

Provisional

For participants only

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Seventy-second session (second part)

Provisional summary record of the 3549th meeting

Held at the Palais des Nations, Geneva, on Monday, 26 July 2021, at 11 a.m.

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Present:

Chair: Mr. Zagaynov (Second Vice-Chair)

Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Mr. Forteau
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Hassouna
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Vázquez-Bermúdez
Sir Michael Wood

Secretariat:

Mr. Llewellyn Secretary to the Commission

In the absence of Mr. Hmoud, Mr. Zagaynov, Second Vice-Chair, took the Chair.

The meeting was called to order at 11 a.m.

Provisional application of treaties (agenda item 4) (*continued*) ([A/CN.4/737](#) and [A/CN.4/738](#))

Report of the Drafting Committee ([A/CN.4/L.952/Rev.1](#))

Ms. Galvão Teles (Chair of the Drafting Committee) said that the second report of the Drafting Committee on the topic “Provisional application of treaties” ([A/CN.4/L.952/Rev.1](#)) at the current session contained the complete Guide to Provisional Application of Treaties, made up of the texts and titles of the 12 draft guidelines, as well as an annex consisting of examples of provisions on provisional application of treaties, adopted by the Drafting Committee on second reading. The Commission had already taken note of the Drafting Committee’s first report containing the draft guidelines during the first part of the session.

During the first part of the session, the Drafting Committee had not been able to conclude its consideration of the Special Rapporteur’s proposal for the inclusion of an annex containing a set of draft model clauses designed to assist treaty negotiators. There had been conflicting views concerning the clauses proposed by the Special Rapporteur, and some members had expressed the concern that any model clause might be perceived as indicating a preference by the Commission, which could adversely affect the freedom of States and international organizations. During informal consultations, it had been decided, at the suggestion of the Special Rapporteur, to instead present an annex containing simply examples of provisions in existing agreements and other instruments, as a reference for future treaty negotiators. On that understanding, the Drafting Committee had held one further meeting at which it had adopted the annex now contained in the second report.

The annex comprised an introductory paragraph and five sections. The introductory paragraph explained the purpose of the annex, namely, to present examples of provisions intended to assist States and international organizations in drafting agreements to provisionally apply a treaty or part of a treaty. The intention was not to cover all possible situations, nor to prescribe any specific formulation. The examples had been selected from recent practice, and the Drafting Committee had sought, to the extent possible, to reflect regional diversity.

The five sections were: commencement of provisional application; form of agreement on provisional application; opt in/opt out of provisional application; limitations to provisional application deriving from internal law of States or rules of international organizations; and termination of provisional application. Each of the sections was subdivided into provisions in bilateral and multilateral treaties or agreements.

Concerning terminology, initially the Drafting Committee had been using the word “clauses”, as in the Special Rapporteur’s earlier proposals for model clauses. Given that his original intention had been to provide model formulations to be included in treaties, the use of the word “clauses” had been justified. However, as the examples included in the new annex were drawn not only from treaties, but also from other instruments, such as notes and letters, the Drafting Committee had thought it preferable to use the more neutral term “provisions” so as to avoid any possible mischaracterization of the instruments in question. That choice had resulted in the admittedly inelegant reference to “provisions on provisional application”, which also appeared in the title of the annex. Such inelegance was less of a problem in the other languages.

Having concluded its work on the annex, the Drafting Committee had been in a position to consider the Guide as a whole. It had decided to retain the title, as adopted on first reading, namely the “Guide to Provisional Application of Treaties”. The Drafting Committee had also agreed to recommend that the Guide should be made up of two parts: the guidelines and the annex.

The Drafting Committee recommended that the Commission should adopt, on second reading, the Guide to Provisional Application of Treaties.

The Chair invited the members of the Commission to proceed with the adoption of the Guide to Provisional Application of Treaties, comprised of the draft guidelines and the accompanying annex, as set out in document [A/CN.4/L.952/Rev.1](#).

Draft guidelines 1 to 12

Draft guidelines 1 to 12 were adopted.

Annex: Examples of provisions on provisional application of treaties

The annex was adopted.

The Chair said he took it that the Commission wished to adopt, on second reading, the Guide to Provisional Application of Treaties, as a whole, as contained in document [A/CN.4/L.952/Rev.1](#).

