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WIPO

IAVP/DC/37
ORIGINAL: French/English/Spanish
DATE: March 6, 2002

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

DIPLOMATIC CONFERENCE ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES

Geneva, December 7 to 20, 2000

SUMMARY MINUTES (MAIN COMMITTEE I)

prepared by the International Bureau

President: Mr. Jukka Liedes (Finland)
Secretary: Mr. Jørgen Blomqvist (WIPO)

First Meeting
Thursday, December 7, 2000
Afternoon

Work structure

1. The PRESIDENT opened the meeting and expressed thanks for his election as the President of Main Committee I of the Diplomatic Conference. He noted that Main Committee I would deal with the substantive provisions of the treaties to be considered by the Diplomatic Conference.

2. He had drafted a preliminary work program based on the nature of the issues. This would require the division of the substantive items into six work packages. The first would consist of what he considered to be non-controversial issues. This would include the Preamble, Articles 6 to 10, Articles 13 to 18 and Article 20. The second would include Articles 2 and 5. The third would be solely concerned with Article 11. The fourth would include Articles 3, 4 and 19. The fifth would deal with Article 12, while the final package would include the title and Article 1, which was to be coordinated with Main Committee II. The next stage would include a comprehensive discussion on all the issues. If time were to permit, the floor would be opened to the non-governmental organizations in relation to all the substantive issues. He invited the Committee to comment on his suggested work program.

3. Mrs. RETONDO (Argentina) announced that the Group of Latin American and Caribbean Countries (GRULAC) was interested in Article 11 being dealt with before the moral rights, because the definition of moral rights would be worked out on the basis of what was decided regarding Article 11.

4. The PRESIDENT stated that the order could be changed.

5. Mr. AHOKPA (Benin) said that he had not been able to locate Article 19 in the work package devised for the various provisions.

6. The PRESIDENT reiterated that the fourth work package would include the remaining framework provisions, i.e. Articles 3, 4 and 19.

7. Mr. DICKINSON (United States of America) questioned whether it was prudent to leave the difficult issues till the end where there could be a shortness of time.

8. The PRESIDENT stated that the preliminary work plan was subject to change following consultations.

9. Mrs. BELLO DE KEMPER (Dominican Republic) said that GRULAC wished to avoid having Committees I and II working at the same time, as that would present problems for delegations with few members.

10. Mr. SHEN (China) stated that the Basic Proposal provided a good basis for discussion. His Delegation supported the President's proposed work program. He suggested that a time frame be imposed for individual issues to ensure that enough time would be allocated for discussions on the more difficult subjects.

11. The PRESIDENT stated that this would be considered in due course.

12. Mr. SARMA (India) suggested the inclusion of Articles 3 and 5 under the third work package as these were linked to Article 11 and thus, should be jointly discussed.

13. The PRESIDENT then adjourned the meeting.

Second Meeting
Friday, December 8, 2000
Morning

14. The PRESIDENT stated that the draft work program had been revised following comments from various delegations. It would be used for the first reading of the text while the second would be based on the written proposals received during the initial reading, possibly included in a consolidated document. Although the objective of the first reading was to establish agreement on elements that could be taken to the final instrument, everything would remain open until the entire text was decided.

15. He opened the floor for discussion on the proposed work program. Noting that no delegation asked for the floor, he decided to proceed according to the work program.

Preamble

16. The PRESIDENT proposed two modifications to the Preamble. The word "social" should be included after the word "economic" in the second paragraph in parallel with the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), while the words "audiovisual performances" in the fifth paragraph should be replaced with the phrase "performances fixed in audiovisual fixations" as the WPPT covered, for instance, the broadcasting and the communication to the public of live audiovisual performances.

17. He opened the floor for discussion on the draft Preamble and noting that no delegation had asked for the floor, he stated that Main Committee I had reached a preliminary understanding on the Preamble on which basis the item could be set aside for the time being.

Article 6: Economic Rights of Performers in their Unfixed Performances

18. The PRESIDENT invited the Committee to turn to Article 6 (Economic Rights of Performers in their Unfixed Performances). The provision followed the corresponding provisions of Article 6 of the WPPT. The scope of the right was similar to the right granted to performers under the Rome Convention and the WPPT. It was also proposed by some

delegations during the preparatory stages that the right could be incorporated by simply stating that Article 6 of the WPPT applied *mutatis mutandis* to the instrument.

19. Mr. PHUANGRACH (Thailand) stated that his Delegation was of the view that the instrument should be as identical to the WPPT as possible, as they both dealt with the rights of performers and a "sound performer" often engaged in audiovisual performances.

20. Mr. GOVONI (Switzerland) noted that the President had rightly pointed out that the WPPT also covered the audiovisual field as far as unfixed performances were concerned, and proposed that paragraph 5 of the Preamble be amended accordingly. For the sake of consistency, item (ii) of Article 6 should avoid speaking of audiovisual fixation and should rather be based on the wording of Article 6 of the WPPT, which mentioned only fixation.

21. The PRESIDENT proposed that the issue be discussed at a later stage as it was also relevant to other articles.

22. Mr. GOVONI (Switzerland) pointed out that in Article 7 the words "audiovisual fixation" presented a problem regarding the proposed definition, and suggested replacing the words "audiovisual fixations" in Article 7 with "performances fixed on a medium other than a phonogram," or alternatively avoiding any definition of audiovisual fixation.

23. The PRESIDENT proposed the deletion of the word "audiovisual" from subsection (ii) in order for the provision to be identical to the corresponding provision in the WPPT.

24. Mr. CRESWELL (Australia) stated that, as the interpretation of Article 6 of the WPPT was subject to the scope of the definition of "fixation" under Article 2 of that Treaty, it remained questionable whether it was appropriate to delete the term "audiovisual" from Article 6 of the proposed instrument. He noted that the differences between the definitions of "broadcasting" and "communication to the public" also called into question whether Article 6 in the proposed Treaty could be considered identical to Article 6 in the WPPT.

25. The PRESIDENT noted that this would not be relevant if the instrument would be linked to the WPPT, but could be applicable if the treaties were to be delinked.

26. Mr. COUCHMAN (Canada) noted that the issue of rights and remedies with respect to the secondary uses of unauthorized audiovisual fixations was not currently addressed within the draft instrument.

27. The PRESIDENT stated that the floor would be opened to non-governmental organizations when all the articles in the first package had been discussed. He suggested putting Article 6 aside for the time being, subject to the issue raised by the Delegation of Australia and the possibility of a proposal from the Delegation of Canada.

Article 7: Right of Reproduction

28. The PRESIDENT invited the Committee to turn to Article 7 (Right of Reproduction). The operative elements of this provision were the same as those in the corresponding article of the WPPT.

29. Mr. CRESWELL (Australia) mentioned the possibility of including an agreed statement in order to clarify that the right of reproduction included the audio recording of only the soundtrack component of a film.

30. The PRESIDENT stated that discussions were based on the understanding that the right of reproduction covered the entire audiovisual fixation, including the sound track. The fact that this understanding would be recorded in the official proceedings should be sufficient, but an agreed statement could be considered if clarification were to be required. The question of agreed statements, in particular, the technique of incorporating statements adopted in 1996 into the instrument, would be considered at a later stage.

31. Mr. GOVONI (Switzerland) proposed deleting subparagraph (c) of Article 2, which defined the audiovisual fixation, as it was not very clearly differentiated from the definition of the phonogram as appearing in the WPPT, which was liable to present problems in the implementation of the two Treaties. He suggested drawing inspiration from the wording adopted in the WPPT and so replacing, in the various Articles concerning the rights accorded after first fixation, the words “audiovisual fixations” with “fixations that are not phonograms,” which would obviate the definition of audiovisual fixation.

32. The PRESIDENT suggested that an understanding be fixed on this article and put aside, subject to the issue raised by the Delegation of Switzerland.

Article 8: Right of Distribution

33. The PRESIDENT invited the delegations to turn to Article 8 (Right of Distribution). The operative elements of that Article were identical to the corresponding provisions of the WPPT. As it was considered to be non-controversial, he suggested that an understanding be fixed on this Article before putting it aside.

Article 9: Right of Rental

34. The PRESIDENT submitted Article 9 to the Committee for comments and considerations. He explained that the provisions did not exactly follow Article 9 of the WPPT and that the formula of the second paragraph had been taken from Article 11 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Article 7(2) of the WCT. Paragraph (2) had been borrowed from that field and not from the field of phonograms which was subject to different considerations. He suggested to consider some other forms for the second paragraph, as paragraph (1) belonged to the almost non-controversial elements of the proposal.

35. Mr. REINBOTHE (European Community) agreed with the view that Article 9(1) seemed to be much less controversial. Article 9(2) of the Basic Proposal took a different approach as compared with Article 9 of the WPPT. The European legislation granted rental rights to both sound and audiovisual performers on equal footing with no discrimination. The material impairment test of paragraph (2) took the shape of a condition for the application of the right of rental. It had to be decided whether discussions on rental rights would focus on the group of audiovisual performers as rightholders to be protected considering their twin nature and comparing them with sound performers, who enjoyed those rights combined with the material impairment test in the form of a grandfathering clause, which leaves in place

remuneration rights, or whether they would rather focus on the audiovisual production as such.

36. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, shared the view expressed by the European Community concerning Article 9 of the Basic Proposal. Paragraph (1) did not raise any concern, but with regard to paragraph (2), the group would rather prefer the same wording *mutatis mutandis* as Article 9(2) of the WPPT. The conditions under which a Contracting Party granted these exclusive rights to the same category of rightholders should be the same, or at least of the same nature, notwithstanding whether they were performances fixed in phonograms or audiovisual fixations.

37. Mr. KEPLINGER (United States of America) believed that the reasons expressed in the explanatory notes of the Basic Proposal were logically consistent. The impairment test was part of the test for granting rental rights to cinematographic works. Those were the underlying works in which performances were particularly fixed. If exclusive rental rights were provided with no impairment test to performers, it would have the effect of rewriting the TRIPS Agreement. It would mean granting to performers in respect of cinematographic works higher rights than those granted to authors. The impairment test did not occur in the context of the grandfathering clause. There was a grandfathering clause with respect to rental rights regarding sound recordings in the TRIPS Agreement, but it was intended only to deal with the situation of a very small number of countries which had already enacted the rights of remuneration with respect to rental rights before the TRIPS Agreement. It had no connection with the impairment test and it concerned sound recordings and not audiovisual works. Therefore, he supported the text as it was drafted.

38. Mr. GOVONI (Switzerland) pointed out that in Swiss law performers in the audio and audiovisual fields enjoyed the same level of protection. As far as rental rights were concerned, the wording of paragraph (2) of Article 9 of the WPPT should be incorporated *mutatis mutandis* in the new Treaty.

39. Mr. ISHINO (Japan) noted that, taking into account the consistency with the provisions of the TRIPS Agreement and the WCT, his Delegation supported the wording of Article 9(2) of the Basic Proposal.

40. Mr. CRESWELL (Australia) drew attention to the fact that there was not an exact correspondence between Article 9(1) in the instrument and Article 9(1) of the WPPT. The latter included the words “as determined in the national law of Contracting Parties” which was a critical phrase. If there was to be an alteration to Article 9(2), which Australia wanted retained in its present form, it would be necessary to consider those words in Article 9(1) of the WPPT that had not been carried across into Article 9(1) of the draft instrument.

41. The PRESIDENT concluded that there were a number of delegations supporting paragraph (1). Paragraph (2) could be left, subject to further considerations and to possible proposals from any delegations.

Article 10: Right of Making Available of Fixed Performances

42. The PRESIDENT submitted the Article to consideration and explained that it was a new right which had been inserted in the WPPT concerning phonograms and performers and also

an element in the field of copyright which had been fixed in Article 8 of the WCT as part of the right of communication.

43. Mrs. BELLO DE KEMPER (Dominican Republic) reverted to Article 9 and expressed GRULAC's preference for the present wording in the text of the Basic Proposal.

44. Mr. CRESWELL (Australia) proposed that the word "the" before the words "members of the public" be omitted consistently with Article 10 of the WPPT.

45. The PRESIDENT supported to delete the word "the" in order to make it clear that it concerned any members of the public, and noted that with that modification there was an understanding regarding Article 10.

Article 13: Limitations and Exceptions

46. The PRESIDENT observed that the Article followed as closely as possible the corresponding article in the WPPT. The model had been well established in 1996, both in the context of the WCT and the WPPT. He submitted Article 13 for consideration.

47. Mr. CRESWELL (Australia) noted that although Article 16 of the WPPT was headed "limitations and exceptions," in the second line of that Article the phrase was "limitations or exceptions." He stated that if exact correspondence was to be achieved regarding the WPPT, the expression in Article 13(1) of the Basic Proposal should be the same.

48. The PRESIDENT said that it could be taken into consideration to replace the "and" between limitations and exceptions by "or," and noted that there was and understanding on Article 13, with that amendment.

Article 14: Term of Protection

49. Mr. COUCHMAN (Canada) recalled that in November 1998, the Canadian Delegation had put forward a proposal to the Standing Committee on Copyright and Related Rights that the term of protection for performers should be co-extensive with the protection of the audiovisual work itself. The value of the performance lasted for the entire duration of the audiovisual work itself. The proposal of 1998 recognized that if one was to have such a possible amendment, it might be appropriate to allow for certain limitations in the purely audio uses of such a performance after 50 years. A related issue was the potential of a rule of comparison of terms. Even if the Treaty itself had a 50-year term of protection, countries would be reluctant to go beyond that term if they had to give national treatment to all other Contracting Parties which had a shorter term.

50. The PRESIDENT noted that the instrument consisted of provisions establishing minimum rights, and suggested that the Delegation of Canada submit a proposal that compiled the suggestions relating to the term of protection, national treatment and possibly also some aspects of Article 11.

51. Mrs. TOURÉ (Burkina Faso) noted that, in the French version of Article 14, the word “a” should be added after the word “exécution” in the last line, to match paragraph (1) of Article 17 of the WPPT.

52. Mr. HENNEBERG (Croatia) asked whether, in Article 14, the 50-year term of protection applied also to moral rights.

53. The PRESIDENT explained that Article 14 was a proposal which fixed for the whole protection of 50 years counted from a given date and applicable to both economic rights and moral rights. Nothing precluded a longer term of protection for those rights on the national level. With the understanding that there might be a proposal concerning a possible clause on the comparison of terms, there appeared to be an understanding concerning Article 14.

Article 15: Obligations concerning Technological Measures

54. The PRESIDENT noted that the language again followed the corresponding provisions of the WCT and WPPT and the only changes were dictated by the scope of application. The expression “effective technological measures that are used by performers” had to be read, interpreted and construed in such a way that it also referred to those who were acting on behalf of performers, including their representatives, licensees, assignees, producers, service providers and persons who were engaged in communication or broadcasting using performances on the basis of due authorization.

55. Mr. SEUNA (Cameroon) said that Article 15 was a provision that encompassed not only performers but also licensees, and therefore proposed a mention of holders of rights in Article 15. The provision would therefore read “that are used by performers or by rightholders.”

56. The PRESIDENT indicated that including the word “rightholders” could lead to some questions about the interpretation of the clause. The very purpose of his introductory remark made on the basis of Note 15.03 had been to establish for the records of the Conference an interpretation concerning all those who were acting on behalf of performers.

57. Mr. COUCHMAN (Canada) agreed with the content of Note 15.03. He suggested it might be more transparent to other members of the public if those principles in Note 15.03 were brought forward in an agreed statement.

58. The PRESIDENT concluded that there was an understanding on Article 15 and the clarifications recommended might be reflected in the proceedings of the Conference.

Article 16: Obligations concerning Rights Management Information

59. The PRESIDENT observed that the Article followed very closely the model established in the WCT and the WPPT with one exception. The phrase “or appears in connection with the communication or making available of a fixed performance or a phonogram to the public” was missing in paragraph (2) of draft Article 16, because it was not necessary in the context of audiovisual performances.

60. Mr. CRESWELL (Australia) drew attention to the wording in subparagraph 1(ii) "communicate or make available to the public, without authority, unfixed performances or performances fixed in audiovisual fixations." The corresponding text in Article 19 of the WPPT said "performances, copies of fixed performances," so it could raise interpretation implications to have omitted the reference to "copies of" which was also included in Article 12 of the WCT. In relation to paragraph (2) of the draft Article 16, the wording referred to "information which identifies the performer, the performance of the performer, or the owner of any right in the performance." In the event that Alternative F in Article 12 was favored, a reference would need to be added in Article 16 to the producer who, under that Alternative, would be entitled to exercise the exclusive rights.

61. The PRESIDENT said the latter question would depend on the solution found regarding Article 12. As to the former remark, he stated that the expression was intended to capture all corresponding cases that were covered in the corresponding clause of the WPPT.

62. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, asked for further explanation of the question raised by the Delegation of Australia with reference to the word "fixed" in Article 19 of the WPPT. In the view of the African Group, it should be *mutatis mutandis* application of the WPPT.

63. The PRESIDENT explained that that clause was one of the possible candidates to be taken to the new instrument by using the technique of reference to the WPPT. As to the remark made by the Delegation of Australia concerning paragraph (1)(ii), the expression in the proposed instrument covered all the cases, but if after final analysis it became evident that that was not the case, the paragraph would be reworded. In the present proposal, the expression referred to unfixed performances and performances fixed in audiovisual fixations. Unfixed performances were live performances which were being broadcast, communicated or made available, and performances fixed in audiovisual fixations referred to those cases where performances fixed in audiovisual fixations were being broadcast, communicated or made available, but covering also the case where the performances were fixed in tangible form and were distributed. If several delegations were not to share that interpretation, then the draft article should be reworded.

64. Mr. COUCHMAN (Canada) believed that, in addition to the types of information provided in paragraph (2) such as the identity of the performer or the performances of the performer, it might be useful to include certain other types of purely factual information, such as the nationality of the performer, the place of the habitual residence of the performer or even the place of fixation of the performance as part of the rights management information.

65. The PRESIDENT stated that it was a minimum obligation for the Contracting Parties. He noted that there was an understanding regarding the issue of rights management information, subject to the question concerning the expression "fixed performances" or "performances fixed in audiovisual fixations" in paragraph (1)(ii). He proposed to analyze further whether the last words of Article 19(2) of the WPPT could be omitted without any negative effects.

Article 17: Formalities

66. The PRESIDENT said that there was no need to submit for consideration Article 17, and proposed to have an understanding on it without a debate.

Article 18: Reservations

67. The PRESIDENT stated that Article 18 should be subject to the outcome of those provisions where reservations were possible.

Article 20: Provisions on Enforcement of Rights

68. The PRESIDENT decided not to open a debate on Article 20. There was an understanding on the model which was the same model as in the WCT and the WPPT.

Third Meeting
Friday, December 8, 2000
Afternoon

69. The PRESIDENT opened the floor for the intergovernmental and non-governmental organizations concerning all provisions discussed in the first work package.

70. Mr. ABADA (UNESCO) expressed surprise at the proposals made that morning regarding the deletion in Article 6 of the reference to the word "audiovisual," given that the discussion had to do with the international protection precisely of audiovisual performances. He suggested retaining the word "audiovisual" in Articles 6 and 7, and referring at the end of Article 7 to "fixations embodied in an audiovisual medium."

71. Mr. VINCENT (FIM) pointed out that the fixation concept was crucial. He said that he disagreed with the presentation of the fixation concept given by the President, according to whom the right of fixation in Article 6 should be understood as referring to the copying of a fixation. The view according to which the copying of a fixation was itself a fixation was contradicted by the Rome Convention and also by the proposed Article 6 in the preparatory document. He proposed the following definition of audiovisual fixation: "audiovisual fixation means any fixation other than an exclusively audio fixation," meaning in other words that audiovisual fixation meant any fixation other than a phonogram. The phonogram concept referred not to a medium but to the essence of the artistic performance that was fixed. He added, on the subject of Article 6 and perhaps also Article 10, that the present proposals did not cover the specific case of a concert or a live performance that was broadcast live on the Internet.

