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ORGANIZACIÓN MUNDIAL DE LA PROPIEDAD INTELECTUAL**
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DE DROIT D'AUTEUR ET DE DROITS VOISINS**

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Geneva, December 2 to 20, 1996

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Ginebra, 2 a 20 de diciembre de 1996

COMPTES RENDUS ANALYTIQUES (COMMISSION PRINCIPALE II)

SUMMARY MINUTES, MAIN COMMITTEE II

ACTAS RESUMIDAS (COMISIÓN PRINCIPAL II)

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

Chairman: Mr. Guido Fernando Silva Soares (Brazil)

Secretary: Mr. Francis Gurry (WIPO)

First Meeting

Tuesday, December 17, 1996

Afternoon

Introductory remarks

1. El PRESIDENTE inicia la primera sesión de la Comisión Principal II encargada de analizar la propuesta básica de las cláusulas administrativas y finales de los Tratados en estudio, agradeciendo por su elección a la Presidencia de esta Comisión que considera un gran honor para él como para su país. Destaca la necesidad de acelerar los trabajos, recordando que muchas delegaciones no tienen el número de delegados suficientes para poder participar simultáneamente en las Comisiones Principales I y II. Por esta razón, propone repasar rápidamente en esta Comisión las cláusulas finales, con el fin de identificar los puntos más delicados que pasarían a ser discutidos y analizados en un Comité de negociación informal. El Presidente presenta esta propuesta a la Comisión y al no haber oposición, la adopta.

2. El Presidente inicia una exposición de las disposiciones de la propuesta básica. Respecto del Artículo 98 que crea una Asamblea para los Tratados, el Presidente recuerda que es costumbre en el marco de los Tratados de la OMPI que exista un órgano instituido por los mismos Tratados que vele por la buena aplicación y el respeto de los Tratados. Se trata en este foro de examinar la posibilidad de crear en el marco de los Tratados en estudio, un órgano colectivo encargado de su aplicación. El Artículo 99 trata del papel de la Oficina Internacional de la OMPI relativo a las tareas administrativas vinculadas al Tratado.

3. A continuación, el Presidente se refiere al Artículo 100 que trata de la elegibilidad para ser parte en el Tratado y hace notar que existen dos puntos de extrema importancia en la propuesta básica que son precisamente la cuestión relativa a la admisión de organizaciones internacionales para ser parte en el Tratado y las ratificaciones necesarias para la entrada en vigor del Tratado. El Artículo 101 relativo a la firma del Tratado es usual en el marco de tratados multilaterales en el sentido de que abre el Tratado a la firma durante un período de un año. El Artículo 103 no levanta mayor problema, se trata solamente de determinar un momento a partir del cual se puede ser parte en el Tratado.

4. En lo que atañe al Artículo 104 relativo a las reservas al Tratado, el Presidente recuerda que también es costumbre en el marco de los Tratados de la OMPI el no admitir reservas a los Tratados, y estima que aceptarlas en el marco de los presentes Tratados que tienen como principal objetivo la armonización de las legislaciones a nivel mundial sería una solución peligrosa. El Presidente menciona los Artículos 105, 106 y 107 que son usuales en este tipo de Tratados y abre las discusiones para oír sugerencias en cuanto a los puntos que requerirían de un mayor estudio.

5. M. AMRI (Tunisie) se réfère à l'article 98 et fait remarquer qu'il est d'usage que, dans ces traités, se trouvent deux pouvoirs : l'un administratif, l'autre législatif. Dans l'article 98, l'Assemblée délègue au Directeur général les pouvoirs qui lui sont nécessaires pour mener à bien la tâche que lui confie le traité concerné. Il serait peut-être judicieux d'ajouter à l'article 98 que l'Assemblée examine et approuve les rapports et les activités du Directeur général relatifs aux traités en cause, comme il est d'usage tous les deux ans, pour toutes les Unions des conventions administrées par l'OMPI.
6. Le PRÉSIDENT invite la délégation de la Tunisie à présenter par écrit sa proposition.
7. Mr. GURRY (Secretary) responded to the intervention by the Delegation of Tunisia, and drew attention to the Convention Establishing the World Intellectual Property Organization. He referred to the provisions in that Convention relating to the Director General of WIPO, and in particular, to Article 9(5), and stated that the Director General of WIPO was required to prepare draft programs, budgets and periodic reports on activities, and transmit the same to the Governments of the interested States and to the competent organs of the Unions of the Organization.
8. Le PRÉSIDENT demande à la délégation de la Tunisie, compte tenu des informations données par le secrétaire de la commission principale, de prendre en considération cet aspect dans son éventuelle proposition écrite.
9. El Sr. GASSER (Brasil) destaca los puntos principales que considera importantes de analizar, empezando por la elegibilidad para ser parte en el Tratado especialmente en lo relacionado con las organizaciones intergubernamentales. A continuación, menciona la cuestión de los títulos de los Tratados vinculada a las discusiones del Comité I, el tema de las reservas y el del número de ratificaciones para la entrada en vigor.
10. El PRESIDENTE considera que el título de los Tratados es una cuestión de sustancia y debe ser analizada en el seno de la Comisión Principal I. En lo que atañe a las reservas al Tratado, el Presidente recuerda la diferencia que existe entre las cláusulas generales de reservas como la que aparece en la propuesta básica, las reservas que pueden aparecer en cada artículo y finalmente las reservas que dejan sobre ciertos aspectos una libertad a las legislaciones nacionales. Lo que debe ser analizado en esta Comisión Principal II es el primer tipo de reservas, la prohibición de reservas generales que se notifiquen en el momento de la adhesión de nuevos países.
11. M. SÉRY (Côte d'Ivoire) félicite le Président pour sa nomination à la présidence de la présente commission. Il partage les observations de la délégation de la Tunisie, et souhaite que le groupe africain, dont la Côte d'Ivoire, participe à la rédaction de cette éventuelle proposition d'amendement. Il demande ensuite au Président de procéder article par article pour éviter tout malentendu. Au nom du groupe africain, il souhaite avoir des explications sur la distinction entre la Communauté européenne et toute autre partie consentante, où se dessine cette différence entre les organisations intergouvernementales auxquelles on permet l'accès au traité et les autres organisations. Il lui semble que la Communauté européenne, en l'état des dispositions, remplirait d'emblée les critères requis et satisferait les conditions posées tandis que les autres organisations devraient y répondre.

