the effect that the words “make unlawful” would mean that national legislation would require criminal remedies. He said that his Delegation felt that, in respect of the provisions on technological measures and copyright management information, the remedies that the Contracting Parties would have to provide should leave them more freedom, and might be civil or administrative or criminal remedies, at their choice. He observed that the corresponding wording of the provisions would need to be harmonized in that respect. He pointed out that Article 13(2) of Treaty No. 1 made it clear that the Contracting Parties would have the choice to determine the legal quality of the remedies.

540. Mr. GYERTYÁNFY (Hungary) recognized the emerging need and importance of technological measures to protect copyright, and also the need for the protection of those legitimate measures, and said that, therefore, his Delegation supported the essence of the Articles under discussion. He referred to Article 14 of Draft Treaty No. 1 and Article 23 of Draft Treaty No. 2, concerning rights management information. He proposed that the words “productions and” be added in sub-paragraph (ii) before the word “copies,” in the two respective Articles.

541. The CHAIRMAN announced that the Committee had come to the end of the initial discussion on the two provisions of the two Treaties. He said that there were several Delegations which considered that, in the present form, those provisions should not be included in the Treaties. There were several Delegations which supported the essence of the principles of those provisions, and both groups of Delegations offered useful advice concerning drafting in order to make them internationally acceptable. There was in one intervention a proposal to narrow the scope of the provisions concerning technological measures. There was a suggestion to redraft the passage concerning primary purpose or primary effect, to make it clearer. He observed that there were opinions according to which the provisions on rights management information should not only concern electronic, but any rights management information. There had been clear support for the suggestion that the provisions on rights management information should be narrowed by linking it to infringing acts. It was stressed in respect of both provisions, that activities which were lawful, which concerned materials in the public domain, and acts which had been authorized by the right holders, should not be made subject to those provisions. Reference had been made to libraries and educational activities, where materials would be used, and, in many cases, the materials might include devices in the sense of those provisions. The focus of the knowledge element was also commented upon. It was suggested that it should be carefully considered what should be the exact knowledge element in both provisions.

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Morning

Work program

542. The CHAIRMAN indicated that the next items to be considered by the Committee would be four clusters of Articles. The first cluster would include the provisions on enforcement in Draft Treaty No. 1 and in Draft Treaty No. 2. The second cluster would be the framework provisions of Draft Treaty No. 1, namely Articles 1, 2 and 15. The third cluster would be the framework provisions of Draft Treaty No. 2, that is, Articles 1, 3, 4, 24, 25, and 26. The fourth and last cluster would be the preambles and titles of the two Treaties.

Article 14 (Provisions on Enforcement of Rights) of the WCT (Article 16 and Annex of Draft Treaty No. 1); Article 23 (Provisions on Enforcement of Rights) of the WPPT (Article 27 and Annex of Draft Treaty No. 2)

543. The CHAIRMAN observed that the last Articles in the Basic Proposals on substantive provisions were the *Articles on enforcement—Article 16 of Draft Treaty No. 1 and Article 27 of Draft Treaty No. 2*. He noted that, in the two Treaties under discussion, the provisions on enforcement were identical, but they had been presented in two alternative forms. Alternative A was based on a method according to which there was an Article referring to an Annex, which made it clear in paragraph (2) that the Annex formed an integral part of the Treaty. That followed the approach suggested by certain Delegations during the preparatory work in the Committees of Experts. Alternative B was based on a clause which made the same provisions in the TRIPS Agreement, Articles 41 to 61, applicable by reference, *mutatis mutandis*. He felt that that area had been very well analyzed, and that there was no need to offer any further initial remarks. He opened the floor for comments on the issue of enforcement.

544. Mr. KUSHAN (United States of America) pointed out that the original decision to include enforcement provisions in the Treaties preceded the successful conclusion of the Uruguay Round negotiations and the TRIPS Agreement. He said that the TRIPS Agreement, as concluded, provided a very satisfactory and balanced series of provisions on the enforcement of intellectual property rights. Many countries had been, or were in the process of, implementing those provisions. He stated that his Delegation was of the opinion that any new rights created by the Treaties would be subject to the same enforcement regimes that had been or would have been created by the WTO Members. It, therefore, did not believe that there was a need to include specific provisions on enforcement in the Treaties. He noted that in the light of the discussions in the WIPO Committees of Experts on the Settlement of Disputes, his Delegation saw a significant risk of creating confusion in the development and interpretation of the TRIPS provisions on enforcement, even if identical provisions were incorporated, *mutatis mutandis*, into the Treaties. He concluded that, for those reasons, his

Delegation believed that the most appropriate course of action would be to omit provisions on enforcement from these Treaties.

545. Mr. KIM (Republic of Korea) reverted to the provisions on technological measures and rights management information, indicating that his Delegation was not convinced that those were matters for copyright and neighboring rights, and, was, therefore, against inclusion of those provisions in the Treaties. He said that some form of standardization was required, and he believed that WIPO was the most appropriate organization for such a standardization to be developed. Regarding the two Articles on enforcement, he stated that his Delegation was in favor of Alternative A in both Treaties.

546. Mr. TIWARI (Singapore) noted that both Alternatives A and B made reference to the TRIPS Agreement. He preferred that there be no connection with the TRIPS Agreement. He felt it was important to point out that neither the Berne Convention nor the Rome Convention contained any enforcement provisions. It was his opinion that the enforcement provisions in the TRIPS Agreement would also not be effective unless the dispute prevention and settlement provisions under Part IV. of the TRIPS Agreement were also incorporated. Rather, he preferred that enforcement of the provisions of both Treaties be left to national legislation of each Contracting Party, and he noted that that had traditionally been the practice under Article 36 of the Berne Convention, and the equivalent Article 26 of the Rome Convention. Each country should be in a position under its domestic law to give effect to provisions of the Treaties when it would become bound by their terms. He felt that consideration should also be given to a dispute resolution provision modeled on Article 33 of the Berne Convention, and its equivalent Article 30 of the Rome Convention, which provided a reference to the International Court of Justice, subject to the right of reservation from Contracting Parties who did not wish to be bound by the decisions of that Court. He added that his comments applied also to the corresponding Article 27 of Draft Treaty No. 2. He stated that his Delegation, therefore, supported the position taken by the Delegation of the United States of America to omit any mention of the TRIPS Agreement enforcement provisions.

547. Mr. GYERTYÁNFY (Hungary), speaking on behalf of Bulgaria, Croatia, the Czech Republic, The former Yugoslav Republic of Macedonia, Latvia, Poland, Romania, Slovakia, Slovenia and his own country, supported the inclusion of detailed provisions on enforcement in both Treaties. He favored Alternative A, that is, the inclusion of a full text in both Treaties. He thought that a *mutatis mutandis* reference could result in differing interpretations in the future, and stated that he preferred to strengthen the self-standing nature of the Treaties.

548. Mr. ABBASI (Pakistan) stated that the two Alternatives given in the Articles under discussion were substantially based on the TRIPS Agreement, which, he felt, gave a substantially higher level of enforcement than that provided under the Berne Convention; and, therefore, the enforcement provisions were not acceptable to his Delegation. As an alternative, he suggested that a ten-year transitive period should be allowed for developing countries.

549. Mr. REINBOTHE (European Communities) strongly supported the inclusion of enforcement provisions in the new Treaties, for three reasons. First, any provisions on rights were far less useful without provisions on enforcement, and it seemed to correspond to the modern approach to the protection of intellectual property worldwide that both rights and enforcement measures were provided for. Second, the new Treaties would be self-standing treaties, independent from the TRIPS Agreement. Third, the enforcement provisions in the

TRIPS Agreement did not cover the new elements of protection in the new Treaties. He mentioned that the enforcement provisions in the TRIPS Agreement might not be ideal, but they had been agreed upon by a large number of countries which were also represented in the Diplomatic Conference. He believed that the enforcement provisions in the TRIPS Agreement constituted a good compromise. As a consequence, he suggested that the Conference adopt the TRIPS Agreement enforcement provisions for the new Treaties with only some technical modifications, for example, as an Annex to the new Treaties. He stated that his Delegation preferred Alternative A, which, it felt, provided for more transparency and for more clarity than Alternative B. He said that, as long as there was agreement on the need to attach enforcement provisions to the rights contained in the new Treaties, his Delegation would maintain some flexibility as to the way to achieve that end.

550. Mr. HONGTHONG (Thailand) supported the interventions by the Delegations of Singapore and the United States of America.

551. Mr. YAMBAO (Philippines) supported the opinions expressed by the Delegation of Singapore. He believed that enforcement of the provisions of the Treaties should be left to national legislation, and, therefore, enforcement provisions should not be incorporated in the Treaties. He pointed out that his country was still in the process of fully implementing its obligations under the TRIPS Agreement, and was not to take on additional obligations beyond those obligations.

552. El Sr. ANTEQUERA PARILLI (Venezuela) recuerda que existe ya en el derecho comunitario andino la experiencia de que una norma obligatoria para los cinco países contenga disposiciones relativas a medidas de observancia, de tal manera que su Delegación está de acuerdo con que disposiciones especiales sobre el ejercicio de los derechos figuren también en estos proyectos de Tratados. Al respecto, apoya la Variante A que refleja un esfuerzo de adecuar muchas disposiciones del Acuerdo sobre los ADPIC, pero requiere ciertas modificaciones. Constata en primer lugar que la propuesta contenida en la Variante A obliga a las partes contratantes a asegurar procedimientos de observancia en las legislaciones nacionales, mientras que sería más conveniente que los procedimientos de observancia previstos en los Tratados puedan ser invocados como normas de aplicación directa. En segundo lugar, expresa el deseo de adecuar algunos elementos de la propuesta contenida en la Variante A, con el fin de adaptar y no reproducir el contenido de las medidas de observancia previstas en el Acuerdo sobre los ADPIC que fueron concebidos únicamente para el ejercicio de los derechos vinculados al comercio, cuando en estos Tratados también se están discutiendo otros derechos, no necesariamente relacionados con la ilicitud en los circuitos comerciales.

553. Ms. DALEY (Jamaica) was of the view that Article 1(1) of the Annex in both Draft Treaties was sufficient to impose an obligation on Contracting Parties with respect to enforcement. She proposed that Article 16 plus the Annex of Draft Treaty No. 1 and Article 27 plus the Annex of Draft Treaty No. 2 be deleted and be replaced by the text of Article 1(1) of the Annex of each Treaty which read: "Contracting Parties shall ensure that enforcement procedures are available under their laws so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

554. Mr. SHEN (China) supported the Delegations of Singapore and the Philippines. He was of the view that special provisions on enforcement of rights should reflect, and be replaced by,

the text of Articles 33 and 36 of the Berne Convention. The enforcement issue should be resolved under national legislation and not through an international treaty. If there were problems between countries, they should be dealt with in keeping with Article 33 of the Berne Convention.

555. Mr. OPHIR (Israel) stated that the enforcement provisions in the Draft Treaties might be superfluous in light of the fact that many countries were required by the TRIPS Agreement to implement the enforcement procedures of the TRIPS Agreement. He added, however, that, if enforcement provisions were to be incorporated into the Treaties, his Delegation would support Alternative B. He noted that, while Alternative A also had merit, his Delegation believed that it might be premature to consider those in detail until it had been possible to fully implement and assess the provisions of the TRIPS Agreement in national legislation.

556. Mr. AYYAR (India) observed that, in the Committees of Experts, as well as in the intervention by the Delegation of the European Communities, an understanding had been expressed that the Treaties would be stand-alone Treaties. That being so, he stressed that it would be necessary for the Treaties to have appropriate enforcement provisions. Of the two Alternatives in the Basic Proposals, his Delegation was in favor of Alternative A, but it found the proposal of the Delegation of Jamaica very interesting. He emphasized that his country could not be party to any Treaty with Alternative B, which, in his Delegation's view, was difficult to understand unless it was an experiment to bring the Treaties within the fold of the TRIPS Agreement and the World Trade Organization. He expressed his concern about the larger question of two international organizations, both based in Geneva, simultaneously engaged in intellectual property matters with overlapping jurisdictions, and the interplay of the processes in those organizations being used to continuously reopen and revise treaties.

557. Mr. SØNNELAND (Norway) supported the intervention by the Delegation of the European Communities, and Alternative A.

558. La Sra. ROTONDO (Argentina) apoya plenamente la intervención de la Delegación de Venezuela, optando por la Variante A con las modificaciones sugeridas por dicha Delegación de que estas disposiciones sobre observancia sean de aplicación directa, así como modificaciones necesarias para adecuar las disposiciones del Acuerdo sobre los ADPIC que son disposiciones concebidas para el ejercicio de los derechos vinculados al comercio.

559. Mme YOUM DIABE SIBY (Sénégal) déclare que sa délégation n'est pas opposée, compte tenu de l'indépendance des traités par rapport aux autres instruments internationaux, à l'insertion, dans les traités, de dispositions prévoyant des sanctions.

560. Mr. SCHONEVELD (Australia) stated that his Delegation preferred Alternative A, and referred to the reasons given in the intervention by the Delegation of the European Communities. He indicated that his Delegation would be open to consider other proposals which achieved the same result as Alternative A.

561. El Sr. SILVA SOARES (Brasil) manifiesta su desacuerdo con las Variantes A y B del Artículo relativo al ejercicio de los derechos. Nota que una primera solución consistiría en eliminar toda referencia al ejercicio de los derechos, lo cual podría ser peligroso en el sentido de que se podría recurrir a mecanismos de solución de controversias comerciales, solución inadecuada en el marco de un Tratado sobre derechos privados. Es la razón por la cual opta

por la solución que consistiría en una disposición que prevea una competencia exclusiva de las legislaciones nacionales, dejando a los Estados determinar como van a aplicar los derechos, inclinándose por la redacción propuesta por la Delegación de Singapur.

562. Mr. EKPO (Nigeria) aligned his Delegation with others which had preferred that the provisions on enforcement be left to national legislation.

563. El Sr. ROGERS (Chile) apoya la inclusión de disposiciones especiales sobre el ejercicio de los derechos, inclinándose por la Variante A.

564. El Sr. TEYSERA ROUCO (Uruguay) señala que, al oír los sólidos argumentos avanzados por las Delegaciones de Venezuela, Argentina y de los Comunidades Europeas, su Delegación cambió de posición respecto a ese punto, optando por la Variante A.

565. Mr. MTETEWAUNGA (Tanzania) said that his Delegation was in favor of Alternative A. He also suggested that there be a grace period of ten years for developing countries.

566. M. PALENFO (Burkina Faso) indique que sa délégation est favorable à l'inclusion dans les traités de dispositions relatives à la sanction des droits et qu'elle appuie les variantes A de l'article 16 du projet de traité n° 1 et de l'article 27 du projet de traité n° 2.

567. El Sr. ZAPATA LÓPEZ (Colombia) destaca que una de las falencias que se les reprocha a los tratados administrados por la OMPI, es la de no prever disposiciones especiales que haga viable el respeto de los derechos, razón por la cual considera que ha llegado el momento de prever en el marco de los Tratados en estudio disposiciones sobre el ejercicio de los derechos. En ese sentido, está de acuerdo con la Variante A planteada por los Comunidades Europeas y apoyada por las Delegaciones de Venezuela, Argentina y Chile.

568. El Sr. UGARTECHE VILLACORTA (Perú) manifiesta su apoyo a la Variante A del Artículo en estudio.

569. M. KANDIL (Maroc) déclare qu'en ce qui concerne le régime de sanction des droits, article 16 du projet de traité n° 1 et article 27 du projet de traité n° 2, sa délégation souhaite s'en tenir aux dispositions prévues aux articles 33 et 36 de la Convention de Berne. Il estime qu'il convient de confier aux législations nationales le soin de légiférer en la matière et se joint, à ce sujet, aux délégations qui se sont exprimées dans ce sens. Dans l'hypothèse d'un choix, sa délégation opterait pour les variantes A de l'article 16 du projet de traité n° 1 et de l'article 27 du projet de traité n° 2, respectivement.

570. Mr. CHAVULA (Malawi) said that his Delegation strongly supported the inclusion of enforcement provisions in the Treaties, based on his Delegation's understanding that the Treaties would be completely new and independent. He supported the intervention by the Delegation of the European Communities.

571. Mrs. KADIR (Trinidad and Tobago) believed that the provisions on enforcement should be left to national legislation, and supported the view that, since the Treaties would be independent instruments, they should contain some provisions on enforcement, but that the

mechanics of the operation of those provisions should be left to national legislation. She supported the proposal by the Delegation of Jamaica.

572. M. GOVONI (Suisse) déclare que sa délégation est favorable à l'inclusion dans les traités de dispositions relatives à la sanction des droits dans la mesure où de telles dispositions sont nécessaires pour faire respecter les droits contenus dans ces traités. Il approuve la variante A mais indique que sa délégation est prête à envisager une solution de compromis dans le cadre de la variante B.

573. Mr. SHINAVENE (Namibia) stated that his Delegation supported Alternative A.

574. Mme YOUM DIABE DIBY (Sénégal) précise que sa délégation est favorable aux variantes A de l'article 16 du projet de traité n° 1 et de l'article 27 du projet de traité n° 2.

575. The CHAIRMAN stated that the initial discussion on enforcement provisions had concluded. Alternative A had gained support from the majority of those who had spoken on the matter. There were, however, also a number of Delegations which were against having special provisions on enforcement in the Treaties. He observed that a number of Delegations had referred to Articles 33 and 36 of the Berne Convention, and were of the view that the matter should be left on the basis of those provisions. He also noted that an important number of Delegations were not in favor of having special provisions on enforcement of rights, and had taken the position that the whole enforcement issue should be left to domestic legislation. He said that, in his view, there would be a possibility of having a specific clause stating that the matter of enforcement was left to domestic legislation. He felt that Alternative A had the support of the majority of those who had taken a position. He also drew attention to the position of the Delegation of Jamaica that proposed to drop the Articles on special provisions and the Annexes, and instead have a new Article based on the language in Article 1(1) of the provisions on enforcement in the Annexes. He said that the Committee had an opportunity to analyze the results of the first round of discussions on the issue of enforcement provisions, and then come back to the question and take a final stand on what kind of solutions should be suggested to the Plenary of the Conference.

Articles 1 (Relation to the Berne Convention), 3 (Application of Articles 2 to 6 of the Berne Convention) and 13 (Application in Time) of the WCT (Articles 1, 2 and 15 of Draft Treaty No. 1)

576. The CHAIRMAN introduced what he referred to as the “framework provisions” of *Draft Treaty No. 1*, that is, *Articles 1 (Relation to the Berne Convention) and 2 (Application of Articles 3 to 6 of the Berne Convention)*. He also suggested that the discussion include *Article 15 (Application in Time)*. As a matter of drafting, he suggested that the order of paragraphs (3) and (4) in Article 1 be reversed. He opened the floor for discussion.

577. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe, expresa su inquietud acerca del Artículo 1 del proyecto de Tratado N° 1, en cuanto al vínculo de este Tratado con el Convenio de Berna. Estima que el vínculo debe resultar en que los países que se adhieran al nuevo Tratado se comprometan a respetar las obligaciones del nuevo Tratado así como las del Convenio de Berna tanto en sus disposiciones sustantivas como en las administrativas. A esos efectos, el Grupo Latinoamericano y del Caribe propone

se modifique el Artículo 1 agregando al final del párrafo 1: “El presente Tratado no tendrá conexión explícita o implícita con otros tratados o convenios que estén concernidos directa o indirectamente con la misma materia”, evitando así que la parte relativa a la observancia de los derechos en el Acuerdo sobre los ADPIC se aplique también a este Tratado. Asimismo, el Grupo propone sustituir el párrafo 4 por una disposición que establezca que “los Estados que sean parte en el presente Tratado cumplirán con las disposiciones del Convenio de Berna y de su Anexo” y agregar un párrafo 5 que prevea que “las organizaciones intergubernamentales parte en el presente Tratado cumplirán con las disposiciones de los Artículos 1 a 21 del Convenio de Berna con las de su Anexo”. De esta manera quedarían satisfechos tanto el deseo de la Unión Europea de ser parte en el Tratado como del Grupo Latinoamericano y del Caribe de mantener un vínculo directo y permanente para los países que se adhieran al presente Tratado con las disposiciones del Convenio de Berna.

578. Mr. REINBOTHE (European Communities) expressed his Delegation’s support for Articles 1, 2 and 15 of Draft Treaty No. 1. He said that he had no particular comments on Articles 2 and 15. However, with respect to Article 1, he offered two suggestions. Regarding paragraph (4) of Article 1, he felt that the compliance obligation in paragraph (4) should refer to all Contracting Parties. He expressed the view that the current text could be read as if it were not applying to Contracting Parties that were not party to the Paris Act of the Berne Convention. Therefore, he preferred a compliance clause which was similar to, if not identical with, the compliance clause in Article 9.1., first sentence, of the TRIPS Agreement, that is, a general compliance clause, with the obligation to comply with Articles 1 through 21 and the Appendix of the Berne Convention. He suggested the deletion from the current paragraph (4) the words after the words “Contracting Parties,” that is, “that are not countries of the Union established by the Berne Convention,” so that the paragraph would read “Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.” He pointed out that, throughout the draft Treaty, references were made to the term “nationals,” and he felt that that might pose some problems to the European Community. He suggested that a footnote be added to Article 1, which would be almost identical with the footnote that was found in footnote No. 1 to Article 1 of the TRIPS Agreement. He proposed that the footnote read as follows: “When ‘nationals’ are referred to in the context of this Treaty, they shall be deemed in the case of a separate customs territory party to this Treaty to mean persons, natural or legal, who are domiciled or have a real and effective industrial or commercial establishment in that customs territory.”

579. Mr. GYERTYÁNFY (Hungary), speaking on behalf of Bulgaria, Croatia, the Czech Republic, The former Yugoslav Republic of Macedonia, Latvia, Poland, Romania, Slovakia, Slovenia and his own country, supported the position taken by the Delegation of the European Communities.

580. La Sra. RETONDO (Argentina) apoya la intervención de la Delegación de Colombia en nombre del Grupo Latinoamericano y del Caribe. Sin embargo, expresa una inquietud adicional, relativa al Artículo 2 del proyecto de Tratado N° 1, que en su forma actual es una repetición inútil del Artículo 1. Considera necesario mejorar la redacción de este Artículo para que se pueda diferenciar del Artículo 1 y quede claro que los Artículos 3 a 6 forman realmente parte del presente Tratado.

581. Mr. KUSHAN (United States of America) supported Article 1 as drafted. He referred to the intervention by the Delegation of Argentina on behalf of the countries of Latin America and

the Caribbean, and stated that, first, with regard to the proposed change in paragraph (1), he did not understand what the proposed reference would accomplish and did not see value in attempting to make that type of exclusion. He believed that the provisions of the Treaty addressed the same subject matter as those addressed in other agreements, and that it had been drafted so as to avoid creation of obligations inconsistent with those other agreements. He said that his Delegation had no concern that there would be confusion or inconsistencies, and, therefore, he did not believe it would be wise to include the proposal in paragraph (2) which would add a reference to explicit or implicit connections to other treaties. He stated that his Delegation could also accept reversing the sequence of paragraphs (3) and (4). Finally, on the points raised by the Delegation of the European Communities, he was of the opinion that any intergovernmental organization that would become party to the Treaty would have to assume all of its obligations. The proposal, either in the form of a clarifying clause or the proposed footnote, did not appear to change any of those provisions.

582. Mr. CHEW (Singapore) asked for clarification on Article 1(3), which referred to the Paris Act of July 24, 1971, of the Berne Convention; he understood, however, that there was an amendment on September 28, 1979, and asked whether that would be of any bearing on the 1971 Act. Regarding Article 1(4), he said that his Delegation had difficulties with the provision as drafted. Although it was essentially based on Article 9.1. of the TRIPS Agreement, it did not take into account the last sentence of Article 9.1., which did not make it obligatory to apply Article 6*bis* on moral rights of authors. He underscored that that would mean that that provision, by omission of the last part of Article 9.1., would create a TRIPS-plus obligation, and he expressed the concern of his Delegation in that respect. Regarding Article 2 on the application of Articles 3 to 6 of the Berne Convention, he had in principle no objections to such application except that he would have liked to raise the query whether every single part of Articles 3 to 6 would be applicable. Articles 3 to 6 of the Berne Convention contained many provisions, and he felt that not all of them would be applicable to the new Treaty. Lastly, regarding Article 15, he appreciated the principle behind applying Article 18 of the Berne Convention, but he was of the view that a better model would be Article 70.1. to 5. of the TRIPS Agreement, which was more comprehensive and provided for safeguards for all parties to this Agreement, with the necessary changes to suit the circumstances of this Treaty.

583. El Sr. SILVA SOARES (Brasil) comparte la opinión expresada por la Delegación de Argentina relativa a la necesidad de mejorar la redacción del Artículo 2. Al respecto, considerando que el Tratado N° 1 es un Tratado independiente, un arreglo particular en el sentido del Artículo 20 del Convenio de Berna, propone transcribir en el Artículo 2 los Artículos 3 a 6 del Convenio de Berna, así como en el Artículo 15, reproducir el contenido del Artículo 18 del Convenio de Berna.

584. Mr. AYYAR (India) supported the intervention by the Delegation of Argentina.

585. Mr. CRESWELL (Australia) agreed with the reversal of the order of paragraphs (3) and (4) in Article 1. He suggested that it might be wise to insert, at the start of paragraph (4), the words "Subject to this Treaty." He referred to the existing possibility under the Berne Convention to enact statutory licenses, which perhaps as a result of the Treaty would not be possible in the future. He felt that it might be desirable to recast Article 2, so as to identify those provisions within Articles 3 to 6 of the Berne Convention that were intended to be applied. While his Delegation had not reached a conclusion as to whether that should be done, he thought that it would be desirable for a reference to be included in Article 2, to Articles 2

and *2bis* of the Berne Convention, or at least to Article 2, insofar as it defined indicatively, if not exclusively, the literary and artistic works to be protected. Since there was no direct linkage, it seemed that there should be a reference to the categorization of literary and artistic works in Article 2 of the Berne Convention.