72. The PRESIDENT said that the notion of communication that had been used in Article 6 covered direct transmission via Internet from a live concert. Clearly without problems, it covered cable television, streaming via Internet, and any other transmissions that were not broadcasting. However, when the operation involved the making available according to Article 10, it was another question, which concerned fixed performances. He drew attention

to the definitions of phonograms in both the Rome Convention and in the WPPT. Subsequent fixations could take place after the first fixation allowing the use of the word fixation to signify phonogram. In the Rome Convention, there was a definition of producer which referred to a person who first fixed the sounds of a performance or other sounds.

73. Mr. VINCENT (FIM) said that, as far as he was concerned, the concept of the phonogram referred not to a medium but to the essence of the performance that was fixed. He mentioned that the WIPO Glossary made it clear that the fixation concept had to do with the original embodiment of an unfixed performance. If there were two or more subsequent fixations, that would deprive the concept of reproduction of all meaning.

74. Ms. SAND (FIA) said that the issue of economic rights in the Basic Proposal, apart from the right of broadcasting and communication to the public, was considered uncontroversial by the Conference. She suggested to include the expression “permanent or temporary” in the proposed Article 7 on the reproduction right. In the absence of agreement on that, she proposed the adoption of an agreed statement corresponding to the statement in paragraph 29 of the President’s memorandum. Regarding the right of distribution, it was not clear whether that limitation should be upheld in the digital age or whether distribution via the Internet should not in fact be subject to a modern day version of the distribution right to supplement the making available right. The right of rental in the Basic Proposal was framed along the lines of that in the WCT and the TRIPS Agreement rather than that in the WPPT, including the so-called impairment test, which raised concerns about the implications for national treatment. The new right created should not damage or undermine those protections that had already been achieved at national level through bargaining, statutory rights or a combination of the two.

75. Mr. PÉREZ SOLÍS (FILAIE) proposed that the Treaty refer to “audiovisual performance and videograms.” With regard to Article 7, on the right of reproduction, he considered that one should add to “ the direct or indirect reproduction” the phrase “of all or part,” owing to the large number of ways in which audiovisual recordings could be used and exploited. On the subject of Article 8, on the right of distribution, he proposed a wording that avoided the expression “making available,” which could give rise to confusion with other rights. As for Article 9, on the right of rental, he considered that such a right should be provided for without the condition of proof of prejudice. With regard to Article 10, on the right of making available, he said that he was in favor of deleting the word “members.”

76. The PRESIDENT clarified that there was no interference between the right of distribution and the right of making available. The expression “making available to the public” in Article 8 of the Basic Proposal was also used in the same context in the WCT and the WPPT. The other clarification was concerning the word “members” in Article 10. The public was not always a group of people who were gathered in the same place or a group of people in different places at the same time. Also single members of the public, who at different time in different places had something made available, constituted the public.

77. Mr. BLANC (AEPO) voiced concern regarding the proposed definition of audiovisual performances. The proposal regarded as an audiovisual performance any performance that could be incorporated in an audiovisual fixation, which meant that any performance could be an audiovisual performance, even a purely audio performance. That definition was not necessary in the future protocol. He supported the definition of audiovisual fixation proposed by the FIM.

78. Ms. MARTIN-PRAT (IFPI) stated that the WPPT was clear as regards the definition of phonogram. A sound fixation incorporated in an audiovisual work was not a phonogram. It should be protected as part of that audiovisual work. The definition of the WPPT was broadly reflected in national legislation and in current practices. Music videos, for instance, were widely recognized and exploited as audiovisual works, not as phonograms. This Treaty should protect all performances not protected by the WPPT but should also avoid any overlap in the protection regime. The meaning of the agreed statement on Article 2(b) of the WPPT was that phonograms were protected as phonograms when they existed and were exploited separately from an audiovisual fixation.

79. Mrs. LEPINE-KARNIK (FIAPF) subscribed to the statement made by IFPI, mentioning that the audiovisual work was a single entity made up of a multitude of performances of various kinds, both audio and visual, and that the legal systems of the countries represented had all settled on a unitary conception of the audiovisual work. It should be clear that a purely audio performance incorporated in an audiovisual work would come within the purview of the new Treaty in the same way as other performances.

Article 2: Definitions

80. The PRESIDENT turned to Article 2 and first to Article 2(a) and (c). On the basis of the results of the analysis and debate on Article 2(b) during the regional consultations, the Committee should, as a working hypothesis, delete the definition of "audiovisual performance" in Article 2(b). The purpose of this definition was to function as a technical help, as explained in Note 2.04 of the Basic Proposal, rather than as a real definition. Therefore he would open the floor on Article 2(b) only for those delegations who would like to reintroduce that paragraph. Article 2(a), defining "performers," followed the WPPT, which differed from the Rome Convention in that it added the term "interpret" to the list of types of performances, and "expressions of folklore" to the scope of performances. In Article 2(c), the term "fixation" instead of "work" was used because "audiovisual work" had specific meaning in certain national legislation. Its structure followed the definition of "fixation" in the WPPT. Any tangible copy or object on which a performance was fixed was intended to be included. There were no conditions regarding the requisite permanence or stability of the embodiment. "Fixation" referred to any first fixation and any fixation embodied in a subsequent copy.

81. Mr. GOVONI (Switzerland) proposed deleting subparagraph (c) of Article 2, which defined the audiovisual fixation, as it did not differentiate clearly from the definition of the phonogram appearing in the WPPT. He suggested drawing inspiration from the wording adopted in the WPPT and replacing, the various articles concerning rights conferred after first fixation, the words "audiovisual fixations" with "fixations that are not phonograms," which would make it unnecessary to define what an audiovisual fixation was.

82. Mr. COUCHMAN (Canada) stated that the concept of moving images should be kept. A series of still images, for instance, should not be included in this concept.

83. The PRESIDENT said that in the digital environment, impression of moving images was not created by a series of still images, but from a flow of small changes in the image. The suggestion of the Delegation of Switzerland would be analyzed.

84. Mrs. DE MONTLUC (France) expressed interest in the proposal made by the Delegation of Switzerland.

85. Mr. BOSUMPRAH (Ghana) observed that the African Group would be cautious to remove “audiovisual fixation” from the definitions now that “audiovisual performances” had already been deleted.

86. Mr. CRESWELL (Australia) shared the concern expressed by the Delegation of Canada to retain the concept of moving images. If they followed the Swiss proposal, photographs or even sketches of a performance, for instance, might be caught by “fixations other than phonograms.” He asked why “representations of” images were not included in the definition of audiovisual fixation. The word “sound” should be put in plural in line with the definition of broadcasting.

87. The PRESIDENT noted that as far as sound was concerned, only a representation of a sound could possibly exist in the memory of a computer, whereas images might be somewhat different; one might say that a copy of the image might reside in the memory of the computer. Use of the word “sounds” in plural would be considered later.

88. Mr. OYONO (Cameroon) proposed amending the definition of the audiovisual fixation appearing in subparagraph (c) of Article 2 by replacing the words “embodiment of moving images” with the words “consisting of a series of interconnected moving images, with or without sound.”

89. The PRESIDENT stated that the French version would be studied by the Drafting Committee. He concluded that the definition would be set aside as a possible solution.

90. Mrs. BELLO DE KEMPER (Dominican Republic) said that in the opinion of GRULAC the expression in Article 2(c) of the WPPT should be used, that only “fixation” should be referred to, that it should be defined as “the embodiment of images” and then that the WPPT Article in question be followed.

91. The PRESIDENT asked for clarification whether the Delegation of the Dominican Republic had suggested that the word “audiovisual” should be deleted from Article 2(c).

92. Mrs. BELLO DE KEMPER (Dominican Republic) said that the word “audiovisual” should indeed be deleted from the expression “audiovisual fixation.”

93. The PRESIDENT stated that the suggestion made by the Delegation of the Dominican Republic would be added to the working hypothesis.

94. The PRESIDENT turned to Article 2(d) (broadcasting) and Article 2(e) (communication to the public). As to the notion of broadcasting, he referred to the similarity with the definition in the WPPT, with a slight difference. The notion of broadcasting referred to only wireless transmissions for the reception of the public. The language “public reception” was kept as in the WPPT, although it had been identified that “reception by the public” would be accurate. The same additional clarifying elements, which had been taken from the WPPT referring to the satellite broadcasting and transmissions of encrypted signals, was also included. The notion of communication to the public in Article 2(e) referred to all transmissions which were not broadcasting, in other words, all practices of transmission which were made by wire, and also communication by wireless means not being broadcast,

such as by cell phone technology. The first half of the definition referred to transmissions in circumstances where there was a distance element between the place where the transmission originated and the public. The second half of the definition was parallel to the WPPT. It would extend the notion of communication to the public for the purposes of Article 11 to practices where fixed performances were played from those fixations to the public which was present in the same place where this playing or projection was taking place. For the purposes of Article 6, only the first half of the definition applied. He invited the Spanish-speaking delegations to compare the English and the Spanish versions of the last parts of the provision in order to see whether any change in substance or in expression was needed.

95. Mr. KEPLINGER (United States of America) stated that the definitions put forth in the Basic Proposal were acceptable to his Delegation. Rethinking and reworking of established concepts, in particular those in the WPPT, should be avoided in light of the time constraint. The WPPT was still in the process of coming into force. The soundtrack of a motion picture or television production which formed part of the work was not a separate phonogram subject to separate remuneration, unlike a commercially published phonogram of the soundtrack or a selection from the soundtrack.

96. Mr. ISHINO (Japan) stated that when aural performances once fixed in a phonogram is incorporated in an audiovisual fixation, such aural performances do not fall under the new instrument but fall under the WPPT. On the other hand, aural performances fixed in an audiovisual fixation fall under the new instrument, however, when such aural performances are embodied in a phonogram, such aural performances embodied in a phonogram fall under the WPPT. A definition of “producer” or an agreed statement thereon should be included for the purpose of Article 12 of the Basic Proposal. There were different understandings concerning the meaning of a producer. One could, for example, define a producer as the person or entity who took the initiative and had the responsibility for the audiovisual fixation. That matter should be further considered taking into account the definition of a producer of a phonogram in the WPPT and the Rome Convention.

97. Mr. REINBOTHE (European Community) stated that it would not be appropriate to reopen the WPPT. There were sound recordings that were accompanied by visual elements. That fact made such sound recordings an audiovisual fixation or made them phonograms, depending on how Contracting Parties would deal with these phenomena. The same went for the treatment of music videos. An important objective was that the new instrument would not prejudice the freedom of Contracting Parties to choose the appropriate category as they saw fit for those various phenomena.

98. The PRESIDENT noted that there were definitions on the level of treaties and there were faculties for the Contracting Parties on the national level. Sometimes the Contracting Parties might introduce notions on the level of national legislation that might not be in correspondence with the treaties without being in conflict with the treaties.

99. Mr. COUCHMAN (Canada) stated that there was a reason why in Article 10 the notion of “members of the public” was used rather than simply the “public.” It seemed that those arguments also held true in the first line of the definition of communication to the public. The term to be defined should not be changed to “communication to the members of the public,” but in the second line there might be merit in using the same terminology both in terms of uniformity and comprehension of protection. In the last line of that definition, the “public” probably should remain the way it was because, for example, members of a family were not a public.

100. The PRESIDENT indicated that there was some justification for a difference between the articles concerning the right of making available to the public and those concerning broadcasting and communication to the public. The interactive, individual on-demand practices were not covered by broadcasting and communications to the public, whereas they were covered by the making available right, as was the case of the WPPT.

101. Mr. SARMA (India) supported the suggestion made by the representative from Japan to include a definition of a producer in this new instrument.

Fourth Meeting
Monday, December 11, 2000
Morning

102. The PRESIDENT invited the Committee to consider the proposal by the GRULAC that Article 12 be discussed after work package 1 because of its impact on other issues.

Article 2: Definitions (continuation)

103. The PRESIDENT then opened the floor to the intergovernmental and non-governmental organizations for discussion on Article 2.

104. Mr. ABADA (UNESCO) mentioned the importance of the definitions, which should be retained in the draft Treaty. He proposed specifying in Article 2(b) that the performances of performers were meant, in order to rule out virtual performances, and referring in Article 2(d) to transmission to a particular audience rather than to the public in general.

105. Mr. PÉREZ SOLÍS (FILAIE) felt that the adjective "natural" should be added between the words "other" and "persons" in the definition of "performer," in order to avoid the inclusion of legal entities in the definition. He also expressed concern at the definition of "audiovisual fixation," especially in relation to the phonogram, in which rights were not lost when it was incorporated in a cinematographic or audiovisual work. He felt that a definition of "audiovisual producer" should be included. He felt also that the term "broadcasting" should be distinguished from "communication to the public" by defining the former as "the dissemination or transmission of sounds or of images, carried out by a broadcasting organization or by a broadcaster."

106. Mr. MASUYAMA (CRIC), speaking on behalf of GEIDANKYO, stated that in the interest of clarity, the term "audiovisual fixation" should be further defined. He supported the proposals made by the Delegations of Switzerland and Japan.

107. Mr. RIVERS (ACT) stated that the words "transmission by wireless means for public reception" in the definition of broadcasting did not mean "transmission by wireless means for reception by the public," as intended, and should be rectified. The rights included under the WPPT were not applicable to audiovisual fixations, as provided under Article 2(b) of the WPPT and its agreed statement.

108. Mr. IVINS (NAB), speaking on behalf of the regional broadcasting organizations, stated that in the absence of an explicit provision concerning "extras," the first four sentences of Note 2.03 should be included in an agreed statement to the definition of performers, in order

to avoid wide differences in the interpretation of “extras” by individual countries, particularly as this could affect the application of Article 11 and Alternative G of Article 12.

109. Mr. LERENA (AIR) recalled that the definition of “performer” had been the subject of protracted discussions within the Committee of Experts, and that there had been no agreement at government delegation level. He considered that future difficulties of interpretation and implementation of the provision should be avoided by the inclusion of a clarification or an agreed statement regarding the exclusion of extras from protection under the Treaty.

110. Ms. MARTIN-PRAT (IFPI) stated that as the term “phonogram” was defined in Article 2(b) of the WPPT, blurring the distinction between a phonogram and an audiovisual fixation would cause legal uncertainty in the interpretation of national laws and existing international treaties, in particular, Article 12 of the Rome Convention and Article 15 of the WPPT.

111. Mr. PARROT (ARTIS GEIE) observed that, in the case of a performance already fixed on a phonogram being incorporated in an audiovisual work, the phonogram would continue to be protected by the WPPT. The performance might come within the purview of the new instrument if it were fixed in an audiovisual fixation. In that case the music performers would not be entitled to the equitable remuneration for broadcasting of their fixed performances until they were incorporated in an audiovisual fixation. He therefore proposed deleting the definition of audiovisual performance, but supported the definition of the audiovisual fixation.

112. Mr. VINCENT (FIM) considered that the IFPI proposal on the interpretation of the phonogram concept would complicate the calculation of the term of protection of performances fixed on phonograms, as the WPPT and the Rome Convention both had fixation as the starting point of the term of protection.

113. . Mr. BLANC (AEPO) expressed surprise at the IFPI statement, as its proposal was liable to cause the removal of the right to equitable remuneration when commercial records were broadcast by television companies. He wished to have a definition of audiovisual performance that was sufficiently neutral for the WPPT to exist. As far as the definition of fixation was concerned, he favored the proposal made by Switzerland.

114. Mr. THIEC (EUROCOPYA) declared himself in favor of the definitions proposed in Article 2, and more especially those appearing in subparagraphs (b) and (c), which seemed inseparable and complementary. Apart from that, a definition of the producer of the audiovisual work could be introduced, taken *mutatis mutandis* from that of the phonogram producer appearing in Article 2(d) of the WPPT.

115. Mr. CHAUBEAU (FIAPF) said that an audiovisual work was a complex combination of varied inputs. At the present time it was a question not of renegotiating the WPPT, but rather of negotiating a document that related specifically to audiovisual performances. If it had been decided that such a specific instrument was called for, that was because the audiovisual concept possessed a certain complexity owing to the incorporation of various elements. In an audiovisual fixation there was indeed the notion of audio, but that did not prevent from being a visual as well as an audio fixation, which had its own specific nature, an audiovisual work being a whole that transcended and was greater than the sum of its parts.

116. Ms. MARTIN-PRAT (IFPI) stressed that the focus of the current discussions was Article 11, and not the reinterpretation of Article 12 of the Rome Convention and Articles 2(b) and 15 of the WPPT.

117. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, supported the definition of audiovisual fixations in the Basic Proposal, with the addition of the words "excluding phonograms."

118. The PRESIDENT closed the debate on Article 2.

Work Program

119. The PRESIDENT invited the delegations to comment on the proposal by GRULAC on Article 12 and the work program.

120. Mr. REINBOTHE (European Community) proposed to discuss the framework provisions, including beneficiaries of protection, national treatment, the transfer of rights. In the present agenda the issue of transfer of rights enjoyed already certain preferential treatment because it was the first of the most general points to be discussed. As there was a clear interface between Article 11 and Article 4, he proposed to move up front the discussion of Article 4 and merge it with the discussion in Article 11. Otherwise, the working program proposed by the President should be retained.

121. Mr. GANTCHEV (Bulgaria) speaking on behalf of the Group of Central European and Baltic States thanked GRULAC for its proposal, but expressed a preference for the work program as it stood. Discussions seemed to be moving at a good speed, therefore he suggested covering more ground before coming to the most difficult issues.

122. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, said that the Group agreed with GRULAC's proposal but preferred proceeding with the work program as proposed by the President.

123. Mr. KEPLINGER (United States of America) expressed his appreciation for the proposal of GRULAC. There was a certain logic to completing the discussion of all the economic rights, since those were the subject of Article 12. A compromise position might be to reverse the order of package 3 and package 4 by taking up transfer immediately after the discussion of Articles 11 and 4 and before the discussion of moral rights, since the provisions of Article 12 did not deal with moral rights.

124. M. GOVONI (Switzerland) considered that there was a certain logic to the President's proposal, and that the rights should be discussed before the matter of their transfer was embarked upon. He endorsed to the compromise proposal made by the United States of America.

125. Mr. BLIZNETS (Russian Federation) also proposed to maintain the order that had been agreed on in order to discuss first the less controversial issues and then come to the complicated issues such as the transfer of rights.

126. The PRESIDENT suggested to maintain the original order proposed as many delegations and representatives of the regional groups endorsed that order. However, one delegation had suggested to lift the question of transfer upward in the program, specifically after the debate on all economic rights and national treatment but before moral rights.

127. Mrs. BELLO DE KEMPER (Dominican Republic) said that GRULAC agreed to the compromise solution in order to lend some coherence to the discussion of the items in the Basic Proposal.

128. The PRESIDENT noted there seemed to be consensus on the order of business. The question of transfer changed to package 3 and moral rights changed to package 4.

Article 11: Right of Broadcasting and Communication to the Public

129. The PRESIDENT explained that the main function of Article 11 would be the possibility to internationalize the rights between States and within regions. In Article 11(1), there was an obligation to introduce an exclusive right of authorizing the broadcasting and the communication to the public for performers. According to paragraph (2), the Contracting Parties could establish, instead of the exclusive right of authorization, a right to equitable remuneration and in paragraph (3) the Contracting Parties would get ample freedom to design the rights of remuneration. There were possibilities to limit the right of remuneration by making a reservation. Therefore, Contracting Parties would have the freedom to provide that the right of remuneration would be applicable only for broadcasting, communication or for certain practices of broadcasting, certain groups or certain ways of communicating performances to the public, or then to introduce the rights in such a way that they would cover all practices of broadcasting and communication to the public. For those who would have great difficulties in introducing any rights of remuneration, the clause in paragraph (3) would make it possible to reduce the right of remuneration to a very low level.