12. Le PRÉSIDENT partage la remarque de la délégation de la Côte d'Ivoire de procéder article par article, mais relève qu'il est parfois nécessaire de faire référence à des réserves qui peuvent être inscrites dans d'autres articles.

13. Mr. STOODLEY (European Communities) noted the Chairman's prior intervention regarding conducting the business of Main Committee II in the format of informal consultations. He said that his Delegation would be open to deal with each Article in a formal session of this Committee, or to go into informal sessions. He said that the main concerns of his Delegation were in relation to Articles 98 and 100 concerning the status of the European Community and its Member States, and other intergovernmental organizations.

14. Mr. YAMBAO (Philippines), speaking on behalf of the group of countries of the Asia and Pacific region, indicated that, to those countries, the most important provisions were Articles 98 and 100 concerning intergovernmental organizations. He also drew attention to the importance of Article 101, on the number of ratifications or accessions required to put the Treaties into force, and Article 104 with respect to reservations. He reserved the position of the said countries in respect to Article 104 on reservations, until the work of Main Committee I had been finished. He pointed out that the number of Treaties to be concluded, and to which the Administrative and Final Clauses would apply, would also be left to the work of Main Committee I. He deferred to the Chairman's discretion the question of conducting the business of Main Committee II through the format of informal consultations.

15. The CHAIRMAN indicated that the Committee could meet in informal sessions, and expressed his opinion that the place of the meeting did not influence the work. He said that the Committee could continue in the room where it was presently assembled, and could consider itself an informal meeting. At the end of the work, the Committee could change into a formal meeting, which would be more convenient. He said that it would not be necessary to move to another room for an informal meeting.

16. La Sra. JIMÉNEZ HERNÁNDEZ (México) felicita al Presidente por su elección a la Presidencia de la Comisión Principal II y apoya la propuesta del mismo en cuanto a organizar consultas informales sobre los puntos más controvertidos. Considera que hay unos Artículos que podrían suscitar problemas que son los Artículos 98, 100 y 102 a 104. Los demás, es decir los Artículos 99, 101 y 105 a 107 deberían requerir menos discusiones y por esta razón propone empezar por ellos.

17. Mr. CHEW (Singapore) associated his Delegation with the intervention made by the Delegation of the Philippines, and expressed his opinion that certain articles should be deferred until Main Committee I had completed its work. The provisions which, he believed, the Committee should now focus on were: Article 98(3)(b), Article 100, and Article 103. He pointed out that the number "5" in square brackets was an extremely important and critical question. He stated that Article 104 on reservations was taken from Article 72 of the TRIPS Agreement, but noted that, as had been discussed in Main Committee I, the nature of the two Treaties discussed at the Diplomatic Conference was different from the TRIPS Agreement, and as such, whether reservations should or should not be allowed would have to depend on the nature and the scope of the articles that would be agreed to in the Treaties. He deferred to the discretion of the Chairman as to whether the Committee conducted its business in formal or informal meetings.

18. The CHAIRMAN noted the support of the Committee for holding the meeting as informal sessions. He pointed out that there would be no record of what was discussed in the informal sessions, which he said was the main consequence of their being informal. He, therefore, adjourned the formal meeting, and opened the informal session.

Second Meeting

Wednesday, December 18, 1996

Morning

Review of the results of informal consultations

19. The CHAIRMAN opened the meeting and reviewed the progress the Committee had made in the informal consultations. He said that Article 101 had been adopted, subject to the question of the admission of European Community and its Member States. He said that regarding Article 102, it was a question to be decided as to the number of instruments of ratification or accession by States which would be necessary for the Treaties to come into force. He pointed out that the effective date of becoming party to the Treaties was tied to the question of the number of ratifications or accessions. Regarding Article 103, he stated that the Committee had to decide upon the number of ratifications or accessions, and the question of legitimacy of the European Community and its Member States to become a party to the Treaties. On the question of reservations, Article 104, he said that the Committee had understood that the term "reservations" in that Article meant reservations to particular clauses to the Treaty, since specific reservations that could be raised would be treated within the articles concerned. Regarding Article 105, he pointed out that there had been a correction in the main text proposed by the Director General of WIPO; it was the addition of the words "any Contracting Party." He confirmed that the Article now read: "The Treaty may be denounced by any Contracting Party..." The Chairman stated that that Article, as amended with the proposed change, had been approved by the Committee. He declared that the Committee had also accepted and approved Articles 106 and 107. He asked the Committee if there were any objections to it proceeding along the lines which he had just outlined.

20. Mr. ABEYSEKERA (Sri Lanka) asked for clarification regarding Article 106. He said that it was his understanding that the Committee was discussing the status of the European Community and its Member States, in paragraph (2), and that that aspect was still within square brackets until the status would be decided. However, he noted that the Article used the term "interested party," which could request the language to be established as far as the languages of the Treaty were concerned. He said that, to his understanding, that was the only place in the Treaties which contained anything about interested parties in relation to WIPO. He asked whether that meant that, if any Member State of WIPO was not a Contracting Party to the Treaty, could it exercise that right, or was it confined only to the Contracting Parties, because in the text there were only references to the rights of the Contracting Parties.