586. M. ETRANNY (Côte d'Ivoire) dit que sa délégation approuve l'article 1 du projet de traité n° 1 qui est en conformité avec l'article 20 de la Convention de Berne. Il est également favorable à la proposition du Président visant à inverser les paragraphes 3 et 4 de l'article 1 et indique qu'il est ouvert à toute autre proposition d'amendement. Il ajoute que sa délégation appuie l'article 2 qui fait référence aux grands principes en la matière, tels que ceux prévus aux articles 3 à 6 de la Convention de Berne.

587. M. GOVONI (Suisse) dit que sa délégation partage l'avis exprimé par la délégation des Communautés européennes au sujet de l'article 1 du projet de traité n° 1, et approuve la proposition qu'elle a faite d'élargir l'obligation, contenue l'alinéa 4 de cet article, à toutes les parties contractantes. Il indique qu'il est favorable à l'idée de prévoir une note expliquant, dans ce contexte, la notion de "ressortissants".

588. Mr. YAMBAO (Philippines) supported the amendment proposed by the Delegation of Argentina. He referred to the intervention by the Delegation of the United States of America, that there was no need of adding the additional sentence in paragraph (1) of Article 1 because the provisions had been drafted to make sure that they were independent of other agreements. He felt that it would not create harm if a categorical statement were made in the Treaty. He also favored reversing the order of paragraphs (3) and (4). With respect to Articles 2 and 15, he was in complete agreement with the provisions as drafted.

589. EL Sr. PROAÑO MAYA (Ecuador) destaca que el Tratado en estudio debe considerarse como un nuevo Tratado internacional, con personalidad jurídica, con una normativa que le vaya a dar una identidad propia.

590. Mr. HONGTHONG (Thailand) drew attention to Article 5(2) of the Berne Convention, in which the last clause stated that the means of redress to the author to protect his rights should be covered exclusively by the laws of the country where protection was claimed, and asked whether the inclusion of enforcement provisions into the Treaty was not in conflict with the Berne Convention.

591. Mr. FICSOR (Assistant Director General of WIPO) said that there was no conflict between the Berne Convention and the provisions on enforcement included in the Basic Proposal, because the latter provisions were in harmony with Article 20 of the Berne Convention. He pointed out that, if Contracting Parties were to guarantee more efficient protection for the rights of authors, such as the more efficient protection that the proposed enforcement provisions would require, Article 20 of the Berne Convention would, of course, authorize a special agreement to that effect. In answer to the question raised by the Delegation of Singapore, he said that the September 28, 1979, amendment to the Berne Convention was not relevant for the obligation of Contracting Parties to comply with Articles 1 to 21 and the Annex of the Convention as established by the Paris Act of July 24, 1971, since that amendment only concerned the administrative provisions of the Convention and did not concern the substantive provisions included in Articles 1 to 21 and the Annex.

592. The CHAIRMAN also felt that there was no contradiction between the Berne Convention and the proposed enforcement provisions. He stated that the Committee had come to the end of the discussion on the “framework articles” of Draft Treaty No. 1. He was of the opinion that the general framework was acceptable to the Committee. He felt that further analysis and consultation might produce a next version to be considered by the Committee, and he indicated that the written proposal made by the Group of Latin American and Caribbean countries would be studied. He noted that there were some elements which had been supported by Delegations from other regions, such as the changing of the sequence of paragraphs (3) and (4) in Article 1. He observed that the Delegation of the European Communities had suggested a footnote along the lines of the footnote attached to Article 1 of the TRIPS Agreement, which would be considered by the Committee. He also said that there had been a suggestion that certain provisions of the Berne Convention should be reproduced, but he felt that that had to be analyzed in the light of the clear statements and clear understanding that the Treaty would be an independent Treaty.

Articles 1 (Relation to Other Conventions), 3 (Beneficiaries of Protection under this Treaty), 4 (National Treatment), 20 (Formalities), 21 (Reservations) and 22 (Application in Time) of the WPPT (Articles 1, 3, 4, 24, 25 and 26 of Draft Treaty No. 2)

593. The CHAIRMAN suggested that the Committee discuss the “framework articles” of Draft Treaty No. 2, which were *Articles 1, 3, 4, 24, 25 and 26*. He remarked that Article 1 had a similar function to Article 1 of Draft Treaty No. 1, and that Articles 3 and 4 had a function which corresponded to Article 2 of Draft Treaty No. 1. Article 3 took that which was applied in the TRIPS Agreement. Article 24 corresponded to Article 2 of Draft Treaty No. 1. He compared Article 26 of Draft Treaty No. 2 to Article 18 of the Berne Convention, in respect of its function to deal with the application in time of the protection provided in the Treaty, and noted that the approach was corresponding to the approach taken in the TRIPS Agreement. Regarding reservations under Article 25, he thought that it would not be useful to have a full discussion on reservations independent of the Articles to which such reservations applied.

594. He pointed out that the rules of the applicability of Draft Treaty No. 2 followed the mechanism of the TRIPS Agreement, which was applied, for the time being, by 126 countries. Since 128 countries were registered at the Conference, there was good reason to suggest the same method. Article 4 on national treatment took the model from two treaties. Paragraph (1) of that Article concerning national treatment followed the model in the TRIPS Agreement, and paragraph (2) took the model of Article 2.2. of the Rome Convention. He opened the floor for discussion.

595. El Sr. SILVA SOARES (Brasil) levanta a la atención del Comité de Redacción un punto de orden redaccional relativo al Artículo 3 del proyecto de Tratado N° 2, notando que la versión española del párrafo 3 de dicho Artículo cuando dice “podrá recurrir a las posibilidades previstas en el Artículo 5.3” no corresponde a la versión inglesa.

596. Mr. WIERZBICKI (New Zealand) referred to Article 25 on reservations, and also to his prior intervention on Article 5 on moral rights. He suggested that Contracting Parties should have the ability to enter a reservation to the entirety of Article 5, and proposed to add as a new paragraph (2) to Article 25: “Any country upon becoming a Contracting Party to this Treaty,

may, in a notification deposited with the Director General of WIPO, declare that it will not apply the provisions of Article 5.” He pointed out that he had deliberately not sought to delete the reference in subparagraph (ii) of paragraph (1) to Article 5(1), since there might be signatories that only wished to utilize that particular reservation. He also referred to interventions by the Delegations of the United States of America and the European Community, in which it had been indicated that there might be major changes relevant to this Article.

597. Mr. KIM (Republic of Korea) drew attention to the fact that Article 26 was different than that which had been discussed in the Committees of Experts, and asked the Chairman for clarification as to why that was so. He proposed the following language: “Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.” He stated that that proposal was intended to maintain the current retroactive provisions, that is, Article 14.6. and Article 70.2. of the TRIPS Agreement. In particular, Article 70.2. of the TRIPS Agreement simply stated that copyright obligations as well as obligations with respect to the rights of producers of phonograms and performers, in existing copyright matters, should be determined solely on the basis of Article 18 of the Berne Convention. He said that his Delegation felt that more extensive retroactive protection was not necessary for the beneficiaries of neighboring rights, and it wanted to have the same provisions as in Article 15 of Draft Treaty No. 1.

598. The CHAIRMAN responded to the request for clarification, and stated that Article 26 had been drafted as an independent Article, and the intended way to apply it followed the same principles and the same general approach as that reflected in Article 18 of the Berne Convention. In his opinion, there was no difference in substance between the ideas and drafting in Draft Treaty No. 2 and the position expressed by the Delegation of the Republic of Korea.

599. Mr. GYERTYÁNFY (Hungary) expressed the opinion of his Delegation that the package being considered seemed to be too complex to be treated as a whole, at least with respect to some of its parts, such as national treatment and reservations. Regarding Article 26, he expressed his Delegation’s understanding that that rule went further than Article 18 of the Berne Convention. The rule on application in time seemed to have a real retroactive effect on the protection of performances and productions fixed before the time of the entry into force of the Treaty, and seemed to apply to the rights to be granted under the Treaty, at least for the time period foreseen in Article 21. However, he observed that there were countries where certain rights to be granted under the Treaty had already been existing for a long time, such as, for example, the distribution rights of producers of sound recordings. He sought clarification as to the protection of sound recordings which had fallen into the public domain by the time of the entry into force of the Treaty: would they be revived and/or protected again?

600. The CHAIRMAN responded by noting that the word “retroactivity” had been used. He pointed out that retroactivity, *per se*, had been excluded from the application of the provisions of the Draft Treaty by introducing the rule and clause in paragraph (2) of Article 26: “The protection shall be without prejudice to any acts taken and any contracts concluded or rights acquired before the entry into force of the Treaty.” He believed that that meant that there would be no retroactive effect concerning prior acts and the provisions of the Treaty would not introduce an obligation to countries to change laws in such a way that prior agreements would be changed. He felt that that was in most countries probably already constitutionally

prohibited. As far as the application in time was generally concerned, it was suggested that all possible protected subject matter within the time frame of the clauses on the term of protection would be protected. He observed that that meant that that clause would revive protection in those cases to which the Delegation of Hungary was referring. That was in order to achieve full harmonization, or, if not full harmonization, at least a harmonization which would not cause any market distortion. He acknowledged that revival of rights in some cases would cause practical problems.

601. Mr. KUSHAN (United States of America) shared some of the concerns that were expressed by the Delegation of Hungary, that there were six Articles upon which to comment. With regard to Article 1(2), he believed that a useful clarification could be made to that provision to eliminate the suggestion that it might establish some hierarchy between the systems of neighboring rights and copyright. He proposed to delete, in paragraph (2), the phrase “and, in particular, nothing in this Treaty shall in any way prejudice the rights granted to authors,” so that the sentence, with the change proposed, would read: “Nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other under treaties for the protection of literary and artistic works under the Berne Convention for the Protection of Literary and Artistic Works.” Regarding Article 3 on beneficiaries of protection, he believed that, as currently structured, it might have to be revisited in the context of some of the proposals his Delegation had made in relation to the audiovisual question. He pointed out that his Delegation had proposed to amend the first provision on points of attachment. As currently drafted, it relied on the points of attachment of the Rome Convention. He believed that Article 3 should be amended to supplement those points of attachment to permit nationality to serve as a point of attachment. In the course of considering such an amendment, he thought it might be beneficial to revisit whether there was a necessity for paragraph (3) of Article 3. With regard to Article 4 on national treatment, his Delegation felt that national treatment should be cast to be very general, along the lines of the Berne Convention. With regard to Article 24, he said that his Delegation could accept the text as drafted. With respect to Article 25 on reservations, he stated that his Delegation could support what would be Alternative D as part of a comprehensive package to address the concerns of his Delegation with regard to audiovisual rights. Regarding Article 26, he supported the Article as drafted.

602. The CHAIRMAN noted the points raised by the Delegations of Hungary and the United States of America in respect to the Committee’s consideration of a number of Articles at once. He stated that he was hoping that the Delegations would put forth their most important points, so that it would be possible to start the second round of deliberations and the drafting of the Treaties.

603. Mr. GYERTYÁNFY (Hungary) expressed the opinion of his Delegation that Article 26(2) did not exclude a kind of retroactivity. He understood that it was rather a safeguard clause, to protect contracts and acts of use commenced or pursued at the time of the entry into force of the Treaty.

604. Mr. CHEW (Singapore) said that he had no comments on Articles 1, 3, 4, 24 and 25. He was of the view that Article 26(1) might be inconsistent with Article 20.2. of the Rome Convention which did not make it obligatory for any Contracting State to protect performances, broadcasts or phonograms which had taken place or fixed before the Convention came into force for the State concerned. He stated that, in his Delegation’s opinion, there was no problem with Article 26(2), it was consistent with Article 20.2. of the

Rome Convention, which did not confer retroactive effect on those rights. The last paragraph of that Article also recognized that transitional provisions might be required for those who had invested, in good faith, in the production of copies when no protection existed. He stated that his Delegation could accept both Articles 26(2) and (3), which were consistent with the principles under the Rome Convention and with the copyright legislation of his country. However, Article 26(1) appeared to be difficult for his Delegation to accept, as it was inconsistent with Article 20.2. of the Rome Convention, and Article 70.1. of the TRIPS Agreement. In addition, he felt that Article 26(1) also appeared to be inconsistent with Article 1(1) of the Draft Treaty, which provided for a non-derogation of the obligations under the Rome Convention.

605. The CHAIRMAN observed that there was no intention to suggest or propose something that was consistent with the Rome Convention. He stated that what was intended was an element in the application of the new Treaty that differed from the approach taken in the Rome Convention.

606. Mr. CRESWELL (Australia) referred to the intervention by the Delegation of the United States of America, and observed that the Committee seemed to be heading towards adding another criterion for the points of attachment, and, therefore, producing a result that would not be in alignment with the TRIPS Agreement formula. He suggested that perhaps the opportunity should be taken to try to simplify the provision. He said that it was the experience of Australia, and perhaps some other countries, that it was an extremely complex process to establish points of attachment. Those in the Rome Convention were quite difficult, and when combined with the TRIPS Agreement formula, the net effect was very complex. Therefore, he felt that, if there was going to be a change and a departure from the Rome and TRIPS provisions, it would be tremendous if the whole thing could be simplified. He agreed with those Delegations that had suggested that the Committee would need to revisit Articles 4 and 25, relative to the application of the Treaty to audiovisual fixations.

607. The CHAIRMAN explained that he had suggested the solution for the points of attachment offered in his proposal on solely pragmatic grounds, as that solution, which was the TRIPS Agreement formula, had been adopted by 126 countries.

608. Mr. KIM (Republic of Korea), referring again to Article 26, still had doubts whether that Article offered a solution of the transitional situation similar to Article 18(3) of the Berne Convention which his Delegation found desirable. He also pointed at the non-retroactivity rule in Article 20.2. of the Rome Convention.

609. Mr. REINBOTHE (European Communities) supported Article 1 as currently drafted. In the view of his Delegation, the modifications of Article 1(2) proposed by the Delegation of the United States of America did not seem to be appropriate. He also supported Article 26 as drafted. Turning to Article 25, he referred to the amendment proposed by the European Community and its Member States, explaining that it was based on Article 25, Alternative C, of the present draft and combined with a proposal on national treatment, which clarified that a Contracting Party which would use the reservation possibility of Article 25 would not be entitled to national treatment in the area of the reservation. In respect of Article 24, he expressed doubts whether paragraph (2) was really needed. The country of origin was a point of attachment in the Berne Convention, but not in the Rome Convention. With respect to Article 3, he suggested to add a footnote on the definition of "nationals" which would be

identical with the footnote already proposed by his Delegation for Article 1 of Draft Treaty No. 1. The footnote in its content was almost identical with footnote No. 1 to Article 1 of the TRIPS Agreement. Concerning Article 4, he expressed his Delegation's firm view that the scope of the national treatment provision in Draft Treaty No. 2 was, and should be, different from the national treatment obligation in Draft Treaty No. 1. The obligation under Article 4 of Draft Treaty No. 2 corresponded, in the view of his Delegation, to the shape of the national treatment obligation under the Rome Convention and under the TRIPS Agreement. It covered only the rights explicitly provided for in Draft Treaty No. 2 and did not, and should not, extend to, for example, remuneration schemes for private copying and other features not expressly guaranteed in Draft Treaty No. 2. The European Community insisted that material reciprocity should apply to the scope of protection going beyond the level stated in Draft Treaty No. 2. He stated that, if the understanding of Article 4 which he had just explained was not the common understanding, his Delegation would have to propose an amendment of Article 4 which would clarify the issue.

610. Mme BOUVET (Canada) souligne les difficultés liées aux articles 4 et 25 du projet de traité n° 2, compte tenu des derniers développements portant sur la protection des fixations audiovisuelles, et attend de connaître à ce sujet les propositions des délégations des Communautés européennes et des États-Unis d'Amérique avant de se prononcer définitivement sur cette question. Elle fait remarquer que la combinaison des articles 4, 7 et 14 du projet de traité n° 2 pourrait conduire à l'interprétation selon laquelle les dispositions du traité imposent une obligation de traitement national semblable à celle que l'on retrouve dans la Convention de Berne, ce qui obligerait son pays à offrir le régime de copie privée, qui existe dans le cadre d'un projet de loi devant le Parlement canadien, à tous les producteurs et artistes étrangers. Par conséquent, elle indique que sa délégation a l'intention de proposer un amendement à l'article 4 dans le but d'exclure la copie privée du traité et permettre ainsi aux États membres de ne pas accorder le traitement national dans ce cas.

611. Concernant l'article 26, elle rappelle que la législation du son pays ne confère pas de droit moral aux artistes interprètes ou exécutants. Elle ajoute que, si l'article 5 du projet de traité n° 2, accordant des droits moraux aux artistes interprètes ou exécutants, est approuvé, il faudrait prévoir que l'entrée en vigueur des attributs du droit moral se fasse progressivement pour éviter que les contrats actuels entre les artistes interprètes ou exécutants et les producteurs deviennent inopérants. Elle indique que sa délégation entend proposer un amendement à ce sujet.

612. El Sr. ANTEQUERA PARILLI (Venezuela) informa que el Grupo Latinoamericano y del Caribe propone que se incorpore en el párrafo 2 del Artículo 1 del proyecto de Tratado N° 2 una cláusula similar a la de salvaguardia contenida en el Artículo 1 de la Convención de Roma.

613. Mr. KUSHAN (United States of America) said that his Delegation shared the view of the Delegation of Canada that the wording of Article 4 did in fact impose a broader obligation with regard to national treatment than what was assumed by the Delegation of the European Communities. He said that his Delegation believed that it was very important, especially in a treaty like the one under consideration, to have a forward-looking and expansive provision on national treatment. He stated that, as it was impossible to foresee technological developments and to know what kind of protection schemes might be offered in the future to ensure the interests of right holders, his Delegation's conclusion was that the most appropriate

formulation for national treatment was a broad one, that is, an expansive and exclusive concept of national treatment. He rejected any solution confined to material reciprocity.

614. The CHAIRMAN stated that the deliberations had touched on all subjects of the two Draft Treaties but their preambles and titles. He then adjourned the meeting.

Tenth Meeting

Thursday, December 12, 1996

Afternoon

Work program

615. Mrs. TOLLE (President of the Conference) proposed that a meeting of the Steering Committee be convened immediately after the adjournment of the meeting.

616. Mr. ABEYSEKERA (Sri Lanka) supported the proposal by the President of the Conference and referred to the fact that a number of issues had not been fully resolved at the meeting of the Steering Committee the day before.

617. The CHAIRMAN agreed that it would be very useful to have a meeting of the Steering Committee immediately after the session.

618. M. SÉRY (Côte d'Ivoire) souscrit aux propos de la délégation de Sri Lanka, mais rappelle qu'une demande émanant de la Présidente de la conférence n'a pas besoin d'être appuyée.

*Partly consolidated text of Draft Treaty No. 1 prepared by the Chairman
(Document CRNR/DC/55)*

619. The CHAIRMAN recalled that the day before, the Steering Committee had decided that the Chairman of Main Committee I should prepare consolidated texts on the substantive provisions of Draft Treaty No. 1 and Draft Treaty No. 2. That decision reflected the desire for an accelerated schedule. Main Committee I had made good progress during the first three days of substantive discussions. It had received a number of written amendments and it had heard a series of interventions on all substantive issues and elements of the treaties, except their preambles and titles. New written proposals had been received in the evening, the day before, and some of them were still being processed by the Secretariat. As the number of written amendments had not been known to him at the meeting of the Steering Committee, the plan that new texts should be available by noon of that day had turned out to be too optimistic. A text for Draft Treaty No. 1 had been produced and distributed in all working languages. A consolidated version of Draft Treaty No. 2 would appear in the original language version within an hour, and in all the working languages as soon as technically possible. The original language version would give an opportunity for the Delegations to have a first impression. Some of the written amendments had been received so late during the drafting process that it

had not been possible to consider them in all their details during the drafting. The versions being distributed were called partly consolidated texts because there had been reasons not to start drafting any amended Chairman's text on given articles. Regarding some articles, it was already known that written amendments would come which were not available yet, and concerning some articles, amendments were available, but they were so fundamental that first the Committee should be offered an opportunity to discuss and comment on them before any consolidated version would be drafted. Later, if the Committee would consider it useful, further partly consolidated versions could be produced where more and more elements would be drafted in order to find consensus in the Committee and at the Conference, and, finally, the Committee should adopt a comprehensive consolidated version of the texts to be considered by the Conference. Some parts of the partly consolidated text might reflect an assessment that certain provisions could be ready to be offered as basis for a consensus decision of the Committee, but continued discussion would show whether there were such provisions.

620. M. SÉRY (Côte d'Ivoire) exprime ses préoccupations concernant la structure du document de synthèse préparé par le Président du Comité principal I. Il souhaiterait que la base de la discussion continue la proposition de base avec la synthèse des amendements et des observations faites par les différentes délégations, ce qui permettrait d'avoir une vue d'ensemble des points d'accord et de désaccord et, pour les différents groupes régionaux, de commencer à négocier sur cette base. Il demande s'il ne serait pas possible d'avoir donc un texte consolidé avec des propositions de base sur un article et une synthèse des amendements et des observations présentés par les différents groupes régionaux.

621. The CHAIRMAN stated that the distributed text was not a comparative table of the suggestions and proposals made and that meant that all the proposals and suggested amendments made in written form by the Delegations were still valid and could be considered by the Committee. If the Committee so wished, a comparative table could be produced. He stressed that the partly consolidated text reflected only some ideas and some assessment of the Chairman and all the written proposals were still valid and subject to discussion. Some proposals had just been circulated to the Delegations, and he had not been able to combine all the proposals in such a way that one could ask any Delegation to withdraw any of its suggestions.

622. M. SÉRY (Côte d'Ivoire) fait observer que tous les amendements sont en principe valables. Le texte de synthèse partielle du projet de traité n° 1 ne fait qu'une sélection de certaines propositions et ne prend pas en compte, notamment, les amendements qui n'ont pas encore été présentés par écrit. Il s'élève contre la proposition du Président et réitère sa demande concernant l'élaboration d'un texte de synthèse des amendements et des propositions en fonction des points de rapprochement. Une telle approche faciliterait la vue d'ensemble des amendements et propositions présentés par les diverses délégations et mettrait en lumière plus aisément les points d'accord.

623. The CHAIRMAN stated that, if all the written proposals should be consolidated, that would probably take until Friday afternoon or evening, so it would not be possible to have a cut-off date and then consolidate what would be at hand, which would include every amendment made in written form and also the oral suggestions. He was personally going through all the notes and all the verbatim records in order to find all the good ideas that had been put forward, and there was no idea, whatsoever, of omitting anything without consideration and without putting it to the Committee if that was its wish. He underlined that

that had been the only way to produce a text overnight which could be used as a basis for considerations while having simultaneously on the table the Basic Proposals and all the written proposals.

624. Mr. KHLESTOV (Russian Federation) acknowledged that the Chairman had been working all night to produce the texts, and even if the Russian text gave his Delegation some grounds for questions, it was ready to work on the basis of that text. There would be a need for some additional proposals, but he considered the text acceptable as a basis for further progress.

625. The CHAIRMAN added that every single intervention made in Main Committee I, up to 20 minutes before the end of the deliberations the day before had been available for the drafting exercise. Therefore, he had had all materials available, even if all the written proposals had not been distributed or otherwise been available. The distributed texts were partly consolidated texts, not comprehensive texts, and they did not try to take all the suggestions into account, because that would not have been possible. He stated that the question was now how to proceed further in order to enable the Committee to take into account all the proposals that had been tabled but not yet considered by the Committee.

626. El Sr. ROGERS (Chile) desapruaba el texto parcialmente consolidado del Tratado N° 1 elaborado por el Presidente, que sólo incluye una de las propuestas presentadas por el Grupo Latinoamericano y del Caribe. Se auna a lo expresado por la Delegación de Côte d'Ivoire ratificando que lo que se entendía por texto consolidado era un texto con todas las enmiendas presentadas, sin excluir ninguna, y se muestra reacio a seguir trabajando sobre la base del documento sometido a esta Comisión.

627. The CHAIRMAN pointed out that he had not yet had the opportunity to present the consolidated texts and indicate which articles had not been touched at all. There were several articles on which there were proposals and it seemed that there were so many proposals that the Committee had to discuss those questions before any attempt to combine any approaches could be made.

628. Mr. ABEYSEKERA (Sri Lanka) stated that the members of the Asian Group felt that their proposals and concerns had not been adequately expressed or reflected in the texts prepared by the Chairman. The members of the Group had expected a document, based on the decisions made in the Steering Committee, but the document prepared by the Chairman did not correspond to those decisions. He suggested that the question be referred to the Steering Committee to decide how to proceed further also taking into account the views expressed by the Delegation of Côte d'Ivoire and the Delegation of Chile, on behalf of the Latin American and Caribbean countries.

629. Mr. SCHÄFERS (Germany) supported what had been stated by the Delegation of the Russian Federation. He understood the concerns expressed by the Delegations of Côte d'Ivoire, Chile and Sri Lanka, but the Diplomatic Conference followed a line, different from the course of other diplomatic conferences convened previously by WIPO, the last one for the Trademark Law Treaty in October 1994. That was the first time that Basic Proposals had been prepared by the Chairman of the Committees of Experts. It was clear from the outset that the Chairman could not follow the ordinary procedure, but he had done a good work. He thought that it would be the best to continue placing confidence in the Chairman and have discussions

on the basis of the paper which he had presented. He stated that his Delegation was willing to discuss substance and not to adjourn the meeting immediately and it looked forward to hearing the Chairman's explanations of the presented text.

630. The CHAIRMAN said that, if a consolidated version of the proposals, in the sense of a comparative table listing the different amendments made to different articles was considered to be helpful, such a document could, of course, be produced. Since there were more and more written proposals, it could be difficult to produce a fully comprehensive document of that kind. He suggested that, after the procedural discussion, the Committee should continue its discussions on the basis of the amendments made by the Delegations. Many amendments had not been considered yet, but only distributed. The partly consolidated texts only represented a very short step in the direction of trying to establish tentative texts to be considered by the Committee, in certain limited cases and not concerning the most fundamental business.