130. Mr. CHOE (Republic of Korea) indicated that the right of remuneration for broadcasting and communication to the public of audio performances existed under the WPPT, in respect of the secondary use of commercial phonograms. He pointed out that, in the Rome Convention, the remuneration right had been granted in order to compensate the economic hardship of performers. The same tradition had been followed by the TRIPS Agreement and the WPPT. In the case of audiovisual performances more time was necessary to evaluate how that right could be adopted in domestic laws.

131. Mr. PHUANGRACH (Thailand) did not think that the structure of Article 11 as it stood would be a good solution. He did not agree with the idea of giving the exclusive right under Article 11(1) as performers were already given the exclusive right of authorizing the fixation of their performances under Article 6(ii). The Treaty should give protection to the performers with respect to broadcasting and communication to the public of his performance, but no more and no less than what was given under the WPPT.

132. Mr. ISHINO (Japan) was of the opinion that the Basic Proposal was a good starting point for discussion. He emphasized the importance to secure the material reciprocity in

relationship with Article 4 on national treatment when taking into consideration the *à la carte* solution of Article 11.

133. Mr. REINBOTHE (European Community) stated that the right of communication to the public and broadcasting was granted in the Member States of the European Community according to different models. There had been no need to harmonize those various models. Likewise, Article 11 of the Basic Proposal did not harmonize the right of broadcasting and communication to the public at the international level. Article 11 left considerable uncertainty with regard to the effects in the various Contracting Parties concerned, in particular regarding the application of national treatment. Article 11 would have to be mirrored by a provision on national treatment, which would make explicit reference to Article 11(1) and (2) where material reciprocity should also apply. He referred to the proposal submitted to the International Bureau by the European Community and its Member States which tackled those issues.

134. The PRESIDENT noted that, according to the statement of the Delegation of the European Community, it seemed that the proposal of that Delegation would add further flexibility to the application of Article 11 and to the obligation of national treatment concerning the right of broadcasting and communication to the public.

135. Mr. KEPLINGER (United States of America) believed that the proper solution was to provide an exclusive right of broadcasting and of communication to the public. Such a provision would be in parallel to the communication right provided under the WCT for audiovisual works in which performances were fixed. Broadcasting and communication to the public represented one of the three methods of exploiting audiovisual performances today, therefore it should be recognized that the viability of that right was integrally linked to the optimal resolution of the alternatives in Article 12. The inclusion of the exclusive right would open the possibility of collective administration.

136. Mr. BLIZNETS (Russian Federation), speaking on behalf of Central Asian, Caucasus an Eastern European Countries, recalled that the Group had approved the constructive proposals contained in paragraphs (1) and (2) of Article 11, but at the same time there was a concern regarding the reservation contained in the last sentence of paragraph (3): "or that it will not apply the provisions of paragraph (1) and (2) at all." That reservation could lead to legal uncertainty and could also deprive performers of their right to obtain their equitable remuneration for broadcasting.

137. Mr. GOVONI (Switzerland) considered that the regulatory system adopted in the new instrument should in principle correspond to that contained in the WPPT. He noted that Article 11 was not consistent with that proposition, as its paragraph (1) conferred an exclusive right on performers whereas Article 15 of the WPPT contained only a right to remuneration. Moreover, the way in which the entitlement to remuneration was arranged in Article 11(2) was different from that contained in Article 15 of the WPPT, which limited the application of the rights to phonograms published for commercial purposes. Article 11 also presented problems in relation to Article 4, and was unsactisfactory as worded at present, because it did not allow for the differences between the markets for phonograms on the one hand and for audiovisual productions on the other.

138. Mr. GANTCHEV (Bulgaria), on behalf of the Central European and Baltic States agreed with the present wording of Article 11 of the Basic Proposal. The Group was of the opinion that such a wide range of options was necessary for Contracting Parties as it was

nearly impossible to predict in which direction the market situation for audiovisual fixation would develop in the future. Furthermore, he emphasized the conjunction of Article 11 with the national treatment provisions in Article 4 of the Basic Proposal.

139. Mr. HERMANSEN (Norway) favored the same protection for performers both in the audio and audiovisual areas. The wording of Article 11 should therefore be the same as that of Article 15 of the WPPT. However, since producers of audiovisual productions to a great extent were in direct contractual relation with the users of those productions and as performers were in direct contractual relations with the producers, they could set the conditions for such exploitation if they had an exclusive right of broadcasting and communication to the public. Therefore, he would not object to the option of an exclusive right as proposed in Article 11(1). Regarding the remuneration right in Article 11(2) and in the WPPT, he shared the analysis presented by the European Community. In principle he also supported the European Community's reasoning concerning reciprocity.

140. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, said that the proposals in Articles 11(1) and (2) were acceptable to the Group, but the reservation in paragraph (3) was not acceptable. The exclusive right of broadcasting and of communication to the public in paragraph (1) was the highest protection provided to performers. Paragraph (2) took into consideration the interests of users such as broadcasting organizations. Contracting Parties should not be given the option not to apply paragraphs (1) and (2) at all. His Delegation could further work on paragraphs (1) and (2) in order to strike the balance between the performers' rights and the interests of users. Therefore paragraph (3) should be deleted.

141. Mr. SHEN (China) stated that his Delegation was of the opinion that all performers, whether their performances were sound or audiovisual, should be accorded the same rights. Paragraph (1) of Article 11 provided for an exclusive right, which was not the case under the WPPT. Moreover, Article 15 of the WPPT concerned only phonograms used for commercial purposes, whereas in Article 11 of the Basic Proposal that expression had been deleted. The expression "for commercial purposes" should be added in paragraph (2) after "direct or indirect use of performances fixed in audiovisual fixations."

142. Mrs. BELLO DE KEMPER (Dominican Republic), speaking on behalf of GRULAC, said that the Group was impatiently awaiting the written proposal by the European Union, and would reflect on the statements made regarding Article 11 and its various alternatives and implications.

143. Mr. CRESWELL (Australia) observed that, due to the variety of possibilities envisaged by Article 12 of the Rome Convention, it gave rise to the question whether it was worth including such a provision at all, considering it could be the subject of a total reservation. He recalled however that Article 11 with the possibility of total reservation nonetheless had had a quite extensive harmonizing effect. His Delegation shared the view that the activity covered by Article 11 was a very important use of audiovisual fixations of performances and it would seem to be surprising if the new instrument would not have any provision on that subject. He considered the possibility of reducing the exclusive right to a right to remuneration and this justified retaining paragraph (2) of proposed Article 11. His Delegation was not in favor of omitting paragraph (3). Finally, regarding the phrase "published for commercial purposes," the explanation in paragraph 11.06 of the explanatory note on this issue was compelling and justified the omission of that phrase from draft Article 11.

144. Mr. HAMID (Bangladesh) said that the provision put in Article 11(1) should remain as it was, whereas the provision proposed in Article 11(2) might be deleted.

Fifth Meeting
Monday, December 11, 2000
Afternoon

145. The PRESIDENT announced that Main Committee I would resume its work on Article 1, and invited the delegations to take the floor on Article 11.

146. Mrs. BELLO DE KEMPER (Dominican Republic) expressed GRULAC's interest in the existence of a right of broadcasting and communication to the public, but reserved its final position until a detailed analysis had been made of Articles 4 and 12, but above all until it had had the opportunity to examine the European Union proposal in Spanish translation.

147. The PRESIDENT invited the Delegation of the European Community to repeat their proposal to introduce its proposal to amend Article 4.

148. Mr. REINBOTHE (European Community) pointed out that the amendment suggested to Alternative D of Article 4 was the following: The obligation under paragraph (1) should remain the same. A new paragraph (2) should be inserted in order to allow material reciprocity with respect of Article 11(1) and (2). It should be an enabling clause, and not an obligation. The wording "to the extent to which, and to the term for which" drew upon paragraph (2) of Alternative C. Paragraph (2) in the current Alternative D would become paragraph (3). When a country made a reservation under Article 11(3), while still maintaining one of the models covered by Article 11 under the national law, neither should this Contracting Party lose the possibility to achieve national treatment on these rights, nor should other Contracting Parties have the possibility to acquire national treatment in the Contracting Party which had made the reservation. His Delegation proposed to modify the wording "another Contracting Party" to "a Contracting Party." It also suggested using the term "Agreement" instead of "Treaty" since it continued to be in favor of a protocol. An agreed statement on the notion of material reciprocity in paragraph (2) should be attached. Material reciprocity should be based on the material equivalence of the right in question as effectively applied for the benefit of the performer. His Delegation continuously preferred Alternative D.

149. Mr. ISHINO (Japan) stated that his Delegation attached much importance to secure material reciprocity for the rights under Article 11, and appreciated the proposal made by the Delegation of the European Community. It would consider the proposal in detail once it had been received in writing. His Delegation was in favor of Alternative D, which was a traditional form of national treatment in the field of neighboring rights.

150. Mr. SARMA (India) asked for clarification from the Delegation of the European Community whether it was in favor of Alternative C or D, pointing out that a provision on material reciprocity which was similar to the one proposed by the European Community was found in paragraph (2) of Alternative C.

151. The PRESIDENT said that his understanding was that some elements of paragraph (2) of Alternative C were used in paragraph (2) of Alternative D.

152. Mr. REINBOTHE (European Community) confirmed the statement by the President. He added that there was an important difference between the proposed Article 4(2) on material reciprocity and the clause under Alternative C, because in the latter, material reciprocity applied to all rights, whereas his Delegation proposed to apply material reciprocity only to Article 11.

153. The PRESIDENT added that Alternative C was based on the proposal made by the African Group. The model for Alternative D was found in the WPPT. As far as the wording "to the extent to which, and to the term for which" was concerned, it was also found in Article 16 of the Rome Convention.

154. Mr. GOVONI (Switzerland) said that his country was in favor of adopting Alternative D, which was modelled on the WPPT formula. If Article 11 was to be retained in its present form, Alternative D would have to be completed with a provision on material reciprocity. He expressed interest in the European Community proposal.

155. Mr. GUISASOLA GONZÁLEZ DEL REY (Spain) said that there was a discrepancy between the English and Spanish versions of the proposal that the European Union had just submitted. In the last paragraph of the agreed statement on Article 4, where it said "aplicada eficazmente," it should say "efectivamente aplicada."

156. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Central European and Baltics States, stated that the Group was firmly in favor of Alternative D. One should not depart from the model adopted in the WPPT, which corresponded to the traditional way in which national treatment applied to neighboring rights. This approach was justified by the fact that, in respect of performers' rights and other related rights, national norm-setting had not brought about the same level of harmonization as had been achieved in the field of copyright. Article 4 should be considered in conjunction with other articles, in particular Article 11.

157. Mr. KEPLINGER (United States of America) expressed his Delegation's preference for the Berne Convention type of national treatment for performers. This would vary from the national treatment provisions in the WPPT, but audiovisual works were different from phonograms in that they were accorded a broad national treatment under both the Berne Convention and the TRIPS Agreement. His Delegation supported Alternative C. Furthermore, it would be unjustifiable to collect remuneration based on the exploitation of the performances of foreign performers in audiovisual works, if such remuneration was not distributed to those performers. His Delegation had submitted an amendment to Article 4 to embody this principle in treaty language.

158. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, confirmed that Alternative C was a proposal of that Group. The European proposal seemed to combine that proposal, Alternative C, and the WPPT model of Alternative D.

159. The PRESIDENT closed the first round of interventions concerning Article 4 and stated that he would open the debate on Articles 11 and 4 the following day to give the government delegations the opportunity to offer further comments on those provisions.

Article 12: Transfer, Entitlement to Exercise Rights, Law Applicable to Transfers and No such Provision

160. The PRESIDENT invited the delegates to discuss the third work package which consisted of Article 12. The alternatives represented in the models of the Basic Proposal had been put forward by delegations or groups of countries during the preparatory stages. Alternative E was based on a rebuttable presumption of transfer. Alternative F was based on the model of Article 14*bis*(2) of the Berne Convention with slight adjustments as described in paragraph 12.11 of the explanatory notes. Alternative G was a model which did not require any clauses on transfer or entitlement in national law, but would bring about an obligation to recognize the transfer of the exclusive rights of authorization by agreement or by operation of law in other Contracting Parties. That model was based on the principles of private international law and the main operation was based on the well-known concept of the law of the country most closely connected to the subject matter. Paragraph (2) contained a hierarchy of possible criteria to define the country most closely connected. Alternative H, even without text, represented a full proposal indicating that there should be no provision in the new instrument on transfers or other similar operations, based on the assumption that the national solutions would prevail.

161. Mr. RATTANASUWAN (Thailand) expressed his Delegation's preference for Alternative E as it would lead to greater certainty. Performers could protect themselves through contractual arrangements if they had the bargaining power to do so. His Delegation rejected all other alternatives. Under Alternative F it was not clear whether the performer could still exercise the exclusive right, while the producer was also entitled to exercise it. That might lead to different interpretations and practices by the Member States.

162. Mr. GOVONI (Switzerland) wished to be given some explanations by the Delegation of the United States of America regarding its proposal for Article 4. It provided that "No Contracting Party shall allow collection of remuneration." The question of charging remuneration was a matter for the private law of contracts between owners of rights and users, not public law.

163. Mr. KEPLINGER (United States of America) said that in the English language version there was no implication that the Contracting Party was necessarily the collecting agent. The French version might imply that it would be the Contracting Party who did the collection, which could be the source of the concern.

164. Mr. GOVONI (Switzerland) said that the implementation of the provision seemed as difficult in national law as in an international treaty.

165. Mr. KEPLINGER replied that his Delegation would endeavor to furnish practical examples.

166. The PRESIDENT adjourned the meeting.

Sixth Meeting
Tuesday, December 12, 2000
Morning

167. The PRESIDENT opened the floor for a continued debate on the right of broadcasting and communication to the public.

168. Mrs. BELLO DE KEMPER (Dominican Republic), speaking on behalf of the GRULAC, expressed interest in the inclusion in the instrument of a right of broadcasting and communication to the public. However, with reference to the European Union proposal and the amendment that the United States had also proposed, she mentioned that there were points that needed to be cleared up before a decision could be taken, and accordingly certain delegations would take the floor separately, above all in view of the implications of Articles 4 and 12.

169. Mr. CRESWELL (Australia) asked for some clarification with regard to the amendment proposed by the European Community in document IAVP/DC/7 regarding Articles 4 and 11. His Delegation was interested to know more about the change proposed to Article 4 (3) which seemed to consist of replacing the word "another" by the article "a."

170. The PRESIDENT pointed out that the question was to determine whether the expression "a Contracting Party" in paragraph (3) would have a double meaning, meaning the Contracting Party which was making reservations and another Contracting Party.

171. Mr. REINBOTHE (European Community) explained that the modification of Article 4 had been based on Alternative D, trying to maintain the model of Article 4 of the WPPT. Article 11 of the Basic Proposal was based on an *à la carte* solution. Therefore, his Delegation was of the opinion that, in the interface between that article and the national treatment obligation in Article 4, the reference to the reservation in Article 4(3) had to be slightly modified. The expression "another Contracting Party," found in Article 4(2) of the WPPT, by "a Contracting Party" was to make clear that once a Contracting Party had made a reservation as allowed under Article 11(3), then no national treatment obligation would apply. Neither the Contracting Party that had made the reservations would enjoy national treatment with respect to the rights for which it had made the reservation in other Contracting Parties, nor would nationals of other Contracting Parties enjoy national treatment in the Contracting Party that had made the reservation.

172. Mr. GOVONI (Switzerland) had doubts about the accuracy of the French translation of the European Community proposal, as it did not make the distinction that has just been mentioned in the English text. The French version referred to "une autre Partie contractante," and not to "une Partie contractante."

173. Mr. REINBOTHE (European Community) said it was a language mistake. The draft in English showed the substitution of the word "another" by the word "a," whereas in the French version it read "ne s'applique pas dans la mesure où une autre Partie contractante," therefore the word "autre" had to be deleted.

174. Mr. BOSUMPRAH (Ghana), on behalf of the African Group, asked for a clarification regarding the agreed statement to Article 4 in the proposal of the European Community, particularly on the meaning of "material equivalence."

175. Mr. ISHINO (Japan) noted that the Delegation of the European Community had said that when a Contracting Party made use of the reservation permitted by Article 11(3), that Contracting Party had no obligation of national treatment. He asked for clarification whether that meant material reciprocity or a zero national treatment obligation.

176. Mr. REINBOTHE (European Community) clarified that Article 4(2) itself did not use the term "material reciprocity," but introduced material reciprocity through the terms "for which" and "to the extent to which." The wording was proposed in order to clarify the matter by using not only the notion of material equivalence in the agreed statement but also by using the whole set of criteria which would be used when engaging in a comparison. Only if the comparison resulted in the finding that there was material equivalence of the right in question and only if that right in question was effectively applied for the benefit of performers, a national treatment obligation would be established. As to the question of the Delegation of Japan regarding the zero national treatment obligation, the answer was that the first layer, in Article 4 (1), had a clear-cut national treatment obligation, the second layer, in Article 4 (2), established that Contracting Parties had the possibility to apply in certain cases the notion of material reciprocity, and the third layer, in Article 4 (3), indicated that whenever a party made use of the possibility to submit a reservation within the context of Article 11(3), the result would be a zero national treatment obligation. That article provided Contracting Parties with the possibility to make a partial, total or tailor-made reservation. In Article 11(3) of the Basic Proposal, the possibility to make a partial reservation only referred to paragraph (2) whereas the possibility to make a total reservation referred to both (1) and (2).

177. Mr. BLIZNETS (Russian Federation), speaking on behalf of the Commonwealth of Independent States, supported Alternative D of Article 4 with the amendments made by the European Union.

178. Mr. BOSUMPRAH (Ghana) stated that the African Group was still considering the proposal of the European Community alongside previous statements on the issue and asked whether it would be possible to replace the word "and" in the second line of Article 11, after "paragraphs (1)" with the word "or."

179. Mr. REINBOTHE (European Community) considered it an excellent suggestion because it reflected the relation between those two options.

180. Mr. GANTCHEV (Bulgaria) speaking on behalf of the Group of Central European and Baltic States agreed with the proposal of the European Community in relation to Article 11. With regard to Article 4, he also agreed with the basic idea but expressed some concerns relating to the agreed statement which had been added to that article.

181. Mr. SARMA (India) suggested not to have Article 11 at all and to delete the references to Article 11 in Article 4. A proposal to that effect had been submitted by his Delegation.

182. Mr. CRESWELL (Australia) referred to the intervention by the Delegation of Japan and the response by the Delegation of the European Community according to which, when a Contracting Party made a reservation of any sort under Article 11(3), then that resulted in zero-level national treatment obligation. If that was so, then the wording of Article 4(3) of the European Community's proposal, in particular the phrase "does not apply to the extent that a party makes use of a reservation," seemed to suggest that the nature and scope of the reservation entered might influence the level of the national treatment obligation. It might be

more appropriate to have the phrase read “does not apply if a Contracting Party makes use of the reservations,” substituting the words “to the extent that” by “if.”

183. Mr. REINBOTHE (European Community) said that the proposal presented by his Delegation was designed to facilitate acceptance of the *à la carte* solution along with Article 4. It was the structure of Article 11 that was at the origin of those many questions.