It was so decided.

Mr. Gómez-Robledo (Special Rapporteur) said that he wished to thank the members of the Commission, the various chairs of the Drafting Committee and the secretariat for their support and contributions to the work on the topic. In the years to come, the Commission should avoid limiting its work exclusively to the identification of positive law. At a time of crisis for the international community, there was a need to explore new paths that led to more progressive development of international law. The validity of international law depended on how it was interpreted, and there were no absolute truths when it came to interpretation. In his view, the special rapporteurs and chairs of study groups should be held in higher regard by the Commission, as they carried out the tasks entrusted to them with the utmost rigour. However, they could not be expected not to have preferences based on their view of the topic at hand and the state of international law. The need to remain flexible in order to achieve a result should not come at the expense of the personal convictions of the special rapporteurs and chairs of the study groups.

Immunity of State officials from foreign criminal jurisdiction (agenda item 3)
(*continued*) ([A/CN.4/739](#))

Report of the Drafting Committee ([A/CN.4/L.953/Add.1](#))

Ms. Galvão Teles (Chair of the Drafting Committee) said that the report of the Drafting Committee on the topic “Immunity of State officials from foreign criminal jurisdiction” ([A/CN.4/L.953/Add.1](#)) contained the text and title of draft article 12, as provisionally adopted by the Drafting Committee. During the first part of the session, she had presented the Drafting Committee’s earlier report, containing the texts and titles of draft articles 8 to 11, all of which had been adopted by the Commission. The Drafting Committee had been able to return to the topic in the second part of the session.

Draft article 12 had originally been draft article 13 in the Special Rapporteur’s seventh report ([A/CN.4/729](#)), and had been referred to the Drafting Committee at the seventy-first session along with the other draft articles. The Drafting Committee had also had to consider the proposals made in plenary and the Special Rapporteur’s proposal to reorder the draft articles. The Drafting Committee had worked on draft article 12 on the basis of a revised proposal by the Special Rapporteur following suggestions during the informal consultations to have a streamlined text.

Draft article 12, like the others adopted by the Commission in the first part of the session, was in Part Four of the draft articles, which addressed questions concerning procedural provisions and safeguards. The draft article dealt with requests for information between the forum State and the State of the official as to whether or not immunity applied, as well as the invocation and waiver of immunity.

Paragraph 1 allowed for requests for information directed by the forum State to the State of the official. There had been some discussion in the Drafting Committee as to whether the definite article “the” should be used – as it was in the Spanish text – in place of the quantifier “any” in connection with “information”. The Special Rapporteur had explained that the phrase “*la información*” in Spanish had the same meaning as “any information” in

English or “*toute information*” in French. It had also been noted that the Special Rapporteur’s proposal used the criterion “*necesaria*” in Spanish – “*nécessaire*” in French – but “relevant” in English. It had been considered that, while “relevant” and “necessary” could have the same meaning, the former was more consistent with general legal usage in English. It had been suggested that the word “necessary” could be misinterpreted as implying that determination of immunity could not occur until requested information was provided, which was not the intention of the paragraph. The French and Spanish texts had therefore been aligned with the English text. The subjective language used in the paragraph reflected the reality that a State requesting information would determine for itself what it considered relevant when it made a request.

The Drafting Committee had discussed at length how to refer to the reasons for which information could be requested. The phrase “in order to” had been retained from the Special Rapporteur’s original proposal, emphasizing that requests for information were linked to a procedure that had a purpose. It had been decided that the phrase “decide whether immunity applies or not” was sufficiently broad to encompass both the examination and determination of the question of immunity. The commentaries would address the scope of that phrase in greater detail.

Paragraph 2 concerned requests made by the State of the official to the forum State for information the former considered relevant in order to decide on the invocation or waiver of immunity. While the Special Rapporteur had initially proposed dealing with requests in both directions in a single paragraph, the Drafting Committee had considered that it would be clearer to address the two kinds of request in separate paragraphs. Paragraphs 1 and 2 used parallel structures. The phrase “in order to” was mirrored in particular to reflect that a decision to invoke or waive immunity could also involve a process that occurred over a period of time.