21. Mr. BOGSCH (Director General of WIPO) explained that WIPO traditionally considered an interested party to be a country which was party, or intended to become party, to the Treaties. He gave as an example, that, if Germany wanted to ratify the Treaty, it would want

to have an official German translation, and WIPO would prepare that in the way it was outlined in the Article. So the term “interested party” really meant both Contracting Party and any WIPO Member State which intended to become a Contracting Party.

22. Ms. MARKOWITZ (United States of America) raised a point for clarification regarding the term “party.” She noted that the text contained the term “party” fairly frequently, and it also used the term “Contracting Party.” She asked if there was going to be one general term that would be used in the final text, or these two terms were generally interchangeable.

23. Mr. BOGSCH (Director General of WIPO) said that the terms were not interchangeable. He explained that the term “party” meant a country which was not a Contracting State. An interested party meant a country which might become a Contracting State, which had the intention to become one.

24. Ms. MARKOWITZ (United States of America) asked for further clarification. She noted that, for instance, Article 100(1) included the following text: “any Member State of WIPO may become party to this Treaty,” whereas, in Article 98, the term “each Contracting Party” was used.

25. Mr. BOGSCH (Director General of WIPO) stated that, in the first instance, it was not a Contracting Party, it was a State in the process of trying to become one.

26. The CHAIRMAN drew the Committee’s attention to Article 100, to the general criteria for becoming a party to the Treaty. He referred to paragraph (1), which stated that “any Member State of WIPO may become party to this Treaty”.

Relationship with the Berne Convention

27. El Sr. ROGERS (Chile), expresándose en nombre del Grupo Latinoamericano y del Caribe, reitera la posición del Grupo en cuanto a la importancia de mantener un estrecho vínculo entre el Tratado en estudio y el Convenio de Berna, de tal forma que sea un requisito para la adhesión al nuevo Tratado que los Estados sean miembros de la Unión de Berna. Por consiguiente, presenta una propuesta relativa al Artículo 100 de la propuesta básica de las cláusulas administrativas y finales, que consiste en agregar al final de su párrafo 1: “siempre que ese Estado sea parte del Convenio de Berna para la protección de las obras literarias y artísticas”.

28. Mr. BOGSCH (Director General of WIPO) referred to the notes attendant to draft Article 100. He stated that the note contained the reasons for which WIPO did not propose to tie the Treaty to the Berne Convention, and read the following: “As far as States are concerned, it is proposed that the Member States of WIPO be eligible to become party to Treaty. Membership in WIPO would be a logical requirement since the initiator of the treaty is WIPO, since all preparations took place in WIPO and since the subject matter of the Treaty is intellectual property. Furthermore, it is to be noted that, already now, WIPO has 157 Member States.” He added, that due to new accessions, WIPO had 161 Member States now. He pointed out that all the 120 States party to the Berne Convention, and 50 of the 51 States party to the Rome Convention, were members of WIPO. The missing one was the Dominican Republic, but he said that it was likely to become soon a member of WIPO. He stressed that in

any case, any State not yet member of WIPO could easily become a member of WIPO—the list of the Member States of WIPO appeared in the Annex. He thought that it was unnecessary that a country wishing to accede to Treaty No. 1 be a member of the Berne Convention. The application of the substantive provisions of the Berne Convention would be made obligatory for any country that would become party to the Treaty. He said that the obligation which had been referred to in the intervention by the Delegation of Chile, namely that Contracting Parties must respect the Berne Convention, was being taken care of, just as in the TRIPS Agreement. In his opinion, it would unduly restrict the eligibility of countries to accede if the adherence to the Berne Convention were a condition. In round figures, WIPO had 160 Member States. There were 120 States party to the Berne Convention. If the proposal were to be accepted, 40 countries would be disqualified to become party to the Treaty.

29. El Sr. ROGERS (Chile) reitera que esta última propuesta fué presentada en nombre del Grupo Latinoamericano y del Caribe.

30. The CHAIRMAN asked the Delegation of Chile to explain again the reasons for its proposal.

31. El Sr. ROGERS (Chile) aclara que en un principio la idea del Grupo era incorporar en el preámbulo esta propuesta relativa a la obligación de ser parte de la Unión de Berna para poder ratificar el nuevo Tratado. Como no se incluyó en el preámbulo, el Grupo se reservó la posibilidad de presentar nuevamente la propuesta en la Comisión Principal II, considerando que se trataba de un elemento fundamental que garantizaría la solidez y la relevancia del nuevo Tratado.

32. Mr. BOGSCH (Director General of WIPO) thought that the argument of the Delegate of Chile was logical. However, in Main Committee I, Article 1(4) of the Treaty had been accepted, namely that Contracting Parties that were not members of the Berne Union should comply with Articles 1 to 21 and the Appendix of the Berne Convention. That is to say, if the preoccupation of the group of Latin American and the Caribbean countries was that the Berne Convention should be respected, it was guaranteed. He stressed that the Committee was speaking about a very important question, politically, about the idea to exclude 40 countries that were Members of WIPO from the possibility of becoming parties to the new Treaty. That was a decision of very great consequence, and there was no reason for it because the Berne Convention would be respected in the same terms as in the TRIPS Agreement.

33. Mr. CHEW (Singapore) associated his Delegation with the intervention by the Director General of WIPO. He said that he supported the position taken by the Director General of WIPO for three reasons. First, the Treaties to be adopted by the Diplomatic Conference would be stand-alone, independent Treaties, and, as such, there should not be any link to any pre-condition to be party to the Berne Convention. Second, he felt that it was best to have the widest participation of countries as parties to the Treaties, and he noted that, as the Director General of WIPO had stated, to link the Treaties to the Berne Convention would exclude 40 countries immediately. He mentioned that Singapore itself had not yet become a party to the Berne Convention, although it intended to do so in the near future. Third, because of Article 1 of Treaty No. 1, Contracting Parties to that Treaty would already be *de facto* parties to the Berne Convention through compliance with the obligations of Articles 1 to 21 and the Appendix of the Berne Convention. For those reasons, he supported the Director General's

position, and opposed the position put forward by the countries of Latin America and the Caribbean.