184. Mr. KEPLINGER (United States of America) referred to the question asked by the Delegation of Switzerland about how his Delegation’s proposal for an amendment to Article 4 would be implemented. It would depend on how the rights were administered in the particular country involved. In some countries, collecting societies were organized by the private sector with minimal government regulation, without any specific statutory authorization and where the authorization derived from the exclusive rights provided in the law. In other countries collecting societies were entities of the State, and in other countries the situation would be somewhere in between. In the first case, the solution could be to include a provision that if royalties were collected for a performance they must be paid to that performer and to provide for civil action by such a performer who was not paid by the collecting society. In the second case, the solution could lie in the basic statutory provisions which could provide for an administrative enforcement mechanism by the regulatory authority.

185. Mr. GOVONI (Switzerland) noted that an inaccuracy in the French version of the text had caused him to criticize the proposal by the United States of America.

186. The PRESIDENT said that for the moment there was not enough basis to draw any conclusions. He invited the intergovernmental and non-governmental organizations to comment on the issues of the second work package.

187. Mr. ABADA (UNESCO) said that the proposal by the European Community represented a good mix. However, paragraph (3) of Article 4 reduced national treatment to nothing, whereas it would have been preferable to have it merely limited where a State made a reservation regarding the exclusive right provided for in paragraph (1) of Article 11. It was unfortunate that reservations should result in cancellation of the exclusive right and the right to remuneration. It would be fairer if the new instrument conferred at the very least a right to remuneration, even limited, but did not allow non-recognition of the right to remuneration and the exclusive right.

188. Ms. BURNETT (EBU) underscored on behalf of the regional broadcasting unions detailed reasons for their opposition to the retention of draft Article 11. It would disrupt existing contractual relationships between performers and producers and between producers and broadcasters. It would cause serious problems of double claims against the broadcasters for the same performance, which were not addressed by draft Article 12. Since there was no parallel between the broadcasting of audiovisual productions on the one hand and the broadcasting of commercial phonograms and the WPPT system on the other, there was no justification for taking the right in Article 15 of the WPPT as a model. Article 11 did not provide harmonization and would give rise to complications and disputes over national treatment. It would cause uncertainty and disruption to financial structures, leading to huge disadvantages for audiovisual production, performers, national broadcasters and the viewing public. If the main attraction of Article 11 was paragraph (3), deletion of the entire article would be the most appropriate solution.

189. Mr. VINCENT (FIM) quoted the example of a concert broadcast on the Internet that had been fixed. What had been communicated to the public was not a live but a fixed performance; in other words it was an audiovisual fixation, which came within the purview of Article 10.

190. Mr. PÉREZ SOLÍS (FILAIE) subscribed to what the representative of FIM had said. He also mentioned that the problem arose precisely where on the one hand performers were denied remuneration for the use of their rights, while on the other hand the same rights could readily be transferred to other holders of the intellectual property rights, namely the producers. He supported what has been said by the European Union regarding the connection between those rights and national treatment, and maintained that it was acceptable for either partial or general reservations to be made, subject to material reciprocity.

191. Mr. OIRA (URTNA) declared that, in Africa, contractual arrangements between producers and performers on the one hand and producers and broadcasters on the other, made collective bargaining much easier and expeditious in the region. Therefore, his Delegation considered Article 11 of the draft proposal to be a threat not only to the settled principles with respect to the audiovisual industry but also to the dissemination of information which was the cornerstone of the broadcasting industry.

192. Mr. HØBERG-PETERSEN (FIA) stated that the right of broadcasting and communication to the public remained the single most important right to audiovisual performers. Any transfer problems should be regulated in national legislation according to the needs and particular circumstances of each country. No direct parallel could be drawn from Article 15 of the WPPT due to the differences between the audiovisual and the phonogram industries as pointed out in Notes 11.05 and 11.06 of the Basic Proposal. A more relevant source of inspiration would be the rules on protection of authors of cinematographic works in Article 11*bis* of the Berne Convention and Article 8 of the WCT. His organization renewed its plea for a Treaty proposal which established an exclusive right or at least a remuneration right as the minimum level of protection. Regarding Article 4 about national treatment, his organization continued to favor the *mutatis mutandis* application of Article 4 of the WPPT extending national treatment to the exclusive rights specifically granted in the instrument as in Alternative D of the Basic Proposal. That alternative would bring full national treatment to the making available right in Article 10 of the Basic Proposal. Considering the importance of that right for the future distribution of audiovisual productions in the digital environment, that in itself would be a remarkable achievement in respect of widening the application of the principle of national treatment of performers' rights in the digital age.

193. Mr. LERENA (AIR) said that the protection envisaged in the Basic Proposal comfortably exceeded the protection that authors had at present in relation to audiovisual works. He believed that any introduction or grant of performers' rights should be subject to the limitations on scope specified in Article 14*bis* of the Berne Convention. Similarly, the performers in audio or phonographic productions had no exclusive right to authorize as was being advocated for performers in audiovisual productions, so that whatever protection was introduced would likewise exceed the protection accorded to performers in phonographic productions, and yet it was constantly being said that the aim was give both types of performer equal status. Moreover, as far as audiovisual performers were concerned, he did not regard them as qualifying for a right to remuneration, as they were not involved in the secondary use that would qualify them for remuneration where performances were broadcast using a commercial phonogram. He said that if an exclusive right to authorize or a right to

remuneration were indeed introduced, it would then be essential to retain the paragraph of the proposal that referred to the possibility of States making reservations.

194. Mrs. GRECO (ARTIS GEIE) supported the statement made by the FIA, and said that the proposal submitted by the European Union regarding Articles 4 and 11 was a good basis for reflection. The concept of material reciprocity applied to national treatment could not be allowed to mean that a right to remuneration existing in one Contracting State would be considered equivalent to an exclusive right accorded in another Contracting State. National treatment should be limited, in the present instrument, to exclusive rights.

195. Mrs. REDLER (NABA) commented on the proposal of the Delegation of the European Community on the possibility to submit the right of broadcasting and communication to the public to material reciprocity rather than national treatment. Broadcasters did not think that applying material reciprocity to Article 11 would solve any of its fundamental flaws and believed that it would create new layers of confusion and potential grounds for interminable disputes, and would not further the objective of the Treaty for harmonization. The fact that material reciprocity is being suggested seems to be a concession that the broadcasting right is incapable of harmonization. The new material reciprocity option would add another level of complexity and therefore broadcasters maintained that the best course of action, as suggested by the Delegation of India, was deletion of Article 11 from the Treaty.

196. Mr. SHAPIRO (IVF) mentioned that proposal of the Delegation of the United States of America on Article 4 had not been the subject of much discussion by the Member States, although several of the non-governmental organizations had mentioned it. Perhaps, it meant there was an agreement on that point.

197. Mr. BLANC (AEPO) considered that exclusive rights had to be exercised by the actual performer or by the organization representing him, and should not be transferred to the producer under an initial contract or by virtue of a presumption of assignment. Recognition of a right to remuneration did not necessarily constitute an alternative to exclusive rights, but it could represent a guarantee, even in connection with the exercise of exclusive rights. A right to remuneration had to be placed under collective management. It was not desirable for reservations to be possible in relation to exclusive rights and the right to remuneration. He was concerned about the scope of national treatment, and was not in favor of the proposal put forward by the United States of America.

198. Mrs. LA BOUVERIE (EUROCOPYA) considered that Article 11 did not effect any harmonization, and should not appear in the new instrument. The right to remuneration was going to upset established practices in audiovisual markets completely, and was liable to cause serious distorsions between catalogues of work subject to the remuneration and those exempted from it.

199. Mrs. LEPINE-KARNIK (FIAPF) found it disturbing that Article 11, as worded at present in the Basic Proposal according to the so-called “à la carte” formula, did not allow any international harmonization of broadcasting and communication to the public. FIAPF considered that Article 11 should be deleted; its present wording would present more problems of implementation than it would solve, and the fact of not achieving consensus at the international level would not deprive Member States of the possibility of granting performers an exclusive right of broadcasting at the national level.

200. Mrs. MANALASTAS (ABU) referred to the chaotic situation which broadcasters in developing countries would be addressing if Article 11 were adopted. The present actual trade practice in the broadcasting industry in acquiring foreign programs had been established through the payment to the producers or distributors of the agreed fees which relieved broadcasters from any further payments. The inclusion of Article 11 would engender double claims of payment, now from the performers in those programs and collecting societies that would increase the costs of operations and affect directly the public broadcasters and the general public. With the retention of Article 11, broadcasters from the developing countries would be in a very difficult situation.

Seventh Meeting
Tuesday, December 12, 2000
Afternoon

Article 12: Transfer, Entitlement to Exercise Rights and Law Applicable to Transfers

201. The PRESIDENT invited the delegations to discuss draft Article 12.

202. Mr. IBRAHIM HASSAN (Sudan) said that the translation of the Arabic version was not entirely compatible and consistent with the English text.

203. Mr. ISHINO (Japan) asked for clarifications of the term “particular fixation” in Alternatives E to G, because of the wider scope of Article 19 of the Rome Convention. Questions remained regarding, for example, transfer to different formats and use of excerpts of films in television. With respect to Alternative E, it was desirable to clarify that the presumption of transfer should not apply to moral rights and to rights of remuneration. In Alternative F, the entitlement to exercise rights was a new concept that required clarification, for instance, regarding whether performers could exploit that particular fixation by themselves, claim injunctions or compensation for unauthorized uses by third parties, register their rights or assign their rights to third parties. As to Alternative G, paragraph (1) defined a principle well established in private international law that transfers should be governed by the law of the country most closely connected with a particular audiovisual fixation, but it was necessary to consider for each point of attachment whether it was acceptable. Alternative G defined the applicable law with respect to the rules on transfer, but not with respect to the substantive provisions on the rights. The purpose of Alternative H was to leave it to the Contracting Parties whether to provide provisions on transfer, but it was necessary to consider the impact on current business practices. Subject to such clarifications, his Delegation favored Alternatives E and F, but it would not exclude other alternatives for discussion.

204. Mr. KEPLINGER (United States of America) stated that in the interest of certainty and clarity, it was necessary to include a provision on the producer’s ability to exercise the exclusive rights of authorization. This would not only facilitate the effective exploitation of an audiovisual work in a global environment, it would also encourage wider ratification of the proposed Treaty which was important for the protection of the rights of performers, particularly as the Internet would soon become a primary channel for the exploitation of audiovisual works. In this context, although his Delegation continued to favor Alternative E, they were prepared to discuss other possible options in the search for a satisfactory solution.

205. Mr. GOVONI (Switzerland) pointed out that national legislation contained contractual provisions concerning the rights of very different performers, which would be difficult to harmonize at the international level. The Berne Convention aimed in its Article 14*bis* to safeguard producers from the claims of certain authors who did not actually possess the status of author when their contracts were concluded. It was difficult to compare Alternative F of the basic document with Article 14*bis*, and in fact it would have the same practical effects as Alternative E. If the exclusive rights of performers were subject to a collective management regime, under Alternatives F and E they would be assigned to the producer. In his country the legislator had preferred not to intervene in that area. Consequently he was in favor of Alternative H, but in a spirit of compromise was prepared to consider Alternative G.

206. Mr. REINBOTHE (European Community) stated that his Delegation believed that Alternative H was the most appropriate. The co-existence of different models within the European Community had not led to any difficulties. Alternative E was not acceptable, as this would require in many countries a revision of their existing transfer schemes and, in some countries, even of the constitution. He agreed that there were important differences between Alternative F and Article 14*bis* of the Berne Convention.

207. Mr. BLIZNETS (Russian Federation) stated that his Delegation was not in favor of Alternatives E and G and considered the solution in Alternative H more appropriate.

208. Mr. HERMANSEN (Norway) supported Alternative H. His Delegation was not in a position to support Alternatives E and F, and it was not convinced by Alternative G as the existing principles of private international law dealt adequately with this issue.

209. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that the Group remained open to any compromise solution.

210. Mr. CRESWELL (Australia) stated that his Delegation favored the inclusion of a provision regarding Article 12. This was justified even though such a provision was not included in the WPPT. The film and television industry was different from the sound recording industry in that regard. He understood that there were fears that the inclusion of Article 12 would threaten performers' rights under the WPPT because of possible overlap of the proposed instrument. However, there were safeguards against overlap in relevant provision of the WPPT on definitions and agreed statements, and in Article 1 of the proposed instrument.

211. Mr. PHUANGRACH (Thailand) stated that his Delegation could not accept Alternative G.

Article 5: Moral Rights

212. The PRESIDENT stated that Article 5 (Moral Rights) was modeled on the corresponding provisions of the WPPT, with the exception that a clarifying clause on "normal exploitation" had been added at the end of Article 5(1)(ii). It was his impression that an understanding on Articles 5(2) and (3) already existed.

213. Mr. REINBOTHE (European Community) referred to the proposal submitted by his Delegation (document IAVP/DC/9). Article 5(1)(ii) could have a spillover effect on the

interpretation of Article 6*bis* of the Berne Convention and Article 5 of the WPPT. The term "normal exploitation" could also cause confusion as it was also used within the context of the "three-step test." Normal exploitation was also difficult to define, particularly because business practices varied across the world.

214. Mr. ISHINO (Japan) stated that further clarification was required regarding the term "normal exploitation." The first three sentences of Note 5.07 should be included in an agreed statement.

215. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, proposed the deletion of the last sentence of Article 5(1)(ii) but was willing to consider its inclusion in an agreed statement.

216. Mr. KEPLINGER (United States of America) stated that his Delegation would propose an amendment to the Basic Proposal aiming at replacing the words "normal exploitation" by "customary practices" and adding an agreed statement.

217. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, supported the deletion of the last sentence of Article 5(1)(ii).

218. Mr. SHEN (China) supported the inclusion of the last sentence of Article 5(1)(ii).

219. Mrs. BELLO DE KEMPER (Dominican Republic) announced that the Latin American and Caribbean region was attaching great importance to Article 5 and the issue of moral rights.

220. Mr. CRESWELL (Australia) agreed with the second sentence of Article 5(1)(ii), and reserved his Delegation's position on the amendment proposed by the Delegation of the United States of America. The WPPT "safeguard" clause in Article 1(2) would avoid spillover from Article 5(1)(ii) to the interpretation of Article 5 of the WPPT.

Article 3: Beneficiaries of Protection

221. The PRESIDENT recalled that, during the preparatory stage, some countries had suggested extensive points of attachment while other countries had taken the approach that the nationality of the performer should be the only one.

222. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central and Baltic States, proposed that paragraph (2) be deleted. His Group did not agree with Note 3.04 of the Basic Proposal. The inclusion of the criterion of habitual residence would not function as an incentive for joining the new instrument.

223. The PRESIDENT observed that the criterion of nationality, including assimilation of habitual residence to nationality, was as motivating or demotivating as were the criteria included in the Berne Convention.

224. Mrs. RETONDO (Argentina) accepted the Basic Proposal as worded at present, and felt that Note 3.04 gave a very good explanation. Habitual residence had also to be a criterion to be heeded, and should not be a cause for the Treaty not being ratified.

225. Mr. ISHINO (Japan) supported Article 3 of the Basic Proposal.

226. Mr. REINBOTHE (European Community) believed that the criterion of nationality as mentioned in Article 3(1) was appropriate, and questioned the necessity of paragraph (2). Article 3(1) as the only criterion would be a better incentive for joining the Protocol. Article 3(2) might open the door to protection despite the fact that the country of origin did not wish to adhere to the protocol. The concept of habitual residence was mentioned in the Berne Convention, but in the context of authors' protection. Regarding an audiovisual fixation there was presumably a greater number of performers than authors, and applying the criterion of habitual residence to performers would lead to a different effect than applying it to authors.

227. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, supported Article 3(1).

228. Mr. KEPLINGER (United States of America) stated that broad points of attachment were desirable in order to ensure protection for the widest possible range of performers. Restrictive points of attachment would decrease the number of persons eligible for protection. Therefore his Delegation supported the draft text.

229. Mrs. BELLO DE KEMPER (Dominican Republic), speaking in the name of her country alone, supported Article 3 of the Basic Proposal, and was in favor of granting protection to those resident in the country, as that was provided in her national law.

230. Mr. UGARTECHE VILLACORTA (Peru) said that, on the understanding that what was being looked for was the provision of greater protection for a greater number of performers, like Argentina and the United States of America, he supported Article 3 of the Basic Proposal.

231. Mr. MAHINGILA (United Republic of Tanzania) expressed his Delegation's support for the text of the Basic Proposal.

232. The PRESIDENT noted that all delegations seemed to accept the criterion of nationality in paragraph (1), but paragraph (2) would need further discussion.

Article 19: Application in Time

233. The PRESIDENT stated that the Basic Proposal differed from the WPPT model. The first paragraph reproduced the main principle of Article 18 of the Berne Convention, which should be applied taking into account the provisions on the term of protection. No performance which existed at the moment of entry into force which was older than 50 years, or whatever would be the term of protection, would be protected. Paragraph (2) accommodated the contractual arrangements that could be disrupted in different legal systems due to the new rights, and provided for the Contracting Parties the option that protection could be confined to performances that occurred after the entry into force of the new rules. Paragraph (2) would make it possible for Contracting Parties to exclude the retrospective application of economic rights, but not moral rights. Paragraph (2) should refer to Articles 7 to 11, but not Article 6. Paragraph (2) would enable countries that provided for retrospective protection to apply reciprocity in relation to countries that did not offer such protection. Paragraph (3) provided that those rules should be without prejudice to any acts of exploitation committed before the entry into force of the new rules. Paragraph (4) contained a clause according to which transitional provisions were explicitly allowed. The first half of the

explanatory Note 19.05 clarified that transitory arrangements might be provided for a limited period or they might be permanent.

234. Mr. CRESWELL (Australia) introduced the proposal of his Delegation in document IAVP/DC/11. In paragraph (2) the possibility to provide only prospective application of rights should be extended to moral rights as well. Article 22(2) of the WPPT allowed Contracting Parties to limit the application of moral rights to future performances, because these rights could not be expected to be applied retrospectively in light of their novelty. The same applied to moral rights for audiovisual performers. Moreover, the words "for that Contracting Party" should be added at the very end of paragraph (2) in line with paragraph (1). In case this proposal was not supported, at least Article 19(4) should be amended to allow transitional arrangements with respect to moral rights.

235. Mr. REINBOTHE (European Community) noted that Article 18 of the Berne Convention had been applied *mutatis mutandis* for the WPPT and the TRIPS Agreement in the field of neighboring rights. This model should be followed. The possibility of prospective application of economic rights protection and retroactive application in respect of moral rights contained in Article 19(2) overturned the concept of Article 22 of the WPPT. Mere prospective application of economic rights protection was not justified and would exclude vast parts of the market. The implications of the national treatment principle in Article 19(2) were not clear. Paragraphs (1) and (2) should be replaced by Article 22(1) and (2) of the WPPT, and paragraphs (3) and (4) were not necessary because sufficient flexibility was provided by Article 18 of the Berne Convention.

236. Mr. ISHINO (Japan) underscored the importance his Delegation attached to paragraph (2), because the proposed instrument would introduce new rights.

237. Ms. SAVELIEVA (Russian Federation), speaking on behalf of the Group of Central Asian, Caucasus and Eastern European Countries, stated that paragraph (1) caused legal uncertainty in the definition of the protected fixed performances and suggested that it should read: "Protection under this Treaty shall be granted to those fixed performances for which the term of protection provided under Article 14 of this Treaty has not expired." Paragraph (2) could be even more flexible. Contracting Parties might choose not to apply the provisions of Articles 7 to 11 as a whole or each of those articles individually. And since the proposed Article 19 (2) would allow for exceptions to the obligations under the instrument, an additional provision could be introduced, establishing the procedure for depositing notifications.

238. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that the established principles of the WPPT and the TRIPS Agreement should be followed. Article 18 of the Berne Convention excluded neither the application of the general principles set out in paragraph (3) nor the transitional arrangements under paragraph (4). The proposed paragraphs (1) and (2) were a reversed version of the WPPT and of the TRIPS Agreement. Article 19 should be replaced by a text along the lines of Article 22 of the WPPT.