631. Mr. EKPO (Nigeria) stated that his Delegation wished to place on record its appreciation for the work done so far by the Chairman and for his efforts to get the Conference going. He asked the Chairman to indicate how he intended to use the information from various groups that was not included in the partly consolidated texts. He felt that there could be difficulties in assessing what was common to everybody without having all the information available.

632. The CHAIRMAN clarified that all the provisions in the original Basic Proposal had been indicated in the partly consolidated text, in order to facilitate the deliberations on the basis of that new document. Nothing had been left out, and his intention was to start dealing with the written proposals which had not been commented on yet in such a way that for each article it could be indicated which documents contained amendments concerning a given provision. He said that the Committee could consider each proposal separately, or simultaneously, depending on the complexity of each issue.

633. Mr. KUSHAN (United States of America) said that, in the view of his Delegation, the Chairman had done what the Steering Committee had asked him to do, that is, to attempt to produce a document that was intended to address some of the topics where opinions were not quite as far apart as with other topics. He felt that in the Steering Committee there had been an understanding that a number of topics would require specific opportunities for negotiations before any suggestions for a possible solution could be developed, and in his view those issues were clearly identified during the discussion of the Steering Committee. On the issues where the differences did not seem to be so severe, he stated that it was his understanding that a text could be drafted that possibly addressed some of the issues that had been raised by many Delegations orally and in written proposals. He said that his Delegation would welcome any document that might be prepared, whether it be a comparative table or any other document that would help finding out the possibilities for compromise, and it was willing to continue considering the written proposals and the oral comments that had been made during the past four days. He suggested that the Chairman briefly summarize the partly consolidated text and then the Steering Committee could decide the course of action for the next few days and, hopefully, address some of the concerns that had been voiced about how to find a solution to some of the issues that had been flagged by the various Delegations.

634. The CHAIRMAN recalled the decision of the Steering Committee that in the afternoon there should be no discussion on substance, but the documents should be introduced and explained. All questions posed by Delegations would be answered and then there would be

time to analyze the written proposals and the documents which had been produced and to have consultations between and within the groups.

635. Mr. STARTUP (United Kingdom) expressed the thanks of his Delegation to the Chairman for the work he had put in the document which, he felt, was valuable even though it did not give the complete picture of the current state of play, but only attempted to represent the state of play on certain aspects under negotiation. He said that he would welcome the Chairman's explanations of how he had arrived at the interim consolidated text, which was the beginning of a process that still was a long way from its end.

636. The CHAIRMAN confirmed the interpretation by the Delegation of the United Kingdom of the intention and the possible function of the document.

637. M. SÉRY (Côte d'Ivoire) appuie la proposition faite par la délégation du Sri Lanka. Il constate qu'il existe une divergence sur l'interprétation de la décision arrêtée par le Comité directeur concernant la structure du texte de synthèse, et estime qu'il serait souhaitable d'organiser une nouvelle réunion à ce sujet. Il indique que sa délégation est prête à poursuivre les travaux, mais aimerait au préalable obtenir des éclaircissements concernant le document à étudier, estimant qu'il existe un réel problème d'interprétation.

638. Mr. EKPO (Nigeria) pointed out that amendments proposed by the African Group had not been reflected in the document prepared by the Chairman and that would make it difficult for that Group to contribute effectively to the discussions. Unless that matter was resolved, he found it difficult to see how the work could move forward.

639. The CHAIRMAN stated that much would be clearer once the procedural discussion was over and he had had the opportunity to explain which Articles in the document had been taken as they were, and in which places written proposals had to be the priority object for deliberations.

640. Mme DE MONTLUC (France) souhaiterait obtenir des informations concernant les raisons qui ont guidé le Président dans le choix des propositions figurant dans le texte de synthèse, leur origine et dans quelle mesure elles résultent d'un accord éventuel entre États. Elle aimerait également savoir si le titre et le préambule font partie de l'exercice et s'il sera procédé ultérieurement à un examen partiel par article, y compris le préambule et le titre.

641. El Sr. PROAÑO MAYA (Ecuador) hace énfasis en la necesidad de acelerar los trabajos y de limitar la emisión de propuestas para llegar a la adopción de los Tratados. Con este fin, sugiere modificar el texto parcialmente consolidado del proyecto de Tratado N° 1 de tal forma que contenga la totalidad de las propuestas presentadas por las diferentes Delegaciones.

642. El Sr. VÁZQUEZ (España) propone que se siga trabajando sobre la base del texto parcialmente consolidado presentado por el Presidente, sin perjuicio de que las Delegaciones sigan analizando la totalidad de las propuestas para llegar a cierto consenso que podría luego ser incorporado en un próximo texto consolidado que presentaría el Presidente. Para tal efecto, la tabla comparativa de las distintas enmiendas propuesta por la Delegación de Côte d'Ivoire sería un buen documento accesorio de trabajo.

643. Mr. SHEN (China) proposed an adjournment of the meeting which would enable his Delegation to review the text and submit its own proposals, before 10 a.m. or 11 a.m. the following morning.

644. The CHAIRMAN asked the Delegation of China whether it would accept that he first made a short presentation of the approach because otherwise it would be difficult to assess the value of the text in the groups and during consultations.

645. Mr. SHEN (China) accepted the Chairman's suggestion.

646. The CHAIRMAN noted that the discussion on procedure had clarified the situation somewhat, and the Committee could now look at document CRNR/DC/55. He repeated that the Basic Proposal continued to be the basis for the deliberations of the Conference and also for Main Committee I. He believed that documents CRNR/DC/55 and CRNR/DC/58 had been produced as decided by the Steering Committee. The full set of amendments presented to the Conference was available to each Delegation.

647. He pointed out that, in the working paper on Draft Treaty No. 1, under discussion, questions concerning the right of distribution had not been addressed, because consultations were going on and there were written proposals on that issue. Articles 13 and 14 on obligations concerning technological measures and obligations concerning rights management information had not been addressed either. Those issues had deliberately been set aside, because important proposals had been tabled and there were many proposals on those issues which had to be considered and discussed before any text, including even alternative solutions or reflecting different approaches, could be produced.

648. He pointed out that, to the Article on the right of reproduction, there were many amendments concerning which intensive consultations were going on. The small changes which had been made in Article 7 tried only to clarify the approach taken during the drafting of the Basic Proposal, specifically concerning the change in the order of some words in paragraph (1) which was purely technical, and, in paragraph (2), the clarifications did not change the contents of those paragraphs. They corresponded to explanations on the intended interpretation that had repeatedly been offered in the consultation meetings and during the Conference. The changes made in the Draft Treaty, including Article 7(2), had not been taken from any suggestion or proposal made in the Committee, but were an attempt of the Chairman to clarify the intended contents of that Article. That meant that Article 7 was totally open for discussion, as it would be premature to look at that Article with any final suggestions, or conclusions, in mind. It also meant, for example, that all Articles to which the document of the African Group was referring had been set aside in producing the working paper and each item in that document had to be dealt with before any conclusion on those Articles could be reached. There had been no attempt by the Chairman in the working document to advance the deliberations on the questions regarding the right of importation, technological measures, rights management information and the right of reproduction.

649. He mentioned that, even though the title of the Treaty and the preamble had not been discussed yet, one proposal had been included in the preamble as a recommendation.

650. In Article 1(4), certain words had been deleted to reflect the exchange of views which had taken place in the Committee. He recalled that he had suggested himself that the order of

paragraphs (3) and (4) be reversed, but, after having listened to the positions of those Delegations that had opinions on those provisions, he would prefer to let the Committee consider whether the order should be kept, in which case certain words in paragraph (4) might be deleted in accordance with a suggestion made by one Delegation and supported by others, very much in the same way as in the TRIPS Agreement.

651. In Article 2, the only additional element was based on a proposal made by the Delegation of the European Communities that a footnote should be added, containing the language from the footnote to Article 1 of the TRIPS Agreement. He had included that text, *mutatis mutandis*, in paragraph (2), but it might seem that that was not a suitable form to be taken into the Treaty, not even as a footnote or as an article or paragraph. Instead, when the final clauses had been discussed, and, if they would contain a provision corresponding to draft Article 100 concerning the eligibility of becoming party to the Treaty, the Committee might prefer to insert a reference to the organizations referred to in draft Article 100(2) and (3) that formed a customs territory.

652. Regarding Article 3 on the notion and place of publication, he noted that the two additions in paragraph (1) clarified the intended drafting and facilitated the understanding of the provision. The condition in Article 3(3) of the Berne Convention that publication should take place with the consent of the author had been included in the language in order to avoid that it would apply only by way of reference. In the end, the words “for purposes of applying the provisions of the Berne Convention” had been added for clarification.

653. He said that what was suggested regarding Article 4 on computer programs relied on the language of Article 2 of the Berne Convention and thereby tried to be a compromise which was tentatively put for the Committee’s consideration.

654. Regarding Article 5 on collections of data (databases), he referred to the Committee’s discussions and recalled that one of the proposals included the word “compilations,” as in the TRIPS Agreement. Even though the Berne Convention used the word “collections,” he had changed it on the understanding that there should be a harmonized international language in that matter, and the word “compilation” would in this context underline the specific nature of those productions. At the end of the Article, the word “rights” had been replaced by “copyright” in order to clarify the reference and to obtain harmony with the TRIPS Agreement.

655. He pointed out that, in Article 6 on the abolition of non-voluntary broadcasting licenses, the words “within three” had been replaced by “within five,” which was a tentative suggestion by the Chairman, and the deletion of paragraph (2) reflected his understanding of the opinion of the overwhelming majority of those Delegations that had taken a position on the provision.

656. Regarding Article 7 on the scope of the right of reproduction and Article 8 on the right of distribution and right of importation, he stressed that those Articles, as all other provisions, were subject to consultations, and they had only been included in the document for the convenience of the Delegations.

657. He noted that, concerning Article 9 on the right of rental, there had been a clear wish from many Delegations that the word “commercial” should be added and, if that was done, the need to have a definition of “rental” would diminish. In Article 9(2), the words “collections” had been changed to “compilations” which, as it had been clarified, should be understood as

collections of data within the meaning of Article 5. In the end of paragraph (2), language from the TRIPS Agreement, concerning computer programs which were not essential objects of rental, had been added, following the opinion of the majority of the Delegations that took the floor on the matter.

658. He noted that, in Article 10 on the right of communication, no changes had been made on the basis of any proposals. He stated that he agreed with certain technical amendments which had been suggested in the Committee. Only some small printing errors in the references had been corrected.

659. Concerning Article 11, he said that he had the impression that all Delegations that had taken the floor had had the same approach as far as the subject matter was concerned, but there had been a suggestion that a different technique should be used. That was still a question to be considered by the Committee.

660. In paragraph (1) of Article 12 on limitations and exceptions, the only modification was to change the wording to correspond exactly to the wording of Article 9(2) of the Berne Convention. Regarding paragraph (2), it seemed that there was an opinion according to which that paragraph could be deleted. Tentatively that had been done, but he stated that he was hesitating whether that was the best approach.

661. Regarding Article 13 on obligations concerning technological measures, there were many written proposals which had to be analyzed by the Committee, and, therefore, no elements had been taken into the working document. That was also the case in respect of Article 14 on obligations concerning rights management information; however, in the similar working document on Draft Treaty No. 2, he had added an element which had been omitted in the Basic Proposal, namely the link to an infringement which probably also should be included in Draft Treaty No. 1. It was his understanding that such an addition was supported by many Delegations.

662. In Article 15 on application in time, no changes had been made, and it seemed that the framework provisions, at least as regarded the substance and approach, were acceptable to the Committee.

663. He indicated that, for practical reasons, the annexes to Article 16 on special provisions on enforcement had not been distributed and reproduced in the partly consolidated text, but they were still valid and referred to. He had added an Alternative C concerning enforcement, following a proposal from one Delegation supported by another Delegation. He noted that the opinions on the question of enforcement were divided; some Delegations found that there should be no provisions, others were in favor of Alternative A, and there were also some in favor of Alternative B. Alternative C represented another approach where paragraph (1) would reproduce language from Article 36(1) of the Berne Convention and paragraph (2) would take the first sentence, *mutatis mutandis*, from Article 41.1. of the TRIPS Agreement.

664. He recalled that the Steering Committee had decided that, as far as introduction of the working paper was concerned, there should be an introduction and then the Chairman should be available for explanations if there were questions from Delegations. He opened the floor for questions.

665. Mr. AYYAR (India) pointed out that a number of proposals, views and suggestions made by Delegations had not been reflected in the partially consolidated text prepared by the Chairman. For example, he had been repeatedly making the point that the Conference should not reopen the Uruguay Round and discuss issues that had been concluded in the TRIPS Agreement which itself provided for a review only after the expiry of the grace period allowed for developing countries. And yet his views had not been fully reflected in the partially consolidated text. It was, therefore, a matter of concern as to how the treaty language would be established. He found the procedures of the Conference difficult to understand. Compared to many international conferences, the delegates were not being provided a daily journal or a transcript of the interventions. Consequently, it was difficult for Delegations to check whether their interventions and proposals were correctly reflected. It was not clear whether the partly consolidated text prepared by the Chairman was in accordance with the decisions of the Steering Committee. If they were not, as it seemed to be the case, a new document should be prepared to reflect the varying shades of opinions. He felt that the procedural problems should be discussed in the Steering Committee in order to establish transparent, credible and acceptable procedures.

666. Mr. SHEN (China) reiterated his suggestion that the meeting be suspended. He added that his Delegation could not accept the first proposal in Article 1(2), and it was of the view that the suggestion regarding customs areas should be deleted as it could lead to confusion. He added that his Delegation also had other suggestions which it would make subsequently.

667. The CHAIRMAN adjourned the meeting.

*Eleventh Meeting
Sunday, December 15, 1996
Morning*

Work program

668. The CHAIRMAN opened the meeting and stated that its purpose, according to the decision of the Steering Committee, was to review the progress of the informal consultations. He referred to the fact that on Friday and Saturday, consultations and meetings of regional groups had taken place, and he invited the coordinators, spokesmen and representatives of the groups and of those Delegations that had engaged in consultations to take the floor.

669. M. SÉRY (Côte d'Ivoire) annonce que le groupe africain a procédé à l'examen des deux traités et se tient prêt à entrer en négociations.

670. The CHAIRMAN mentioned that a number of proposals from different Delegations and groups of Delegations had been given to the Secretariat and made available to all participants in the Conference. All groups and Delegations had been able to take the contents of those proposals into consideration, during the informal consultations, except for some very few that had been distributed after Saturday afternoon. That meant that the deadline decided by the

Steering Committee for the presentation of written proposals, that is, by Saturday, at 1 p.m., had functioned well, and the Committee had a rich source of constructive proposals.

671. Mr. GYERTYÁNFY (Hungary), speaking on behalf of the Group of Central European countries and the Baltic States, said that that Group had thoroughly studied the outcome of the first round of the debate in Main Committee I and analyzed the written amendment proposals, and it had formed its position concerning the issues discussed. He declared that the Group and its members were ready to enter into formal, or, if necessary, continue informal negotiations at any time. He felt that there were a number of Articles, mainly in Draft Treaty No. 1, which could be agreed upon relatively easily, namely the preamble and Articles 1, 2, 3, 4, 5, 6, and probably 8, and Articles 9, 11, and probably 12, and finally Article 16. He suggested that formal discussions on those Articles begin immediately.

672. Mr. HONGTHONG (Thailand) stated, on behalf of the Asian Group, that it had completed its discussions on the substantive issues of the two Draft Treaties, and it was ready to participate in the negotiations in any manner or form.

673. Mme BOUVET (Canada) déclare que le groupe B est également prêt à entamer des négociations de façon formelle ou informelle avec les autres États membres. Elle estime qu'il serait possible d'examiner d'abord les articles 1 à 6 et 11 du projet de traité n° 1 dans la mesure où leur contenu, tant du point de vue du fond que de celui rédactionnel, semble faire l'objet d'un certain consensus par rapport à d'autres dispositions où les divergences de vue sont plus marquées.

674. El Sr. ROGERS (Chile), en nombre del Grupo Latinoamericano y del Caribe, expresa su pleno apoyo a la propuesta presentada por la Delegación de Canadá en el sentido de iniciar consultas y negociaciones oficiosas sobre los Artículos 1 a 6 y 11 del proyecto de Tratado N° 1.

675. The CHAIRMAN expressed his understanding of the intervention of the Delegation of Chile that the Latin American and Caribbean Group was ready to embark upon formal or informal negotiations or consultations, and noted that the Delegation of Chile confirmed that.

676. Mr. SHEN (China) noted with satisfaction the announcements of the Delegations that had just spoken that they were ready to embark on consultations or negotiations. He said that his Delegation had studied closely the proposed Articles and he felt that they, as well as the Basic Proposal, should serve as the basis for the first round of consultation and discussion. In principle, his Delegation supported the statement that the consultations should start with the Articles mentioned, leaving the more difficult issues for later.

677. M. SÉRY (Côte d'Ivoire), intervenant au nom du groupe africain, approuve la proposition de travailler sur la liste de certains articles pour aboutir à un résultat. Il indique que le groupe africain a intégré des amendements émanant d'autres groupes régionaux dans sa position finale qu'il est prêt à présenter devant la Commission.

678. The CHAIRMAN pointed out that, at the given stage, the Committee was only expected to reach an understanding about the nature of the next step, whether there should be informal, or formal, deliberations or negotiations. He noted that there had been much flexibility in the indications of the positions, and he invited the spokesmen to offer their advice in that respect,

noting that in informal consultations all interested Delegations would be invited to take part, and, in that case, the group coordinators should make sure that the groups would be properly represented. No Delegation would be excluded from informal consultations.

679. M. SÉRY (Côte d'Ivoire) constate que toutes les délégations qui sont intervenues, ont exprimé leur souhait d'aboutir à des résultats positifs. Il rappelle que le groupe africain est prêt aussi à se rallier à la position générale allant dans ce sens.

680. El Sr. ROGERS (Chile) insiste en la necesidad de llevar a cabo consultas y con este fin propone se utilice la sala 4.

681. The CHAIRMAN stated that a consultation process taking place in a smaller room and having the character of an informal process would mean that decisions could not be made during that process, but indications on a possible consensus from the representatives of groups could be given in Main Committee I, which would facilitate its decisions.

682. Mr. KUSHAN (United States of America) said that his Delegation supported the suggestion made by the Delegation of Chile.

683. Mme BOUVET (Canada) appuie les interventions faites par la délégation du Chili au nom du GRULAC et par la délégation des États-Unis d'Amérique.

684. The CHAIRMAN noted that the tendency was towards an informal continuation of the work. That would mean that in that process of consultation it would be explored where the groups could agree on issues, and the work would be, as suggested and supported by several Delegations, that discussions would start from the less controversial issues and then advance to the issues where negotiations and consultations still might be going on, possibly simultaneously with the informal consultations. In that case, the Committee should avoid voting in the present meeting, but it should explore where it could find consensus.

685. He suggested that the informal consultations should start the same day, and that they should continue as long as there would be progress. He had had informal consultations with the President of the Conference who had indicated that in the evening there would be an evaluation of the informal consultations so far, and the President of the Conference would, on the basis of that evaluation, decide on possible proposals to the Steering Committee

686. Mr. TIWARI (Singapore) asked the Chairman to clarify whether the informal consultations would be transparent in nature.

687. The CHAIRMAN answered that his understanding of the suggestions made was that the informal consultation procedure would be completely transparent. Any Delegation wishing to participate in that procedure would have the possibility to do so. It might be advisable that the consultation take place in a somewhat more limited meeting than the whole of Main Committee I, but it would be up to the coordinators of the groups to ensure the proper and appropriate participation from the groups, taking into consideration that all Delegations that were interested in participating in given parts of the work should have the opportunity to do so.

688. Mrs. TOLLE (President of the Diplomatic Conference) took the floor in her capacity of both the President of the Conference and the Head of the Delegation of Kenya. She said that her Delegation had carefully followed the exchange of views that had taken place in order to enable the work to advance positively and constructively. In her capacity as President of the Conference, she had observed the same and she was now very optimistic regarding the possible outcome of the Conference. She congratulated the Delegations, individually and collectively, for the cooperative and positive manner in which they had worked during the last 48 hours. She said that she had observed the positive spirit which had been expressed across the room by the representatives of the various regional groups which sent a clear signal that everybody wanted a product to adopt and carry home by the end of the Conference. In her capacity as President of the Conference, she called on all Delegations to exercise maximum flexibility, tolerance, patience and understanding with each other. It was the time to make concessions, because only little time was left. She proposed to the Chairman that the present meeting try to adopt the easier Articles, and then be adjourned for informal consultations. She said that it was her expectation to get at least some form of conclusive report by the end of that day, so that a constructive work program for the remaining few days could be established by the Steering Committee the next morning.

689. The CHAIRMAN thanked the President of the Conference for her intervention, and, agreeing with her suggestion, proposed that the Committee followed the suggestion of three Delegations regarding which Articles to discuss first, in order to settle certain issues already in the present meeting.

690. M. SÉRY (Côte d'Ivoire) déclare que sa délégation soutient la proposition présentée par la Présidente de la conférence diplomatique.

691. El Sr. ROGERS (Chile) afirma el deseo del Grupo Latinoamericano y del Caribe de avanzar en los trabajos y se pregunta cuáles son los Artículos realmente no controvertidos.

692. The CHAIRMAN noted that the suggested lists of less controversial issues had Articles 1, 2, 3, 4, 5, 6 and 11 in common, and said that the Committee should try to settle those.

693. Mr. FICSOR (Assistant Director General of WIPO) said that it was his understanding that it was the wish of the Committee to use a smaller meeting room for informal consultations and indicated the possibilities available. He proposed Room IV for that purpose.

694. The CHAIRMAN asked the President of the Conference whether her suggestion implied that discussions on less controversial issues should continue in Main Committee I, rather than in informal consultations.

695. He clarified that Main Committee I would continue its meeting, and attempt to reach consensus in this formal meeting on certain items.

696. Mrs. TOLLE (President of the Diplomatic Conference) expressed her desire that the Conference save as much time as possible, and make as much progress as possible. She said that, in an effort to exercise maximum flexibility, and in the spirit of transparency, the Committee should dispose of those Articles on which consensus might be reached but then it should move to informal negotiations as soon as possible.

697. The CHAIRMAN stated that the Committee would quickly move through certain Articles to determine if consensus could be found on them. He proposed that, instead of official voting, rather an “indicative vote” take place. If there were consensus on a particular Article or paragraph, as determined by the indicative vote, it would be taken forward to the Plenary.

698. Mr. TIWARI (Singapore) asked the Chairman for clarification as to the change in the Committee’s method of working. He noted that there were simpler Articles, and more difficult ones, but that many of the Articles were interconnected. He stressed that the new method of working should not preclude a Delegation from raising a point which was connected to another Article even if previously discussed. He reserved his Delegation’s right to do so if required.

699. The CHAIRMAN pointed out that the Committee would work article by article now, and that any consensus which might be achieved would only be provisional. When the whole Treaty was presented, if there were a connection between adopted Articles and those which were being considered, it would be natural that Delegations might discuss such a connection.

700. Mr. TIWARI (Singapore) felt that there were Delegations which would see linkages between various provisions, and would be reluctant to agree to certain provisions because of such linkages. He stated, though, that his Delegation would not object to the manner in which the Committee would now proceed.

701. Mr. KUSHAN (United States of America) referred to the intervention by the Delegation of Singapore, and noted that his Delegation would like to also raise the issue of linkages. He thought that there might be some value in attempting to do some initial processing of the Articles, through informal consultations, so as to identify and resolve those linkages before formally attempting to adopt any Articles.

702. El Sr. ROGERS (Chile), en nombre del Grupo Latinoamericano y del Caribe, apoya plenamente lo expresado por la Delegación de Singapur y luego por la de Estados Unidos de América destacando que, si bien los Artículos en estudio son menos controvertidos que otros, también han sido objeto de propuestas por parte de las Delegaciones y, en consecuencia, se reserva el derecho a plantear otro procedimiento en caso de que este trabajo no prospere.

703. M. SÉRY (Côte d’Ivoire) est de l’avis que l’aspect procédural doit venir en second plan pour faire place à l’examen des textes de base avec les différentes propositions présentées par les délégations. Il souhaite donc que soient examinés les articles, les uns après les autres, avec une adoption formelle ou informelle, mais à tout le moins que cela conduise à l’avancement substantiel des travaux.

704. The CHAIRMAN introduced Articles 1, 2, 3, 4, 5, 6 and 11 of Draft Treaty No. 1 for discussion by the Committee, with the understanding that, if there were any difficulties with any Article, it would be relegated to further negotiation and consultation. He observed that the order of the Articles corresponded to their order in the Basic Proposal, and proposed that the Committee review each Article on a paragraph by paragraph basis. He noted that there was a proposal concerning paragraph (1) of Article 1, by the Group of Latin American and Caribbean countries.

705. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe, insiste en la propuesta presentada por el Grupo respecto del Artículo 1 del proyecto de tratado N° 1, que consiste, en primer lugar, en suprimir el párrafo 1 en su redacción actual e insertar lo siguiente: “El presente Tratado es un arreglo particular en el sentido del Artículo 20 del Convenio de Berna para la Protección de las Obras Literarias y Artísticas en lo que respecta a las Partes Contratantes que son países de la Unión establecida por dicho Convenio. El presente Tratado no tendrá conexión, explícita o implícita, con otros tratados o convenios que estén concernidos directa o indirectamente con la misma materia.” De esta manera, queda explícito que la referencia al Convenio de Berna concierne exclusivamente al Acta de 1971, y se elimina el riesgo que se interprete que los acuerdos particulares en virtud del Artículo 20 puedan considerarse como parte del Convenio de Berna. El segundo elemento de la propuesta consiste en remplazar el actual párrafo 4 por el siguiente: “Los Estados que sean parte en el presente Tratado cumplirán con las disposiciones del Convenio de Berna y de su Anexo”. Explica que esta modificación tiene como propósito el de mantener la importancia del Convenio de Berna motivando nuevas adhesiones al mismo, sin embargo insiste que el real deseo del Grupo sería redactar esta disposición en el sentido de que sea obligatoria la vinculación al Convenio de Berna de los Estados que deseen adherirse al presente Tratado. La última parte de la propuesta consiste en agregar un párrafo 5 según el cual: “Las organizaciones intergubernamentales parte en el presente Tratado cumplirán con las disposiciones de los Artículos 1 a 21 del Convenio de Berna y con las de su Anexo”, en el sentido de separar las obligaciones que corresponden a los Estados y las que les corresponden a los organismos intergubernamentales que solamente están sometidos a las obligaciones sustantivas y no las administrativas del Convenio de Berna.