34. EL Sr. ZAPATA LÓPEZ (Colombia) expone, en nombre del Grupo Latinoamericano y del Caribe, la posición que ha asumido el Grupo en el sentido de desear la existencia de un vínculo efectivo y expreso entre el Tratado y el Convenio de Berna. Hace notar que al inicio de los trabajos de los Comités de Expertos se hablaba de un protocolo al Convenio de Berna, porque el deseo de los países de la Unión, que entendían los argumentos avanzados por la Oficina Internacional según los cuales debido al gran número de Estados miembros de la Unión de Berna era irrealista pretender lograr la unanimidad que exige el Tratado para hacer una revisión, era adecuar el Convenio de Berna a las nuevas realidades. Es la razón por la cual se habló de un protocolo en el entendido que se enmarcaría en el Artículo 20 del Convenio de Berna. Si bien el tema del vínculo con el Convenio de Berna no se examinó durante las sesiones de los Comités de Expertos para concentrarse en los temas sustantivos, el Grupo Latinoamericano y del Caribe expresa ahora su voluntad de crear un vínculo real y no una simple referencia al respeto del Convenio de Berna. Insiste en la importancia de seguir los esfuerzos realizados hasta ahora por la Oficina Internacional en aumentar los números de adherentes al Convenio de Berna, y considera que el vínculo que crearía una obligación de adherirse a Berna para poder adherirse al nuevo Tratado sería una forma de impulsar nuevas adhesiones. Además, esta obligación no sería novedosa en el marco de los tratados administrados por la OMPI, si se considera por ejemplo que la Convención de Roma plantea como exigencia el ser parte en el Convenio de Berna o en la Convención Universal sobre derecho de autor, práctica que no ha sido cuestionada ante la Corte Internacional de Justicia. Considera igualmente que sin vínculo expreso con el Convenio de Berna, los países de la Unión de Berna se convertirían en un club de privilegiados que participarían en un Comité Ejecutivo que a su turno elige a los miembros del Comité de Coordinación de la OMPI, órgano de suma importancia que tiene entre sus responsabilidades la elección del Director General de la OMPI así como de los altos funcionarios de la OMPI. Es la razón por la cual, considera necesario incrementar el número de países miembros de la Unión de Berna y evitar que algunos países por adherirse al nuevo Tratado sin ser miembro de Berna se encuentren en la situación de no poder participar en las decisiones claves de la OMPI.

35. M. SÉRY (Côte d'Ivoire) rappelle que le groupe africain, lors de sa réunion à Casablanca, a examiné l'article en question et a souhaité qu'un lien étroit soit établi entre le projet de traité et la Convention de Berne.

36. Mr. BOGSCH (Director General of WIPO) referred to the "close connection" mentioned in the prior intervention. It was his opinion that the close connection was there; it was established by Article 1, which said that every Contracting Party had to respect the obligations of the Berne Convention. He pointed out that it was not exact to say that all important decisions were taken in the Executive Committee of the Berne Union. In connection with the forthcoming election of the Director General of WIPO, a majority would have to be attained in the Executive Committee of the Berne Union, but that was the only important decision in which the Berne Union Members had some specific rights. He said that the Committee would be making not a legal decision, because legally everything was in order, since Contracting Parties would have to respect the Berne Convention, but a political decision. He emphasized that, if the Committee established Berne Union membership as a condition for becoming party, it would throw out 40 countries and maybe more, because there were at least 20 countries which were Members of the United Nations and not Members of WIPO. Those 20 countries

might soon become Members of WIPO, and then it would be 60 countries which would be barred from becoming party to the Treaties.

37. Mr. KHLESTOV (Russian Federation) supported the interventions by the Director General of WIPO and by the Delegation of Singapore. He felt that membership in the Berne Convention should not be a basis for excluding any State from the Treaty. It would be quite enough for the State to promise to fulfill or comply with the basic obligations of the Berne Convention.

38. Mr. ALABTHNI (Yemen) also associated his Delegation with the interventions by the Director General of WIPO and by the Delegation of Singapore. He believed that it was not necessary to advocate membership in the Berne Union with respect to the two Treaties. It was merely a question of respecting the provisions of the Berne Convention. In addition, he said, the new Treaties contained more rights than were included in the Berne Convention; consequently, he considered that the new Treaties provided new and further reasons for additional accessions. He said that the condition of Berne membership would prevent numerous countries from acceding to the new Treaties.

39. Mr. YAMBAO (Philippines) also opposed the requirement of Berne Union membership put forward by the group of Latin American and Caribbean countries. He observed that the Rome Convention had not grown so much because it was a closed Treaty. He said that the Treaties being considered at the Diplomatic Conference would not touch only on the Berne Convention—they would touch also on the Rome Convention. In his opinion, if the Latin America and Caribbean countries insisted on the Berne membership requirement to be imposed, the Committee should, for purposes of Treaty No. 2, require membership in the Rome Convention. He said that that would make it a really exclusive club, limited to only fifty-some States. Contrary to that position, he felt that the Delegations should want the widest possible application for the Treaties. From a legal point of view, it was in the best interests of Berne member States that non-Berne States become party to the Treaties.

40. Mr. MALAMBUGI (Tanzania) supported the position put forward by the Director General of WIPO. He felt that the Committee should attempt to entice as many States as possible to ratify the Treaties.

41. M. SÉRY (Côte d'Ivoire) déclare que, suite aux explications du Directeur général de l'OMPI et aux interventions de certaines délégations, sa délégation partage l'avis du Directeur général sous réserve que les dispositions de l'article premier règlent le problème.