239. Mr. KEPLINGER (United States of America) stated that moral rights in currently existing fixations should be protected as proposed in paragraph (1). Paragraph (2) struck the right balance by providing for prospective application of economic rights. As audiovisual works were subject to extensive contractual arrangements, this provision resulted in a greater certainty for both performers and producers. The principles expressed in paragraphs (3)

and (4) in respect of acquired rights and the transitional provisions were also essential. Therefore, his Delegation supported the text of the Basic Proposal.

240. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, stated that it was not opposed to Article 19, as included in the Basic Proposal.

241. Mr. COUCHMAN (Canada) supported Article 19, particularly paragraph (2). It would be difficult for countries, which had not previously protected audiovisual performances, to provide retrospective protection to audiovisual fixations.

242. Mr. SHEN (China) stated that his Delegation could in principle accept Article 19, with minor changes in paragraph (1), which should be replaced by the wording of Article 22(1) of the WPPT.

Title, Article 1: Relation to Other Conventions and Treaties

243. The PRESIDENT explained that the Alternatives in the Title and Article 1 related to the administrative and final clauses of the new instrument. The main issue was whether the proposed instrument should be self-standing, or closely linked to the WPPT. This choice did not dictate the Title. There could, for example, be a joint assembly, even under Alternative B. Adherence to the WPPT could also be a condition for adherence to the new instrument, under both Alternatives. Paragraph (2) of Alternative A was a safeguarding clause for the WPPT and the Rome Convention. Paragraph (3) of Alternative A was based mainly on the Rome Convention.

244. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, stated that his Group opted for Alternative A.

245. Mr. REINBOTHE (European Community) stated that his Delegation preferred the title "Protocol." However, the content and the structure of the instrument were more important than its title. His Delegation supported a strong link with the WPPT and was in favor of Alternative A to be applied throughout the agreement. The new instrument and the WPPT should share one assembly. Membership in the WPPT should be a condition for adherence. The number of instruments of ratification or accession that would be required for the entry into force could be lower than that required for the WPPT.

246. Mr. KEPLINGER (United States of America) expressed his Delegation's preference for a new treaty taking into account the importance of audiovisual fixations. The content was the important matter. The provisional title given to a proposed instrument during the preparatory stage was not determinative. The necessity of linkage with the WPPT was not evident. If substantive linkages were needed, linkage with the WCT should also be considered since it dealt with audiovisual works in which those performances were fixed. The administrative procedure could be simplified by having only one assembly. The number of countries party to the Treaty required for its entry into force should not be as high as for the WPPT to allow both instruments to enter into force as soon as possible.

247. Mrs. RETONDO (Argentina) said that she was leaning towards Alternative B. She pointed out that there would in any event be linkages, regardless of whether a Treaty or a Protocol to the WPPT was adopted. Nevertheless, she announced that her Delegation reserved the right to decide at the time of the final provisions whether there should be a

requirement to belong to the WPPT for ratification of the Treaty, or whether mere membership of WIPO would be sufficient.

248. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that audiovisual performances should be treated on the same basis as aural performances under the WPPT, and opted for a protocol and Alternative A. However the substance was more important. His Delegation showed flexibility as long as the new instrument was linked to the WPPT.

249. Mr. HERMANSEN (Norway) expressed the preference of his Delegation for a protocol to the WPPT under Alternative A.

250. Mr. HAMID (Bangladesh) approved Alternative A.

251. Mr. SHEN (China) said that the new instrument should be a protocol to the WPPT, although more importance should be attached to the substance. The purpose of the new instrument was to resolve a question which should have been resolved in 1996 by the WPPT.

252. Mr. COUCHMAN (Canada) expressed his Delegation's preference for Alternative B. Membership in the WPPT should not be a pre-condition for adherence.

253. Mr. GOVONI (Switzerland) was in favor of Alternative A, even though the adoption of a Protocol or of a Treaty was not a question of prime importance. He suggested entitling the new instrument "Protocol relating to the WIPO Performances and Phonograms Treaty." Provision should be made for linkages with the WPPT.

254. Mr. SARMA (India) expressed the preference of his Delegation for Alternative B. Adherence to the WPPT should not be a pre-condition for joining the new instrument. A single assembly for both treaties was acceptable. The number of members required for the entry into force could be lower than that required for the WPPT.

255. Mr. MONTEIRO AFONSO DOS SANTOS (Brazil) supported Alternative B. Membership in the WPPT or the WCT should not be a pre-condition for adherence.

256. Mr. SIMANJUNTAK (Indonesia) expressed the preference of his Delegation for a Treaty, which would enable a greater number of countries to join.

257. Mr. CRESWELL (Australia) expressed the preference of his Delegation for a Treaty, though it was open to considering linkage with the WPPT. With reference to the earlier intervention by the Delegation of Switzerland, the new instrument could not be designated simply as a protocol to the WPPT, because WPPT was a Treaty covering phonograms, and the subject matter of the new instrument was audiovisual performances.

258. Mr. REDKO (Ukraine) thought the instrument should be a separate Treaty. He supported Alternative B.

259. The PRESIDENT confirmed that many delegations had stressed the substantive matters and links between the new instrument and the WPPT. As far as the different linking elements were concerned, there were important differences in opinion. He opened the floor for comments on the fifth and sixth work package from intergovernmental and non-governmental organizations.

260. Mr. BLANC (AEPO) said that, as far as performers were concerned, there was no difference between Alternative E and Alternative F of Article 12, as both had to do with the possible expropriation of the rights of performers; Alternative G was far too complex. Alternative H was the only acceptable solution. As far as moral rights were concerned, a text similar to the one in the WPPT should be adopted.

261. Mr. UEHARA (NAB Japan) proposed, regarding Article 12(1), that the word "particular fixation" be clarified. Although the Basic Proposal stated that "the inclusion of the same fixed performance in another audiovisual production is subject to the authorization of the performer," it does not necessarily mean that the use of that particular audiovisual fixation in part is always subject to the authorization of the performer. If not, that would be very inconvenient not only for broadcasters and movie industries, but also for the audience. If "particular audiovisual fixation" means only the deemed authorization of the use of the entire "audiovisual fixation" of that particular audiovisual fixation, broadcasting organizations could not accept the Alternatives E, F, G and H. The words "particular fixation" had to be clarified, for example, in the form of an agreed statement. As for Article 5, he strongly hoped that the agreed statement would be established just as the Delegation of Japan had stated before

262. Mr. HØBERG-PETERSEN (FIA) strongly opposed any Treaty rule prescribing a mandatory presumption of transfer of the performers' exclusive rights to the producer of the audiovisual fixation as proposed in Alternative E. A rule of that nature would be unfair to performers and would force a number of States which joined the instrument to lower the level of the protection of audiovisual performers currently existing at national level. That would inevitably disrupt the well-established bargaining frameworks and contract patterns in those countries to the grave detriment of performers. Alternative F did not represent any real improvement but only a slight variation of Alternative E with no real parallel to Article 14*bis* of the Berne Convention. Alternative G was best suited to provide common ground for a compromise, but paragraph (2) of Alternative G should be deleted. Regarding Articles 5 and 19, the retroactive application of moral rights should be retained.

263. Mr. PÉREZ SOLÍS (FILAIE) referred to Article 12 and stated his preference for Alternative H. He also asked the Chair for some clarification of the expression "that would be prejudicial to his reputation." If that requirement were applied in the case of distortion, mutilation and modification of performances, the number of the verb "causar" in Spanish should be plural, with the clause reading "que causen perjuicio a su reputación"; on moral rights and their application in time, he felt that the fifty years counted from the date of fixation or publication should in fact be counted from the date of disclosure; on the beneficiaries of protection, he said that he favored both the criterion of nationality and that of habitual residence; on application in time, he preferred a provision similar to Article 18 of the Berne Convention in conjunction with Article 22 of the WPPT. As far as the title was concerned, he was in favor of a Protocol to the WPPT.

Eighth Meeting
Wednesday, December 13, 2000
Afternoon

264. Mr. ABADA (UNESCO) felt that the proposal by the European Community on moral rights was a good basis for agreement, and could be completed with a joint statement that picked up on the ideas contained in the proposal by the United States of America. As far as Article 12 was concerned, performers needed the new instrument to improve their rights substantially, yet Alternatives E and F of Article 12 seemed biased to their disadvantage. The draft instrument should leave it to the performers and producers to settle the procedure for the assignment of rights according to the particular characteristics of the various audiovisual works and the specifics of the national law involved. Alternative H seemed more likely to provide more fairly for the interests involved, whereas Alternative G would be particularly awkward to apply.

265. Ms. HAGEN (ILO) stated that ILO had been involved in the issue of the protection of performers since the 1920's. It had been one of three organizations behind the Rome Convention, along with WIPO and UNESCO. Article 19(8) of the Constitution of the ILO included a principle that might be of relevance to Article 12 of the proposed instrument: that the adoption of any international labor standard should in no case be deemed to affect any law, award, custom or agreement which ensured more favorable conditions to the workers in any particular country concerned than those provided in the international labor standard. This is why ILO had called for flexibility between the various positions expressed on the issue of the transfer of rights or the exercise of exclusive rights. This flexibility was requested in order to encourage the search for consensus and to minimize risks for performers, producers, broadcasters and others in the context of bargaining and collective management of rights. Performers' rights as such should not be diminished as they pertained to the performers themselves. The concern expressed by UNESCO about Alternative G lay largely in paragraph (2). Paragraph (1) of Alternative G would serve as an example of the kind of approach which would be a basis for integrating into the final document this concern for the protection of rights and the assurance of the respect for the rights established in each particular country. Regulating the transfer of rights accordingly might be problematic in terms of the complexities of paragraph (2).

266. Mr. VINCENT (FIM) observed that Alternative E of Article 12 would result in a level of protection lower than that available within the legal framework established by the Rome Convention in 1961. Apart from that, his organization supported the European Community proposal on application in time, which corresponded to the solution adopted in Article 22 of the WPPT.

267. Mrs. LA BOUVERIE (EUROCOPYA) considered that only machinery for the transfer of rights made it possible for works to be exploited, rights to be exercised and consequently performers to be rewarded. However, in order to respect national legislative practice, her organization supported the adoption of Alternative G, which respected existing laws and agreements, and also Article 19 of the Basic Proposal.

268. Mrs. LEPINE-KARNIK (FIAPF) said that Alternative G of Article 12 was an interesting compromise, as it lent legal security to the international circulation of works. Her organization was concerned that the proposal put forward by the European Community on Alternative G was liable to create uncertainties as to the transfer of rights regime.

269. Mr. LERENA (AIR) referred to Article 5, and specifically to the right of integrity, saying that it was essential that the Treaty include a clause providing for certain normal practices in the exploitation of the work. With that in mind he supported the present wording of the Proposal, even though the proposal by the United States of America that an agreed statement should be included was also acceptable. With regard to Article 19, he considered that the new Treaty should apply to new performances, namely those that were given or took place after the entry into force of the new Treaty, as that would afford both legal and economic security. He did wish to acknowledge that the formula written into the proposal had been an interesting attempt to reconcile the various interests at stake, but in any case he was firmly opposed to the inclusion in the Treaty of the criteria established in Article 18 of the Berne Convention.

270. Mr. GRIMAU MUÑOZ (CSAI) said that his organization was an agreement with the position taken by the European Community regarding Articles 1, 3, 5, 12 and 19 of the Basic Proposal. He added that the future instrument would have to allow for all forms of exploitation of audiovisual performances, including the communication to the public and broadcasting provided for in Article 11. Indeed he said that the right of broadcasting and communication to the public constituted the very essence of the future instrument, and that as a result he considered that the absence of that right would be bound to cause the Diplomatic Conference to be described as a resounding failure. The solution offered by the Delegation of the European Community for Articles 4 and 11seemed to him sufficiently intelligent to be adopted by States. Finally he believed that the future instrument should improve the protection of the performer in the audiovisual medium, but without that in any way entailing any inconvenient revision of the content of other instruments already in force that protected other holders of rights or other creative subject matter.

271. Mr. IVINS (NAB), speaking on behalf of his organization as well as its sister associations NABA, ABU, ACT and EBU, stated with respect to Article 5 that there was a concern in many countries that the moral rights of performers might be used for economic reasons in the audiovisual area and could unreasonably prejudice the interest of other performers and of the producer of an audiovisual fixation. The last sentence of draft Article 5(1)(ii) was intended to clarify that usual professional practices of the producer in the framework of an exploitation authorized by the performer did not raise moral rights issues. The organizations strongly supported the inclusion of such a phrase or an equivalent such as the proposal made by the Delegation of the United States of America. They also supported the Delegations of the United States of America and Japan with respect to their proposed agreed statements. More important, draft Article 5(1)(ii) itself should specify that only serious distortions or mutilations resulting in grave prejudice to reputation should be considered a violation of the performer's moral rights and that each performer should take the interest of the other performers, the producer and the authors into account when exercising the rights. It would be desirable that it be expressly recognized and included in an agreed statement that performers might waive moral rights. His organization supported the Delegation of the United States of America regarding Article 12.

272. Mrs. GRECO (ARTIS GEIE) felt that there was no reason for applying any limitation to moral rights other than those provided for in Article 5 of the WPPT. As for Article 12, it was advisable to keep to Alternative H. In Article 3, the so called "habitual residence" criterion seemed particularly imprecise, and it would be preferable to rely on the one given in Article 3(1). The limitation specified in Article 19 for fixations prior to the entry into force of the instrument made for discrimination in time and also between performers, depending on

whether they were governed by one Treaty or the other. Her organization favored a protocol to the WPPT.

273. Mr. PÉREZ SOLÍS (FILAIE) referred to the statement that he made the previous day, which had to do with the interpretation of Article 5 in the Spanish version of the Basic Proposal. He also pressed for the calculation of the term of protection to be determined not by publication but by disclosure. As for the proposal on moral rights, he was not in agreement with the inclusion of the expression "modifications consistent with normal exploitation," as it introduced a concept of a commercial nature in a moral concept, which could not be allowed.

274. Mr. SHAPIRO (IVF) stated that Article 5 on moral rights was an issue of vital importance to the video sector. His organization appreciated the clarity that the Japanese Delegation had sought by incorporating the Explanatory Note 5.07 in the agreed statement as well as the proposal made by the United States of America on customary practices. With respect to Article 12, his organization supported Alternative E, although it could also support a solution based on Alternative G. It had always been a question of respecting agreements between producers and performers. It could not support the proposal submitted by the European Community on Article 12. With respect to the application in time, it supported the Basic Proposal. It was in favor of an independent Treaty. Finally, as to Article 2(c), it adhered strongly to the definition contained in the Basic Proposal.

275. Ms. REDLER (NABA), speaking on behalf of various broadcasters' unions, stated that the limitation to the application in time under proposed Article 19(2) should be extended to moral rights in order to guarantee smooth introduction of those rights without necessitating new negotiations between producers and performers concerning old productions. Her organization supported the proposal made in this respect by the Delegation of Australia.

276. Mr. RIVERS (ACT) referred to Article 12 and described the ways in which broadcasters could acquire the necessary rights: by entering into a direct relationship with the producer; by entering into a direct relationship with a program licensor who had acquired the rights from third parties; and by acquiring a blanket license from, for instance, a music collecting society. However, a worldwide system like that of the music collecting societies was yet to be established for performers. Regarding Article 12, ACT preferred a solution modeled on Alternative G, but paragraph (2) of that alternative did not serve a useful purpose and should be deleted. The country most closely connected with the production should be determined by applying the established rules of private international law which specified a number of criteria. In paragraph (1), it had to be made clear that the court of the protecting country should apply the proper law of the contract, which would be in general the law specified by the parties.

Conclusion of the first reading of the draft text

277. The PRESIDENT invited the Committee to conclude the first reading of the draft text of the substantive provisions by confirming an understanding on each article to the extent possible, following the order of the work packages.

Article 6: Economic Rights of Performers in their Unfixed Performances

278. The PRESIDENT recalled that it had been suggested that the word "audiovisual" be deleted from paragraph (ii) of Article 6. This might result in an overlap with the WPPT, the Rome Convention and the TRIPS Agreement but it did not cause any harm and could remain as an understanding. One delegation had referred to the possible addition of a clause on the subsequent uses of unlawfully made fixations. That suggestion might be kept in mind although no proposal had been made to this effect.

Article 7: Right of Reproduction

279. The PRESIDENT stated that an agreed statement similar to those adopted in the context of Article 1(4) of the WCT and Article 7 of the WPPT regarding the application of the reproduction right in the digital environment would be drafted.

Articles 8: Right of Distribution

280. The PRESIDENT noted that there was an understanding that the text itself would be retained. An agreed statement to the WPPT provided that the expressions "copies" and "original and copies" being subject to the rights of distribution and rental referred exclusively to fixed copies that could be put into circulation as tangible objects. A similar agreed statement could be considered concerning both Articles 8 and 9 of the proposed instrument. In the case of the WPPT, the statement was adopted with reference to the definition of "publications" in Article 2(e) as well, which did not exist in the proposed instrument. A draft text of such an agreed statement following very closely the one of the WPPT would be prepared in the context of both the right of distribution and the right of rental. The statement would only refer to the expression "original and copies," and not "copies."

Article 9: Right of Rental

281. The PRESIDENT indicated that the text of Article 9(1) in the Basic Proposal would be maintained. An agreed statement referring to the expression "original and copies" as in the context of Article 8 would be attached. Paragraph (2) provided for the "material impairment" test which corresponded to the provisions concerning the authors' right of rental in respect of cinematographic works in the TRIPS Agreement and the WCT. It had been suggested that this wording be replaced by that of the corresponding provision of the WPPT with respect to the rental right in phonograms which was used only in the context of the so-called "grandfathering clause." That model would lead to higher protection than the present proposal which was based on a general material impairment test.

282. Mr. SHEN (China) recalled the suggestion made by the Delegation of Switzerland concerning Article 9(1) that the expression "as determined in the national law of Contracting Parties" should be added after the words "audiovisual fixations."

283. Mr. CRESWELL (Australia) supported Article 9(2). His Delegation referred again to the lack of complete correspondence between Article 9(1) in the WPPT and draft Article 9(1).

284. Mr. SARMA (India) requested some clarification on the status of the proposal made by the Delegation of Switzerland concerning the definition of "fixation," since Article 9(1) referred to "audiovisual fixations." The adoption of the Swiss proposal could clarify the situation. Some delegates had sought for clarification on what was meant by "particular audiovisual fixation" in Article 12. The President was asked to confirm that these aspects would be covered to the extent possible and agreeable in an agreed statement.

285. The PRESIDENT replied that the agreed statements adopted at the Diplomatic Conference in 1996 had an important guiding effect on the interpretation of the clauses in the WCT and the WPPT. The proposed instrument should have clauses similar to these Treaties. If the proposal made by the Delegation of Switzerland concerning the definition in Article 2(c) was adopted, it would have an impact on the language in several provisions. Therefore the exact wording of these clauses was not dealt with at this moment, but would be discussed in conjunction with Article 2(c).

286. Mr. GOVONI (Switzerland) felt that paragraph (2) of Article 9 should be drafted in the same terms as in the WPPT, as the new instrument should stay as close as possible to that Treaty.

287. The PRESIDENT confirmed that the proposal made by the Delegation of Switzerland was still valid, and would be negotiated later.

288. Mr. SHEN (China) supported the addition of the words "as determined in the national law of Contracting Parties" in proposed Article 9(1).

289. Mr. OMOROV (Kyrgyzstan) supported the extension of the wording of Article 9(1) along the lines of the WPPT and the proposal made by the Delegation of Switzerland as contained in the document IAVP/DC/14 to use the words "their fixed performances" instead of "their performances fixed in audiovisual fixations."