706. Mr. HONGTHONG (Thailand) supported the proposal made by the Group of Latin American and Caribbean countries.

707. Mr. VISSER (South Africa), speaking on behalf of the African Group, observed that, in the proposal by the Latin American and Caribbean Group, paragraphs (4) and (5) corresponded with the position of the African Group.

708. Mr. TIWARI (Singapore) asked for clarification regarding the issue of moral rights. He noted that the Treaty applied Articles 1 to 21 of the Berne Convention. He asked why, in view of the fact that the TRIPS Agreement was only two years old, there was now a necessity to include moral rights in the new Treaty. He pointed out that there was a general feeling in the Conference on the need to balance the interests between right holders and economic imperatives, and asked for the reasons behind the inclusion of moral rights.

709. Mr. KUSHAN (United States of America) noted that, with regard to the proposal made by the Latin American and Caribbean countries, that is, to insert a clause in paragraph (1), there were some questions which were not easy to address. He said that his Delegation did not understand the need for that type of reference to other treaties. He also wondered whether certain topics which were included in the Treaty did in fact have relationships to other agreements; he specifically referred to the question of provisions on enforcement. He stated that his Delegation did not see the need for including such a reference. With regard to the proposal to revise paragraph (4), he stated that his Delegation was able to support it, but only with reference to the questions that had been raised by the Delegation of Singapore. He felt that that was a matter of clarification, but also a matter for consensus. He thought that the Committee would have to revisit the Article under discussion, depending on what type of

satisfactory solutions could be reached with regard to other provisions, specifically Article 4 in relation to computer programs.

710. Mr. GYERTYÁNFY (Hungary), speaking on behalf of the Group of Central and Eastern European countries and the Baltic States, felt that the apparent fear of linkage of the Treaty with the TRIPS Agreement was unfounded. He referred to the intervention by the Delegation of Singapore regarding the question of moral rights. It was his opinion that the inclusion of moral rights in the Treaty was unavoidable, when one considered Article 20 of the Berne Convention, which precluded countries party to the Convention from concluding agreements on the same subject matter which would be contrary to, or provide less protection than, the Berne Convention.

711. The CHAIRMAN stated that there were two possibilities for the Committee as far as Article 1(1) was concerned. The first solution would be to include the text proposed by the Latin American and Caribbean Group. He noted that the first phrase of that proposal was identical to Article 1(1) of the Basic Proposal. The second solution would be to leave the said proposal pending, that is, to adopt the first sentence with the understanding that the Committee would come back to the second sentence. There would be a better conception a little later of the possible links and connections of the Treaty to other treaties.

712. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe, expresa el deseo de que la aprobación del párrafo 1 del Artículo 1 se haga en su integridad, de manera que no quede pendiente ninguna de las oraciones que conforman dicho párrafo, y propone un voto si necesario.

713. The CHAIRMAN asked if the Delegation of Colombia would like to defer the question.

714. El Sr. ZAPATA LÓPEZ (Colombia) insiste que la posición del Grupo Latinoamericano y del Caribe es la de considerar el párrafo 1 en su conjunto.

715. The CHAIRMAN asked if the Latin American and Caribbean countries would agree to provisionally approve Article 1(1) as drafted.

716. El Sr. ZAPATA LÓPEZ (Colombia) hace hincapié en el deseo del Grupo de que el párrafo 1 sea considerado en su integridad.

717. M. SÉRY (Côte d'Ivoire) indique qu'il intervient uniquement au nom de sa délégation car c'est la délégation de l'Afrique du Sud qui prendra la parole au nom du groupe africain. Il fait observer que lorsqu'une délégation a demandé un vote sur un amendement, le contre-amendement doit émaner d'une autre délégation et non du Président de la Commission.

718. Mr. TIWARI (Singapore) asked the Chairman to reconsider the interventions by the Delegations of Colombia and the United States of America. He stressed that the basic rule of the Conference was to attempt to achieve as many things as possible by consensus. He felt that, if there were provisions which were problematical, it would be unwise to rush to a vote. It would be more advisable to move into informal consultations on such provisions. That would be more fruitful and less divisive, and, in his opinion, better for the Treaty.

719. The CHAIRMAN said that it was his understanding of the intervention by the Delegation of Colombia that, if the Committee would vote on paragraph (1), the vote should cover the proposal of the Latin American and Caribbean Group as a whole as an alternative to the Basic Proposal. He stated that the decision before the Committee was whether it should start voting, in the form of an indicative vote, on paragraph (1), or whether it should defer the vote in order to offer the possibility for informal consultations.

720. El Sr. ZAPATA LÓPEZ (Colombia) opta por la segunda alternativa que consiste en postergar la decisión respecto de este párrafo, de manera que se pueda seguir con las consultas a nivel informal entre coordinadores de los diferentes grupos.

721. Mme M'KADDEM (Tunisie) constate que des difficultés existant pour adopter certains articles qui, *a priori*, devaient faire l'objet d'une adoption par *consensus* sans recourir à la procédure de vote. Elle se demande si les négociations au sein du comité constitué de façon informelle pourraient aboutir à une solution de nature à éviter un vote sur ce premier article. Elle souhaite savoir si, par ailleurs, les délégations peuvent émettre des points de vue tendant à ce rapprochement consensuel ou s'il est envisagé de voter sur cet article en tout état de cause.

722. The CHAIRMAN stated that the Committee would proceed and explore all the items where consensus could be found, and, when it became evident that consensus could not be found on some items, further consultation would take place. He expressed his confidence that the Committee would find a way to find solutions. He proposed that the Committee not discuss the procedure any more, because it seemed that Article 1(1) would be deferred to informal consultations.

723. Mr. EKPO (Nigeria) asked the Chairman for clarification as to the difference between informal consultations and formal consultations.

724. The CHAIRMAN explained that the distinction between formal procedures and informal procedures was the following: in a formal meeting, all the deliberations would be recorded and reflected in the summary minutes, whereas, in an informal meeting, no recording would be made and no summary minutes would be prepared and thus the discussions would be completely outside of any records of the Conference, and no decisions could be made. A possible consensus could be explored, and, if consensus were not found, possible proposals, on the basis of which the Conference, could ultimately decide, could be explored and established.

Article 1 (Relation to the Berne Convention) of the WCT, paragraph (2)

725. The CHAIRMAN asked the Committee if there was consensus as to paragraph (2) of Article 1, as included in document CRNR/DC/55, and stated that there was no objection.

726. *Main Committee I adopted by consensus paragraph (2) of Article 1 (Relation to the Berne Convention) of Draft Treaty No. 1, as included in document CRNR/DC/55.*

Article 1 (Relation to the Berne Convention) of the WCT, paragraph (3)

727. The CHAIRMAN submitted paragraph (3) of Article 1, as included in document CRNR/DC/55, to the Committee to determine if there was consensus on that paragraph. He noted that there had been discussion as to reversing the order between paragraphs (3) and (4).

728. *Main Committee I adopted by consensus paragraph (3) of Article 1 (Relation to the Berne Convention) of Draft Treaty No. 1, as included in document CRNR/DC/55.*

Article 1 (Relation to the Berne Convention) of the WCT, paragraph (4)

729. The CHAIRMAN presented paragraph (4) of Article 1 to the Committee, pointing out that there had been a proposal by the Group of Latin American and Caribbean countries. He noted that the Basic Proposal read: "Contracting Parties that are not countries of the Union established by the Berne Convention shall comply with Articles 1 to 21 and the Appendix of the Berne Convention." He drew attention to the proposal from the Group of Latin American and Caribbean countries, which read: "The States that become party to this Treaty shall comply with the provisions of the Berne Convention and the Appendix thereto," and noted that that proposal should be read in conjunction with paragraph (5) under the proposal which read: "The intergovernmental organizations party to this Treaty shall comply with the provisions of Articles 1 to 21 of the Berne Convention and with those of the Appendix thereto." There would be one obligation on the States, and a different obligation on the intergovernmental organizations which became party to the Treaty.

730. Mr. TIWARI (Singapore) asked for clarification as to whether the Committee was now dealing with paragraph (4), or paragraphs (4) and (5) of Article 1.

731. The CHAIRMAN indicated that the Committee was working only on paragraph (4) of Article 1, but, in the proposal by the Latin American and Caribbean countries, paragraphs (4) and (5) corresponded to the subject matter of paragraph (4) of Article 1.

732. Mr. TIWARI (Singapore) indicated that he did not have problems with the proposal from the Group of Latin American and Caribbean countries, in so far as the first part was concerned, regarding States which became party to the Treaty. His concerns related to the part which involved the Berne Convention, and specifically, the question of moral rights under Article 6bis of the Convention. He thought that there were cogent reasons for leaving that area to national law. He observed that the world was moving on to an area of digital technology, and that, therefore, that particular issue had to be managed in relation to the multimedia industry. He felt that there were good reasons as to why moral rights should not be made mandatory in the Treaty. He also noted that the provisions of the Treaty would apply to intergovernmental organizations. He stated that there had not been much discussion on the latter aspect. He urged that, at least, Article 1(4) and (5) in the proposal by the Latin American and Caribbean countries should be referred for further discussions.

733. The CHAIRMAN agreed that the said paragraph should be deferred for further consultations.

734. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe y en relación con los párrafos 4 y 5 del Artículo 1, expresa su desacuerdo con la posición presentada por la Delegación de Singapur de cuestionar la obligación para los Estados Contratantes de proteger los derechos morales, destacando que esta posibilidad nunca fue examinada por los Comités de Expertos porque la obligación de protección de los derechos morales es una cuestión claramente establecida en el Convenio de Berna, y sería inconcebible derogar esta obligación en el marco de un Tratado asimilado a un acuerdo del Artículo 20 del Convenio de Berna.

735. The CHAIRMAN observed that the matter could not be resolved without a long discussion or a vote, or both, and, therefore, the issues under discussion were deferred for informal consultations.

736. M. SÉRY (Côte d'Ivoire) s'étonne de voir qu'il existe seulement, en fait, des difficultés pour l'adoption d'articles qui, en apparence, ne semblaient pas poser problème. Il s'interroge sur l'opportunités d'évoquer le droit moral dans le cadre de cet alinéa. Il rappelle que l'article 20 de la Convention de Berne impose le respect d'un certain niveau de protection qui est inscrit dans la Convention elle-même, et indique que sa délégation ne saurait négocier sur cette question de droit moral.

737. Mr. FICSOR (Assistant Director General of WIPO) observed that while, under Article 1(4) of the Basic Proposal, the obligation to comply with the Berne Convention only extended to the substantive provisions, that is, to Articles 1 to 21, under the proposal of the Group of the Latin American and Caribbean countries, that obligation would extend to all provisions of the Berne Convention, which meant that also to the administrative provisions and the final clauses, that is, also to Articles 22 to 38. Those articles provided for certain rights and certain obligations. For example, the right to participate in the Assembly of the Berne Union and in the Executive Committee, and the obligation to pay a fee as a member of the Union. But there was also a provision that a State could become party to the Berne Convention, and a member of the Union, only if it acceded to the Convention. He asked whether it was meant by the proposal of the Latin American and Caribbean countries that only those countries could accede to the new Treaty which were party to the Berne Convention. He felt that, if that was the intention, it could be taken care of in the administrative and final clauses of the new Treaty.

738. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe, expresa el deseo de modificar la propuesta presentada por el Grupo acerca del Artículo 1 del proyecto de Tratado N° 1, en el sentido de hacer obligatoria la adhesión al Convenio de Berna como requisito indispensable para ser miembro del presente Tratado, de tal forma que exista la obligación de respetar no sólo las disposiciones de fondo del Convenio de Berna, sino también la construcción administrativa prevista en dicho Convenio. Insiste en la importancia del Comité Ejecutivo del Convenio de Berna o del Comité de Coordinación de la OMPI, órganos a través de los cuales se toman medidas trascendentes para la cooperación en materia de derecho de autor destinada a los países en vía de desarrollo.

739. M. GOVONI (Suisse) partage l'avis du président de reporter la discussion de l'alinéa 4 au sein du comité informel. Il comprend les préoccupations soulevées par la délégation de Singapour, mais souligne qu'il ne peut pas être question d'évoquer le droit moral. Il rappelle que l'article 20 de la Convention de Berne impose le respect d'un certain niveau de protection

qui est inscrit dans la Convention elle-même, et indique que sa délégation ne saurait négocier sur cette question du droit moral.

740. Mme DE MONTLUC (France) appuie les observations de la délégation de la Suisse concernant le droit moral.

Article 3 (Application of Articles 2 to 6 of the Berne Convention) of the WCT (Article 2 of Draft Treaty No. 1)

741. The CHAIRMAN introduced Article 2 of Draft Treaty No. 1 for consideration by the Committee. He mentioned that Article 2 of Draft Treaty No. 1 included an obligation to apply the provisions of Articles 3 to 6 of the Berne Convention, in respect of the protection provided for in the Draft Treaty. He said that, instead of creating a new set of rules on the international applicability of the new Treaty, the Article referred to the well established provisions in Articles 3 to 6. He noted that there were some proposals for amendment concerning Article 2, namely, from the Delegation of Brazil, that the substantive Articles should be transcribed, reproduced in full, from the Berne Convention in the new Treaty; from the Delegation of Australia, to the effect that the reference in Article 2 should be not only to Articles 3 to 6, but that it should also cover Article 2 of the Berne Convention. He observed that there would be a need to include in the discussion the issues of what should be done with any references to “nationals” as such references might affect international organizations.

742. Mr. SILVA SOARES (Brazil) underscored that the Conference was creating a new treaty and was not dealing any more with the concept of a protocol to the Berne Convention. He felt that it was dangerous to include by reference, or to make reference to, any articles of the Berne Convention. If the provisions included in those articles were needed, it would be more appropriate to simply transcribe them into the treaty.

743. The CHAIRMAN pointed out that there were two different technical ways to tackle the issue under discussion. One was the way the Basic Proposal had been drafted, and the other was the proposal from the Delegation of Brazil to reproduce the relevant articles. He referred to the fact that the Treaty would not be a protocol but a separate instrument. He stated that, when using the articles from the Berne Convention, the Committee would be using the articles in the latest version of the Berne Convention, which could be revised in the future.

744. Mr. CRESWELL (Australia) expressed his Delegation's interest in the proposal from the Delegation of Brazil which did address a specific problem. He observed that there were several references in Articles 3 to 6 to countries of the Union. It was his understanding that the Draft Treaty admitted the possibility that States not party to the Berne Convention could become party to it without having to be a member of the Berne Union. He said that his Delegation felt that further consideration was needed concerning all the implications of simply carrying the words of Articles 3 to 6 of the Berne Convention over into the Treaty, in that there could be a problem regarding countries which would join the Treaty without joining the Berne Convention. As to the proposal of his Delegation, he pointed out that there were references in the Draft Treaty to literary and artistic works, and his Delegation felt that there was a case for affirming in the Treaty, if it was going to be a free-standing Treaty, that the works being referred to were those that were defined indicatively, if not exhaustively, in

Article 2(1) of the Berne Convention. His Delegation's proposal was framed to cover Articles 2 to 6, including Article *2bis*.

745. The CHAIRMAN commented that, if the language of Article 2 in the Basic Proposal were approved, the Committee could consider whether the words "*mutatis mutandis*" should be incorporated in that provision, in order to overcome the technical aspects to which the Delegation of Australia had referred.

746. Mr. VISSER (South Africa), speaking on behalf of the African Group of countries, supported the proposals made by the Delegations of Brazil and Australia. He shared the view that Draft Treaty No. 1 was to have an existence of its own and was no longer merely a protocol to the Berne Convention. For that reason, he wished to see the text of Articles 3 to 6 be transcribed into the text of Draft Treaty No. 1. He also agreed with the proposal from the Delegation of Australia on the need to also include Articles 2 and *2bis* of the Berne Convention.

747. Mr. SHEN (China) stated that, since Article 1(4) of Draft Treaty No. 1 had already made it very clear that all Contracting Parties should comply with the Berne Convention, there was no need to refer, in Article 2 of the Draft Treaty, to the application of the provisions of Articles 3 to 6 of the Berne Convention. He felt that no reference was necessary to customs territories. He thought that the term "nationals" was very clearly identified in the Berne Convention. He suggested the deletion of paragraph (2) from Article 2 of Draft Treaty No. 1, as proposed in the Chairman's partially consolidated text.

748. Mr. GYERTYÁNFY (Hungary), speaking on behalf of the Group of Central and Eastern European countries and the Baltic States, supported the proposal made by the Delegation of Brazil that the relevant provisions of the Berne Convention should be transcribed with the necessary modifications into the new Treaty. He also supported the proposal of the Delegation of Australia to include Articles 2 and *2bis* of the Berne Convention. He felt that the transcription, with the necessary modifications, might also address some of the problems mentioned by the Delegation of China.

749. El Sr. PROAÑO MAYA (Ecuador) apoya la propuesta presentada por la Delegación de Brasil en cuanto a la necesidad de transcribir las disposiciones de Convenio de Berna y no simplemente hacer referencia a ellas. Por otro lado, se opone a la inclusión en el texto parcialmente consolidado del proyecto de Tratado N° 1, del párrafo 2, destacando que la noción de territorios aduaneros corresponde a mecanismos de comercio internacional cuando aquí se trata de un nuevo Tratado que tiene que ser adoptados por Estados. Insiste en la importancia de otorgar una protección adecuada a los autores sobre sus creaciones sin caer en los mecanismos del comercio internacional.

750. The CHAIRMAN said that, considering the importance of the matter and its possible consequences for other provisions in the Draft Treaty, he wished to hear other views.

751. Mr. KUSHAN (United States of America) stated that his Delegation supported the original formulation in the Basic Proposal. He said that, having listened to the concerns expressed by the Delegations that supported an incorporation of the text of the Berne Convention into the Draft Treaty, his Delegation still did not believe that that would be necessary, for two reasons: first, while it was clear that the obligations under the Berne

Convention should be applied with respect to the protection under Draft Treaty No. 1, an attempt to transfer the language of all those provisions into that Treaty would be too time-consuming; second, if, in the future, there would be a possible amendment to the Berne Convention, the act to be applied would still follow from Article 1 of the Treaty, and it would be much simpler in that case to make a simple change of the reference. He stated that his Delegation could support the proposal of the Delegation of Australia that there be reference to Articles 2 to 6 of the Berne Convention.

752. Mrs. TOLLE (President of the Diplomatic Conference) noted with satisfaction that the proceedings had demonstrated goodwill and signaled that everybody wished to make progress. However, in order to accelerate that progress, she proposed that the session be adjourned and followed by informal consultations, the details of which should be coordinated by the Chairman and the regional coordinators.

753. The CHAIRMAN said that he still wanted to finish the discussion by giving the floor to the Delegations that had asked for the floor.

754. Mr. STARTUP (United Kingdom) stated that his Delegation would reserve its position on the substance of the Article for the informal consultations. Before proceeding to such consultations, he wished to hear the views of Dr. Ficsor, Secretary of the Conference and Main Committee I, on three questions, relating to the Articles under discussion: first, whether his understanding was correct that Article 1(4), in whatever form it ultimately might end up, and Article 2, would serve essentially different purposes, 1(4) requiring compliance with certain provisions of the Berne Convention and Article 2 applying certain articles of the Berne Convention to the protection under Draft Treaty No. 1; second, whether it would be advisable to extend the reference to the Berne Convention by also including Articles 2 and *2bis* because of the need to define more clearly the subject matter of the Treaty; and, third, whether Article 2 in its current form, with or without the addition of such words as *mutatis mutandis*, would actually achieve the desired effect of simply incorporating those provisions into Draft Treaty No. 1, without the need to rewrite and necessarily adapt them, something which might take additional time.

755. Mr. FICSOR (Assistant Director General of WIPO) said that his answer to all the three questions was yes.

756. Mr. KEMPER (Germany), with regard to the proposal of the Delegation of Brazil to incorporate the complete text of the relevant articles of the Berne Convention, supported the views expressed by the Delegation of the United States of America, and referred to the text of the TRIPS Agreement, which was also an agreement in its own right, and still the Agreement referred to the provisions of other international treaties instead of reproducing the text of those provisions.

757. The CHAIRMAN recalled that the solutions in the two Draft Treaties corresponded to the solution in Article 1.3. of the TRIPS Agreement. The Articles on the criteria of applicability was a different matter and needed a different solution.

758. Mr. WIERZBICKI (New Zealand) expressed his Delegation's support for the statement by the Delegation of the United States of America that Article 1 adequately dealt with the question raised by the Delegation of Brazil, and said that his Delegation had interpreted the

Draft Treaty to refer to the Paris Act of the Berne Convention. He added that his Delegation also supported the comments by the Delegation of Australia.

759. Mr. TIWARI (Singapore) agreed with the Delegation of Australia that it was necessary to make a reference to Articles 2 and *2bis* of the Berne Convention, because that would enable the use of the definition of literary and artistic works under the Convention.

760. Mr. HENNESSY (Ireland), speaking on behalf of the European Community and its Member States, supported the text of Article 2(1) as currently written, because it related clearly to well-established points of attachment contained in the Berne Convention. He said that it would not be fruitful to adopt a different approach. Therefore, he endorsed the comments by the Delegations of Germany, the United Kingdom and the United States of America.

761. The CHAIRMAN noted that all Delegations seemed to support the suggestion by the President of the Conference that informal negotiations should begin after the present meeting with participation of representatives of the various groups, including the spokesmen of those groups. He invited the spokesmen of the groups to take care of the appropriate participation of each group, in such a way that the group that would be meeting for informal consultations would be smaller than the full Committee, but also taking into consideration the requirement of openness and transparency and taking into account that certain Delegations had specific interests in certain matters that would be subject for informal consultations.

762. Mrs. TOLLE (President of the Diplomatic Conference) announced that, following the reports that she would receive in the evening about the results of the informal consultations, she intended to convene a meeting of the Steering Committee the following morning.

763. After consultation with the Secretariat, the CHAIRMAN announced the beginning of informal consultations, and adjourned the meeting.

Twelfth Meeting

Thursday, December 19, 1996

Morning

764. The CHAIRMAN opened the meeting by introducing documents CRNR/DC/82 Prov. and CRNR/DC/84 Prov. containing the substantive provisions of the two Draft Treaties reflecting the results of the informal consultations started more or less a week ago. In the consultations, the various groups of countries had been represented in an appropriate way. Furthermore, all Delegations had had access to the consultations. He said that he had got the impression that all Delegations were committed to the common work. He underlined the very constructive and good atmosphere which had facilitated informal understandings in the consultation process.

765. El Sr. ZAPATA LÓPEZ (Colombia) se refiere al texto de las disposiciones sustantivas del proyecto de Tratado N° 1, notando que existe un problema en la versión española del

preámbulo, que debería hacer referencia a los derechos de los autores por un lado y a los intereses del público en general por el otro.

766. The CHAIRMAN invited all Delegations to hand over to the Secretariat in writing any translation corrections they might find necessary. Addressing the work plan of the Committee, he said that the current meeting was limited to the question of formal endorsement of the agreements on the substantive provisions of the two Draft Treaties reached in the informal consultations. A following meeting would deal with the agreed statements as well as with proposals for resolutions or recommendations to be adopted by the Conference. He added that it appeared that one of such resolutions or recommendations would deal with the question of audiovisual coverage of the protection of performers and another one would concern the third draft Treaty on a *sui generis* protection of databases that the Conference had not been able to discuss and negotiate. He suggested that the latter recommendation would aim at speedy continuation of the work on the third draft Treaty after the Diplomatic Conference.

Preamble of the WCT

767. The CHAIRMAN proceeded to the adoption of the provisions of Treaty No. 1 (document CRNR/DC/82 Prov.) leaving the title of the Treaty for later consideration, and he proposed that, first, the first three paragraphs of the Preamble be adopted.

768. *Main Committee I adopted by consensus the first three paragraphs of the Preamble of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

769. Mr. GYERTYÁNFY (Hungary), speaking on behalf of the *ad hoc* Group of Central European countries and the Baltic States, introduced the fourth paragraph of the Preamble as set out in document CRNR/DC/82 Prov. He stated that the special reason and aim of the Treaty was to restate and strengthen copyright protection particularly in a new technological environment. While referring in the preamble to the interest of the public and to groups of the public, the Treaty should also, as a matter of balance, emphasize the fundamental aim to give an incentive to creation and investment in creation.

770. Mr. KHLESTOV (Russian Federation) pointed out that there were certain problems with the Russian translation of the document which had to be addressed by the Drafting Committee.

771. Mr. FICSOR (Assistant Director General of WIPO) asked the Delegations to hand over their corrections as soon as possible, in order to enable the Secretariat to prepare revised texts of the various language versions for the Drafting Committee.

772. *Main Committee I adopted by consensus the fourth paragraph of the Preamble of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

773. Mr. AYYAR (India) introduced the fifth paragraph of the Preamble that his Delegation had suggested and the purpose of which was to avoid, in strict conformity with the Berne Convention, disharmony between the interests of right holders and the larger public interest.

774. *Main Committee I adopted by consensus the fifth paragraph of the Preamble, as included in document CRNR/DC/82 Prov.*

Article 1 (Relation to the Berne Convention) of the WCT

775. The CHAIRMAN invited proposals concerning Article 1 of Draft Treaty No. 1.

776. El Sr. ZAPATA LÓPEZ (Colombia) informa que el Grupo Latinoamericano y del Caribe, deseoso de aclarar la naturaleza del vínculo entre el presente Tratado y el Convenio de Berna, somete a la aprobación de las demás Delegaciones una nueva redacción del párrafo 1 del Artículo 1 que quedaría así: “El presente Tratado es un arreglo particular en el sentido del Artículo 20 del Convenio de Berna para la Protección de las Obras Literarias y Artísticas, en lo que respecta a las Partes Contratantes que son países de la Unión establecida por dicho Convenio. El presente Tratado no tendrá conexión con tratados distintos del Convenio de Berna ni perjudicará ningún derecho u obligación en virtud de cualquier otro tratado.”