42. La Sra. JIMÉNEZ HÉRNANDEZ (México) apoya plenamente la posición defendida por la Delegación de Colombia, en nombre del Grupo Latinoamericano y del Caribe, así como la intervención de la Delegación de Chile. Considera difícil, desde el punto de vista de la lógica jurídica, no establecer como requisito para la adhesión al nuevo Tratado la pertenencia al Convenio de Berna, siendo que el Tratado se está considerando como un arreglo particular derivado del Artículo 20 del Convenio de Berna y resulta difícil imaginar que un Estado pueda ser parte de un acuerdo accesorio sin ser parte del principal.

43. Mr. CHRISTOV (Bulgaria) pointed out that Bulgaria had been party to the Berne Convention since 1921, and had witnessed the growth of membership in the Berne Union. He felt that the required application of Articles 1 to 21 and the Appendix of the Berne Convention,

as specified in Article 1(4) of Treaty No. 1, would produce the necessary respect for the Berne Convention which was being requested by the Latin America and Caribbean countries. His Delegation, therefore, opposed the requirement of Berne Union membership, and supported the positions put forward by the Director General of WIPO. He also associated his Delegation with the intervention by the Delegation of the Philippines.

44. Mr. MAOPE (Lesotho) supported the points raised by the Director General of WIPO and the Delegation of Tanzania.

45. El Sr. GASSER (Brasil) se auna a la opiniones expresadas por las Delegaciones de Colombia, México y Chile.

46. Mr. BOGSCH (Director General of WIPO) reminded the Committee that time was getting short, and asked the countries of Latin America and the Caribbean if they could not accept the Article as drafted, subject to the final provisions of Article 1(4) of Treaty No. 1 containing the required application of Articles 1 to 21 and the Appendix of the Berne Convention.

47. The CHAIRMAN suggested that the matter could be put to a vote along the lines suggested by the Director General of WIPO.

48. El Sr. ZAPATA LÓPEZ (Colombia), si bien acata los planteamientos del Director General de la OMPI que sabe mejor que nadie como funcionan y se manejan los tratados administrados por la OMPI, desea insistir en la importancia del papel desempeñado por el Comité de Coordinación, que no sólo se ocupa de la elección del Director General de la OMPI sino también de la preparación del orden del día y del proyecto de presupuesto de la Conferencia, del proyecto de orden del día de la Asamblea General, de aconsejar a los órganos de las uniones, a la Asamblea General, a las Conferencias, al Director General de la OMPI sobre todas las cuestiones administrativas y financieras y las demás cuestiones de interés común a las uniones y especialmente respecto del presupuesto de los gastos comunes de las uniones. Reitera que este importante comité es elegido por los miembros de los comités ejecutivos que crean las uniones de París y de Berna. Una simple referencia al respeto de las disposiciones sustantivas del Convenio de Berna, tal como se propone, no llevaría al respeto de las disposiciones administrativas que considera tan importantes como la consagración de derechos exclusivos en favor de los autores. Destaca en segundo lugar, que, si bien en su país existe el principio según el cual la ignorancia de la ley no es excusa, se trata de las leyes publicadas en el diario oficial del país en el que aparecen los actos que obligan a los ciudadanos de ese país. En consecuencia, se pregunta si se le puede pedir a un juez de un país que ratifique el nuevo Tratado sin ser parte en el Convenio de Berna, que aplique las disposiciones de este último sin que hayan sido publicadas en el diario oficial del país en cuestión. En conclusión, expresa su deseo de evitar que después de cinco años de trabajo y de esfuerzos, se llegue a un resultado que no corresponda exactamente a los fines originales del Tratado.

49. Mr. CHEW (Singapore) suggested that it would be better to attempt to find consensus on that issue rather than proceed to a vote at that time. He asked all Delegations to consider their positions on the question under discussion, and to come to a consensus decision.

50. Mr. SCHÄFERS (Germany) supported the position put forward by the Director General of WIPO. He pointed out that, with respect to the election of the Director General of WIPO,

he was not elected by the Executive Committee of the Berne Union, nor by the Coordination Committee. The Coordination Committee, composed of about 55 member countries, had the right by simple majority to make a proposal, and the final decision was taken by the General Assembly. All of the countries which might become Contracting Parties to the Treaties would be member States of WIPO; therefore, the attraction of having influence in the operations of the International Bureau through the Executive Committees, regarding, for example, the publication of laws, contributions, financial matters, etc., would serve to invite each and every Contracting Party to this Treaty to try to become a member of the Berne Union. He said that, therefore, he did not understand the concerns expressed by the Latin America and Caribbean countries.

51. El Sr. ROGERS (Chile) expresa el deseo de no proceder al voto por el momento.

52. El PRESIDENTE nota que conoce las posiciones de las Delegaciones de Singapur, Alemania, del Grupo Latinoamericano y del Caribe y se pregunta si la Delegación de Singapur se expresó en nombre del Grupo Asiático.

53. M. SÉRY (Côte d'Ivoire) déclare que sa délégation souscrit aux propos exprimés par le représentant du GRULAC et estime que, pour atteindre le plus grand nombre d'adhésion il convient de donner du temps aux délégations pour se consulter. Par ailleurs, en ce qui concerne le vote éventuel, il se demande si le règlement intérieur prévoit de voter sur une proposition du Directeur général, et émet des doutes à cet égard.

54. El Sr. JIMENEZ ADAY (Cuba) también expresa el deseo de esperar antes de proceder al voto porque considera necesario que todos tomen el tiempo de analizar y reflexionar sobre los argumentos que han sido avanzados tanto por la Delegación de Chile como por la de Colombia, en nombre del Grupo Latinoamericano y del Caribe.