Paragraph 3, renumbered from paragraph 2 because the first paragraph had been split into two paragraphs, dealt with the means of communication that could be used to request information. The paragraph reflected *mutatis mutandis* the language already adopted in the third paragraphs of draft articles 9, 10 and 11. After some discussion on how best to draft the provision, the Drafting Committee had opted to place the emphasis on the information rather than the request by making “information” the subject of the sentence. It had been noted that attention would nevertheless need to be paid to ensuring the consistency of the provisions relating to means of communication in each of the language versions during the *toiletage* stage.

Paragraph 4, which provided that the requested State should consider any request for information in good faith, had been adopted on the basis of a new proposal by the Special Rapporteur following informal consultations that had significantly simplified the text. The Special Rapporteur’s original proposal, as contained in her seventh report, had enumerated the reasons why a State might refuse a request for information. That formulation had been considered overly burdensome and detailed, and concerns had been expressed that the provision would interact poorly with relevant domestic laws. It had also been considered that the original proposal could give rise to a mistaken impression that it established limitations on the communication of information. The paragraph had thus been amended to emphasize that the goal of the paragraph was to encourage cooperation between the forum State and the State of the official.

The simplified text of that paragraph had led to further discussion in the Drafting Committee. The view had been expressed that the paragraph was unnecessary, as it was self-evident that States must act in good faith. However, concern had also been expressed that the simplification might go too far in deleting the reference to concerns of sovereignty, public order, security and essential public interest that might justify a refusal to provide information. It had been noted that the paragraph provided for an obligation of conduct, rather than result, and that a State could refuse in good faith to provide information for any number of reasons. The relationship between the consideration of a request in good faith and potential limitations or conditions on the provision of information would be addressed further in the commentaries.

With respect to the specific wording of the paragraph, the Drafting Committee had discussed whether the phrasing “any request” should be made more specific by referring

instead to “the request” or “such request”. However, it had been considered that the word “any” would keep the language of the paragraph consistent with the previous paragraphs and avoid questions that more specific language might provoke. The phrase “requested State” had also been the subject of some discussion. While some members of the Drafting Committee considered it inelegant, it had been decided to keep the language as its meaning was clear and consistent with existing treaty practice.

Three paragraphs proposed by the Special Rapporteur in her seventh report no longer appeared in the text. Paragraph 3, as originally proposed, concerned the forwarding of requests for information among the authorities of the requested State. Similar paragraphs with respect to the invocation and waiver of immunity had already been adopted as paragraph 4 of draft articles 10 and 11, respectively. However, the paragraph had been considered unnecessary, as by the time requests for additional information were being made, the competent authorities would be known to each State.

The proposed paragraph 5 had concerned the application of conditions of confidentiality to the provision of information by the requested State. As with the Special Rapporteur’s original proposal for paragraph 4, that provision had been considered overly burdensome and detailed, and concerns had been expressed that it could be interpreted as discouraging cooperation. It had also been noted that confidentiality requirements were often already established by domestic law or regulations. The Drafting Committee had therefore decided not to include draft paragraph 5.

The proposed paragraph 6 had addressed the question of whether a refusal to provide information by the State of the official could be grounds for the forum State not to apply immunity. The Drafting Committee had considered that the question was linked to the determination of whether immunity applied or not. It had therefore been decided that the paragraph would be deleted from draft article 12 and revisited when the Drafting Committee considered the renumbered draft article 13 – formerly 9 – which related to the determination of immunity.

Draft article 12 was entitled “Requests for information”, a modified version of the title proposed by the Special Rapporteur – “Exchange of information”. The new title corresponded to revisions in the text to refer to requests instead of an exchange.

The Chair said he took it that the Commission wished to adopt draft article 12, on “Requests for information”, as contained in document [A/CN.4/L.953/Add.1](#).

It was so decided.

Draft report of the Commission on the work of its seventy-second session

Chapter IV. Protection of the atmosphere ([A/CN.4/L.944](#) and [A/CN.4/L.944/Add.1](#))

The Chair invited the Commission to commence the adoption of the draft report paragraph by paragraph, starting with the portion of chapter IV contained in document [A/CN.4/L.944](#).

A. Introduction

Paragraphs 1 and 2

Paragraphs 1 and 2 were adopted.

B. Consideration of the topic at the present session

Paragraphs 3 to 8

Paragraphs 3 to 8 were adopted.