777. Main Committee I adopted by consensus Article 1(1) (Relation to the Berne Convention) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.

778. The CHAIRMAN reminded the Committee that paragraphs (2) and (3) had already been approved by the Committee, and, therefore, only paragraph (4) should still be adopted.

779. Mr. VISSER (South Africa) explained that paragraph (4) was a simple compliance clause. All Contracting Parties had to comply with the substantive provisions of the Berne Convention. No distinction was made between Contracting Parties as to whether they were or were not party to the Berne Convention and as to whether they were States or international organizations. He proposed the adoption of paragraph (4), as included in document CRNR/DC/82 Prov.

780. Main Committee I adopted by consensus Article 1(4) (Relation to the Berne Convention) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.

Article 2 (Scope of Copyright Protection) of the WCT (Article 1bis of Draft Treaty No. 1)

781. The CHAIRMAN invited proposals concerning Article 1bis of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.

782. Mr. KUSHAN (United States of America) explained that the new Article 1bis was proposed as part of the understanding reached on Article 4 (Computer Programs).

783. El Sr. PROAÑO MAYA (Ecuador) destaca que el Artículo 1bis corresponde textualmente al Artículo 9.2. del Acuerdo sobre los ADPIC lo cual crearía un vínculo con un acuerdo relativo al comercio internacional y por esta razón su Delegación emite reservas respecto del Artículo 1bis. No obstante, su Delegación no tiene la intención de crear un obstáculo para un consenso sobre el Artículo.

784. Main Committee I adopted by consensus Article 1bis (Scope of Copyright Protection) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.

Article 3 (Application of Articles 2 to 6 of the Berne Convention) of the WCT (Article 2 of Draft Treaty No. 1)

785. The CHAIRMAN invited proposals on Article 2 of Draft Treaty No. 1.

786. Mr. CRESWELL (Australia) explained that, in the new text of Article 2, as amended from the Basic Proposal and as included in document CRNR/DC/82 Prov., reference was now made also to Articles 2 and *2bis* of the Berne Convention. He announced that he would propose a statement on the application of those provisions to the protection under the Treaty, later.

787. *Main Committee I adopted by consensus Article 2 (Application of Articles 2 to 6 of the Berne Convention) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 3 (Notion and Place of Publication) of Draft Treaty No. 1

788. The CHAIRMAN invited proposals on Article 3 (Notion and Place of Publication) of Draft Treaty No. 1.

789. Mr. REINBOTHE (European Communities) said that, in the view of his Delegation, Article 3(3) of the Berne Convention continued to provide for a valid definition of the concept of publication. Contracting Parties should be able to rely on that Article as incorporated in Draft Treaty No. 1 by Article 1(4), when defining criteria of eligibility for protection. Therefore, a separate provision, as proposed in the Basic Proposal on that issue, did not appear to be necessary in the Treaty. He said that a lot of effort had been deployed for the deliberations on Article 3, and his Delegation was confident that such deliberations had not been in vain. They would, in the future, guide the application at domestic level of the concept of publication regarding the protection provided for by Draft Treaty No. 1.

790. *Main Committee I agreed by consensus on the deletion of Article 3 (Notion and Place of Publication) of Draft Treaty No. 1.*

Article 4 (Computer Programs) of the WCT

791. The CHAIRMAN invited proposals concerning Article 4.

792. Mr. KUSHAN (United States of America) said that his Delegation proposed an amendment to Article 4 as contained in the Basic Proposal. The amendment, which was already included in document CRNR/DC/82 Prov., was limited to the second sentence that now read: "Such protection applies to computer programs, whatever may be the mode or form of their expressions."

793. Mr. AYYAR (India) said that his Delegation agreed with that amendment as a result of the informal consultations and announced that he would propose later a statement to clarify the proper interpretation of Article 4 along with Article *1bis*.

794. *Main Committee I adopted by consensus Article 4 (Computer Programs) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 5 (Compilations of Data (Databases)) of the WCT

795. The CHAIRMAN invited proposals concerning Article 5 of Draft Treaty No. 1.

796. Mr. AYYAR (India) recommended the text appearing in CRNR/DC/82 Prov. for approval, as it reflected the consensus reached in the informal consultations and was in conformity with the TRIPS Agreement.

797. *Main Committee I adopted by consensus Article 5 (Compilations of Data (Databases)) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 6 (Abolition of Certain Non-Voluntary Licenses) of Draft Treaty No. 1

798. The CHAIRMAN opened the floor on Article 6 of Draft Treaty No. 1.

799. Mr. KIM (Republic of Korea) explained the results of the informal consultations, as contained in document CRNR/DC/82 Prov. Article 6(2) of the Basic Proposal on the abolition of mechanical licenses had been dropped, while Article 6(1), concerning the abolition of non-voluntary broadcasting licenses, had been maintained by extending the phasing-out period from five to seven years.

800. Mr. SHEN (China) recalled that, in the informal consultations, his Delegation, supported by several other Delegations, had pleaded for deletion of the entire Article 6. He pointed out that broadcasting was, in many developing countries, a popular and important form of dissemination of information and means of enjoyment of literature and art, and that non-voluntary licenses for broadcasting, as established in the legislation of his country, were helpful in that respect and even beneficial to the fair remuneration of authors and other concerned parties. He stated that strong policy reasons in the respective countries commanded that they be free to maintain such non-voluntary licenses, and that, therefore, his Delegation requested deletion of Article 6.

801. The CHAIRMAN declared that a decision on Article 6 of Draft Treaty No. 1, as well as on Article 7 of that draft Treaty was deferred.

Article 6 (Right of Distribution) of the WCT (Article 8 of Draft Treaty No. 1)

802. The CHAIRMAN opened the floor on Article 8 of Draft Treaty No. 1.

803. Mr. KUSHAN (United States of America) proposed the text, as found in document CRNR/DC/82 Prov., for approval by consensus.

804. The CHAIRMAN noted that consensus could not yet be reached on Article 8 and deferred the discussion on it.

Article 7 (Rights of Rental) of the WCT (Article 9 of Draft Treaty No. 1)

805. The CHAIRMAN opened the floor on Article 9 of Draft Treaty No. 1.

806. Mr. AYYAR (India) proposed the text contained in document CRNR/DC/82 Prov. as the result of the informal consultations for adoption, by deleting—as a stylistic change—the word “and” after “computer programs” and inserting a comma instead.

807. El Sr. UGARTECHE VILLACORTA (Perú), con respecto al derecho de alquiler del Artículo 9, se opone a la enmienda contenida en el documento denominado disposiciones sustantivas del proyecto de Tratado N°1 y sugiere se mantenga el texto de la propuesta básica, destacando que en materia de alquiler la legislación nacional de su país no hace discriminación ninguna entre las diferentes categorías de obras.

808. The CHAIRMAN deferred the discussion on Article 9.

Article 8 (Communication to the Public) of the WCT (Article 10 of Draft Treaty No. 1)

809. The CHAIRMAN invited proposals concerning Article 10 of Draft Treaty No. 1.

810. Mr. CRESWELL (Australia) said that his Delegation had been a long-time proponent of an improved right of communication to the public as a means of helping to provide effective copyright protection in the network environment and now was very pleased to move for adoption of Article 10 of Draft Treaty No. 1, which complemented the rights of communication already provided for in the Berne Convention, and which appeared to be one of the most important Articles, if not the most important Article, of the Draft Treaty.

811. *Main Committee I adopted by consensus Article 10 (Communication to the Public) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 9 (Duration of the Protection of Photographic Works) of the WCT (Article 11 of Draft Treaty No. 1)

812. The CHAIRMAN opened the floor on Article 11 of Draft Treaty No. 1.

813. Mr. HENNEBERG (Croatia) introduced Article 11 as amended as a result of the informal consultations and as included in document CRNR/DC/82 Prov., explaining that the wording had been changed for formal reasons and for the purpose of clarification and simplification.

814. *Main Committee I adopted by consensus Article 11 (Duration of the Protection of Photographic Works) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 10 (Limitations and Exceptions) of the WCT (Article 12 of Draft Treaty No. 1)

815. The CHAIRMAN opened the floor on Article 12 of Draft Treaty No. 1.

816. Mr. CRESWELL (Australia) suggested that Article 12, because of the obvious linkages between Articles 7 and 12, be reserved for further informal consultations.

817. Mr. SILVA SOARES (Brazil) supported the proposal of the Delegation of Australia.

818. The CHAIRMAN deferred the discussion on Article 12 of Draft Treaty No. 1.

Article 12 (Obligations concerning Technological Measures) of the WCT (Article 13 of Draft Treaty No. 1)

819. The CHAIRMAN invited proposals concerning Article 13 of Draft Treaty No. 1.

820. Mr. VISSER (South Africa) proposed the new wording contained in document CRNR/DC/82 Prov. In addition, he proposed insertion of the words “or the Berne Convention” after the words “this Treaty,” to bring Article 13 into line with Article 14.

821. La Sra. RETONDO (Argentina) solicita que se vuelva a redactar el Artículo referente a las obligaciones relativas a las medidas tecnológicas.

822. The CHAIRMAN said that language reservations were valid. Nonetheless, the text of Article 13 as amended by the Delegation of South Africa was clear.

823. *Main Committee I adopted by consensus Article 13 (Obligations concerning Technological Measures of Protection) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov., with the amendment proposed by the Delegation of South Africa.*

Article 12 (Obligations concerning Rights Management Information) of the WCT (Article 14 of Draft Treaty No. 1)

824. The CHAIRMAN invited proposals on Article 14 of Draft Treaty No. 1.

825. Mr. KUSHAN (United States of America) proposed Article 14 as amended in Document CRNR/DC/82 Prov. for adoption, and announced that his Delegation would propose an agreed statement concerning that Article.

826. *Main Committee I adopted by consensus Article 14 (Obligations concerning Rights Management Information) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 13 (Application in Time) of the WCT (Article 15 of Draft Treaty No. 1)

827. The CHAIRMAN opened discussion on Article 15 of Draft Treaty No. 1.

828. El Sr. ZAPATA LÓPEZ (Colombia), en nombre del Grupo Latinoamericano y del Caribe, expresa su pleno apoyo al Artículo 15 relativo a la aplicación del Tratado en el tiempo.

829. *Main Committee I adopted by consensus Article 15 (Application in Time) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 14 (Provisions on Enforcement of Rights) of the WCT (Article 16 of Draft Treaty No. 1)

830. The CHAIRMAN invited proposals on Article 16 of Draft Treaty No. 1.

831. Ms. DALEY (Jamaica) supported Article 16 as amended in document CRNR/DC/82 Prov. which reflected the proposal put forward by her Delegation. She proposed that the word “special” in the title of the Article be deleted.

832. *Main Committee I adopted by consensus Article 16 (Provisions on Enforcement of Rights) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov., with the amendment proposed by the Delegation of Jamaica.*

833. The CHAIRMAN adjourned the meeting.

Thirteenth Meeting

Thursday, December 19, 1996

Afternoon

Article 1 of the WPPT (Relation to Other Conventions)

834. The CHAIRMAN opened the meeting and proceeded to Draft Treaty No. 2. He drew the attention of the Committee to the fact that, as a technical error, paragraph (3) had been left out from Article 1. That paragraph should be similar to the second sentence of Article 1(1) of Draft Treaty No. 1 and should read: “This Treaty shall have no connection with, nor shall it prejudice any rights and obligations under, any other treaties.”

Preamble and Articles 1 (Relation to other Conventions), 2 (Definitions), 3 (Beneficiaries of Protection under this Treaty), 17 (Term of Protection), 18 (Obligations concerning Technological Measures), 19 (Obligations concerning Rights Management Information), 20 (Formalities) and 23 (Provisions on Enforcement of Rights) of the WPPT (Preamble and Articles 1, 2, 3, 21, 22, 23, 24 and 27 of Draft Treaty No. 2)

835. The CHAIRMAN offered the following texts for adoption: the Preamble, Articles 1, 2, 3, 21, 22, 23, 24 of Draft Treaty No. 2 and an additional Article 27 thereof on enforcement of rights which had been omitted by error and which should be identical with Article 16 of Draft Treaty No. 1.

836. *Main Committee I adopted by consensus the Preamble and Articles 1 (Relation to other Conventions), 2 (Definitions), 3 (Beneficiaries of Protection under this Treaty), 21 (Term of Protection), 22 (Obligations concerning Technological Measures), 23 (Obligations concerning Rights Management Information), 24 (Formalities) and 27 (Provisions on Enforcement of Rights), as included in document CRNR/DC/84 Prov. and with the amendments in Article 1 indicated by the Chairman.*

837. The CHAIRMAN announced that he would later turn to the Articles still open when more clarity would have appeared about where voting was necessary.

838. M. GOVONI (Suisse) demande que la proposition de sa délégation relative à l'article 6 soit reflétée dans le texte en discussion, ce qui n'est pas le cas. Il souhaite que le membre de phrase "sauf lorsque l'interprétation ou l'exécution est déjà une interprétation ou exécution radiodiffusée" soit mis entre crochets pour faciliter la discussion et trouver un accord sur cet article.

839. The CHAIRMAN stated that the Committee had taken note of the intervention by the Delegation of Switzerland, but added that Article 6 of Draft Treaty No. 2 had not yet been submitted for adoption.

Article 7 (Right of Rental) of the WCT (Article 9 of Draft Treaty No. 1)

840. The CHAIRMAN opened the discussion on Article 9 of Draft Treaty No. 1.

841. El Sr. UGARTECHE VILLACORTA (Perú) reitera su posición acerca del derecho de alquiler en el sentido de abogar en favor de un derecho de alquiler general tal como se encuentra en la Decisión 351 del Acuerdo de Cartagena o en la Directiva europea sobre el derecho de alquiler. Opina que la tendencia que consiste en discriminar según el tipo de obras no corresponde a la filosofía del Convenio de Berna sino a la del Acuerdo sobre los ADPIC, y la armonización en el presente Tratado del plazo de protección para las obras fotográficas lo demuestra claramente.

842. The CHAIRMAN noted that there was apparently no consensus on Article 9.

843. El Sr. PROAÑO MAYA (Ecuador), refiriéndose al Artículo 9 relativo al derecho de alquiler, pregunta si la coma que le sigue a la palabra "fonogramas" implica que la expresión "tal como lo determina la legislación nacional de las partes contratantes" se aplica tanto a los

programas de ordenador como a las obras cinematográficas y a las obras incorporadas en fonogramas o si sólo se refiere a esta última categoría.

844. The CHAIRMAN, after a consultation with the Secretariat, proposed to redraft the first two lines of Article 9 as follows:

“Authors of
 (i) computer programs;
 (ii) cinematographic works; and
 (iii) works embodied in phonograms as determined in the national law of Contracting Parties,
shall....”

He noted that this would make the reference and the qualification completely clear.

845. M. GOVONI (Suisse) fait part de son inquiétude quant à la formulation prévoyant de dire “tel que défini dans la législation nationale” qui suscite une divergence d’interprétation.

846. The CHAIRMAN noted that there was no consensus on Article 9 yet, and stated that, if that remained the case, a vote would be needed.

Article 6 (Right of Distribution) of the WCT (Article 8 of Draft Treaty No. 1)

847. The CHAIRMAN opened the floor on Article 8 of Draft Treaty No. 1.

848. Mr. WIERZBICKI (New Zealand) explained that his Government could reluctantly agree to paragraph (2) of that Article provided that the words “the conditions, if any,” were replaced by “the extent and the scope of any conditions” and that the corresponding changes were made in Articles 8 and 16 of Treaty No. 2. Those changes would remove an ambiguity existing in the texts as currently drafted. He stressed that the authorities of his country wanted absolute clarity that Contracting Parties were free to impose conditions or not to impose conditions.

849. Mr. KUSHAN (United States of America) recalled that the current text of paragraph (2) had been produced in the informal negotiations after a tremendous amount of effort, and significant concessions had been made by both sides to achieve a very balanced text. He stated that his Delegation could not accept the changes proposed by the Delegation of New Zealand and, therefore, supported the text of document CRNR/DC/82 Prov.

850. Mr. CRESWELL (Australia) said that, while his Delegation felt sympathy for the concern expressed by the Delegation of New Zealand, it could live with Article 8(2) as negotiated in the informal consultations. He added that his Delegation reserved the right to make a statement with respect to the understanding of Article 8(2).

851. Mr. SILVA SOARES (Brazil) said that his Delegation did not support the proposal made by the Delegation of New Zealand, but was also interested in making a statement on this issue.

852. The CHAIRMAN noted that it was justified to make such a statement.

853. *Main Committee I adopted by consensus Article 8 (Right of Distribution) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov.*

Article 7 (Right of Rental) of the WCT (Article 9 of Draft Treaty No. 1)

854. The CHAIRMAN opened the floor on Article 9 (Right of Rental) of Draft Treaty No. 1, recalling the drafting change that he had suggested earlier.

855. El Sr. PROAÑO MAYA (Ecuador), refiriéndose al Artículo relativo al derecho de alquiler, propone sustuir en la expresión “tal como determina la legislación nacional de las partes contratantes”, las palabras “tal como” por “o como”, de tal forma que se deje cierta libertad a las legislaciones nacionales en cuanto a las categorías de obras cubiertas por el derecho de alquiler.

856. The CHAIRMAN expressed his view that Article 9 reflected the common denominator for the majority of Delegations and that it could not be expected that a higher level of protection would be internationally acceptable.

857. El Sr. UGARTECHE VILLACORTA (Perú), si bien reconoce que se trata de acordarse sobre derechos mínimos, insiste en su preferencia por la propuesta básica relativa al derecho de alquiler, que propone mantener, y considera que cualquier otra propuesta debe ser sometida al régimen de votación como enmienda.

858. The CHAIRMAN indicated that a vote on Article 9 appeared to be necessary.

859. El Sr. ZAPATA LÓPEZ (Colombia) le pide a la Presidencia cinco minutos para consultas.

860. The CHAIRMAN stated that according to the Rules of Procedure, when the procedure of voting had been started, it could not be interrupted, and put Article 9, as contained in Document CRNR/DC/82 Prov. and amended by him, to vote.

861. *Main Committee I adopted, with 66 votes in favor, 6 votes against and with 18 abstentions, Article 9 (Right of Rental) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov., with the amendments proposed by the Chairman.*

Articles 8 (Right of Distribution), 9 (Right of Rental), 10 (Right of Making Available of Fixed Performances), 12 (Right of Distribution), 13 (Right of Rental) and 14 (Right of Making Available of Phonograms) of the WPPT (Articles 9, 10, 11, 16, 17 and 18 of Draft Treaty No. 2)

862. The CHAIRMAN opened the floor on Articles 9, 10, 11, 16, 17 and 18 of Draft Treaty No. 2, as contained in document CRNR/DC/84 Prov.

863. Mr. SILVA SOARES (Brazil) asked whether a decision was to be taken on the word “musical” which was in brackets.

864. The CHAIRMAN invited the Delegation of the United States of America to take the floor on that matter.

865. Mr. KUSHAN (United States of America) explained that his Delegation had, as the only Delegation, placed a reservation on the deletion of the word “musical,” contained in brackets in Articles 9 and 11. His Delegation was now in a position to withdraw that reservation so that the word “musical” had to be deleted.

866. The CHAIRMAN thanked the Delegation of the United States of America for that clarification and for the withdrawal of its reservation. Consequently, the word “musical,” so far in brackets, had to be deleted from Articles 9 and 11.

867. Mr. CRESWELL (Australia) asked the Chairman’s permission to raise a drafting point. He understood that the Committee was trying to harmonize the counterpart provisions in the two Draft Treaties as far as possible. For that purpose, he suggested, for Article 10 (Right of Rental), to insert, after the words “commercial rental” in paragraph (1), the words “to the public.” In a corresponding way, he proposed adding the words “to the public” in Article 11 after the words “making available.”

868. The CHAIRMAN thanked the Delegation of Australia for its proposal. He added that identical insertions had to be made in the parallel provisions on the rights of phonogram producers, namely in Articles 17 and 18.

869. *Main Committee I adopted Articles 9 (Right of Distribution), 10 (Right of Rental), 11 (Right of Making Available of Fixed Performances), 16 (Right of Distribution), 17 (Right of Rental) and 18 (Right of Making Available of Phonograms) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov., as clarified by the Delegation of the United States of America and with the amendments proposed by the Delegation of Australia.*

870. The CHAIRMAN pointed out the need to again engage in informal consultations on the remaining Articles of both Draft Treaties and adjourned the meeting.

*Fourteenth Meeting
Thursday, December 19, 1996
Evening*

Absence of quorum

871. The CHAIRMAN opened the meeting, stated that the quorum could not be reached and, after announcing that the informal consultation group would continue its work, immediately adjourned the meeting.

Fifteenth Meeting
Friday, December 20, 1996
Morning

Article 6 (Abolition of Non-Voluntary Broadcasting Licenses) of Draft Treaty No. 1

872. The CHAIRMAN opened the meeting and suggested to first decide about Article 6 (Abolition of Non-Voluntary Broadcasting Licenses) of Draft Treaty No. 1, as set out in document CRNR/DC/82 Prov.

873. Mr. SHEN (China) reiterated his Delegation's urgent desire to have Article 6 deleted.

874. Mr. DA COSTA CORDEIRO (Portugal) strongly supported the deletion of Article 6. He stressed that the abolition of non-voluntary broadcasting licenses would cause prejudice to the just balance between authors and broadcasters that had been reached since the Brussels Act of the Berne Convention (1948). Now that situations of monopoly occurred frequently, non-voluntary broadcasting licenses were needed more than ever. Those licenses permitted dissemination of works and consequently culture as well as the use of archives of broadcasters which were mankind patrimony.

875. The CHAIRMAN stated that there was no consensus on the deletion of Article 6. He put the proposed deletion of Article 6 to vote.

876. *Main Committee I adopted, with 54 votes in favor, 8 votes against and with 9 abstentions, the deletion of Article 6 (Abolition of Non-Voluntary Broadcasting Licenses) of Draft Treaty No. 1.*

Article 7 (Scope of the Right of Reproduction) of Draft Treaty No. 1

877. The CHAIRMAN invited Delegations to make proposals on Article 7 (Scope of the Right of Reproduction) of Draft Treaty No. 1.

878. Mr. VISSER (South Africa), speaking on behalf of the African Group of countries, moved for deletion of the whole of Article 7. In that case, the right of reproduction could be left subject to Article 9 of the Berne Convention and the well-established and flexible principles developed thereunder. That provision of the Convention had coped admirably with every technical development. He was confident that it would continue to do so.

879. Mr. KUSHAN (United States of America) said, that his Delegation supported the deletion of Article 7 only on the condition of acceptance of an appropriate agreed statement for the Records of the Diplomatic Conference.

880. Mr. NØRUP-NIELSEN (Denmark) said that his Delegation, while accepting the deletion of Article 7, thought that in that situation Article 9 of the Berne Convention could be applied with its normal flexibility.

881. *Main Committee I adopted by consensus the deletion of Article 7 (Scope of the Right of Reproduction) of Draft Treaty No. 1*

Article 10 (Limitations and Exceptions) of the WCT (Article 12 of Draft Treaty No. 1)

882. The CHAIRMAN submitted Article 12 (Limitations and Exceptions) of Draft Treaty No. 1 for approval.

883. Mme BOUVET (Canada) à la lumière des délibérations informelles, dit que sa délégation propose de substituer à l'alinéa 1 de l'article 12 du projet de traité n° 1 l'alinéa 1 de l'article 12 inclu dans document CRNR/DC/55, à savoir "les parties contractantes peuvent prévoir dans leur législation nationale d'assortir de limitations ou d'exceptions les droits conférés aux auteurs d'oeuvres littéraires et artistiques en vertu du présent traité dans certains cas spéciaux qui ne portent pas atteinte à une exploitation normale de l'oeuvre ni ne causent un préjudice injustifié aux intérêts légitimes de l'auteur."

884. The CHAIRMAN noted that the proposal made by the Delegation of Canada meant that Article 12 would have the wording of the Basic Proposal except that in paragraph (1) the word "only" would be deleted and in both paragraphs the article "the" preceding the words "normal exploitation" would be replaced by the article "a."

885. Mr. KUSHAN (United States of America) said that his Delegation could support the proposed changes to Article 12, as outlined by the Chairman.

886. Mr. CRESWELL (Australia), supported the proposal by the Delegation of Canada, and added that his Delegation would look forward to seeing the terms of an agreed statement to be made with regard to Article 12(2).

887. Mr. NØRUP-NIELSEN (Denmark) supported the proposal by the Delegation of Canada.

888. Mr. OPHIR (Israel) supported the proposal by the Delegation of Canada.

889. Mr. TIWARI (Singapore) supported the proposal by the Delegation of Canada.

890. The CHAIRMAN noted that the agreed statements would have to be dealt with by the Committee after the approval of the Articles.

891. *Main Committee I adopted by consensus Article 12 (Limitations and Exceptions) of Draft Treaty No. 1, as included in document CRNR/DC/82 Prov., with the amendment proposed by the Delegation of Canada.*

892. The CHAIRMAN noted that all of the substantive Articles of Draft Treaty No. 1 had been adopted.

Articles 5 (Moral Rights of Performers) and 22 (Application in Time) of the WPPT (Articles 5 and 26 of Draft Treaty No. 2)

893. The CHAIRMAN submitted Article 5 (Moral Rights of Performers) of Draft Treaty No. 2 for discussion, pointing out that document CRNR/DC/84 Prov. reflected the results of the informal consultations.

894. Mr. STARTUP (United Kingdom) said that his Government's position on granting moral rights was well known; nevertheless, his Delegation understood the strong desire of other Delegations to see an international treaty for the first time provide for the moral rights of performers, and, therefore, after intensive informal discussions with other Delegations, his Delegation, in a spirit of compromise, was prepared to lift its reservation on Article 5, subject to the following amendments of Article 5(1): the version of the paragraph that appeared in square brackets would be the basis, and the words "[musical] performances" would be replaced by the words "live aural performances or performances fixed in phonograms." The agreement of his Delegation was further subject to the Committee's approval of the amendment to Article 26 proposed by the Delegation of Canada.