55. Mr. YAMBAO (Philippines) asked the Committee to grant time to the Latin American and Caribbean countries, for them to reconsider their position. He also supported the suggestion by the Director General of WIPO, that those countries accept the Article as drafted, subject to finalization of Article 1(4) in Treaty No. 1.

56. The CHAIRMAN suspended the meeting.

[*Suspension*]

Number of instruments of ratification or accession necessary for the entry into force of the Treaties

57. Le PRÉSIDENT invite les délégations à considérer la question du nombre de ratifications nécessaires à l'entrée en vigueur des traités qui seront éventuellement adoptés. Il rappelle d'une part la proposition de la délégation de Singapour, au nom du groupe asiatique, retenant le nombre d'un tiers des Etats membres de l'OMPI, et d'autre part, la proposition du GRULAC indiquant 15 États seulement. Il fait observer que l'étendue géographique des futurs

traités doit être prise en considération et il se réfère à l'Union européenne qui compte 15 États membres. Il ajoute également qu'un nombre trop élevé poserait peut-être des problèmes de ratifications susceptibles de différer l'entrée en vigueur des traités.

58. M. SÉRY (Côte d'Ivoire) déclare que le groupe africain souhaite attendre les résultats des réunions de la Commission principale I avant de se prononcer sur un nombre quelconque.

59. Le PRÉSIDENT demande à la délégation de la Côte d'Ivoire d'expliquer sa position.

60. M. SÉRY (Côte d'Ivoire) explique que le nombre de ratifications pourrait être éventuellement inférieur à 15 si le contenu du traité donnait pleine et entière satisfaction aux pays du groupe africain. En revanche, il pourrait envisager un nombre plus élevé si la ratification du traité nécessitait un temps de réflexion plus long pour les États.

61. Ms. MARKOWITZ (United States of America) expressed the view of her Delegation that it was quite comfortable with the bracketed figure of "5." The Delegation was also able to support the suggestion made by the Director General of WIPO during the informal consultations that "10" would be a good number. She said that her Delegation's main concern, and the concern of the Director General of WIPO and a number of other speakers, was that the Treaties should come into force within a reasonable time. She did not want to set too high a number, so that those important obligations would remain in suspense internationally while the Treaties waited for a large number of countries to ratify.

62. Le PRÉSIDENT constate l'existence de nouveaux arguments dans le présent débat, à savoir d'une part l'octroi d'un temps de réflexion laissé aux États pour prendre leur décision de ratifier le traité en cause et choisir un nombre de ratifications en fonction des dispositions de fond et, d'autre part, l'idée d'un nombre le moins élevé possible soutenu par la délégation des États-Unis d'Amérique.

63. Mr. BOGSCH (Director General of WIPO) indicated that each country would decide for itself when it should become a Contracting Party to the Treaties. He noted that, if the Treaties were very difficult to comply with, because of the new obligations, then it would take longer. If they would be easy Treaties, they would be ratified sooner. In his opinion, the content of the Treaties would have a direct influence on the speed in each individual country for the ratification. He said that that question had very little to do with the entry into force of the Treaties, because, even if the Treaties entered into force, it would not bind any country which had not ratified it.

64. Mr. KEMPER (Germany) supported the intervention by the Director General of WIPO. In his opinion, it did not make sense to hold the text of the Treaties hostage, so to speak. He noted that, if one were to look at the preamble and its third paragraph, namely, "recognizing the profound impact of the development and convergence of information and communication technologies, on the creation and use of literary and artistic works," one was able to see that it was discussing the adaptation or approximation of the advanced systems to the needs and requirements of the information society. He felt that everybody in the Committee and the Diplomatic Conference was well aware of the speed at which technological developments were taking place. Therefore, it did not make sense to set a high threshold. His Delegation had no problem with the "5," as indicated in brackets. The Treaties should enter into force as soon as possible. He referred to what had been the course of action adopted at the Diplomatic

Conference in 1994 for the Treaty on Trademark Laws. The ceiling for the entry into force was low, five instruments, and he observed that that was one of the reasons why it had already entered into force. He emphasized that there was no reason to put a high threshold for the entry into force of the Treaties.

65. Mr. HENNESSY (Ireland), speaking on behalf of the European Community and its Member States, said that those countries would have no problem with “5,” which had been suggested, or with “10,” as suggested by the Director General of WIPO. But, in any event, he stressed that the number should not be too high, and in that regard, “20” would seem like the absolute maximum number. It would be preferable that the Treaties come into force at an early date.

66. Ms. BETTS (Canada) supported the number “5,” and said that her Delegation was eager to see the Treaties come into force as quickly as possible.

67. Mr. KIM (Republic of Korea) said that his Delegation believed that the Treaties, once entered into force, would have a globally significant impact on related industries and international trade, on related goods and services, as well on a tremendous number of users, and therefore must not upset the universal character of exchange of information in that environment. He stressed that the impact of the Treaties would extend even to the countries which were not Contracting Parties to the Treaties. His Delegation supported the position of the countries of Asia and the Pacific that the number of ratifications or accessions should be 50.

68. Mr. CHEW (Singapore) referred to the discussions in Main Committee I, in which it had been indicated that the Treaties, when they would come into force, would have significant implications and a global impact. He pointed out that many of the articles in the Treaties created new rights, some of which were entirely new rights not found in the existing conventions. Existing rights under the Berne Convention had also been extended by the Treaties. He referred to the TRIPS Agreement, which, he said, had certain transitional provisions for developing countries which would enable some time to put into effect those obligations. He said that the Treaties in some areas had gone beyond the TRIPS Agreement. He drew attention to the fact that, as to the industrialized countries, the obligations of the TRIPS Agreement had been fully in force on January 1, 1996. But the developing countries had a few more years, until January 1, 2000, to implement their obligations under the TRIPS Agreement. Bearing that in mind, he said that the Delegates at the Conference would certainly not want to see the new Treaties overtaking obligations that had been agreed upon in a different forum, namely the World Trade Organization, only two years ago. That might create a pattern of negotiations where one treaty sought to supersede another so soon. He urged the Delegations from the industrialized countries to adopt a more reasonable stance on the question at hand, and referred to the suggestion by the Delegation of the European Community and its Members States, which had indicated that 20 would be a possible absolute maximum. He asked for flexibility, and indicated that the countries of the Asia and Pacific region were prepared to also be flexible. He suggested that perhaps the number of parties that were taking part in this Conference could be used as an indication, and that a fraction of that number could be used as a guide as to the appropriate figure.