290. The PRESIDENT confirmed that those proposals would be considered.

Article 10: Right of Making Available of Fixed Performances

291. The PRESIDENT noted that as to Article 10, the preliminary understanding was, as far as the English version was concerned, that the word "the" before the words "members of the public" be omitted in order to make it clear that it concerned any members of the public.

Article 13: Limitations and Exceptions

292. The PRESIDENT explained that in paragraph (1) the expression "limitations and exceptions" should be replaced by "limitations or exceptions." Additionally, an agreed statement in line with those adopted in relation to the corresponding provisions in the WPPT and the WCT would be produced, with the necessary changes arising from the difference in the scope of protection.

Article 14: Term of Protection

293. The PRESIDENT noted that a correction should be made in the French version of Article 14 on the basis of a suggestion made by the Delegation of Burkina Faso. One delegation suggested the possibility of introducing the principle of comparison of terms for those countries which provided for longer terms of protection than that prescribed in this article. Subject to technical changes concerning the basic notions in Article 2, it was understood that the substantive content of Article 14 was confirmed.

Article 15: Obligations concerning Technological Measures

294. The PRESIDENT stated that the expression "technological measures used by performers" in Article 15 should be construed broadly, referring also to those acting on behalf of performers, including their representatives and others, as stated in Note 15.03 of the Basic Proposal. This corresponded to the established understanding of the corresponding articles in the WCT and the WPPT. One delegation had suggested that the guideline should be included in an agreed statement. The drafted statement could also refer back to the WCT and the WPPT. It was understood that the text of Article 15 itself was confirmed.

Article 16: Obligations concerning Rights Management Information

295. The PRESIDENT noted that in paragraph (1)(ii), the expression "unfixed performances or performances fixed in audiovisual fixations" should be changed to "performances or copies of performances fixed in audiovisual fixations." This was intended to make the text clearer and followed more closely the language in the WPPT without changing the coverage of the scope of application. Article 19 was also subject to the possible changes in Article 2. The elements at the last one and a half line of Article 19 (2) in the WPPT did not appear in the proposed Article 16. This was because it was not necessary in light of the technological development. It would not imply any change to the scope of obligation under Article 16. The operations listed in the end of Article 19 in the WPPT would be covered by the language of Article 16.

296. Mr. CRESWELL (Australia) indicated that his Delegation was considering proposing that the words "a copy of" be inserted after "attached to" in the last line of draft Article 16(2) in order to bring the text closer to the language of the WPPT.

297. The PRESIDENT explained that if the word "a copy of" was added, the rest of the ending of Article 19(2) of the WPPT would have to be added. The objective of the change from the text of the WPPT was to avoid this technology-specific listing of operations so that the rights management information would be protected in relation to any use of the performance, whether it was distributed attached to a copy, or appeared in connection with a communication to the public. It had also been suggested that reference to a lawful user should be added, in case Article 12 Alternative F would be adopted. Another delegation had also pointed out that in addition to the types of information provided in paragraph (2), it might be useful to include certain other types of information, such as the nationality of the performer, the place of habitual residence of the performer, or the place of fixation of the performance. In relation to the corresponding Article 19 of the WPPT, the first part of an agreed statement provided that the reference to infringement of any right covered by the instrument included both exclusive rights and rights of remuneration. The second half stated that Contracting

Parties should not rely on that article to devise or implement rights management systems that would have the effect of imposing formalities which were not permitted. Both parts were relevant to the proposed Article 16. Subject to the pending issue in regard to paragraph (2), the understanding on the text of Article 16 was confirmed.

Article 17: Formalities

298. The PRESIDENT indicated that the text would be retained.

Article 18: Reservations

299. The PRESIDENT indicated that the article would be kept open until it became clear which reservations would be allowed under the operative articles.

Article 20: Provisions on Enforcement of Rights

300. The PRESIDENT indicated that it was understood that the text would be retained.

Article 2: Definitions

301. The PRESIDENT indicated that with respect to Article 2(a) on the definition of performer, the proposal contained in IAVP/DC/16 made by the Delegation of the United States of America referred to an agreed statement on "extras," "ancillary performers" and "ancillary participants." The question had been well identified during the preparatory stages and had been dealt with in Note 2.03 to the Basic Proposal.

302. Mr. KEPLINGER (United States of America) stated that it was an element of earlier proposals made by his Delegation. The objective was to clarify the scope of coverage of the article. There would be some value to retaining it as an agreed statement although his Delegation acknowledged that it had been removed from the Basic Proposal.

303. Mr. SARMA (India) supported the agreed statement proposed by the Delegation of the United States of America.

304. The PRESIDENT noted that the body of the proposed agreed statement followed the language of explanatory Note 2.03.

305. Ms. PERALTA (Philippines) stated that her Delegation had no objection to the inclusion of an agreed statement according to the proposal stated in Explanatory Note 2.03. Additionally, there should be a statement regarding the determination of the threshold in national legislation as well as industry practices existing in the Contracting States.

306. Mr. REINBOTHE (European Community) stated that at this stage his Delegation reserved its position on this issue. In Note 2.03 it was pointed out that Contracting Parties might determine in their national legislation the threshold according to which a person was to be considered a performer entitled to protection. It would be wiser to leave that to national or regional legislation.

307. The PRESIDENT commented that the explanatory note would simply serve as a guideline on this matter whereas an agreed statement would be more explicit and have more interpretative power.

308. Mr. GOVONI (Switzerland) recognized that, while a joint statement on the subject was not without its usefulness, the matter should, in the event of a dispute, be settled by a court on the basis of national legislation.

309. The PRESIDENT recalled that the expression “extras” had been used in the meetings of the Standing Committee on Copyright and Related Rights in a qualified manner by delegations and NGOs based on professional practices. The use of the expression “ancillary performer” would not be harmful. The quotation marks clarified that the word “performers” in this context was not used in the sense of performers being protected in this instrument.

310. Mr. FICSOR (Hungary), speaking on behalf of the Group of Central European and Baltic States, informed that so far that Group had not been able to reach a common position on the proposal made by the Delegation of the United States of America to amend Article 2 by adding an agreed statement.

311. Mrs. RETONDO (Argentina) said that her Delegation was looking at the Article in question very closely, and believed that a solution could be found if the following wording were retained: “It is understood that, in general, ‘extras,’ ‘ancillary performers’ or ‘ancillary participants’ do not qualify for protection under this Instrument because they do not, in the strict sense, perform literary or artistic works or expressions of folklore.” In that way ancillary performers would not actually be considered performers, but specifically extras or secondary participants who did not meet the necessary requirements for protection, thereby avoiding any kind of confusion.

312. The PRESIDENT suggested that an understanding be fixed on this item and invited the delegations to turn to the definition of audiovisual performances and suggested that this be deleted from the text as it would have no effect on the interpretation of the substantive provisions of the Basic Proposal. He invited the Committe to turn to the definition of audiovisual fixation. The word “sound” should be replaced with “sounds” for similarity with the corresponding provision of the WPPT.

313. Mr. GOVONI (Switzerland) said that the purpose of his proposal was to simplify the basic text and provide a clear demarcation of the scope of the WPPT and of the new instrument. The definition of the audiovisual fixation proposed in Article 2(c) was intended to distinguish it from the definition of the phonogram contained in Article 2(b) of the WPPT. That definition made it possible to lighten the text of the Basic Proposal inasmuch as, in Articles 7, 8, 10, 11, 12, 14, 16 and 19, instead of mentioning “their performances fixed in audiovisual fixations,” it would be sufficient to say “their fixed performances.”

314. The PRESIDENT noted that during the preparatory stages, numerous alternatives had been examined before deciding on the term “audiovisual fixation.” This expression was included in the Basic Proposal from Article 7 onwards in all operative provisions on rights within the phrase “performances fixed in audiovisual fixations” to correspond with the use of the expression “performances fixed in phonograms” in the WPPT. The use of an alternative term in Article 2 could have consequences for the substantive provisions of the draft proposal and would have to be examined.

315. Mr. KEPLINGER (United States of America) supported the draft text, in particular if it were to be read in conjunction with Notes 2.05 and 2.11. His Delegation was strongly opposed to any changes as this would create ambiguity and uncertainty.

316. Mr. BOSUMPRAH (Ghana) speaking on behalf of the African Group, requested clarification as to whether the term "audiovisual fixation" was still to be defined as his Delegation had made a proposal on this issue.

317. Mr. REINBOTHE (European Community) supported the text of Article 2(c) which drew the line with the WPPT. Explanatory Note 2.11 was an important point of reference.

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Thursday, December 14, 2000
Morning

318. The PRESIDENT stated that a Swiss proposal relating to the definition of audiovisual fixation in Article 2 had been submitted with a view to simplifying the conceptual basis, and he recalled the proposal presented by the GRULAC and the remarks made by the African Group.

319. Mr. CRESWELL (Australia) expressed his opposition to the amendments and supported Article 2(c) of the Basic Proposal. Although his Delegation shared the view that a line of demarcation should be established between the WPPT and the proposed Treaty, the amendment would lead into the undefined territory of non-phonogram fixations, such as still photographs or even drawings. The focus of the Treaty in discussion was the rights of performers in the already well-recognized form of fixation, namely an audiovisual fixation. According to the definition in Article 2(b) of the WPPT, once a phonogram was incorporated in an audiovisual work, in that new context it ceased to be a phonogram, but the phonogram in the original format continued to enjoy its status and protection. Thus, if it was broadcast, Article 15 of the WPPT would continue to apply notwithstanding that it had been incorporated in the audiovisual fixation. However, if the audiovisual work incorporating the phonogram was used in a broadcast, the phonogram incorporated in it was not being broadcast for the purposes of Article 15. The WPPT supplemented by the agreed statement established its own limits and it was neither necessary nor appropriate to change that. There also seemed to be some drafting difficulties with the proposal, for instance with the proposed amendments to Articles 2(d), 11, 12, 14, 16 and 19.

320. Mr. ISHINO (Japan) stated that the definition of audiovisual fixation in Article 2(c) of the Basic Proposal should be the starting point for the discussion.

321. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, referred to the Swiss proposal and stated that the Group wanted neither to reopen any discussion on definitions that had been agreed nor to reopen any possibilities for new interpretations. His Group was not in a position to support the Swiss proposal.

322. Ms. DALEY (Jamaica) recalled that the Rome Convention contained a specific mention of variety and circus artists. Article 9 of that Convention allowed countries to extend the protection to performers that did not perform literary or artistic works. Clarification was required as to whether the definition of performers in the Basic Proposal would preclude

countries from extending protection to performers who did not perform literary or artistic works or expressions of folklore.

323. The PRESIDENT stated that Article 9 of the Rome Convention was a permissive clause which stated that the Contracting States might in their domestic law and regulations extend protection to such artists. The current negotiations were aiming at establishing minimum rights. Contracting Parties would have the freedom to introduce more extensive rights and to establish wider definitions of performers and criteria for the points of attachment.

324. Mr. SHEN (China), proposed to use the definitions in Article 2 of the Basic Proposal, but to cut out paragraph (b). There was no conflict between the Basic Proposal, the WPPT and the Rome Convention.

325. The PRESIDENT referred to the definition of broadcasting, and pointed out that three technical changes could be made aiming at making the definition of broadcasting technically closer to the definition of broadcasting in WPPT. It should read "broadcasting means the transmission by wireless means for public reception of sounds or of images, or of images and sounds, or of the representations of sounds." An understanding on the definition of broadcasting could be reached, if the delegations agreed with that wording. As to the definition of communication to the public, the only proposal that referred to the definition was probably the proposal of the Delegation of Switzerland. He referred to a proposal presented by the Delegation of Japan (document IAVP/DC/18) concerning a new definition of "producer."

326. Mr. ISHINO (Japan) said that Article 12, if adopted, would require a clarification regarding the notion of "producer." The definition had been proposed taking into account the notion of the maker of a cinematographic work and the definitions of producer of phonogram in the WPPT and the Rome Convention. As to the definition of "audiovisual fixation" in the Basic Proposal, it also included any fixation embodied in a substantive copy. An agreed statement had to be incorporated in order to avoid any confusion in that respect.

327. Mr. KEPLINGER (United States of America) said that while his Delegation appreciated the efforts of the Delegation of Japan to introduce the definition of producer, the discussion on that issue had to be deferred until the completion of discussions on Article 12. If the word "producer" ended up not being used in Article 12, there would be no need for such a definition.

328. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, agreed with the statement of the Delegation of the United States of America. He pointed out that the proposal of the Delegation of Japan was very close to the formulation which was contained in Article 2(d) of the WPPT.

329. Mr. SHEN (China) said that during the Asian Regional Consultation meeting, his Delegation had asked the Japanese Delegation whether there was a difference between producer and cinematographer and the answer had been that in most cases the producer meant the producer of cinematography. He proposed to exclude that definition from the instrument.

330. The PRESIDENT suggested deferring deliberations on the proposal of the Delegation of Japan till after deliberations concerning Article 12. Regarding Article 11, he referred to the proposal of the European Community and its Member States (document IAVP/DC/7) and the proposals of the Delegations of India and Thailand (documents IAVP/DC/20 and 21).

331. Mr. PHUANGRACH (Thailand) said that his Delegation had proposed the deletion of Article 11, because if that article was adopted, it would give Member States much flexibility in respect of the right of broadcasting and communication to the public. Some undesirable effects could arise from such provisions and it would make the application of the national treatment principle more complicated.

332. Mr. SARMA (India) proposed the deletion of Article 11 because, first, if the exclusive right of broadcasting and communication to the public had not been considered necessary in the context of the WPPT, then it could not become essential in the context of the new instrument. Second, the option of remuneration rights was very premature bearing in mind the needs of economic and social development of his country. Third, those nations which did not wish to provide for such rights could evoke Article 11(3).

333. Mr. REINBOTHE (European Community) stated that the right of broadcasting and communication to the public was a very important right for audiovisual performers, but at the same time Article 11 did not provide any meaningful harmonization of that right. The adoption of the so-called *à la carte* solution would have two consequences: First, Article 11(3) should be adjusted in such a way that there was a possibility of making a partial reservation also to Article 11(1) and, second, Article 11 would have important implications relating to national treatment under Article 4 of the Agreement.

334. The PRESIDENT recalled the suggestion by the African Group combining the references to paragraphs (1) and (2). He proposed to defer any further conclusions concerning Article 11 to a later stage.

335. Mr. ISHINO (Japan) stated that the rights of broadcasting and communication to the public, as the most important uses of audiovisual fixations, had to be considered in the new instrument. Article 11 of the Basic Proposal constituted an adequate solution which allowed Contracting Parties to choose according to their own particular situation. Therefore, his Delegation was of the strong view that Article 11 should be retained taking into consideration the national treatment implications.

336. Mr. NGUYEN (Viet Nam) explained that despite the fact that the *à la carte* solution was reasonable, his Delegation had favored originally the deletion of Article 11, in particular if the adoption of that article would lead to an obligatory remuneration.

337. The PRESIDENT mentioned that two proposals had been submitted regarding Article 4, one from the European Community and its Member States (document IAVP/DC/7) and one from the Delegation of the United States of America (document IAVP/DC/8).

338. Mr. KEPLINGER (United States of America) said that the proposal in document IAVP/DC/8 was consistent with earlier proposals made by his Delegation concerning what was a principle of fundamental fairness, implying that if performers were not paid, the collection related to their performances should not be permitted, as mentioned in the explanatory Note 4.06 of the Basic Proposal. It was an important part of the recognition of the performers rights.

339. Mr. REINBOTHE (European Community) referred to the proposal submitted by his Delegation (document IAVP/DC/7) and suggested a new Article 4(2) which would give Contracting Parties the possibility to apply the principle of material reciprocity to the rights covered by Article 11. Since some interpretative guidance was needed on the concept of

material equivalence, it would be useful to add to Article 4(2) an agreed statement about the comparison of the material equivalence in different countries' systems of protection. The drafting of the new Article 4(2) was based largely on Article 4(2) under Alternative C which itself already contained the notion of material reciprocity.

340. Mr. GOVONI (Switzerland) felt that the proposal by the United States of America to amend Alternatives C and D by inserting a new paragraph in Article 4 was unnecessary: in that case the charging of remuneration would have no underlying legal justification, and therefore would be improper and legally baseless. Such a new paragraph would be superfluous.

341. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, drew the Committee's attention to the fact that the Group was considering a proposal on Article 2(c). Article 11 was so important to audiovisual performers that deleting it would be unacceptable. His Group preferred a right which maintained the balance between the users and the performers by means of an easily administrable equitable remuneration. Article 4, Alternative C, was more or less an original proposal, and Alternative D was related to the WPPT. The new proposal submitted by the European Community was a kind of combination of Alternatives C and D.

342. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, supported the European Community's proposal on Article 4. The three proposed articles reflected to a great extent the position of his Group. Paragraph (3) of that article could be more precise by replacing "a" with "another." The agreed statement was not clear enough.

343. The PRESIDENT said that Article 4 could be deferred to further deliberations at a later stage.

344. Mr. KEPLINGER (United States of America) supported the right of broadcasting because it was an important right for performers in the digital era. Some delegations had suggested the introduction of material reciprocity in the partial reservation in respect of Article 11 in an effort to resolve certain concerns with respect to their rights. His Delegation was seriously looking at the possibility that Article 11 remained in its present form and the possibility of extending the reservation to paragraph (1). His Delegation had some concern with the proposal related to material reciprocity as it could weaken the broadcasting and communication to the public rights. It was necessary to understand the whole package of the final Treaty including what rights and what kinds of national treatment were granted therein, before making a final decision on the availability of a material reciprocity provision.

345. The PRESIDENT took note of the additional position expressed by the Delegation of Ghana concerning Article 11 in the context of Article 4. He invited the Committee to tackle Article 12. He recalled that there were two proposals concerning Article 12, proposal IAVP/DC/12 submitted by the Delegation of the European Community and proposal IAVP/DC/22 submitted by the Delegation of the United States of America.

346. Mr. REINBOTHE (European Community) said that his Delegation continued to favor Alternative H. Document IAVP/DC/12 contained a provision clarifying that Contracting Parties were free to provide for transfer of the economic rights provided by the instrument. Countries that had models of transfer in place, could maintain those rules in the absence of any provision on transfer. His Delegation's proposal on Article 12 was designed to

accommodate the concerns of those that believed that the protocol should contain a provision on transfer. The proposal also included an agreed statement concerning the law applicable to a transfer by agreement, which drew upon Alternative G of the Basic Proposal. If the issue of applicable law was not taken into account carefully, it could affect existing obligations which were in place at national and international levels. The middle part of the agreed statement established a general rule: private parties to an agreement were free to choose the law applicable to a transfer clause contained in the agreement. Where no such choice of law had been made in the agreement, the agreed statement would confirm that the law of the country most closely connected with the private agreement should apply. Those two general rules which were reflected in the agreed statement were combined with two conditions: the possibility to choose the law and the application of the law of the country most closely connected with the private agreement. The latter condition was mentioned in the last phrase of the agreed statement that read "without prejudice to any mandatory rules." A country could choose to let such mandatory rules override private agreements, and that choice had to be respected.

347. Mr. KEPLINGER (United States of America) stated that, as the European Community, his Delegation was also looking for a solution to the matter of Article 12, and it believed that the preferable solution was Alternative E. Its proposal (document IAVP/DC/22), however, had drawn elements from Alternatives F and G to come up with elements that could be acceptable to a very broad number of parties. In that respect, some support had been expressed for the principle embodied in Alternative F, the principle underlying Article 14*bis* of the Berne Convention as well as for the African proposal reflected in Alternative G. Therefore, the new proposal referred to the entitlement to exercise any of the exclusive rights of authorization that should, in the absence of an agreement to the contrary by the performer regarding applicable law, be governed by the law of the country which was most closely connected with the particular audiovisual fixation. His Delegation had some concerns about the need for some particular guidance with respect to the applicable criteria. Rather than being mandatory, they should be illustrative and provide guidelines that judges might consider in determining the country most closely connected to the contract. In addition, the proposal included an agreed statement which clarified that the provisions would not affect the exercise of moral rights and rights of equitable remuneration.