895. Mr. KUSHAN (United States of America) said that his Delegation supported the proposal of the Delegation of the United Kingdom.

896. The CHAIRMAN proposed for approval Article 5, paragraph (1), as amended by the Delegation of the United Kingdom, and paragraphs (2) and (3), as set out in document CRNR/DC/84 Prov., together with Article 26, as amended by the Delegation of Canada in document CRNR/DC/44, which would be included as a new paragraph (2) of that Article.

897. Main Committee I adopted by consensus Article 5 (Moral Rights of Performers) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov., with the amendment of paragraph (1) proposed by the Delegation of the United Kingdom, and Article 26 (Application in Time) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov., with the amendment proposed by the Delegation of Canada in document CRNR/DC/44, included as a new paragraph (2).

898. Mr. KEMPER (Germany) asked for the indulgence of the Committee for his offering an additional proposal linked to Article 5. Moral rights in his view should be granted on a universal basis, that is, without any criteria of attachment. The obligation to grant moral rights should not be depending on the nationality of a performer. Therefore, his Delegation proposed the following additional paragraph to be added to Article 3 which concerned beneficiaries of protection: "The right provided for in Article 5 shall be granted to any performer irrespective of his nationality."

899. The CHAIRMAN considered that that proposal would imply reopening of the decision that the Committee had just taken on Articles 5 and 26(2). He asked whether there was any support for reopening this question.

900. El Sr. VÁZQUEZ (España) no considera necesario reabrir las discusiones sobre este punto y apoya la introducción del párrafo tal como propuesto que corresponde al carácter universal de los derechos morales.

901. The CHAIRMAN, after a discussion with the Secretariat, advised the Committee that for reopening a question, a two-thirds majority was required. He asked whether there was any objection to reopening.

902. Mr. KUSHAN (United States of America) indicated that his Delegation had concerns with reopening an accepted compromise text. It was a matter of procedural concern. His Delegation felt it had to insist that the agreed compromise be kept as the Article had been accepted.

903. Mme DE MONTLUC (France) appuie la proposition faite par la délégation allemande mais dans la mesure où il ne s'agit pas d'une disposition essentielle, elle suggère que cette proposition figure dans une simple déclaration.

904. The CHAIRMAN said that a substantial discussion of the matter would not be possible. The Committee had to decide whether this question should be opened or not. It seemed that there was support for the reopening and that there was also opposition against reopening. Therefore, a vote on this procedural question was necessary, and he reiterated that a two-thirds majority was required.

905. *Main Committee I declined, with 21 votes in favor and 37 votes against and with 10 abstentions, to reopen the discussions on Article 5 of Draft Treaty No. 2.*

Article 6 (Economic Rights of Performers in their Unfixed Performances) of the WPPT

906. The CHAIRMAN opened the floor on Article 6 (Economic Rights of Performers in their Unfixed Performances), recalling that in that Article the word “musical” was in square brackets.

907. Mr. KUSHAN (United States of America) said that his Delegation proposed the deletion of the word “musical” and supported the Article as it stood, without that word.

908. *Main Committee I adopted by consensus Article 6 (Economic Rights of Performers in their Unfixed Performances), with the amendment proposed by the Delegation of the United States of America.*

Article 7 (Right of Reproduction) of the WPPT

909. The CHAIRMAN opened the floor on Article 7 (Right of Reproduction) of Draft Treaty No. 2, as drafted in document CRNR/DC/84 Prov., recalling the Committee's decision to delete Article 7 (Right of Reproduction) of Draft Treaty No. 1.

910. Mr. VISSER (South Africa), speaking on behalf of the African Group of countries, proposed the deletion of the words “whether permanent or temporary,” in paragraph (1) and

also the deletion of the entire paragraph (2). He took the view that the remaining Article would be in line with the Committee's position concerning Draft Treaty No. 1 and would also incorporate some of the features of the definition contained in the Rome Convention. He further proposed that an agreed statement should be entered into the Records of the Conference.

911. Mr. KUSHAN (United States of America) supported the proposal made by the Delegation of South Africa on behalf of the African Group. He also agreed with the deletion of the word "musical."

912. Mr. SHEN (China) supported the proposal made by the Delegation of South Africa on behalf of the African Group.

913. M. DEBRULLE (Belgique) appuie pleinement la proposition faite par le groupe africain.

914. Mme DE MONTLUC (France) appuie également la proposition présentée par le groupe africain.

915. Mr. TIWARI (Singapore) supported the proposals made by the Delegations of South Africa and the United States of America.

916. Mr. NØRUP-NIELSEN (Denmark) supported the proposal of the Delegation of South Africa.

917. *Main Committee I adopted by consensus Article 7 (Right of Reproduction) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov., with the amendments proposed by the Delegations of South Africa and the United States of America.*

Article 8 (Right of Modification) of Draft Treaty No. 2

918. The CHAIRMAN opened the floor on Article 8 (Right of Modification) of Draft Treaty No. 2, recalling that there had been little support for that Article.

919. Mr. KUSHAN (United States of America) said that his Delegation could support deletion of Article 8 and its corresponding Article 15 with an agreed understanding that clarified the relationship between the right of modification and the right of reproduction.

920. The CHAIRMAN recalled that the understanding was that the right of reproduction met the need for protection in that respect.

921. *Main Committee I adopted by consensus the deletion of Article 8 (Right of Modification) of Draft Treaty No. 2 with the understanding mentioned by the Chairman.*

Article 11 (Right of Reproduction) of the WPPT (Article 14 of Draft Treaty No. 2)

922. The CHAIRMAN opened the floor on Article 14 (Right of Reproduction) of Draft Treaty No. 2.

923. Mr. VISSER (South Africa), speaking on behalf of the African Group, proposed the deletion of the words “whether permanent or temporary,” in paragraph (1) and the deletion of paragraph (2), in order to bring Article 14 into line with Article 7. He recalled that there would be a proposal for an agreed statement.

924. *Main Committee I adopted by consensus Article 14 (Right of Reproduction) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov., with the amendment proposed by the Delegation of South Africa.*

Article 15 (Right of Modification) of Draft Treaty No. 2

925. The CHAIRMAN opened the floor on Article 15 (Right of Modification) of Draft Treaty No. 2, proposing that a similar decision be taken as on Article 8.

926. *Main Committee I adopted by consensus the deletion of Article 15 (Right of Modification) of Draft Treaty No. 2.*

Article 15 (Right of Remuneration for Broadcasting and Communication to the Public) of the WPPT (Articles 12 and 19, and later jointly Article 20a of Draft Treaty No. 2)

927. The CHAIRMAN proceeded to Article 20a of Draft Treaty No. 2, as contained in document CRNR/DC/84 Prov., and resumed that during the informal consultations an agreement had been reached that the version of paragraph (1), which was not in brackets, should be retained, the brackets appearing within the text of that paragraph should be removed and the text therein retained. Paragraph (4) should have the following wording: “For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.”

928. M. GOVONI (Suisse) souhaite que l’adoption formelle de l’article 20 a), alinéa 3, soit reportée après qu’une décision intervienne au sujet de l’article 4.

929. M. DEBRULLE (Belgique) partage l’opinion exprimée par la délégation suisse, et estime que l’importance des questions à régler requiert de parvenir, au préalable à un compromis sur l’article 4.

930. The CHAIRMAN accepted the proposal made by the Delegation of Switzerland and supported by the Delegation of Belgium to defer the decision on the second sentence of paragraph (3) until after the adoption of Article 4 and asked the Committee whether it could confirm the contents of Article 20a, except for the second sentence of paragraph (3).

931. El Sr. ROGERS (Chile) se pronuncia en favor de la adopción del Artículo relativo al derecho a remuneración por radiodifusión y comunicación al público, en el entendido de que dicho derecho debe ser establecido para los artistas intérpretes o ejecutantes y los productores de fonogramas, conjuntamente, lo cual no aparece en la versión española del documento.

932. The CHAIRMAN agreed that the Spanish version had to be brought into line with the English and French versions which he considered to be correct.

933. Main Committee I adopted by consensus Article 20a (Right of Remuneration for Broadcasting and Communication to the Public) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov., with the amendments pronounced by the Chairman, except for the second sentence of its paragraph (3).

Article 20abis (Right of Digital Broadcasting and Communication to the Public) of Draft Treaty No. 2

934. The CHAIRMAN opened the floor on Article 20abis (Right to Digital Broadcasting and Communication to the Public) of Draft Treaty No. 2.

935. Mr. KUSHAN (United States of America) said that his Delegation agreed to delete Article 20abis, on the condition that there would be an agreed statement clarifying that Treaty No. 2 did not represent a complete resolution on the level of rights of broadcasting and communication to the public that should be enjoyed by phonogram producers and performers in the digital age.

936. Main Committee I agreed by consensus on the deletion of Article 20abis (Right to Digital Broadcasting and Communication to the Public) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov.

Article 16 (Limitations and Exceptions) of the WPPT (Articles 13 and 20, and jointly later Article 20b of Draft Treaty No. 2)

937. The CHAIRMAN recalled that Article 20b (Limitations and Exceptions) of Draft Treaty No. 2 had been agreed on in the informal consultations.

938. Main Committee I adopted by consensus Article 20b (Limitations and Exceptions) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov.

Article 22 (Application in Time) of the WPPT (Article 26 of Draft Treaty No. 2)

939. The CHAIRMAN proposed to decide on Article 25 (Reservations) later, in conjunction with Article 4 (National Treatment), and proceeded to Article 26 (Application in Time) of Draft Treaty No. 2. He recalled that the proposal made by the Delegation of Canada had already been adopted as Article 26(2), so that the text of Article 26, as contained in document CRNR/DC/84 Prov. would become Article 26(1).

940. *Main Committee I adopted by consensus Article 25(1) (Application in Time) of Draft Treaty No. 2, as included in document CRNR/DC/84 Prov.*

Article 23 (Provisions on Enforcement of Rights) of the WPPT (Article 27 of Draft Treaty No. 2)

941. The CHAIRMAN, referring to document CRNR/DC/84 Prov. Corr., drew the attention of the Committee to the fact that the day before it had decided to adopt an Article 27 (Special Provisions on Enforcement of Rights), in accordance with the wording of Article 16 of Draft Treaty No. 1.

942. Mme BOUVET (Canada) fait observer que plusieurs amendements de l'article 4 ont été présentés et sa délégation considère cet article comme étant d'une importance capitale pour le projet de traité n° 2. Par conséquent, elle demande une suspension de séance pour pouvoir étudier lesdits amendements et leurs effets.

943. Mr. KUSHAN (United States of America) supported the proposal by the Delegation of Canada to suspend the meeting with the understanding that that would offer opportunity for informal consultations which might help to advance and achieve a consensus.

944. Mme DE MONTLUC (France) appuie la proposition de la délégation du Canada. Elle considère que l'article 4 est essentiel en raison de son impact quant aux techniques tant analogique que numérique. Elle précise que sa formulation est de nature à influencer la position de sa délégation quant à la signature et à la ratification des traités.

945. The CHAIRMAN suspended the meeting.

[Suspension]

Article 4 (National Treatment) of the WPPT

946. The CHAIRMAN opened the floor on Article 4 (National Treatment) of Draft Treaty No. 2.

947. M. GOVONI (Suisse) constate que l'article 4 est le dernier obstacle à l'aboutissement des travaux conduisant à l'adoption du traité n° 2. Face aux divergentes opinions exprimées sur cette disposition, il indique que sa délégation a soumis un amendement à l'article 4 qui, s'appuyant sur le texte de l'Accord sur les ADPICs, devrait constituer une base de compromis acceptable pour toutes les délégations.

948. Mr. KUSHAN (United States of America) proposed, as a compromise that would be acceptable to his Delegation, two amendments to the proposal of the Delegation of Switzerland, namely to delete, in paragraph (1), the word "specifically" and to insert a second paragraph which said: "The obligation of paragraph (1) shall extend to remuneration systems

for private copying of phonograms in a digital form, except that Contracting Parties shall only be required to extend protection to nationals of another Contracting Party to the degree that the other Contracting Party has established such a remuneration system.” He recalled that that was the text of a paper circulating in the room. The second paragraph of the proposal of the Delegation of Switzerland would then become paragraph (3). He said that his Delegation believed that that was a truly mid-point compromise that reflected the realities of the future digital environment. The obligations outlined in this national treatment clause would, in a mixed remuneration system, for example, only extend to the portion of the system that was digital. In that clause, a fair principle of material reciprocity was recognized, providing for equality in enjoyment of rights between nationals in the varying systems wherever there was equality between those systems.

949. Mme BOUVET (Canada) remercie les délégations de la Suisse et des États-Unis d’Amérique de leurs propositions d’amendement tendant à parvenir à un compromis. Elle souhaite que le mot “specifically” soit mentionné dans la proposition présentée par la Suisse, car sa délégation approuve la formulation anglaise suivante: “with regard to the exclusive rights specifically granted in this Treaty”.

950. Mr. GOVONI (Switzerland) read out his proposal as follows:

“(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to exclusive rights specifically granted in this Treaty and to the right to equitable remuneration provided for in Article 20a of this Treaty.

“(2) The obligation provided under paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 20a(3) of this Treaty.”

In addition, Article 20a(3), second sentence, should be deleted.

951. Mr. KUSHAN (United States of America) said that he was only taking the floor because the Delegation of Canada sought clarification about the way the proposal made by the Delegation of Switzerland would be amended by his Delegation. To his understanding, in the combined text, national treatment was limited to the rights set out in the Draft Treaty. Paragraph (2), as proposed by his Delegation, established the material reciprocity standard. Paragraph (3) excluded the obligation of national treatment with regard to reservations within the meaning of Article 20a.

952. The CHAIRMAN thanked the Delegation of the United States of America for the clarification. The proposals now seemed to be clear.

953. Mr. REINBOTHE (European Communities) recalled that his Delegation, in document CRNR/DC/59, had submitted a proposal on national treatment with respect to Draft Treaty No. 2, where it had taken the approach chosen by the Rome Convention, an approach that had been confirmed by the TRIPS Agreement a few years ago. He stated that his Delegation believed that that approach was the appropriate one for the type of protection that was envisaged in Draft Treaty No. 2. Therefore, just like in those two other agreements, the national treatment obligation should extend to those rights that were specifically granted and

guaranteed in Draft Treaty No. 2 itself. While his Delegation confirmed its proposal, it felt the need to arrive at a compromise that would suit all Delegations. Such a compromise should not deviate from the basic approach and the structure of the national treatment obligation as contained both in the Rome Convention and in the TRIPS Agreement with respect to related rights. Therefore, the proposal submitted by the Delegation of Switzerland went into the right direction. It respected the approach and the structure of the national treatment obligation for related rights which he had just described. In particular, the proposal of the Delegation of Switzerland had some important elements that reflected the wording of the Rome Convention and also, in part, of the TRIPS Agreement. The Delegation of the United States of America proposed the word “specifically” in paragraph (1) to be deleted. However, that word “specifically” was, in the Rome Convention, even combined with the word “guaranteed.” Therefore, his Delegation, just like the Delegation of Canada, insisted on maintaining the word “specifically” in paragraph (1). The proposal submitted by the Delegation of the United States of America fell short of respecting the structure he had just described; in particular, paragraph (2) did not, in his view, only provide for material reciprocity. It rather provided for a clear national treatment obligation on top of the provisions enshrined in Draft Treaty No. 2 for remuneration systems for private copying of phonograms in a digital form; the material reciprocity provision was contained in the latter part of that paragraph submitted by the Delegation of the United States of America. On the contrary, the proposal made by the Delegation of Switzerland was the approach that had been shared by all States party to the Rome Convention and had been confirmed by all those countries that had adhered to the TRIPS Agreement.

954. La Sra. RETONDO (Argentina) expresa su pleno apoyo a la propuesta presentada por la Delegación de Suiza en relación con el trato nacional, pero no se encuentra en condiciones de aceptar la propuesta de la Delegación de los Estados Unidos de América, que introduce referencias a la copia privada que no ha sido considerada en los Tratados en estudio.

955. El Sr. ZAPATA LÓPEZ (Colombia) recuerda en primer lugar que en los Comités de expertos, su Delegación siempre abogó en favor de que los presentes Tratados trataran de la copia privada que considera un buen complemento de los derechos exclusivos que se puedan otorgar. No se adhiere a la propuesta presentada por la Delegación de los Estados Unidos de América en lo referente al trato nacional, en el sentido de que prevé la posibilidad de establecer un trato nacional para los sistemas de remuneración por copia privada que no está considerada en el presente Tratado. Por este motivo y por los motivos claramente expuestos por la Delegación de la Comisión Europea, apoya sin reserva la propuesta presentada por la Delegación de Suiza que respeta el enfoque y la estructura del trato nacional en la Convención de Roma y se ajusta a los alineamientos del Acuerdo sobre los ADPIC.

956. Mr. KUSHAN (United States of America) recalled that, while the Delegation of the European Communities had emphasized the importance of adhering to the structure of the Rome Convention, the new Treaty stood on its own. It was independent from the Rome Convention. He also noted that the proposal from the Delegation of Switzerland, standing alone, would not reach the level of the TRIPS Agreement. He stressed that, with its additional proposal, his Delegation was not seeking a free ride on other countries' remuneration systems for private copying. It was made expressly clear in its proposal that the obligation to extend national treatment with regard to the remuneration system was limited to the degree that the other Contracting Party had established such a system. That was fair treatment. The failure to give serious consideration to what his Delegation believed was a very fair arrangement was

distressing to his Government. He urged Delegations to seriously consider that the text, as amended by his Delegation, would represent a compromise.

957. The CHAIRMAN noted that the Committee had to make a decision. There was a proposal put forward by the Delegation of Switzerland. The European Community and its Member States had earlier submitted a written proposal, but now supported the proposal of the Delegation of Switzerland. The Delegation of the United States of America had also submitted earlier a written proposal, and now it had pronounced a new proposal. The third proposal was the proposal by the Delegation of Switzerland, without the word “specifically” in paragraph (1). It seemed that some clarification was needed.

958. Mme BOUVET (Canada) rappelle que sa délégation a proposé d’ajouter le mot “specifically” à la proposition en discussion et demande si la délégation des États-Unis d’Amérique serait d’accord d’en faire de même dans son texte de sorte que seulement deux propositions seraient en discussion.

959. The CHAIRMAN, answering to the last intervention, noted that the Delegation of Canada could support the proposal from the Delegation of the United States of America if the word “specifically” in paragraph (1) were maintained. Now there were two proposals: the proposal from the Delegation of Switzerland and the proposal from the Delegation of the United States of America, with a variation of the latter proposal suggested by the Delegation of Canada.

960. Mr. KUSHAN (United States of America) said that he wanted to clarify one point about what was on the table. His Delegation, in its earlier intervention, had expressed its willingness to take the proposal from the Delegation of Switzerland as a basis for the discussion, and to that proposal, it had requested two changes, one of which had been referred to by the Delegation of Canada and the second one was the insertion of a paragraph (2), as proposed by his Delegation. Turning to the question of the Delegation of Canada, he answered that his Delegation did not consider the word “specifically” to be necessary in that context, because it did not add anything to the meaning of the phrase. If that was the general understanding, then his Delegation could be flexible in retaining the word “specifically,” but if there was a different understanding, his Delegation would have to explore that matter further.

961. The CHAIRMAN stated that, first, the proposal of the Delegation of the United States of America had to be put to vote, as it was the most remote one from the Basic Proposal. Subsequently, the vote would be on the same text, but with the word “specifically” maintained in paragraph (1).

962. Mme BOUVET (Canada) indique qu’elle appuie la proposition des États-Unis d’Amérique si ceux-ci acceptent d’ajouter le paragraphe 1 suggéré par la délégation de la Suisse.

963. The CHAIRMAN asked the Delegation of the United States of America whether it accepted paragraph (1), as proposed by the Delegation of Switzerland, the word “specifically” being included.

964. Mr. KUSHAN (United States of America) said that he understood the question put as being if his Delegation would accept the word “specifically,” the other part of the question

being that paragraph (2) of the proposal by his Delegation would be inserted in the proposal of the Delegation of Switzerland. If that was the condition, then his Delegation would accept the word “specifically” in paragraph (1).

965. The CHAIRMAN noted that now the procedure could be simplified. The proposal of the Delegation of the United States of America, as now amended, was to be put to vote first. It consisted of paragraph (1), as proposed by the Delegation of Switzerland, paragraph (2), as proposed by the Delegation of the United States of America, and paragraph (3), as proposed by the Delegation of Switzerland. That was a package. He invited Delegations who intended to vote “yes” to indicate their vote.

966. M. SÉRY (Côte d’Ivoire) demande des éclaircissements sur les propositions en présence qui vont faire l’objet du vote.

967. Mr. MILESI FERRETTI (Italy) expressed concern about the procedure, because of the speed of the process, it was difficult to follow.

968. The CHAIRMAN noted that there were two clear proposals.

969. M. DEBRULLE (Belgique) rappelle que la délégation de la Suisse a présenté formellement une proposition appuyée par d’autres délégations et qu’en conséquence il en soit présentement tenu compte.

970. The CHAIRMAN explained that there were written proposals and an oral proposal of the Delegation of Switzerland which corresponded to a non-paper being circulated in the room. The Committee so far had been willing and able to work on the basis of documents which were not official documents of the Conference.

971. Mme DE MONTLUC (France) fait remarquer que sa délégation avait manifesté depuis un long moment le désir de prendre la parole afin de contribuer à l’émergence d’une solution constructive au présent débat. Elle regrette cet incident et, face aux nombreuses solutions proposées, elle propose néanmoins de se référer à l’alinéa 4 de la proposition faite par la délégation de la Communauté européenne et de la compléter, dans le sens évoqué par la délégation du Canada, en ajoutant le mot “existence” avant les termes “spécifiquement garantie”.

972. Mr. SHEN (China) also felt, as the Delegation of Côte d’Ivoire had expressed, that clarity was needed about what the vote was on and how many proposals were to be decided on.

973. The CHAIRMAN noted that there was sufficient reason to pronounce the proposals once again.

974. M. GOVONI (Suisse) demande que la proposition qu’il a formulée oralement, et dont le texte a été distribué, soit mise au vote.

975. The CHAIRMAN asked the Delegation of Switzerland to pronounce the proposal very slowly once more. He would then invite the Delegation of the United States of America to do likewise. He indicated that the latter proposal would be put to vote first.

976. Mr. GOVONI (Switzerland) read out his proposal: Replace Article 4 by the following Article:

“(1) Each Contracting Party shall accord to nationals of other Contracting Parties as defined in Article 3(2) the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and to the right to equitable remuneration provided for in Article 20a of this Treaty.

“(2) The obligation provided under paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 20a(3) of this Treaty.”

977. Mr. KUSHAN (United States of America) said that his Delegation moved to amend the proposal made by the Delegation of Switzerland by inserting the following paragraph, after paragraph (1): “The obligation of paragraph (1) shall extend to remuneration systems for private copying of phonograms in a digital form, except that Contracting Parties shall only be required to extend protection to nationals of another Contracting Party to the degree that the other Contracting Party has established such a remuneration system.”

978. Mr. SAN DIEGO (Philippines) said that his Delegation would like to hear from the Delegation of Switzerland whether it accepted the amendment proposed by the Delegation of the United States of America, because that would reduce the options.

979. M. GOVONI (Suisse) indique que sa délégation a présenté une proposition qui a été appuyée par plusieurs délégations, et qu’elle n’entend pas revenir sur sa position notamment pour cette raison.

980. *Main Committee I rejected, with 4 votes in favor, 60 votes against and with 17 abstentions, the proposal of the Delegation of the United States of America.*

981. The CHAIRMAN announced that the next item would be to vote on the proposal by the Delegation of Switzerland.

982. *Main Committee I adopted, with 88 votes in favor, 2 votes against and with 4 abstentions, the proposal of the Delegation of Switzerland.*

983. The CHAIRMAN stated that Article 4 was now inserted in Draft Treaty No. 2, in the form proposed by the Delegation of Switzerland. He pointed out that the renumbering of the paragraphs and cross-references in the Treaty would be done by himself and the Secretariat.

Titles of the Draft Treaties

984. The CHAIRMAN suggested that the Committee consider the titles of the Draft Treaties. He mentioned that the Director General of WIPO had proposed that the titles of the Draft Treaties would be as follows: for Draft Treaty No. 1, the title would be “WIPO Copyright Treaty”; and, for Draft Treaty No. 2, the title would be “WIPO Performances and

Phonograms Treaty.” The Chairman pointed out that those proposals had been met with consensus during the informal consultations.

985. *Main Committee I adopted the titles of the Draft Treaties, as proposed by the Director General of WIPO.*

Adoption of the texts of the Draft Treaties

986. The CHAIRMAN proposed that the text as a whole be adopted by the Committee. He indicated that, if so adopted, it would next go before the Drafting Committee, and if there were no changes there, it would then be presented to the Plenary. But if there were changes or questions in the Drafting Committee, it would have to come back to Main Committee I for further consideration.

987. *Main Committee I adopted the texts of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.*

Agreed statements concerning the WIPO Copyright Treaty

988. The CHAIRMAN noted that there had been requests from Delegations that proposals for statements could be made. Because of the time constraints, he proposed a shortened and streamlined procedure for most of those statements. He stated that he would pronounce the text of each statement in English, slowly, and one by one, indicating the proponents of each statement and the Article to which it referred.

989. Seeing no objection, the Chairman announced that the Delegation of Australia had proposed, that, in the context of Article 2 of Draft Treaty No. 1, the following statement would be included in the Records of the Conference: “It is understood that, in applying Article 2 of this Treaty, the expression ‘country of the Union’ in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression ‘country outside the Union,’ in those Articles in the Berne Convention, will in the same circumstances be read as if it were a reference to a country that is not a Contracting Party to this Treaty and that ‘this Convention’ in Articles 2(8), 2bis(2), 3, 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 2 to 6 of the Berne Convention to a ‘national of one of the countries of the Union’ will, when these Articles are applied in this Treaty, mean in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organization.” He noted that there was no objection to the statement. He added that, when the final numbering of the provisions of the Treaty was established, the reference to Article 2 of Draft Treaty No. 1 might change to Article 3 and that similar renumbering was possible in the case of other Articles to which agreed statements related.