69. Mr. BOGSCH (Director General of WIPO) explained that the TRIPS Agreement would bind the developing countries which were members of the World Trade Organization in the

year 2000. The present Treaty had no time limit for any country, developing or industrialized. He said that every country could wait a hundred years and could still not be forced to adhere to the Treaty. He stressed that there was a great difference in that, in the TRIPS Agreement, there was no flexibility. However, here, a country never had the obligation to accede to the Treaties. It was each country's decision. Each country could make its decision separately, individually, sovereignly, when it wanted to be bound by the Treaties. If the existence of the Treaties would have, as some of the participants had said, a *de facto* impact on the mood of the world, that impact, if it existed, would exist whether the Treaties were in force or not. It would have such an alleged impact from the end of the Diplomatic Conference, because there would be the Treaties the text of which would be known, whether in force or not. He asked the Delegates what was the value of preventing those five or ten countries which wanted to be bound to each other, to be able to do that. Since it was a voluntary decision by the countries, and since some countries wanted to have the benefits, why not let those countries which wanted to be bound soon to be bound soon. He said that it was not in any country's interest to prevent them.

70. Mr. SIHNA (India) referred to the usefulness of the interventions by the Director General of WIPO. He expressed the desire of his Delegation that the Treaties come into force as early as possible. He also said that his Delegation would like the Treaties to be genuinely effective. He thought that the effectiveness of the Treaties might depend on how universal they would be. The Treaties dealt with the digital environment, and the digital environment did not respect national boundaries, but rather was genuinely global in nature, far more global in nature than any other medium known earlier. He pointed out that there was considerable interest among developing countries in intellectual property matters, and that that had been confirmed by the presence and the active participation of many developing countries in this Conference. In his opinion, the number of ratifications or accessions would have to be distinctly higher than that number considered in other treaties administered by WIPO, because there were over 120 Member States participating in the Diplomatic Conference. He felt that any figure agreed upon should have bearing on, or should be in the context of, that participation rather than earlier participations.

71. Mr. SHONEVELD (Australia) indicated that his Delegation agreed with the interventions made by the Delegations of Canada and the United States of America on that issue. His Delegation would be prepared to accept 5 or 10, but was concerned that a higher number might unnecessarily delay the Treaties' coming into force amongst those countries that wanted to implement it.

72. The CHAIRMAN stressed that time was getting short, and that the question of the number of ratifications or accessions necessary for the Treaties to come into force had to be decided, since the important question involving the European Community and its Member States still required resolution. He said that the number of ratifications or accessions was a technical question, and not a political decision. He said that he had no problem with adjournment for informal consultations, but that, if the matter could not be decided by consensus, it would be put to a vote by the Committee.

73. Mr. BOGSCH (Director General of WIPO) stated that the discussion on that question had been thorough, and that everybody should be clear on the various arguments and reasons connected to that item. He suggested that perhaps consensus could be reached during an adjournment. He asked if any Delegations wished to make some explanation on the proposal

of the European Community and its Member States, so that when the groups discussed that issue among themselves, they would already have answers to possible questions which they might have. He also pointed out that it would be against the Rules of Procedure to have a question decided only in the Plenary of the Conference. The Plenary of the Conference, according to the Rules, should pronounce itself on what was proposed by the Main Committees.

74. The CHAIRMAN asked the Delegations to try to resolve the questions which were pending during the adjournment. One was the number of ratifications or accessions necessary for the Treaties to come into force. He asked if there were any questions on the proposal by the European Community and its Member States.

75. M. SÉRY (Côte d'Ivoire) déclare que le Groupe africain affiche une certaine flexibilité quant à ce nombre de ratifications nécessaires. S'agissant du problème de la Communauté européenne, il souhaite, avant de se prononcer, recevoir le document y relatif en langue française.

Voting by intergovernmental organizations party to the Treaties

76. The CHAIRMAN reminded the Committee that it had before it the Basic Proposal, a second proposal on the framework of admission of new members, and a third proposal by the European Community and its Member States.

77. Mr. SINHA (India) asked for clarification on two points. First, regarding the European Community and its Member States, and referring to the proposed new Article 98(3)(b), he said that the last sentence was rather complex. He read that sentence: "The rights to vote as exercised between an intergovernmental organization and its member States, Contracting Parties to this Treaty, shall not, in any one vote, be exercised in any combination of votes, exercised by the member States and votes exercised by the organization." He indicated that that sentence, in its current form, was not clear, and asked that it be made more clear. Second, he referred to a proposal that was to recall a statement in the minutes of the Conference, specifically, that "the European Community and its Member States hereby indicate that their common practice is to deposit their instruments of ratification or accession simultaneously." He requested to have clarification as to what exactly was the legal status of the minutes of the Conference as compared to the text of the Treaties.