348. Mr. STOCKFISH (Canada) was concerned about the accuracy of the French version of the proposal by the United States of America, where paragraph (2) read "sur le territoire de laquelle a lieu l'essentiel de la prise de vue." According to him, the phrase "la plus grande partie des prises de vue" was a better rendering of "most of the photography."

Tenth Meeting
Friday, December 15, 2000
Morning

349. The PRESIDENT opened the floor for discussion on the work of Main Committee I and stated that it had been suggested that a sub-group be established to make progress in the negotiations. Each group would be represented by its coordinator and four other delegations appointed by the group. However, only one person would speak on behalf of the group. Group meetings could also be held to facilitate consultation with the other members of the respective groups. The results of the discussions of the sub-group would be presented to Main Committee I.

350. Mr. COUCHMAN (Canada) informed the President that interventions had so far been made by three members of his Delegation and he requested that they be allowed to continue to do so if they were included in the sub-group.

351. Mr. GOVONI (Switzerland) expressed reservations as to the desirability of setting up sub-groups. Any introduction of new structures was liable to present organizational problems and delay work.

352. The PRESIDENT stated that the proposed structure should be put in place and evaluated before deciding on whether or not it should be revised.

353. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, supported the proposed work structure in order to accelerate the discussions in Main Committee I.

354. Mr. CRESWELL (Australia) wondered if the participation of observers could be allowed if the number of interested delegations were to exceed the number of places allocated to a group.

355. The PRESIDENT stated that to increase the efficiency, the proposed work structure should be adopted for the time being and its results evaluated before deciding whether or not to revert to informal consultations with the participation of all government delegations.

356. Mrs. BELLO DE KEMPER (Dominican Republic), speaking on behalf of the GRULAC, said that the Group endorsed the proposal that had been made in a spirit of cooperation so that the work might progress. She did however wish to make it clear that it was a procedure that was not provided for in the rules, and one that carried a great deal of risk, including lack of transparency. She asked for that to be the possibility of holding regional consultations while the activities of the sub-group of the Main Committee were going on.

357. Mrs. ABDOU (Madagascar), speaking on behalf of the African Group, was in favor of the proposal and designated Algeria, Benin, Burkina Faso and Ghana as its members within the working group.

358. Mr. GOVONI (Switzerland) wondered whether the proposal to set up a sub-group was supported by the rules of procedure, and suggested continuing to hold informal meetings with all delegations until the procedural point had been clarified.

359. The PRESIDENT explained that according to Rule 12.3 of the Rules of Procedure, a Main Committee could create its own working groups. The working group's tasks should be specified by the Main Committee, which was also required to decide on the size of the working group and elect its members from among the member delegations. The Secretariat could be consulted if further clarification was required on the Rules of Procedure.

360. Mrs. WEIL-GUTHMANN (France), speaking as Coordinator of Group B, announced that her Group would meet to examine the Director General's proposal.

361. Mrs. RETONDO (Argentina) fully supported what had been said by the Coordinator of the GRULAC regarding the concerns over working methods. She also agreed with what had been said by Australia to the effect that the setting up of and ad hoc group would restrict

work. The question had to be asked whether in fact, after the findings of the group were submitted to the Plenary, the eventual results would also be achieved more rapidly, or whether on the other hand just another negotiation process would start. She accepted the idea that the working group should be open, so that those delegations wishing to do so could follow the discussions as observers, thereby avoiding a negation of the meaning of a Diplomatic Conference, at which precisely every country participates according to its sovereign rights. She also expressely reserved her opinion on the eventual findings of the working group.

362. Mr. RAJA REZA (Malaysia) speaking on behalf of the Asian Group, expressed support for the setting up of a smaller group in order to advance the work of Main Committee I. He also emphasized the need for transparency.

363. Mr. GOVONI (Switzerland) said that the terms of reference of the working group should be laid down.

364. Mr. RASHID SIDDIK (Egypt) stated that although his Delegation was ready to join the consensus for the establishment of a working group, it supported the interventions of the Delegations of Australia and Argentina that observers be allowed to participate in the working group.

365. The PRESIDENT stated that, in order to make progress in the discussions of Main Committee I, the working group should be established. Progress would be assessed and evaluated after one or two sessions before deciding on whether or not the proposed work procedure should be revised.

366. Mr. SHEN (China) stated that in the interest of transparency, observers should be allowed to take part in the working group.

367. The PRESIDENT suggested that the proposed structure be adopted for the moment. The working group was not a decision-making body. Its proposals would be submitted to Main Committee I. Provisions would also be made for consultations within each group.

368. Mr. RASHID SIDDIK (Egypt) stated that unless observers were allowed to participate, his Delegation would not be able to accept the setting up of the working group, as a small group of delegations should not be allowed to decide on the fate of the proposed instrument. The admission of observers to the working group was a minimum requirement.

369. The PRESIDENT reiterated that the working group would not have any decision-making power.

370. Mr. RASHID SIDDIK (Egypt) stated that the group would be engaged in the drafting of the text and, as such, it was essential that observers be allowed to attend.

371. Mr. BLIZNETS (Russian Federation), speaking on behalf of the Group of Central Asian, Caucasus and Eastern European Countries, stated that some delegations were overestimating the terms of reference of the working group, while also underestimating its transparency. The working group was only responsible for preparing proposals and finding solutions to certain difficult issues and was not empowered to make any decisions. No country would be excluded from the process as the members of the working group would represent their respective groups and work would be conducted at the expert level. Solutions

would be presented to the regional groups for consideration and to Main Committee I for approval.

372. Mr. CRESWELL (Australia) noted that the issue of observers could be resolved through an amendment to the Rules of Procedure. Group B should be given an opportunity to consult before embarking on any further discussions.

373. The PRESIDENT reiterated that the proposed procedure should be established, tested and evaluated before contemplating any changes to the proposed work structure.

374. Mr. STOCKFISH (Canada) supported the creation of the working group and associated his Delegation with the intervention of the Delegation of the Russian Federation. The tasks of the working group could be confined to the articles that required most attention. It was also clear that it would report to Main Committee I.

375. Mr. GOVONI (Switzerland) repeated that the terms of reference of the working group should be laid down.

376. The PRESIDENT noted that there was an understanding in Main Committee I to establish a working group, the mandate of which was to examine the remaining open questions and suggest solutions to the Main Committee.

Preamble

377. The PRESIDENT opened the floor for discussion on the Preamble. He recalled that there had been no objections concerning his proposed amendments and suggested that an understanding be established.

378. Mr. ISHINO (Japan) suggested that the word “the” be inserted in the first line of the Preamble before the phrase “rights of performers” to correspond with the wording of the preamble to the WPPT.

379. The PRESIDENT agreed that this should be incorporated in an understanding. Noting that no further delegation asked for the floor, he confirmed that an understanding on the Preamble had been reached.

Article 3: Beneficiaries of Protection

380. The PRESIDENT recalled that there were three proposals regarding Article 3. As most delegations would be willing to accept the text of the Basic Proposal, he asked the Delegations of the United States of America and of the European Community to reconsider their proposals on the issue.

381. Mr. REINBOTHE (European Community) stated that although his Delegation continued to have concerns over Article 3(2), it could accept the text contained in the Basic Proposal if it would pave the way for an overall compromise. However, the agreement of his Delegation on this Article depended upon the final outcome.

382. Mr. KEPLINGER (United States of America) stated that although his Delegation continued to believe that the points of attachment should be expanded in order to extend the application of the instrument to as many performers as possible, it would be willing to accept the text contained in the Basic Proposal as it reflected the minimum requirements on the points of attachment.

383. The PRESIDENT reiterated that all understandings were based on the premise that everything would remain open until the entire text was adopted and presented to the Diplomatic Conference. He noted that an understanding had been reached on Article 3.

Article 9: Right of Rental

384. The PRESIDENT recalled that during the first reading, there had been an understanding that a draft agreed statement would be proposed in relation to Articles 8 and 9. It would follow the form and contents of the agreed statement to the corresponding articles of the WPPT. Most delegations were ready to have an understanding based on the text contained in the Basic Proposal, and asked whether it would be possible to have an understanding on Article 9.

385. Mr. SHEN (China) reiterated that during the first reading, his Delegation had agreed with the Delegation of Switzerland that the phrase "as determined in the national law of Contracting Parties" should be included in Article 9(1) after the term "audiovisual fixations."

386. The PRESIDENT clarified that an understanding had been fixed on Article 9(1) with the inclusion of the phrase just referred to by the Delegation of China. An understanding had not been reached on Article 9(2), as some delegations had raised concerns regarding the application of the material impairment test included under that provision.

387. Mr. REINBOTHE (European Community) said that his Delegation continued to believe that the material impairment test should parallel the corresponding provision in the WPPT. The similarity between Article 9(2) of the Basic Proposal and Article 11 of the TRIPS Agreement was also dangerous in view of its implications on national treatment. Concerns had also been raised by some other delegations in relation to the text contained in the Basic Proposal. His Delegation could, however, reconsider its concerns.

388. The PRESIDENT noted that the Delegations of Bulgaria, the United States of America, Switzerland, Japan and Australia had also taken the floor on this issue during the first reading of Article 9. Some had supported the Basic Proposal while a few had expressed concerns.

389. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that his Group had raised certain concerns in relation to Article 9(2). Although it preferred the text corresponding to the wording contained in the WPPT, it was willing to reconsider its position.

390. Mr. GOVONI (Switzerland) said that he would prefer to have paragraph (2) drafted in exactly the same way as paragraph (2) of Article 9 of the WPPT. He was however willing to show some flexibility in that respect.

391. The PRESIDENT took note of the indications of flexibility and suggested that Article 9 be left open for the moment.

Article 2: Definitions

392. The PRESIDENT recalled that there was an understanding on the definition of performers, subject to a proposed agreed statement from the Delegation of the United States of America. There was also an understanding on the definition of broadcasting and one on the definition of audiovisual performances that would be deleted. The only definitions that remained open were those concerning audiovisual fixation and communication to the public. The definition of communication to the public was left open as it was dependent on the definition of audiovisual fixation or fixation.

393. Mr. GOVONI (Switzerland) said that his proposal regarding Article 2(c) was intended to settle the question of the scope of the WPPT and of the new instrument. In a spirit of compromise, his Delegation withdrew its proposal and subscribed to that of the European Community, whose proposed joint statement sought to achieve the same objective.

394. Mr. REINBOTHE (European Community) reiterated that the scope of application of the WPPT should be respected, and as such its definitions should not be called into question. His Delegation believed that the definition of audiovisual fixation in the Basic Proposal provided a very useful basis for further discussion. It should not prejudice Article 2(b) of the WPPT and its agreed statement on the definition of a phonogram. His Delegation had proposed an agreed statement to this effect. It was preferable that some clarification be provided without any modification to the text of the Basic Proposal. The proposed statement was identical to the agreed statement included in relation to the mentioned provision of the WPPT.

395. Mr. KEPLINGER (United States of America) stated that his Delegation continued to believe that no further clarification was required in relation to the text contained in the Basic Proposal. However, as some delegations were of the view that further clarification was necessary, he expressed support for the proposal submitted by the European Community and its Member States.

396. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, associated his Delegation with the intervention of the Delegation of the United States of America. The text of the Basic Proposal and the proposed agreed statement by the European Community provided a clear definition of audiovisual fixation.

397. Mr. ISHINO (Japan) supported the proposal submitted by the European Community and its Member States.

398. The PRESIDENT stated that there appeared to be broad support for the proposal by the European Community and noted that laws were increasingly based on the expression “moving images” instead of a more detailed expression. This was done in order to extend the coverage to the digital environment where the impression of movement was caused not by a series of images but rather by constant changing small parts of the image.

399. The PRESIDENT adjourned the meeting.

Eleventh Meeting
Sunday, December 17, 2000
Afternoon

400. The PRESIDENT provided a summary of the discussions which had taken place in the working group. Although it had been decided that the issue of national treatment and the link between Articles 4 and 11 would be discussed at a later stage, a conditional understanding had been reached on the contents of Article 11 based on the proposal submitted by the European Community and its Member States. Language had also been developed on Article 5 and its proposed agreed statement. Also Article 19 had been thoroughly examined and the model of the Basic Proposal and that of the WPPT had been considered. Main Committee II had also discussed Article 1 following its decision in favor of the proposed common Assembly for the WPPT and the instrument. The working group would submit a proposal to Main Committee I on Article 1 at a later stage. Although the issue of whether membership should be linked to membership in the WPPT would be discussed in Main Committee II, the working group had agreed to propose to Main Committee I that the new instrument be named the WIPO Audiovisual Performances Treaty. Article 12 had also been discussed and some progress had been made on the drafting of an enabling clause. The ideas contained in Alternative G on applicable law and the recognition of contractual arrangements had been taken to the draft article as a second paragraph. This included a statement that parties had the freedom to choose the applicable law to a contract. If the applicable law were not determined by the parties then the law of the country most closely connected with the agreement would be applicable. There was also an understanding that mention would be made that the contractual arrangements referred to in Article 12 would only apply to the exclusive rights of authorization and not to moral rights and the right of equitable remuneration.

401. Mr. REINBOTHE (European Community) stated that Article 12 involved private international law. Rules on private international law were not found in other copyright treaties because they were of a horizontal character to be applied across the board. As such, the Diplomatic Conference should refrain from introducing new rules in this area. For this reason his Delegation preferred Alternative H of the Basic Proposal but considerable efforts had been made to accommodate the requests from other delegations to have something stated in the instrument. An enabling clause had been suggested which stated that Contracting Parties would be free to provide for models relating to the transfer or exercise of rights. It might also be useful to include, in an agreed statement, that the parties to a contract may determine the law applicable to the transfer. To the extent that the law applicable to the contract was not chosen by the parties, the law of the country most closely connected to the contract would apply. His Delegation could not join a consensus going beyond such a confirmation. He referred to the working paper prepared by the President and stated that, while this would be discussed further in the working group, its contents appeared to go beyond the limits required by his Delegation.

402. Mr. KEPLINGER (United States of America) stated that the issue was not as complex as spelled out by the European Community. The proposal relating to private international law had been around for several months prior to the preparation of the Basic Proposal and it was an issue within the scope and expertise of the Diplomatic Conference, as it was to be applied only to the requirements of the proposed Treaty. The solution proposed by the President as a possible compromise was a simple straightforward solution and could form a basis for an agreement that would satisfy his Delegation's requirements without doing any harm to the concepts of international law. To arrive at a compromise, his Delegation had moved

considerably from its original preference for Alternative E but for his Government to ratify the proposed Treaty there would have to be meaningful provisions on the transfer of the exclusive rights of authorization.

403. The PRESIDENT stated that these interventions demonstrated both the political difficulties and the legal complexities surrounding Article 12.

404. Mr. MURPHY (United Kingdom) stated that it was important for all delegations to work towards finding an acceptable solution. He referred to the President's working paper and stated that it raised more questions than it answered. Although there was a reference to contractual arrangements in paragraph (1), that same paragraph also referred to the transfer of rights, which seemed to involve statutory rather than contractual arrangements, while the subsequent reference to the consent by the performer involved the realm of contract. That paragraph created a real risk of cross currents between the areas of statutory and contractual provisions. There was a need for clarity that Contracting Parties were free to choose the provision they wanted to include in their national laws on the transfer of rights and the proposals from the European Community (document IAVP/ DC 12) and China (document IAVP/DC 31) were appropriate in this regard. There was also a need to avoid inconsistencies with private international law.

405. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, referred to Alternative G in the Basic Proposal, originally proposed by that Group, which was based on Article 5(4) of the Berne Convention. He believed that there would have been more headway if Alternative G had been used as the basis for the discussions on this issue. Additional proposals had been made but these appeared to create more problems than they would solve. His Delegation continued to believe that the proposal of the African Group would form a good basis for finding a solution to this difficult issue.

406. Mr. GUISASOLA GONZÁLEZ DEL REY (Spain), referring to the proposal that had been put forward as a working document on Article 12, to which a number of delegations had also referred, said that he shared the concern shown by other delegations such as those of the European Community and the United Kingdom, which had voiced some misgivings regarding its contents. The assignment of performers' rights was an important question which was settled differently in different laws and according to different national traditions, and ultimately it was precisely in that national environment that it should be dealt with. If it partly sacrificed its initial assumptions for the sake of achieving some results that could satisfy all parties involved in the negotiation, his Delegation could appreciate the possible usefulness of having a rule in the future instrument, like the one submitted by the European Community and its Member States, which allowed States to legislate at the national level on whether or not the rights of performers could be assigned subject to respect for prevailing legal traditions. The document submitted by the Chair did not meet those conditions, and indeed on the contrary could seriously affect the operation of the current system, as it had the effect of introducing new rules on the legislation applicable to contracts.

407. Mr. SØNNELAND (Norway) favored Alternative H, but could support the proposal submitted by the European Community and its Member States as it had the merit of flexibility and precision in its enabling clause. The proposed agreed statement confirmed that a transfer by agreement was without prejudice to international obligations and that the mandatory rules in the law of the country where protection was sought would be respected. His Delegation hoped that the proposal would form the basis for further work and in this context, he

associated his Delegation with the interventions by the Delegations of the European Community and the United Kingdom.

408. Mr. PHUANGRACH (Thailand) associated his Delegation with the intervention of the European Community.

409. Mr. GOVONI (Switzerland) expressed concern regarding Article 12. He considered that the Treaty should be silent on the subject, as the relations between producers and performers had to be governed by contract, with the national legislator being allowed to lay down specific rules in that area. As for the implementation of contracts at the international level, there were established rules in private and international law that allowed contracting parties to choose the law applicable. According to him, a compromise solution should not go beyond what was proposed in documents IAVP/DC/12 and IAVP/DC/31.

410. Mr. CRESWELL (Australia) congratulated the President on his work. He stated that his Delegation would like to engage in further discussion before formulating its position on that difficult issue. The concerns raised by the Delegation of the United Kingdom in relation to paragraph (1) of the working paper were important and should be discussed. A transfer provision was necessary. Some delegations had insisted that there should be no interference with the principles of private international law, but these principles often included imprecise concepts. He referred to Article 5(3) of the Basic Proposal on the applicable law in disputes relating to moral rights. His Delegation felt that there was room for compromise.

411. Mr. SARMA (India) reiterated that although his Delegation had initially preferred Alternative E it was necessary to compromise and as such, it had carefully examined all the proposals that were on the table and it was currently in the process of examining the working paper prepared by the President. The "permissive clause" included under that proposal appeared to be an *à la carte* provision in the sense that it provided the Contracting Parties with a choice, and as such, it provided a good basis for further discussion. His Delegation also wondered if the language relating to the law applicable to contracts could be further refined to remove the concerns of some delegations.

412. The PRESIDENT concluded by stating that each and every element of the current proposals would be explored in the search for an acceptable solution but all delegations had to show flexibility in the efforts to reach a consensus.

Twelfth Meeting
Wednesday, December 20, 2000
Morning

413. The PRESIDENT suggested that progress be made without opening the floor for substantive discussions. Noting that this was accepted by the Committee, he invited the Committee to adopt all articles indicated in bold type in document IAVP/DC/33 with two corrections. First, Article 3(2) should be in bold type and second, the agreed statement concerning Article 2(c) as contained in document IAVP/DC/25 should be included. At the same time, he invited the Committee to adopt all articles in document IAVP/DC/34, except Articles 4, 5(1) and 12. The President noticed that the Delegation of Mexico had a point of order.