990. He indicated that the Delegation of India had proposed the following statement to be included in the Records of the Conference, with reference to Article 4 of Draft Treaty No. 1: “The scope of protection for computer programs under Article 4 of this Treaty, read with

Article *1bis*, is consistent with Article 2 of the Berne Convention, and on a par with the relevant provisions of the TRIPS Agreement.” He noted that there was no objection to that statement.

991. He stated that the Delegation of India had proposed the following statement concerning Article 5 of Draft Treaty No. 1: “The scope of protection for compilations of databases under Article 5 of this Treaty, read with Article *1bis*, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.” He noted that there was no objection to that statement.

992. He offered, *ex officio*, the following statement concerning Articles 8 and 9 of Draft Treaty No. 1: “As used in these Articles, the expression ‘copies and originals’ being subject to the right of distribution and the right of rental, refer exclusively to fixed copies that can be put into circulation as tangible objects.” He noted that there was no objection to the statement.

993. He stated that the Delegation of the United States of America had proposed, with reference to Article 9 of Draft Treaty No. 1, the following statement: “It is understood that the obligation under Article 9(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who under that Contracting Party’s law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.” He noted that there was no objection to that statement.

994. He said that the Delegations of Singapore and South Africa and the Group of Latin American and Caribbean countries had proposed a statement in reference to Article 10 of Draft Treaty No. 1.

995. Mr. TIWARI (Singapore) pointed out that, in the written proposal on that point, the word “physical” had been added before the word “facilities,” and after the word “communication,” there had been the words “to the public.” He asked for clarification on those discrepancies.

996. The CHAIRMAN indicated that, in the informal consultations, those words had been inserted as clarifying expressions.

997. Mr. TIWARI (Singapore) said that the addition of the word “physical” did not appear objectionable. However, he felt that the phrase “communication to the public” was useful, and suggested that it be reinserted after the second “communication” in the second line.

998. The CHAIRMAN pointed out that it had been felt in the informal consultations that the words “to the public” would not be necessary because, in the statement, reference was only made to the communication which was the operative term in the clauses on the right of communication in the Berne Convention, and in the Draft Treaty. He said that, in his opinion, that operative term in the Draft Treaties was always combined with the expression “to the public.” He asked if the Delegation of Singapore would accept that the statement, when it referred to the expression “communication,” was always used in combination with the expression “to the public.”

999. Mr. TIWARI (Singapore) agreed with the clarification given by the Chairman.

1000. The CHAIRMAN stated that there appeared to be agreement on the agreed statement to Article 10 of Draft Treaty No. 1, which read as follows: “If it is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.”

1001. He said that the Delegations of the United States of America and of India had proposed the following statement to Article 12 of Draft Treaty No. 1: “It is understood that the provisions of Article 12 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 12(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” He stated that this statement would be applicable, *mutatis mutandis*, also to Draft Treaty No. 2, and asked the Committee if there were any objections to that statement.

1002. Mr. CRESWELL (Australia) indicated that he had no problem with the statement just read by the Chairman. He referred back to Article 10, and recalled, that a part of the agreement regarding the final form of Article 10, in particular the reference to the Articles of the Berne Convention, was that Article 10 would be without prejudice to other Articles of the Berne Convention, such as Article 11*bis*(2). He said that his Delegation had dropped its request to include a statement to that effect, on the understanding that the Chairman would make a declaration that the right of communication would have no application to the possibility of making statutory licenses with regard to retransmission. He also pointed out that, with regard to Article 12, the statement that was due to have been made or proposed in the name of the Delegation of Australia with regard to Article 6, * would be appropriate to be made also in relation to Article 12. It was in the context of Article 12 that the Chairman’s notes to the Basic Proposal made reference to the minor reservations and exceptions, and the two paragraphs of the proposed statement under Article 6 were appropriate, in the view of his Delegation, to be made or proposed in the context of Article 12.

1003. The CHAIRMAN, in response to the intervention by the Delegation of Australia, proposed that the Committee add one more sentence to the statement concerning Article 10, as follows: “It is further understood that nothing in Article 10 precludes a Contracting Party from applying Article 11*bis*(2).” He noted that, with that addition, the statement had been adopted.

* That proposed statement read as follows:

“Australia accepts it being understood that in respect of the rights dealt with in this Treaty, Contracting Parties remain free to introduce any legislation they think necessary in the public interest in order to prevent or remedy any abuse of rights that may restrict or prevent competition.

“As was referred to in the Stockholm (1967) and Brussels (1948) Diplomatic Conferences, Australia accepts it being understood that in respect of rights dealt with in this Treaty, Contracting Parties may make minor reservations particularly for the needs of members of the public with disabilities, religious ceremonies, military bands and the requirements of education and popularisation.”

1004. Mr. NØRUP-NIELSEN (Denmark) indicated that his Delegation, in respect to Article 12, would have liked to see some examples of the traditional exceptions, such as education, research, library activities and uses by persons with handicaps.

1005. The CHAIRMAN confirmed that the position of the Delegation of Denmark would be reflected in the Minutes of the Conference, as well as the position of the Delegation of Australia regarding the so-called minor reservations.

1006. He said that the Delegation of the Republic of Korea had proposed the following statement regarding Article 13 of Draft Treaty No. 1: "It is understood that, in applying this Article, Contracting Parties are given a discretionary power to make materials or works which are not original nor protected by law, and those in which the exclusive rights of authors are limited by law, to be used freely or against equitable remuneration."

1007. Mr. VISSER (South Africa) remarked that, earlier in the Committee, the Delegation of South Africa had indicated that it would also propose a statement in respect of Article 13. His Delegation had decided not to do so in view of the fact that it was a new provision which created a very delicate balance between the various interested parties, and, as a consequence, it thought it would be dangerous at the given stage to try and freeze certain positions in respect of that Article.

1008. Mr. OLSSON (Sweden) associated his Delegation with the intervention by the Delegation of Denmark.

1009. The CHAIRMAN noted that there was no consensus on the last proposal.

1010. Mr. KUSHAN (United States of America) associated his Delegation with the intervention by the Delegation of South Africa in relation to the delicate balance that had been crafted. He stated that he believed that the formulation that had been offered as an understanding might not be very helpful in maintaining that delicate balance.

1011. The CHAIRMAN asked the Delegation of the Republic of Korea if it would be acceptable to have only reflected in the Minutes of the Conference the discussions on Article 13, and noted the agreement of that Delegation.

1012. He said that the Delegation of the United States of America had proposed the following statement in regard to Article 14 of Draft Treaty No. 1: "It is understood that the reference to 'infringement of any right covered by this Treaty or the Berne Convention' includes both exclusive rights and rights of remuneration. It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty." He observed that this statement was approved by the Committee. He added that this agreed statement would be applied, *mutatis mutandis*, also to Draft Treaty No. 2.

Agreed statements concerning the WIPO Performances and Phonograms Treaty

1013. The CHAIRMAN read the proposed statement from the Delegation of the United States of America regarding Article 1 of Draft Treaty No. 2: “It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyrights in works embodied in phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice-versa.” He noted the approval of the Committee to this statement. He read the second sentence of the statement regarding Article 1: “It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.” He noted the approval of the Committee to this statement.

1014. He proposed the following statement relative to the definition of “publication” in Article 2(e) of Draft Treaty No. 2, and as it appeared in Articles 9, 10, 16 and 17: “As used in these Articles, the expressions ‘copies’ and ‘originals and copies,’ being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.” He noted that the Committee approved that statement.

1015. The Chairman read the proposed statement from the Delegation of Belgium concerning Article 3(2) of Draft Treaty No. 2: “Aux fins d’application de l’article 3.2, les parties contractantes entendent par fixation la réalisation finale de la bande mère.” He noted that it was approved by the Committee.

1016. The CHAIRMAN read the statement proposed by the Delegation of the United States of America in regard to Article 20 of Draft Treaty No. 2: “It is understood that Article 20 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by phonogram producers and performers in the digital age. Contracting Parties were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have, therefore, left the issue to future resolution.” He noted that the Committee approved the statement.

1017. Mr. REINBOTHE (European Communities) offered the following statement concerning Article 3 of Draft Treaty No. 2: “It is understood that the reference in Articles 5(a) and 16(a)(iv) of the Rome Convention, to ‘national’ of another Contracting State will, when applied to this Treaty, mean in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is a member of that organization.”

1018. The CHAIRMAN observed that the proposed statement by the Delegation of the European Communities was a useful clarification.

1019. Mr. SILVA SOARES (Brazil) stated that, regarding the proposed statement by the Delegation of the United States of America, his Delegation felt that it was not appropriate at this stage to speak of “Contracting Parties”, but rather to use the term “Delegations.”

1020. Mr. KUSHAN (United States of America) pointed out that it was not the Delegation of the United States of America which had made the last statement, but rather the Delegation of the European Communities.

1021. The CHAIRMAN asked the Delegation of the United States of America if it supported the proposed statement by the Delegation of the European Communities, and noted that both that Delegation and the Committee did support the proposed statement. He then referred to the change in wording proposed by the Delegation of Brazil, to use the word "Delegations" rather than "Contracting Parties," and noted that there was agreement on the latter change.

1022. Mr. VISSER (South Africa) proposed the following statement concerning Article 20a of Draft Treaty No. 2: "It is understood that Article 20a does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore, where such phonograms have not been published for commercial gain."

1023. The CHAIRMAN noted that the proposed statement by the Delegation of South Africa was approved by the Committee.

1024. He indicated that still a proposed statement by the Delegation of Belgium was to be approved by the Committee, and then adopted by the Conference.

1025. Mr. STARTUP (United Kingdom) stressed that his Delegation did not agree to the statement proposed by the Delegation of Belgium being adopted by the Conference, and suggested that it be simply recorded in the Records of the Conference.

1026. The CHAIRMAN, noting that there was no consensus on that statement, asked the Delegation of Belgium if its statement being recorded in the Records of the Conference would be acceptable to it.

1027. M. DEBRULLE (Belgique) fait remarquer que le contacts pris avec les milieux professionnels n'ont pas abouti à une formulation satisfaisante du critère de la fixation. Il suggère de trouver une solution de compromis avec la délégation du Royaume-Uni afin de mettre au point une déclaration acceptable pour toutes les autres délégations.

1028. The CHAIRMAN said that there was no choice but to have the proposed statement by the Delegation of Belgium appear in the Records of the Conference, and suggested that before the final plenary session, the Delegations of Belgium and the United Kingdom might negotiate a compromise on the question.

1029. Mr. CRESWELL (Australia) made the following statement regarding Article 8 of Draft Treaty No. 1 and Articles 9 and 16 of Draft Treaty No. 2: "Australia agrees to paragraph (2) in Article 8 in the WIPO Copyright Treaty, and in Articles 9 and 16 in the WIPO Performances and Phonograms Treaty, on the understanding that the paragraph will not affect existing, as well as future, national legislation providing for the importation of copies of works and phonograms that have been made by or with the consent of the rightholders."

1030. Mr. SILVA SOARES (Brazil) made the following statement regarding Article 8 of Draft Treaty No. 1 and Articles 9 and 16 of Draft Treaty No. 2, which he noted would have to

be renumbered: “Brazil understands that Article 8 of the WIPO Copyright Treaty, and Articles 9 and 16 of the WIPO Performances and Phonograms Treaty, do not in any way affect the rights the Contracting Parties have to determine the conditions under which the right of distribution provided for in these Articles is exhausted after the first sale or transfer of ownership of the original or a copy of the work or a fixed performance or a phonogram, with the authorization of the rightholder, as covered by these Treaties.”

1031. The CHAIRMAN noted that the statements would be reflected in the Records of the Conference.

1032. Mr. YAMBAO (Philippines) clarified that the process just taking place in the Committee was an important one, in which various Delegations were clarifying their obligations under the Treaties which had been agreed upon. He stated that, if the statements only meant to be manifestations by each Delegation of its understanding of the Treaty, his Delegation would not scrutinize them. However, if the statements were meant to be a basis for interpretation, then, in the absence of all of those manifestations in writing, his Delegation would have a general reservation about their validity as interpretation tools.

1033. The CHAIRMAN responded that the understanding of the Delegation of the Philippines was accurate, in that the proposals for statements would be made available in written form, they would be presented to the Plenary of the Conference, and the statements by single Delegations, on their own behalf, would only be reflected in the Records of the Conference as they had been pronounced.

1034. Mlle KALLINIKOU (Grèce) souhaite se réserver le droit de faire une déclaration générale sur le droit moral des artistes à la fin de la conférence diplomatique.

1035. Mr. WIERZBICKI (New Zealand) associated his Delegation with the intervention by the Delegation of Australia relative to Article 8 of the WIPO Copyright Treaty, and Articles 9 and 16 of the WIPO Performances and Phonograms Treaty. He also confirmed his Delegation’s understanding that the three Articles mentioned did not in any way affect the extent and scope of any conditions which national legislation might provide for in respect of the right of distribution provided for in those Articles.

1036. Mr. TIWARI (Singapore) associated his Delegation with the intervention by the Delegation of Australia, as supported by the Delegation of New Zealand, to the effect that the provisions on the right of distribution in the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty did not affect his country’s parallel import regime in any way.

1037. Mme DE MONTLUC (France) fait part de ses vives préoccupations quant à les déclarations faites par les délégations de Singapour et de l’Afrique du Sud au sujet de l’article 10 du projet de traité n° 1 et précise que sa délégation ne saurait accepter que cette déclaration ait la nature d’une “déclaration concernée”.

1038. Mr. KUSHAN (United States of America) referred to the proposal by the Delegation of Australia to incorporate certain statements, and stated that his Delegation would like to reserve its position on that question until it had had a chance to study the proposals in relation to Article 12 of Draft Treaty No. 1.

1039. M. SÉRY (Côte d'Ivoire) ne souhaite pas que l'on revienne sur les déclarations concertées puisque le débat a déjà pris place au moment où les propositions ayant cette nature ont été formulées.

1040. The CHAIRMAN noted that the series of statements would be put before the Plenary in a working document so the Delegations would have the opportunity to examine them.

1041. La Sra. JIMÉNEZ HERNÁNDEZ (México) se adhiere a la propuesta de declaración presentada por Brasil.

1042. Mrs. BOUVET (Canada) stated that her Delegation agreed with the prior statement regarding paragraph (2) of Article 8 of Draft Treaty No. 1, and Articles 9 and 16 of Draft Treaty No. 2, on the understanding that those provisions would not affect existing, as well as future, national legislation providing for importation of copies of works, performances and phonograms that had been made and sold by or with the consent of the right holders.

1043. The CHAIRMAN stated that the Committee had heard the last declaration, and that the declarations would be put into the Records of the Conference. The substantive text of the Treaties would be combined with the text from Main Committee II, and then the Conference would proceed accordingly.

1044. Mr. FICSOR (Assistant Director General of WIPO) announced that the Drafting Committee would begin its work immediately.

1045. The CHAIRMAN adjourned the meeting.

Sixteenth Meeting

Friday, December 20, 1996

Evening

1046. The CHAIRMAN stated that he was opening what might be presumably the last meeting of Main Committee I. He mentioned that, in the preceding meeting, when the texts of the Draft Treaties were finalized, there had also been a series of proposals for agreed statements, as to which it had been agreed that they should be presented to the Plenary of the Conference. He pointed out that, when the Articles were approved, one of the Articles in Draft Treaty No. 1 had been deleted, and that deletion had been subject to the approval of another agreed statement on the same question.

1047. Mr. KUSHAN (United States of America) mentioned that his Delegation had been working with a number of other Delegations to try to fashion a statement that was to be created as part of the understanding that would accompany the deletion of Article 7 in Draft Treaty No. 1. His Delegation had been asked to present that proposal, which did not represent the views of any Delegation, but rather represented a composite of views of a number of Delegations which had expressed varying perspectives on the issues raised by the deleted

Article 7. He noted that there would be a statement relating to both Draft Treaty No. 1 and Draft Treaty No. 2. With respect to the reproduction right issue, because Article 7 had been deleted in Draft Treaty No. 1, that statement would be an agreed statement in relation to Article 1(4) of Draft Treaty No. 1, which incorporated provisions of the Berne Convention. He read the following: "Contracting Parties confirm that the reproduction right as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention." He said that that was the full text of the statement for Draft Treaty No. 1, the WIPO Copyright Treaty. He indicated that there was a parallel statement which had been modified only to refer to the relevant provisions in Draft Treaty No. 2, and he read the following: "Contracting Parties confirm that the reproduction right as set out in Articles 7 and 14, and the exceptions permitted thereunder through Article 20b, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles." It was his belief that those statements conformed to the understanding that had been reached pursuant to the discussions related to Article 7 on the reproduction right in Draft Treaty No. 2. He invited the Secretariat to indicate its views on the second sentence in those statements because it was his understanding that the second sentence was a statement which had been accepted in substance for a fairly long time.

1048. Mr. FICSOR (Assistant Director General of WIPO) said that an understanding had been prevailing since 1982 in the international copyright community. In the beginning of the 1980's, there were two sessions of a Committee of Governmental Experts convened jointly by WIPO and Unesco. At the second session of that Committee, in Paris in June 1982, recommendations and principles had been adopted about the copyright questions in connection with the use of works in computer systems. In the recommendations and principles, it was stated several times, both in respect of copyright and in respect of neighboring rights, that storage of works in an electronic medium was to be considered reproduction. He repeated that what was included in the second sentence concerning both the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty reflected what was an agreement in the copyright community, and what had been an agreement for nearly 15 years.

1049. Mr. MILESI FERRETTI (Italy) supported the proposed statement by the Delegation of the United States of America.

1050. El Sr. ZAPATA LÓPEZ (Colombia) expresa su pleno apoyo a la propuesta de declaración concertada relativa al derecho de reproducción, a la que se adhieren muchas Delegaciones del Grupo Latinoamericano y del Caribe. Considera que dicha declaración se ajusta plenamente a lo que el Artículo 9 del Convenio de Berna establece y no interfiere en nada con la facultad que tienen los países de la Unión de establecer reservas al derecho de reproducción.

1051. Mr. HENNESEY (Ireland), speaking on behalf of the European Community and its Member States, supported the proposed statement. He indicated that the language of the statement had emerged through exchanges during the day. It might not have reflected what any Delegation would have wished ultimately; however, it was an acceptable basic proposition of well-established principles. He said that his Delegation agreed with what the Assistant

Director General of WIPO had said, and with what had been pronounced by the Delegation of Colombia.

1052. Mr. KEMPER (Germany) supported the proposed statement. He observed that the second sentence, as the Assistant Director General of WIPO had pointed out, corresponded to the established interpretation of the Berne Convention. He felt that it was innocent and harmless, hardly sufficient, but he said that his Delegation accepted it.

1053. El Sr. UGARTECHE VILLACORTA (Perú) se adhiere a la opinión expresada por la Delegación de Colombia acerca de la declaración concertada relativa al derecho de reproducción.

1054. Mr. SILVA SOARES (Brazil) supported the first sentence of the proposed statement. However, he did not think that “Contracting Parties” would be the exact term for this statement. He suggested that the Delegations present at the Diplomatic Conference confirm their positions. As to the second sentence, it was his Delegation’s understanding that the access to make a work perceptible by browsing, and the transmission of a work through a computer network in the course of a temporary or non-permanent storage resulting from a technical procedure, did not infringe the exclusive rights of reproduction within the meaning of Article 9 of the Berne Convention.

1055. Mr. GYERTYÁNFY (Hungary), speaking on behalf of the Group of Central European countries and the Baltic States whose Delegations were present in the room, namely, Bulgaria, Croatia, The former Yugoslav Republic of Macedonia, Hungary, Poland, Romania, Slovakia, and Slovenia, supported the full text of the proposed statement. He associated his Delegation with the interventions by the Delegations of the United States of America, Colombia and Germany, as well as with the intervention by the Assistant Director General of WIPO.

1056. Mr. SHEN (China) stated that his Delegation would support the proposed statement if the word “may” was inserted before the word “constitute.”

1057. El Sr. ANTEQUERA PARILLI (Venezuela) expresa el apoyo de su Delegación a las propuestas de declaraciones concertadas relativas al derecho de reproducción, que ambas son fieles al concepto de reproducción, independientemente de que las legislaciones nacionales puedan prever ciertas limitaciones. Destaca que no cabe duda de que el almacenamiento electrónico constituye una reproducción. En lo que se refiere a la propuesta de declaración para el proyecto de Tratado N° 2, sugiere modificar su redacción en el sentido de remplazar la frase según la cual “el almacenamiento de una obra protegida en forma digital constituye una reproducción” por lo siguiente: “el almacenamiento digital de una interpretación o de una ejecución o de un fonograma, constituye una reproducción”.

1058. Mr. KIM (Republic of Korea) stated that his Delegation had a problem in accepting the proposed statement. He said that there should be a balance of the various interests in the digital environment. He felt that the second sentence of the statement did not address the necessary concerns, and, as such, his Delegation favored deletion of the entire statement, and at the very least, deletion of the second sentence.

1059. El Sr. ROGERS (Chile) se adhiere plenamente a la declaración concertada relativa al derecho de reproducción y considera que las inquietudes que puedan sentir algunas

Delegaciones encuentran su solución en la misma que hace aplicable el Artículo 9 del Convenio de Berna, incluyendo su párrafo 2 el cual se refiere a la posibilidad de establecer excepciones.

1060. El Sr. TEYSERA ROUCO (Uruguay) apoya las propuestas de declaraciones concertadas que han sido presentadas así como las argumentaciones avanzadas por las diferentes Delegaciones incluyendo la de Venezuela.

1061. Mr. AYYAR (India) expressed the opinion that it would be extremely strange if the Diplomatic Conference concluded without at least some sort of statement concerning the core of the digital agenda. It was necessary that there be some sort of a formulation, which would send a message to the world that the process of adjusting the digital agenda had begun at WIPO. He observed that the Delegations had not been able to come to a definitive conclusion, in the informal consultations, on treaty language. He believed that, because that was a new phase in which all of the participants might not have been fully aware of the implications, and given the fluidity of the situation in the market place as with other technological practices, it was impossible to come to agreement on treaty language. He remembered that the consensus in the informal consultations had been that those Articles should be dropped, but an appropriate statement should be agreed upon in the Plenary for the Records of the Conference. Therefore, he stressed that there should be some sort of a statement agreed to. He pointed out that a statement had been tabled, and, in his Delegation's view, it might not be perfect, since it was possible for countries to make their own interpretations of such a statement, but subject to those understandings, he strongly felt that the Conference should adopt the statement. He mentioned that the question of what type of exceptions and limitations should be enacted could also be debated, but he felt that it was possible for national legislations to cope with a variety of situations, such as the issue of temporary reproduction as being integral to the technological process. It was understood that the proposed amendments would not reduce the discretion vested in the Member States under the Berne Convention in the matter of limitations and exceptions. Another aspect was the question of liability of the carriers. But he pointed out that that was part of a larger question, not limited to copyright, and the Conference needed to address it in a larger context. He suggested that there was a need for WIPO to establish procedures for continuously reviewing how the technical standards were evolving, and how the market places were evolving, in conjunction with the new Treaties. He offered his support for the proposed statement.

1062. El Sr. ESPINOZA PAO (Nicaragua), a la luz de las explicaciones de la Secretaría y de la intervención de la Delegación de Colombia, expresa su apoyo a las propuestas de declaraciones concertadas, destacando los esfuerzos realizados por la Delegación de los Estados Unidos de América.

1063. Mr. KUSHAN (United States of America) supported the intervention by the Delegation of India. He reminded the Conference that the statement proposed by his Delegation was the work of a number of Delegations, and embodied much work by all of them.

1064. Mr. SHEN (China) indicated that his Delegation, while it had a right to its own opinion, would not oppose the proposed statement.

1065. Mr. ABBASI (Pakistan) indicated that his Delegation was uncertain as to the legal status of the proposed statement. In his understanding, several statements had been adopted by consensus, which gave them a certain status, especially if the statement served to interpret

the treaty language. Those statements also involved the intent of the framers of the Treaties. He felt that many Delegations were willing to go along with the proposed statement, provided that some Delegations could have their own interpretation of the statement, in which case the statement did not enjoy the consensus of the Conference. However, a statement without consensus could not be given the same status as a statement adopted by consensus by all Delegations which were present in the Conference. Therefore, he stated that his Delegation had a problem with the proposed statement.

1066. Mr. SILVA SOARES (Brazil) agreed with the intervention by the Delegation of Pakistan. He stated that the statement could not be adopted based on consensus, since his Delegation could not agree with the second sentence of the proposed statement.

1067. La Sra. JIMÉNEZ HERNÁNDEZ (México) se expresa en favor de la declaración propuesta por la Delegación de los Estados Unidos de América en el entendido que los países pueden hacer las precisiones necesarias y los matices que requiera su aplicación interna.

1068. M. SÉRY (Côte d'Ivoire) souhaiterait savoir si le fait de reprendre les travaux de la Commission principale I sans procéder au préalable à un vote sur la décision qui a été prise antérieurement en la Commission , est conforme aux règles de procédure.

1069. The CHAIRMAN responded, observing that Main Committee I had made a decision on the substantive clauses of the two Draft Treaties. The Committee, in the same session, adopted and decided to present to the Plenary a number of proposals for agreed statements. The decisions on the Articles, and specifically the deletion of a certain Article, had been made on the condition that there would be an agreed statement on the subject matter dealt with in that deleted Article. In general, the agreed statements might refer to any Articles, or any subject matter dealt with in the Draft Treaties. He pointed out that the Delegation which had proposed this statement explained that the statement referred to Article 1(4) of Draft Treaty No. 1, and the second statement referred to the Articles which dealt with the right of reproduction in Draft Treaty No. 2. It was the Chairman's opinion that it was clearly in the competence of Main Committee I to consider and possibly adopt, and propose to the Plenary of the Conference, an agreed statement to that effect. He felt that there were no procedural problems in that matter.