78. Mr. STOODLEY (European Communities) offered a clarification regarding the language in the proposal of the European Community and its Member States for Article 98(3)(b). He referred to discussions in connection with the Rules of Procedure of the Conference concerning the way in which the European Community would exercise voting rights. He said that, on behalf of the European Communities, his Delegation had made a clear statement that it was never the Delegation's intention to combine any voting with votes by the Member States. As an example, he mentioned the case where the Member States individually would be exercising their voting rights, but not all 15 of the Member States of the Community exercised those rights, for example, only 10 of them did so. He emphasized that, in those circumstances, the European Community would not ever intervene to exercise the remaining five votes. He stated that the purpose of the language proposed was to give effect to that sentiment, that where the Member States exercised their voting rights individually, they would do so as they

decided, if they were present. However, where the European Community exercised the voting rights, it would do so *en bloc* for the 15 Member States, which was, in fact, the capacity in which the European Community acted. He stressed that there would never be a case of individual Member States in a single vote exercising votes and the Community seeking to complete the votes for those Member States which did not exercise their rights.

79. Mr. BOGSCH (Director General of WIPO) clarified that the prior intervention was in respect to the second sentence of the proposal of the European Community and its Member States. He pointed out that the third sentence had to do with another question, namely, whether the Member State had to be present during the voting, which had been the controversial issue when the Rules of Procedure were being adopted. As far as the last sentence was concerned, the European Community and its Member States had indicated that their common practice was to deposit their instruments of ratification or accession simultaneously, and it had been proposed that that statement should be recorded in the minutes of the Conference. He referred to the intervention by the Delegation of India, and said that an obligation came only from the Treaty, and anything that was in the records was something which was simply recorded. It merely would record the fact that there existed a practice in the European Community.

80. The CHAIRMAN adjourned the meeting, and indicated that the next session of the Committee would be its last one.

Third Session

Thursday, December 19, 1996

Afternoon

Adoption of the Administrative Provisions and Final Clauses

81. The CHAIRMAN opened the meeting, and introduced document CRNR/DC/83 Prov., dated December 18, 1996, for consideration by the Committee, and proposed that it be addressed article by article. He referred to Article 100(1)(a), (b) and (c). There were no objections, and it was approved. He referred to paragraph (2)(a), (b) and (c). There were no objections, and it was approved. He referred to paragraph (3)(a). There were no objections, and it was approved. He referred to subparagraph (b), and read it: "Any Contracting Party that is an intergovernmental organization may participate in the vote in place of its Member States with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its rights to vote or vice versa." There were no objections, and it was approved. He referred to paragraphs (4) and (5). There were no objections, and they were approved. He referred to Article 101. There were no objections, and it was approved. He referred to Article 102(1), and read it: "Any Member State of WIPO may become party to this Treaty." There were no objections, and it was approved. He referred to paragraph (2). There were no objections, and it was approved. He referred to paragraph (3). There were no objections, and it was approved. He referred to Article 103. There were no objections, and it was approved. He referred to Article 104. There were no objections, and it was approved.

He referred to Article 105, and read it: "This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO." There were no objections, and it was approved. He referred to Article 106. There were no objections, and it was approved. He referred to Article 107. There were no objections, and it was approved. He referred to Article 108. There were no objections, and it was approved. He referred to Article 109. There were no objections, and it was approved. He referred to Article 110. There were no objections, and it was approved.

Closing remarks

82. The CHAIRMAN congratulated all of the Delegations, and opened the floor for declarations.

83. M. SÉRY (Côte d'Ivoire) exprime, au nom du groupe africain, ses vifs remerciements et félicitations au Président pour tout le travail qu'il a accompli. Il remercie le Directeur général de l'OMPI pour son active participation et ses conseils avisés, ainsi que toutes les délégations qui ont su faire des concessions pour parvenir à des résultats positifs par consensus.

84. Mr. KHLESTOV (Russian Federation) associated his Delegation with the congratulations to the Chairman by the Delegation of Côte d'Ivoire and the other such interventions. He said that the Committee had achieved compromise by all working together. He also congratulated the Director General of WIPO, the Secretariat and the interpreters.

85. Mr. YAMBAO (Philippines) joined all the Delegations in congratulating the Chairman for his able leadership of the Committee, and also noted the efforts by the Director General of WIPO, which he called 'heroic.' He also thanked all the Delegations present, on behalf of the Asian and Pacific group of countries, for the spirit of cooperation that had prevailed throughout the work of the Committee. He hoped that the same spirit would also prevail in the other rooms, so that the following day it could be said that they had succeeded in the Conference.

86. Ms. MARKOWITZ (United States of America) expressed the appreciation of her Delegation to the Chairman, the Director General of WIPO, the Secretariat, the interpreters and all participants, for bringing the work of the Committee to a successful conclusion. She observed that the decision concerning making provisions for the European Community to become party to the Treaties was very important. She stated that the provisions approved in the Committee, particularly Articles 102 and 103, offered a firm legal basis for pursuing any matter related to the Treaties with the European Community as well as with its Member States who would be party to the Treaties.

87. Mr. STOODLEY (European Communities) thanked the Chairman, the Director General of WIPO, the Secretariat, and all Delegations, for agreeing to include the European Community and its Member States with the status of a party to the Treaties.

88. El Sr. ROGERS (Chile), en nombre del Grupo Latinoamericano y del Caribe, se auna a las felicitaciones dirigidas por las demás Delegaciones al Presidente de la Comisión II por la forma en que dirigió los debates y agradece al Director General de la OMPI así como a la Secretaría por la labor realizada.

89. Ms. BETTS (Canada) thanked the Chairman, the Director General of WIPO, and the Secretariat. She agreed that the provisions for the European Community to become party to the Treaties were very important.

90. Mr. BOGSCH (Director General of WIPO) thanked all Delegations for their efforts in the Committee.

91. The CHAIRMAN thanked all participants involved in the Committee's work. He noted that, for him, being the Chairman had been an unforgettable experience. He said that he was a professor of international law, and now he could say to his students that he had the magnificent experience of being the chairman of a committee in a Diplomatic Conference. In his opinion, very few professors of international law could say that they have had such a magnificent opportunity. For that, he expressed deep-felt thankfulness, and with that, he closed the meeting.

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