C. *Recommendation of the Commission*

D. *Tribute to the Special Rapporteur*

The Chair said that sections C and D would be left in abeyance until the necessary information was available to complete them.

E. *Text of the draft guidelines on the protection of the atmosphere*

The Chair invited the Commission to consider the portion of the draft report contained in document [A/CN.4/L.944/Add.1](#).

1. *Text of the draft guidelines*

Paragraph 1

Paragraph 1 was adopted.

2. *Text of the draft guidelines and commentaries thereto*

Paragraph 2

Paragraph 2 was adopted.

Protection of the atmosphere

General commentary

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Park, supported by **Sir Michael Wood**, said that, as the paragraph contained the first reference in the commentary to the 2013 understanding, a footnote should be inserted after the words “the 2013 understanding”, referring readers to footnote 1 in document [A/CN.4/L.944](#), which explained the understanding.

Mr. Forteau said that he agreed with Mr. Park on the need for a footnote. In order to help readers consulting only the commentaries to understand the reference to the understanding, he suggested that the words “based on the 2013 understanding” should be followed by the phrase “reached when the topic was included on the Commission’s agenda” [*au moment de l’inscription du sujet à l’ordre du jour de la Commission*].

With the addition of the footnote, paragraph (2) was adopted.

Commentary to the draft preamble

Paragraph (1)

Mr. Murase (Special Rapporteur) said that, in the last sentence of the paragraph, “as referred also to” should be replaced with “also referred to”.

Mr. Rajput said that the clause “since it was assumed that everyone could benefit from it without depriving others of its use” was unnecessary, as the sentence would make sense without it, and should be deleted. In addition, the words “See for example” should be inserted at the beginning of footnote 5, since the case cited in that footnote dealt with the issue of clean air and not the atmosphere.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murase (Special Rapporteur) said that the sentence “The air moves and circulates around the Earth in a complicated formation called ‘atmospheric circulation’” should be deleted, since the use of the term “atmospheric circulation” without further explanation could lead to confusion.

Sir Michael Wood said that the first two sentences of footnote 7 should be deleted.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murase (Special Rapporteur), supported by Mr. Murphy, said that, in the first sentence of the paragraph, the word “pronounces” should be replaced with “states” and the clause “bearing in mind the importance of the atmosphere as aforementioned and the concerns of the international community” should be deleted. In the fourth sentence, the words “refer to the common concern” should be replaced with “use this expression”. The entire fifth sentence, beginning with “The main benefit”, should be deleted. In the sixth sentence, the phrase “as used in this preambular paragraph” should be inserted after “The phrase”; the words “because all are affected” should be replaced with “that all may be affected”; and the phrase “as defined in the guidelines” should be added to the end of the sentence. In the eighth sentence, the words “that the expression identifies a problem that requires international cooperation, while” should be inserted after “It is understood”, and the clauses “that are not spelled out in the draft guidelines” and “and that it is to be understood as a call to action and a means to enhance international cooperation” should be deleted. In the ninth sentence, the word “support” should be replaced with the words “been widely discussed”.

The reference in footnote 12 to *International Law and the Environment* should be updated to refer to the fourth edition and to reflect the new page numbering and the sad demise of one of the authors, Patricia Birnie. In the last reference in that footnote, the spelling “Cortier” should be corrected to “Cottier”.

Mr. Park, supported by **Mr. Murphy**, said that the last sentence of the paragraph, with its reference to the academic literature, should be deleted, since the seventh sentence of the paragraph already included a reference to doctrine. The footnote 12 indicator should then be placed at the end of the seventh sentence, after “scope, content and consequences”.

Mr. Forteau said that he objected to only one of the changes to the paragraph proposed by the Special Rapporteur. The language proposed for inclusion in the eighth sentence – namely, “that the expression identifies a problem that requires international cooperation” – was too weak. He therefore proposed adding “from the entire international community” [*de la part de la communauté internationale tout entière*] after “international cooperation”. In addition, the phrase “as such” [*en tant que telle*] should be inserted between the words “create” and “rights and obligations” in that sentence.

Mr. Murphy said that he did not object to Mr. Forteau’s first proposal. However, if that proposal was accepted, the word “international” should be deleted before “cooperation” so that the relevant clause of the eighth sentence would read, “that requires cooperation from the entire international community”. With respect to Mr. Forteau’s second proposal, he was not sure why the phrase “as such” was needed.