1070. Mr. CRESWELL (Australia) said that the second sentence of the proposed statement probably reflected the effect of the copyright law of Australia. However, he referred to the intervention by the Delegation of Brazil, and observed that the proposed statement did not have the approval of all Delegations at the Conference. He, therefore, suggested that the statement might reflect that it was supported by a majority of the Delegations.

1071. Mme BOUVET (Canada) dit que, sur la base des explications fournis par le sous-directeur général de l'OMPI, ainsi que des observations présentées par les délégations de Colombie et d'Allemagne, sa délégation appuie les propositions de déclarations relatives au droit de reproduction.

1072. La Sra. ROMERO ROJAS (Honduras) expresa su pleno apoyo a las propuestas de declaraciones concertadas relativas al derecho de reproducción.

1073. El Sr. ALVAREZ (Costa Rica) apoya la propuesta de declaración presentada por la Delegación de los Estados Unidos de América.

1074. The CHAIRMAN reiterated that, as had been asked in prior interventions, the statements made by single Delegations were going to be recorded in the Records of the Diplomatic Conference. He asked the Committee if it could approve by consensus the first sentence in the proposed statement by the Delegation of the United States of America.

1075. Main Committee I adopted by consensus the first sentence of the proposal by the Delegation of the United States of America.

1076. Mme YOUM DIABE SIBY (Sénégal) exprime ses préoccupations quant à la “déclaration concertée” sur le droit de reproduction. Il indique que la réaffirmation du principe de l’article 9 de la Convention de Berne ne poserait pas de difficultés; en revanche, ce n’est pas le cas pour les exceptions qui semblent vider de son contenu le principe même. Il souhaite avoir de plus amples explications à ce sujet de la part des délégations qui ont élaboré cette déclaration concertée.

1077. The CHAIRMAN explained that the statement referred to Article 9 of the Berne Convention, the exceptions thereunder, and to the scope of a right of reproduction, its functioning in the digital environment and to the functioning of, and the application of, the clause, or clauses, on exceptions under Article 9 in the Berne Convention. He stressed that the proposed statement did not by any means preclude the normal interpretation of the Berne Convention, since it referred to Article 9 of the Berne Convention. He felt that the same seemed to be true as far as the second proposed statement was concerned, as the Articles on the right of reproduction of Draft Treaty No. 2 clearly were subject to possible limitations and exceptions. He stated that there should be no concerns on the possible limitations or exceptions regarding the right of reproduction, and that they might be applied according to the established interpretation of Article 9 of the Berne Convention. He pointed out that the interpretation of Draft Treaty No. 2 closely, if not identically, followed the interpretations of the Berne Convention.

1078. M. SÉRY (Côte d’Ivoire) demande des éclaircissements quant au mode de procédure d’adoption d’une déclaration.

1079. The CHAIRMAN explained that, according to the Rules of Procedure for the Conference, the main aim and objective was to reach decisions by consensus. Main Committee I had always followed that objective. When consensus was not possible, the decision would be taken by a majority vote. Also, it was the task of Main Committee I to present to the Plenary any agreed statements upon which the Committee had favorably decided.

1080. M. SÉRY (Côte d’Ivoire) est de l’avis qu’une déclaration engage tous les États et qu’elle est faite par toutes les parties contractantes. Il ne peut être question de toutes les parties contractantes dès que l’une d’elle manifeste son désaccord; il faudrait avoir une liste des États qui acceptent la déclaration. Il souhaite donc obtenir plus de précisions sur la question.

1081. The CHAIRMAN stated that the first sentence in the proposed statement by the Delegation of the United States of America had been approved by the Committee by

consensus. He suggested that the Committee could approve the second sentence of the statement. He observed that an agreed statement as such had no binding effect, it was merely a very high level indication of a position of interpretation.

1082. M. SÉRY (Côte d'Ivoire) fait part de ses doutes quant à la portée des réserves qui sont émises par certaines délégations et leur mention dans le rapport. Il ne s'agit plus d'un document de la conférence. Par ailleurs, il fait observer que tout le document doit être adopté et se demande si cela requiert une majorité ou si cela se fait par consensus. Il ajoute qu'il convient de considérer les principes dans un premier temps et les arrangements sont à discuter dans un second temps.

1083. The CHAIRMAN indicated that the decision would be made by vote, if necessary.

1084. Mr. SCHÄFFERS (Germany) referred to the intervention by the Delegation of Côte d'Ivoire, and stated that the question had to be seen in the context of the Vienna Convention on the Law of Treaties. Agreed statements were instruments related to a treaty in the sense of the Vienna Convention. He noted that agreed statements had a lesser binding effect than the Treaties, and, therefore, it was certainly possible that such agreed statements could be adopted by majority, if necessary. He pointed out that that was the established practice in all the conferences under the aegis of WIPO.

1085. Mr. KUSHAN (United States of America) associated his Delegation with the prior intervention by the Delegation of Germany. He stated that the Conference was facing a decision. If consensus was not possible, the Committee needed to take a decision, and that should be done by a vote.

1086. Mr. FICSOR (Assistant Director General of WIPO) observed that that was the last issue to be discussed, and that it was preferable to achieve an agreement based on consensus. He noted that the first sentence of the proposed statement had been approved by consensus. With regard to the second sentence, he felt that it had been a clearly established principle, since the early 1980's, that storage of works was to be considered reproduction, and that principle could hardly be questioned. He felt that the problem was rather about the interpretation of the word "storage." He suggested that a possible solution was that the second sentence might also be agreed upon by consensus, not excluding, however, the possibility of differing interpretations at the national level, which otherwise could not be fully excluded even in respect of certain aspects of the texts of the Treaties themselves. He added that it was another matter that some interpretations could be accepted as valid while some others not.

1087. M. AMRI (Tunisie) est de l'avis que les délégations ne sont pas des parties contractantes mais représentent leurs États respectifs. Il se demande si une déclaration concertée fait partie intégrante du traité ou si l'adhésion ou la ratification du traité n'est limitée qu'à celui-ci, la ou les déclarations en étant exclues. C'est une question importante, car selon lui, il y a déjà un engagement de la part des États pour reconnaître que l'interprétation de l'article 9 de la Convention de Berne doit être faite comme telle.

1088. The CHAIRMAN referred to the Rules of Procedure of the Conference, and stated that the objective of the Conference was to negotiate and adopt a treaty or treaties, to adopt any recommendation or resolution whose subject matter was germane to the treaty or treaties, and to adopt any agreed statements to be included in the Records of the Conference. The agreed

statements were part of the Records of the Conference, and could be used in the interpretation of the treaty or treaties. He pointed out that the agreed statements were not subject to ratification or other measures to put them into force.

1089. Mr. EL NASHAR (Egypt) observed that the subject of the statement proposed by the Delegation of the United States of America was not covered by the Treaties. He noted that there was consensus on the first sentence, but not on the second sentence. In that case, he felt that there would be reservations as well as observations to be made by the Delegations who did not join in the consensus.

1090. Mr. BOGSCH (Director General of WIPO) asked if it were not possible to go a little further in the same direction as what had been proposed earlier. First, he suggested that the title of the statement could be: "Statement adopted by the Conference." It would not read "The Contracting Parties confirm" since there were no Contracting Parties yet. It could start out by saying, "The reproduction right," as a statement. And then there could be added a third sentence, which would read more or less as follows: "It is further understood that the interpretation of the term 'storage' is to be done in the light of the discussions of Main Committee I."

1091. Mr. SILVA SOARES (Brazil) supported the proposal by the Director General of WIPO.

1092. Mr. KUSHAN (United States of America) expressed the concern of his Delegation, for several reasons. He noted that as part of the decision to delete Article 7, there had been an understanding that there would be a statement. He stressed that his Delegation had made a proposal that represented the views of several Delegations. He agreed with the point by the Director General of WIPO, regarding deletion of the words "Contracting Parties confirm that." He thought it was well taken, and that it reflected the concerns expressed by the Delegation of Brazil. In regard to the suggestion that the interpretation of the statement should depend on comments that were recorded in Main Committee I, the Delegation had significant concerns because many comments that were offered during the discussion of the reproduction right, and which incidentally touched on storage, had been made in the informal consultations, and those would not be reflected in the Records of the Conference. He moved that the Committee take a decision on the text that was proposed by the Delegation of the United States of America, with the amendment that was offered and accepted, that is, the deletion of the words "Contracting Parties confirm that," which words would be deleted from the first sentence in each of the paragraphs. He strongly suggested that, if there was no consensus, a vote take place on the question.

1093. Mr. BOGSCH (Director General of WIPO) withdrew his suggestion in the light of the comments made by the Delegation of the United States of America.

1094. Mr. KIM (Republic of Korea) expressed the support of his Delegation for the suggestion by the Director General of WIPO. He indicated that his Delegation could not support the proposed statement as drafted, and, therefore, reserved its position on that issue.

1095. Mr. EKPO (Nigeria) indicated that his Delegation was not opposed to the statement, but was not in favor of it being a statement by consensus.

1096. Mr. OKAMOTO (Japan) referred to the prior intervention by the Assistant Director General of WIPO regarding the possible differing interpretations of the word “storage” at the national level, and with that clarification, expressed his Delegation’s support for the proposed statement.

1097. Mr. YAMBAO (Philippines) said that the Conference could make any statements it wanted by consensus, if possible, but even by a vote, if necessary. He stressed, however, that, in the event that statements were made by means of a vote, it was understood that those statements could never be understood as an agreement within the context of the Vienna Convention.

1098. The CHAIRMAN recalled that the first sentence of the proposed statement by the Delegation of the United States of America had been adopted by consensus. He said that the second sentence would be put to a vote. Those who were in favor of the second sentence were to vote yes, and those who were opposed to the second sentence were to vote no.

1099. M. NGOUBEYOU (Cameroun) se réfère aux observations des délégations du Nigeria, de la Côte d’Ivoire et de la Tunisie. Il est de l’avis que le défaut de consensus sur l’adoption d’un texte est une invitation très claire à procéder à un vote nominal de sorte que chaque délégation pourra identifier celles qui se prononceront en faveur ou contre le texte mis au vote. Par ailleurs, il souhaite savoir quelle est la nature juridique d’une déclaration concertée une fois celle-ci adoptée à la majorité.

1100. M. SILVA SOARES (Brésil) abonde dans le sens des observations présentées par la délégation du Cameroun.

1101. Mr. ABBASI (Pakistan) observed that it was his Delegation’s understanding that the statement, if adopted by a vote, would not enjoy the same status as a statement adopted by consensus. He said that the procedure of voting integral paragraphs, sentence by sentence, aroused concern. He preferred that, if a vote had to be taken at all, there be a vote on the entire paragraph, which he felt would simplify the whole matter.

1102. The CHAIRMAN reminded the Committee that it had already adopted the first sentence by consensus.

1103. M. SÉRY (Côte d’Ivoire) dit qu’il approuve la proposition faite par le Directeur général de l’OMPI, qu’il l’a fait sienne et qu’en conséquence, elle devient la proposition de sa délégation qui estime que l’interprétation du terme “stockage” doit se faire à la lumière des déclarations des États lors du début en Commission principale I.

1104. M. AMRI (Tunisie) dit que sa délégation appuie la proposition de la Côte d’Ivoire ainsi que celle de la délégation du Cameroun au sujet d’un vote nominal.

1105. M. KANDIL (Maroc) indique que sa délégation appuie tant la proposition de la délégation du Cameroun que celle présentée par la délégation de la Côte d’Ivoire.

1106. M. SILVA SOARES (Brésil) se réfère aux observations des délégations du Cameroun, de la Tunisie et du Maroc, et propose que le vote nominal porte sur la deuxième partie de

l'article de sorte que les États qui ne acceptent pas la proposition des États-Unis d'Amérique, soient inscrits dans les actes de la Conférence diplomatique.

1107. The CHAIRMAN referred to the proposal put forward by the Delegation of Cameroon, and said that the first sentences in the two statements had already been adopted by consensus in Main Committee I. Therefore, the vote would concern the adoption of the second sentences in the two statements.

1108. M. NGOUBEYOU (Cameroun) précise qu'il a demandé une vote par appel nominal pour éviter tout malentendu sur le nombre des États qui approuvent ou désapprouvent le contenu de la deuxième partie de la proposition des États-Unis d'Amérique.

1109. Mr. YAMBAO (Philippines) asked that the Committee reflect carefully on the reasons underlying the vote, before the vote was taken. He said that that was crucial, because, if there was consensus, the statement would be an aid in the interpretation of the Treaty. But if there was even one Delegation which objected to the statement, it would cease to be an agreed statement within the meaning of Article 31(2)(a) of the Vienna Convention, and would merely be part of the preparatory work of the Conference, with little value in terms of interpretation of the Treaty.

1110. The CHAIRMAN acknowledged the value of an agreed statement achieved by consensus. He said that it was still his intention to proceed with a vote if the Committee could not otherwise make such a decision on this matter.

1111. Mr. KUSHAN (United States of America) stressed that his Delegation had called for a vote a long time ago. He pointed out that there was also a request from another Delegation that the vote be taken by the roll call method.

1112. The CHAIRMAN noted that he had omitted a point of order from the Delegation of Algeria.

1113. M. KATEB (Algérie) se réfère aux remarques faites par la délégation de la Tunisie, ainsi qu'à l'article 1er du règlement intérieur de la Conférence portant sur le but et les compétences de la Conférence. Si la Conférence a effectivement toute latitude pour adopter toute déclaration concertée et à les inclure dans les actes de la Conférence, il fait remarquer que la présente session est celle de la Commission principale I et non la conférence plénière.

1114. Mr. KUSHAN (United States of America) stated that the issue before the Committee was adoption of the second sentence of the statements. He had also made a motion for a vote which had been seconded by some other Delegations. He emphasized that the Committee should now be engaging in that vote.

1115. The CHAIRMAN indicated that the Committee would proceed to a vote.

1116. M. SÉRY (Côte d'Ivoire) demande une suspension de séance pour permettre aux membres de son groupe de se consulter.

1117. Mr. KHLESTOV (Russian Federation) proposed that the Committee stop going around in circles, and that it undertake the vote.

1118. The CHAIRMAN again stated that the Committee would proceed now to the vote on the second sentence in the two statements. He noted that the floor would not be given for any other purpose than for a point of order.

1119. M. NGOUBEYOU (Cameroun) constate que la procédure de vote est imminente et demande donc au président de donner lecture du texte faisant l'objet du vote afin d'en avoir une compréhension univoque. Il n'appuie pas la demande de suspension de séance faite par la délégation de la Côte d'Ivoire.

1120. Mr. SCHÄFERS (Germany) pointed out that the request for a roll call vote came from the Delegation of Cameroon on a certain question, and, therefore, it was up to the Delegation of Cameroon to tell the Committee what was the subject matter of the requested roll call vote. If the Delegation did not know what it was about, then it did not make sense to request a roll call vote.

1121. The CHAIRMAN asked the Delegation of Cameroon to explain the subject matter of the request for the roll call vote.

1122. M. NGOUBEYOU (Cameroun) demande au Président d'identifier l'amendement du projet de texte qui est soumis au vote, compte tenu du fait que plusieurs propositions ont été présentées, y compris celle que le Directeur Général a faite puis retiré, et qui a été ensuite reprise par la délégation de la Côte d'Ivoire.

1123. The CHAIRMAN deferred to a point of order by the Delegation of the United States of America.

1124. Mr. KUSHAN (United States of America) stated that he was making a point of order. He felt that it was difficult to follow the course of the debate, because there had been a convoluted path of interventions on the initial point of order. However, it all had originated with the motion which his Delegation had made for a vote on the text of the second sentence in each of the paragraphs proposed as statements. That was what the subject matter of the vote was to be. Thereafter, there had been a request for the vote to be taken in the form of a roll call vote, and everything since that point had been a point of order relating to the question of the vote. He emphasized that that was not a matter of opening up a sequence of issues for votes; that was a matter of voting on a specific text. He again stressed that that was a matter of a point of order; there had been a motion for a vote, which had been seconded, and there had been a request for a roll call vote. Since the vote was to be on the second sentence in each of the paragraphs proposed, he did not believe that it was necessary to list the various proposals that had been made during the course of the debate prior to the calling for the vote.

1125. Mr. FICSOR (Assistant Director General of WIPO), at the request of the Chairman, indicated the subject matter of the vote: the Committee had a proposal—from the Delegation of the United States of America—which consisted of two statements very similar to each other; one to Draft Treaty No. 1 and another to Draft Treaty No. 2. The Committee had made a consensus decision on the first sentences of each of those statements, and, therefore, the vote would not concern those first sentences. The Delegation of the United States of America had moved for a vote on the second sentences of each statement, but the discussion continued, and the vote had not started. The Director General of WIPO had made a proposal,

but then, for the reasons indicated, he had withdrawn his proposal. After that, the Delegation of Côte d'Ivoire had reintroduced the proposal of the Director General, and that proposal had been seconded. Thus, there were two proposals concerning both statements. The more remote from the original proposal was proposed by the Delegation of Côte d'Ivoire, so, according to the Chairman's intention, the Committee should vote first on that proposal. He read the text of the second sentence in the proposal of the Delegation of the United States of America concerning Draft Treaty No. 1 which was the following: "It is understood that the storage of a protected work in digital form in an electronic medium constitutes reproduction within the meaning of Article 9 of the Berne Convention." Under the Director General's proposal, which had been withdrawn by him, but then reintroduced by the Delegation of Côte d'Ivoire, that second sentence would remain unchanged, but then one more sentence would be added to it to read as follows: "It is further understood that the interpretation of the term 'storage' is to be understood in the light of the discussions of Main Committee I." In respect of Draft Treaty No. 2, the second sentence in the proposal of the Delegation of the United States of America read as follows: "It is understood that the storage of a protected work in digital form in an electronic medium constitutes reproduction within the meaning of these Articles." The same sentence would be added under the proposal reintroduced by the Delegation of Côte d'Ivoire as to the statement concerning Draft Treaty No. 1, that is, the following one: "It is further understood that the interpretation of the term 'storage' is to be understood in the light of the discussions of Main Committee I." He stated that, as he understood the Chairman's intention, the Committee would first have a vote on the two statements simultaneously to decide whether or not it accepted the amended version as reintroduced by the Delegation of Côte d'Ivoire. The vote would be by roll call, because it had been requested by one Delegation, and it had been seconded by at least another.

1126. The CHAIRMAN asked the Secretariat to explain how the roll call vote would take place.

1127. Mr. GURRY (Secretariat) directed the Committee's attention to Rule 35(2) of the Rules of Procedure of the Conference, which governed the procedure for a roll call vote. He pointed out that the roll should be called in the alphabetical order of the names, in French, of the States, beginning with a Delegation whose name should be drawn by lot by the presiding officer, who was the Chairman. For that purpose, he had the box for the Chairman to draw by lot. He clarified the question regarding the Delegation of the European Communities. For the purpose of selecting the State with the name of which the Committee would begin the roll call vote, Rule 2(2) of the Rules of Procedure specifically excluded the Special Delegation from Member Delegations. He proposed commencing the roll call with the name of the State which was selected, through the list of the State Members of WIPO, in its order, and at the end would be the European Communities.

1128. *The CHAIRMAN drew by lot the Delegation of India.*

1129. Mr. GURRY (Secretariat) began the roll call vote by calling the name of India.

1130. Mr. AYYAR (India) asked that the text which the Committee was to vote be read again.

1131. Mr. FICSOR (Assistant Director General of WIPO), at the request of the Chairman, indicated that the vote was about the following amended proposal in respect of the first

statement concerning the WIPO Copyright Treaty: “It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention. It is further understood that the interpretation of the term ‘storage’ is to be done in the light of the discussions of Main Committee I.” In respect of the second statement concerning the WIPO Performances and Phonograms Treaty, the amended proposal read as follows: “It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles. It is further understood that the interpretation of the term ‘storage’ is to be done in the light of the discussion of Main Committee I.”

1132. Mr. GURRY (Secretariat) again asked the Delegation of India to cast its vote, and then the roll call vote took place.

1133. The Delegations of the following States voted in favor of the proposed statements as amended: India, Indonesia, Mali, Morocco, Mexico, Mongolia, Namibia, Niger, Pakistan, Republic of Korea, Singapore, Thailand, Tunisia, Zimbabwe, Algeria, Angola, Belarus, Brazil, Burkina Faso, Côte d’Ivoire, Cuba, Egypt and Ecuador.

1134. The Delegations of the following States voted against the proposed statements as amended: Ireland, Italy, Jamaica, Japan, Nicaragua, Norway, New Zealand, Netherlands, Philippines, Poland, Portugal, Republic of Moldova, Czech Republic, Romania, United Kingdom, Slovakia, Slovenia, Sweden, Switzerland, Uruguay, Venezuela, South Africa, Germany, Argentina, Australia, Austria, Belgium, Bolivia, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Denmark, El Salvador, Spain, United States of America, The former Yugoslav Republic of Macedonia, Russian Federation, Finland, France, Greece, Haiti, Honduras and Hungary.

1135. The Delegations of the following States abstained from the vote: Jordan, Kazakstan, Kenya, Libya, Malawi, Malta, Nigeria, Uzbekistan, Peru, Senegal, Sudan, Sri Lanka, Tajikistan, Togo, Trinidad and Tobago, Yemen, Zambia, Armenia, Azerbaijan, Cameroon, China, Gabon and Ghana.

1136. *Main Committee I rejected the proposed amendments, with 23 votes in favor, 46 votes against, and with 23 abstentions.*

1137. The CHAIRMAN said that the Committee would now proceed to the second vote and asked the Delegation of Cameroon whether the request for a roll call vote also concerned the second vote.

1138. M. NGOUBEYOU (Cameroun) répond de manière affirmative à la question du Président.

1139. The CHAIRMAN stated that the Committee would proceed to the second vote. He said that the subject of the vote would be the second sentences which were presented in the written proposal of the Delegation of the United States of America.

1140. Mr. AYYAR (India) observed that there had been much discussion earlier, before the voting, with reference to the interpretation of the Treaties, to the status of the statements, and to the provisions of the Berne Convention. He referred to his earlier intervention, which had

been uncontested, that, because these statements embodied certain reflections, there was a full scope for interpretation and a full scope for national legislations to reflect on whatever was adopted. He noted that, within the framework of the Berne Convention and the Rome Convention, national legislation could provide the necessary exceptions and limitations. He said that he would not have raised that question now, but for the fact that the resolution just voted down contained a statement, the third sentence, that it was not susceptible to interpretation. His Delegation had some difficulty with the third sentence of the resolution that was voted down, because the whole course of the debate had gone on the premise that the value of those statements was of an interpretational nature, with flexibility as far as the interpretation was concerned. For that reason, his Delegation voted against the resolution. He emphasized that there was an assumption of flexibility in the Berne Convention and in the Rome Convention for exceptions and limitations.

1141. The CHAIRMAN stated that the part of the proposed statement which had already been adopted, included a reference to Article 9 of the Berne Convention, and the exceptions permitted thereunder. He observed that the normal interpretations, which were up to the governments and the parliaments of the States, would prevail. He referred to the exceptions to and limitations on the right of reproduction which were permitted under the Berne Convention, and under the Treaties still to be adopted, and said that their application would be governed by the normal rules.

1142. He said that the Committee would now proceed to the second vote. The text which would be put to vote would be the second sentences of the two statements. Although they had been pronounced many times, to be absolutely certain that everyone would understand what was being put to vote, he read the proposals. He read the second sentence of the first statement, as follows: "It is understood that the storage of a protected work in digital form in an electronic medium constitutes the reproduction within the meaning of Article 9 of the Berne Convention." He read the second sentence of the second statement as follows: "It is understood that the storage of a protected performances or phonogram in digital form in an electronic medium constitutes the reproduction within the meaning of these Articles."

1143. Mr. SCHÄFERS (Germany) pointed out that this second request for a roll call put forward by the Delegation of Cameroon, had to be seconded, according to the Rules of Procedure. He felt that there was still a little room for hope that it would not be seconded, but nevertheless, he asked to insist on the Rules of Procedure, which required seconding for such a request.

1144. The CHAIRMAN asked the Committee if any Delegation seconded the request by the Delegation of Cameroon for a roll call vote.

1145. Mr. SILVA SOARES (Brazil) seconded the request for a roll call vote.

1146. The CHAIRMAN declared that the roll call vote would now proceed. He stated that, if a Delegation was in favor of the adoption of the subject text, it should vote "yes"; if it was against adoption of the text, it should vote "no"; and any Delegation which wished could register an abstention from the vote.

1147. *The Chairman drew by lot the Delegation of South Africa.*

1148. The Delegations of the following States voted in favor of the proposed statements: South Africa, Germany, Argentina, Australia, Austria, Belarus, Belgium, Bolivia, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Denmark, El Salvador, Spain, United States of America, The former Yugoslav Republic of Macedonia, Russian Federation, Finland, France, Greece, Haiti, Honduras, Hungary, India, Ireland, Italy, Jamaica, Japan, Mongolia, Nicaragua, Norway, New Zealand, Netherlands, Peru, Portugal, Czech Republic, Romania, United Kingdom, Senegal, Slovakia, Slovenia, Sweden, Switzerland, Trinidad and Tobago, Uruguay, and Venezuela.

1149. The Delegations of the following States voted against the proposed statements: Algeria, Angola, Brazil, China, Côte d'Ivoire, Cuba, Fiji, Indonesia, Libya, Mali, Pakistan, Republic of Korea, and Republic of Moldova.

1150. The Delegations of the following States abstained from the vote: Armenia, Azerbaijan, Burkina Faso, Cameroon, Ecuador, Egypt, Gabon, Ghana, Jordan, Kazakstan, Kenya, Malawi, Malta, Morocco, Mexico, Namibia, Niger, Nigeria, Uzbekistan, Philippines, Singapore, Sudan, Sri Lanka, Thailand, Togo, Tunisia, Yemen, Zambia, and Zimbabwe.

1151. *Main Committee I adopted, with 49 votes in favor, 13 votes against and with 29 abstentions, the second sentences of the proposals by the Delegation of the United States of America.*

1152. The CHAIRMAN announced that the vote meant that the texts which had been put to vote were adopted, and they would be presented for adoption to the Plenary of the Conference. He thanked all Delegations and participants for their cooperation, and declared the meeting closed.

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