414. Mr. HERNÁNDEZ BASAVE (Mexico) proposed revising the Spanish version of the text, in view of the fact that there were some errors in relation to the English version. He suggested working on the matters that were pending in the negotiations, while the Secretariat drew up a more orderly version of the document in all languages. He said that his Delegation would then be in a position to give its formal endorsement, in Committee, to the understandings reached by the group.

415. The PRESIDENT suggested that the Committee adopt in substance the 17 articles, subject to proper correction in the Drafting Committee of the different language versions. If any further steps would be taken at the Diplomatic Conference, fully corrected texts in all languages should be presented to the Plenary for adoption. Noting that that solution satisfied the Delegation of Mexico, the President stated that he would interpret any request for the floor to mean that there was no consensus. The adoption covered, however, only the text contained in the said documents and it did not preclude later adoption of additional elements or text. Furthermore, drafting errors in all languages could be corrected in the Drafting Committee.

416. *Main Committee I adopted, by consensus, the Preamble and Articles 2, 3, 5(2) and (3), 6, 7, 8, 9(1), 10, 13, 15, 16, 17 and 20, as contained in document IAVP/DC/33, with the corrections indicated by the President of the Committee and the Title and Articles 1, 9(2), 11, 14, 18 and 19, as contained in document IAVP/DC/34 with the corresponding agreed statements.*

417. The PRESIDENT suggested that Main Committee I adopt without further discussion Article 5(1) on moral right and the agreed statement concerning that article.

418. Mr. KEPLINGER (United States of America) requested for clarification which version of Article 5 was being considered.

419. The PRESIDENT replied that the version contained in document IAVP/DC/34 was being considered.

420. Mr. HERNÁNDEZ BASAVE (Mexico) wished to have it made clear whether or not Article 14 was adopted, as it appeared in bold type in document IAVP/DC/33 and also figured in document IAVP/DC/34.

421. The PRESIDENT clarified that the text in document IAVP/DC/34 prevailed over the text in IAVP/DC/33. The differences in the two documents were due to the fact that the working group had suggested changes to the earlier understanding of Main Committee I.

422. *Main Committee I adopted, by consensus, Article 5(1) and the agreed statement concerning Article 5, as contained in document IAVP/DC/34.*

423. The PRESIDENT congratulated the Committee on the introduction of moral rights for performers in the audiovisual field. He invited the Committee to consider Article 4 on national treatment, underlining that any delegation had the possibility to stop the process at any moment. The President made the following declaration: “during the work of Main Committee I, a proposal was made to include in the Treaty a provision stating that no Contracting Party should allow collection of remuneration in respect of performances of nationals of another Contracting Party, unless distribution of such remuneration is made to those nationals. Such rules have not been taken to the text of the Treaty. It is understood that there is no legal basis for collection of remuneration in a Contracting Party in respect of

nationals of another Contracting Party for rights that it does not accord to those nationals. Collections in such circumstances would be inappropriate and without legal authority. Therefore all those from whom such remuneration is claimed should have legal remedies against the payment. Where remuneration is collected, on the basis of proper mandates, in a Contracting Party for rights that it accords to the nationals of another Contracting Party, but not distributed to them, those nationals should have legal means to ensure that they received the remuneration collected on their behalf." The President asked the Committee whether Article 4 could be adopted with the understanding that the declaration he had just made would be taken to the Records of the Diplomatic Conference.

424. *Main Committee I adopted, by consensus, Article 4, as contained in document IAVP/DC/34.*

425. The PRESIDENT recalled the statement of the Director General of WIPO in the Plenary, that one possibility was to report what had been achieved so far at the Conference to the General Assembly of WIPO. Another possibility was to proceed to the adoption of the Treaty in this exceptional situation with little time available. A slight technical possibility existed in this respect if the Committee could proceed further without debates, because any debates would immediately consume all the time that would be needed for the remaining steps of the process.

426. Mr. ARGUDO CARPIO (Ecuador) said that, with a view to making satisfactory progress enhanced by input from all delegations, there should at least be a paper copy available of the statement read out by the President.

427. The PRESIDENT suspended the meeting for informal consultations.

Thirteenth Meeting
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Afternoon

428. The PRESIDENT invited the Committee to consider Article 12. The procedure applied to other articles would not be used and the floor was open for a debate. Much effort and thought had been put into the analysis and consultations with respect to Article 12. The question was whether any delegation had a solution.

429. Ms. DALEY (Jamaica) proposed in a spirit of compromise that Article 12(2) should read as follows: "without prejudice to international obligations and to public or private international law, a transfer by agreement of exclusive rights of authorization granted under this Treaty, or the right to exercise such rights with the agreement of the performer to the fixation, shall be governed by the law of the country chosen by the parties or, to the extent that the law applicable to the agreement between the performer and the producer has not been chosen, by the law of the country with which the agreement is most closely connected."

430. Mr. UGARTECHE VILLACORTA (Peru) remarked that the proposal by the Delegation of Jamaica was very similar to that made in the course of the working meeting two mornings previously, so that his Delegation had no objection to supporting it.

431. Mr. SARMA (India) asked for clarification of the difference between the texts in the document IAVP/DC/34 and the proposal put forward by the Delegation of Jamaica. It was not clear as to whose right to exercise was in question.

432. Ms. DALEY (Jamaica) clarified that it meant the right of the producer, because in the rest of the paragraph, the agreement between the performer and the producer was referred to.

433. Mr. SARMA (India) expressed his understanding that the Treaty was for the rights of performers, and it was confusing to see a right of producers being introduced at that stage.

434. Mr. GOVONI (Switzerland) asked for further clarification of the difference between the proposal made by the Delegation of Jamaica and the text in paragraph (2) in document IAVP/DC/34, with the second square brackets.

435. Mr. UGARTECHE VILLACORTA (Peru) sought clarification on the definition of the most closely connected country, regarding it as an element essential to the future application of the provisions by the judiciary.

436. The PRESIDENT answered that the question had been discussed in the working group. The notion was quite established in the area of private international law and therefore no further criteria were included in the proposal.

437. Mr. UGARTECHE VILLACORTA (Peru) explained that he merely wished to know the President's opinion on the manner in which the requested definition was interpreted. It would normally have been easier for the courts to understand the criterion of connection according to the country in which the protection was sought.

438. Mr. GOVONI (Switzerland) recalled his question regarding the proposal made by the Delegation of Jamaica. The difference between the second Alternative in document IAVP/DC/34 and the proposal of the Delegation of Jamaica was not clear to him.

439. The PRESIDENT invited the Delegation of Jamaica to offer an analysis of the difference between its proposal and the text in the second square brackets of paragraph (2).

440. Ms. DALEY (Jamaica) replied that in her opinion the right to exercise rights could derive from an agreement, a contract or another legally binding agreement. Therefore the "right" to exercise such rights by agreement was not as strong as the word "entitlement" to exercise such rights.

441. Mr. CRESWELL (Australia) agreed with the Delegation of Jamaica that the proposal of that Delegation referred to the right of the producer to exercise the performer's rights. The words "with the agreement of the performer" underlined that, in that the performer would not need an agreement to exercise his or her own rights. Therefore the focus was on the producer's right to exercise the rights of the performer.

442. Mr. TROJAN (European Community) warned against entering a territory beyond the call of the Treaty which was the rights of performers. The last few days' discussions of the possibility to find a solution on the issue of transfer of rights had shown that delegations had very different or even quite opposite concepts on that issue. Efforts had been made to gap the differences, but the issue was too serious to be solved by mixing different texts on matters entering the territory of international private law, particularly that related to applicable law,

without clear understanding of the matters being discussed. He suggested to delete paragraph (2) of Article 12 in document IAVP/DC/34 and retain paragraph (1). Substantial progress had been made with the rest of the Treaty, and he complimented the President and the Director General of WIPO for their endeavors. At this stage it depended on the presidency of the Conference and Main Committee I and the Director General of WIPO to decide the ways and means to safeguard the substantial progress made.

443. The PRESIDENT invited the Committee to explore the prevailing opinions regarding the proposals on the table, namely the alternatives in paragraph (2) as contained in document IAVP/DC/34 and the proposals put forward by the Delegations of Jamaica and the European Community.

444. Mr. KEPLINGER (United States of America) stated that his Delegation had consistently underlined the importance of ensuring that transfers of the rights of performers under national laws were not put in jeopardy. To address the issue, it had originally proposed a presumption of transfer in each jurisdiction and, as other ideas had been put on the table, it had been prepared to support proposals based on any one of the options laid out in the Basic Proposal with the only exception of Alternative H. It had also carefully considered the further compromise-oriented proposals of the African Group, China, Peru and Switzerland and most recently the significant contribution offered by Jamaica. It could not abandon the basic principle that all countries, whatever their legal system, should respect the legal relationship established by the performers and the producers when they first made their films or television shows. His Delegation expressed its thanks to Australia, African countries, Bulgaria, Canada, Eastern European countries, Guatemala, Jamaica, Japan, Peru, Switzerland, and all the others who had struggled to find a solution to this problem. He urged delegates to consider the compromise proposal put forward by the Delegation of Jamaica.

445. Mr. GOVONI (Switzerland) agreed with the Delegation of the United States of America that contracts must be respected. This concept was completely fulfilled by paragraph (2) in the first alternative as put forward in document IAVP/DC/34, and his Delegation could support that alternative.

446. The PRESIDENT asked the Delegation of Jamaica whether those delegations which could not agree with the Jamaican proposal could take a closer look at the text and possibly suggest some amendments.

447. Ms. DALEY (Jamaica) replied that her Delegation had put forward a proposal in an effort to facilitate an agreement and a consensus. If it were not acceptable to some, the Delegation would not insist on the proposal.

448. The PRESIDENT asked the Delegation of the European Community whether it could take a closer look at the proposal of the Delegation of Jamaica and possibly consider any amendments that would make it acceptable for it.

449. Mr. TROJAN (European Community) stated that from the outset his Delegation did not wish to include any provision on transfer of rights in the Treaty, but after discussion it had accepted Article 12(1). His Delegation had made a number of proposals to include some language in the Preamble or in an agreed statement, in order to accommodate those delegations who would have difficulties in not having any Article 12 at all. He was not sure if it was worthwhile to start collective drafting of Article 12(2), and therefore reiterated his suggestion to delete paragraph (2) but maintain paragraph (1). His Delegation was still

prepared to work on the language as a way to safeguard the considerable work that had been done in the Diplomatic Conference.

450. Mr. ISHINO (Japan) noted the considerable efforts that had been made in order to establish new international rules for the protection of audiovisual performances. In the course of the discussions many delegations had made concessions in order to get the new rules in place, which were awaited by all interested parties. The Conference should not loose the opportunity to reach a consensus based on the proposal of the Delegation of Jamaica.

451. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, stated that his Group consented to Article 12(1) as contained in document IAVP/DC/34. Concerning paragraph (2), the group wished that everybody would be open to further discussion and necessary compromise. It raised the possibility of taking Article 12(2) into a protocol to the proposed Treaty.

452. The PRESIDENT suggested spending some time for consultations between the delegations to see whether a consensus could be reached. He suspended the meeting.

[*Suspension*]

453. The PRESIDENT summarized the proposals made so far.

454. Mr. BOSUMPRAH (Ghana) clarified that the African Group consented to paragraph (1) of Article 12. Concerning paragraph (2), the Group was open to further discussions and necessary compromise.

455. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that these countries found merit in the African proposal the way it had been put forward before the break. The Conference had reached agreement on 99% of the Treaty, and it would be regrettable to leave the room without anything. Accepting all articles but Article 12(2) could be some success, but as the group had always recognized the importance of the issues that were dealt with in that paragraph, they should be tackled in an appropriate manner. Although a consensus had not been reached at the moment, the Group could commit itself to reach an agreement on those issues through the adoption of an additional optional protocol when the necessary process had taken place and a solution was ready.

456. The PRESIDENT noted that the proposal of the African Group was convergent with that of the European Community, and observed that no consensus seemed to emerge.

457. Mr. CRESWELL (Australia) noted that the working group had reached consensus on most of Article 12(2). There was a lot of merit and attraction in the alternative suggested by the Delegation of Jamaica and his Delegation was prepared to support it. As another alternative, he suggested the following text to begin Article 12(2): "Without prejudice to international obligations and to public or private international law, the transfer by agreement of exclusive rights of authorization granted under this treaty, or the exercise of such rights pursuant to the agreement with the performer to the fixation, shall be governed…"

458. The PRESIDENT noted that six proposals were on the table and there seemed to be no consensus. He noted that the proposal by the European Community and the proposal by Ghana, on behalf of the African Group, converged in that they both suggested to retain paragraph (1) but the African Group also declared itself open for further discussion and compromise regarding paragraph (2).

459. Ms. ABOULNAGA (Egypt) agreed with the Delegation of Bulgaria that it would be more than sad if the Conference would conclude without an agreement. Her Delegation proposed to adopt Article 12(1) and delete paragraph (2). Then a President's statement would refer to the fact that those unresolved issues would be subject of further consideration. That proposal would safeguard the very significant progress that had been achieved so far.

460. Mr. TROJAN (European Community) seconded the proposal submitted by the Delegation of Egypt.

461. Mr. KEPLINGER (United States of America) said that the proposal of the Delegation of Egypt raised a number of issues. An answer was not simply to delete paragraph (2). As stated by the Delegation of India, his country was a major producer of motion pictures, television productions and other audiovisual works. His Delegation wanted to achieve a balanced treaty that improved in a significant way the rights of performers, and did not harm the ability of producers of motion pictures to exploit them to the benefit of everyone involved. Without paragraph (2) that balance would be removed.

462. The PRESIDENT noted that there were seven proposals which he would repeat chronologically to see if any of them could be adopted by consensus, using the same procedure as earlier, meaning that any request for the floor would indicate lack of consensus. The proposal of the Delegation of Jamaica to amend the text in document IAVP/DC/34 had been supported by the Delegations of Peru, the United States of America and Japan. Noting that there were clearly diverging opinions, he stated that it could not become the consensus proposal. The proposal submitted by the Delegation of the European Community to retain paragraph (1) and drop paragraph (2), he noted, could not become a decision by consensus. The proposal submitted by the Delegation of Switzerland referred to document IAVP/DC/34 and suggested that the text be adopted with the first square brackets, could not become basis for a consensus either. The proposal submitted by the Delegation of Ghana on behalf of the African Group, to retain paragraph (1) and to remain open to further discussion and necessary compromise implied that the African Group could consider different solutions where paragraph (1) was maintained.

463. Mr. TROJAN (European Community) asked for clarification whether the Delegation of Egypt, on behalf of the African Group, had clarified the position of the Group and suggested to retain paragraph (1) and to delete paragraph (2).

464. The PRESIDENT clarified that his understanding was that the proposal submitted by the Delegation of Egypt was a proposal of that Delegation. The African proposal should be understood in the context of the other proposals. The proposal of the Delegation of Bulgaria was to adopt an additional optional protocol to the Treaty based on Article 12(2).

465. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, clarified that his proposal was to adopt Article 12 only with paragraph (1), and to adopt a resolution of the Diplomatic Conference that would commit itself to adopt an

additional optional protocol related to the issues that were addressed in paragraph (2) of the article.

466. Mr. UGARTECHE VILLACORTA (Peru) explained that he had mentioned that the proposal by the Delegation of Jamaica resembled that formulated by his own Delegation in the working group, but he added that he was seriously concerned about the last paragraph but one, concerning the law of the country with which the agreement was most closely connected, as to be more feasible it should refer rather to the law of the country in which protection was sought.

467. The PRESIDENT asked whether the proposal of the Delegation of Bulgaria would not meet the requirements to become the basis for consensus.

468. Mr. PESSANHA CANNABRAVA (Brazil) sought clarification as to the legal scope of the proposal by the Delegation of Bulgaria. Its proposal was to adopt the text in Article 12(1) and a resolution to negotiate an optional protocol.

469. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, confirmed that the proposal was to agree for the time being on a Treaty including Article 12(1) and a resolution committing the governments to adopting an additional protocol to the Treaty which would deal with the unresolved issues.

470. Mr. PESSANHA CANNABRAVA (Brazil) stated that it was his understanding that the proposal submitted by the Delegation of Bulgaria was not a facultative protocol but an additional protocol.

471. Mr. SARMA (India) reminded the Conference that, at the adoption of the Resolution relating to audiovisual fixations in 1996, the WPPT by itself was well balanced. Without a consensus on paragraph (2), there would be no balance between producers and performers. Hence, he considered it very difficult to agree to the proposal submitted by the Delegation of Bulgaria.

472. The PRESIDENT asked the Delegation of India whether the position just put forward was a formal opposition against the suggestion made by Bulgaria.

473. Mr. SARMA (India) confirmed that that was the case. He would prefer if the Conference could meet again in the future and resolve the matter.

474. The PRESIDENT noted that no consensus could be built on the proposal of the Delegation of Bulgaria. He turned to the proposal submitted by the Delegation of Australia and noted from the reactions in the Committee that no consensus could be built on it. After summarizing the proposal made by the Delegation of Egypt, he noted that one or several delegations would not join the consensus concerning that proposal. Since no single proposal could serve as basis for consensus building, he suggested that the Conference consider whether there would be other ways to go ahead.

475. M. HERNÁNDEZ BASAVE (Mexico) said that he had exercised his right to veto, not his right to vote, and that the atmosphere did not seem right for a vote on such an important subject. The delegations wanted a Treaty by consensus that would open the door wide to a large number of ratifications. Apart from that it seemed clear that there was no chance of achieving a consensus, and a number of delegations had indicated that time was running out.

The considerable effort that had been made should not be wasted, however, as it represented moral progress towards the protection of performers' rights. He called for the submission of a report to the next Assemblies so that they could make a ruling. His Delegation would support such a proposal on condition that all the paragraphs of all approved articles were themselves approved, so that thereafter work might resume exclusively on paragraph (2) of Article 12.

476. The PRESIDENT suspended the session for informal consultations.

[*suspension*]

477. The PRESIDENT concluded the debate on Article 12 of the draft Treaty and proposed to Main Committee I that it submit a proposal to the Diplomatic Conference meeting in Plenary, taking into account the proposal made by the Delegation of Mexico. Such a proposal would read as follows:

"The Diplomatic Conference

"(i) notes that a provisional agreement has been achieved on 19 Articles;
"(ii) recommends to the Assemblies of Member States of WIPO, in their September 2001 session, that they reconvene the Diplomatic Conference for the purpose of reaching agreement on outstanding issues."

478. *Main Committee I adopted by consensus the President's proposal.*

479. Mr. RAJA REZA (Malaysia) said that a possible solution might have been overlooked. It would not be an additional protocol nor a President's statement but an agreed statement along the lines of the agreed statement concerning Article 15 of the WPPT. It would read as follows: "It is understood that Article 12 does not represent a complete solution on transfer and exercise of exclusive rights of authorization. Delegations were unable to achieve consensus on different proposals on transfer and exercise of exclusive rights of authorization and have left the issue to future resolution."

480. The PRESIDENT asked the Delegation of Malaysia whether it could join the consensus regarding his proposal.

481. Mr. RAJA REZA (Malaysia) expressed sadness because the Conference had failed to come up with a successful conclusion. He had hoped to solve the problem by having a Treaty without any additional protocol or President's statement.

482. The PRESIDENT said the proposal by the Delegation of Malaysia was very positive and constructive, but some delegations' signs indicated that it would not gather consensus. He noted that it had been decided by consensus to present to the Plenary of the Diplomatic Conference the proposal that he had read a few minutes ago. He thanked the Committee for their decision, their confidence, their endurance, their cooperation and for the good atmosphere during the Conference and declared the session closed.

[End of document]