Mr. Jalloh said that he supported Mr. Forteau’s proposal to insert “as such”. There had been extensive debates in the Commission about whether or not specific guidelines represented obligations. By inserting “as such”, the Commission would make it clear that it was casting no doubt on any international cooperation that could be seen as arising from a “common concern”.

Sir Michael Wood said that he did not support the addition of “as such”. The sentence could perhaps be made clearer by inserting the words “in the draft guidelines” between “inclusion” and “does not create”.

Mr. Jalloh said that Sir Michael Wood’s proposal seemed to drastically change Mr. Forteau’s original proposal. It was important to remember that a number of States had

submitted comments to the Commission expressing their strong support for including the expression “common concern”.

Mr. Saboia, supported by **Ms. Oral**, said that he supported Mr. Forteau’s proposal and Mr. Jalloh’s reasoning with respect to that proposal. The wording of the commentaries should not serve to weaken the language of the guidelines.

Sir Michael Wood said he would like to know what, in Mr. Forteau’s view, the effect was of adding the words “as such”.

Mr. Forteau said that the addition of “as such” would help to more clearly define the legal conclusions that could or could not be drawn from the concept of a “common concern of humankind”. As the inclusion in the preamble of language concerning a “common concern of humankind” could have legal effects, the addition of the words “as such” would indicate that the inclusion of that language did not in and of itself create rights and obligations.

Mr. Rajput said that paragraph (3) was in full accordance with the statement of the Chair of the Drafting Committee (A/CN.4/SR.3529), which had clearly indicated that the purpose had not been to create any *erga omnes* obligations. The commentary as currently drafted struck the necessary balance. The addition of “as such” would reopen an issue that had been settled in the Chair’s statement.

Ms. Lehto said that she supported the addition of the phrase “as such”, which provided much-needed clarification.

Sir Michael Wood said that he was unconvinced by Mr. Forteau’s explanation regarding the phrase “as such”. He could, however, support the clearer formulation “in and of itself”, which Mr. Forteau had used in his explanation.

Mr. Petrič said that he did not understand the purpose that the addition of “as such” would serve. Mr. Forteau’s explanation seemed to indicate that the addition was in line with the position that the concept of a “common concern of humankind” did not, in and of itself, establish *erga omnes* obligations. On the basis of that understanding, he would not oppose the inclusion of “as such”. However, like Sir Michael Wood, he would prefer the clearer formulation “in and of itself”.

Mr. Murase (Special Rapporteur) said that he could accept the addition of “as such”, but he too would prefer Sir Michael Wood’s proposal of “in and of itself”, which reflected the intention behind his drafting. As Mr. Park had proposed, footnote 12 would be placed immediately after “scope, content and consequences”.

Mr. Jalloh said that he could not accept the phrase “in and of itself”. The statement of the Chair of the Drafting Committee had indicated that there were differences of opinion in the Committee. That statement could, therefore, not now be used as a basis for holding out one of those views as the predominant one. As he was uncertain about the implications of the use of the term “common concern of humankind” under international environmental law, he did not want to preclude any possibility.

Mr. Rajput proposed incorporating, in the eighth sentence of the paragraph, language from the statement of the Chair of the Drafting Committee on the topic at the Commission’s current session, specifically the phrase “that atmospheric pollution and atmospheric degradation reflect a concern of the entire international community because all are affected by them, that its inclusion does not create rights and obligations that are not spelled out in the draft guidelines, in particular, the phrase does not entail *erga omnes* obligations in the context of the draft guidelines, and that it is to be understood as a call to action and as a means to enhance international cooperation”.

Mr. Murphy said that he did not support Mr. Rajput’s proposal. The statement of the Chair of the Drafting Committee, while useful in providing a summary of the Committee’s discussion, typically needed to be adjusted for the purpose of the commentary. The Commission seemed close to adopting the eighth sentence of the paragraph, as amended by the Special Rapporteur and Mr. Forteau, so that it would read: “It is understood that the expression identifies a problem that requires cooperation from the entire international community, while at the same time that its inclusion does not create, as such, rights and

obligations, and in particular, that it does not entail *erga omnes* obligations in the context of the draft guidelines.” He himself would not oppose the addition of the words “as such”.

Ms. Oral, noting that paragraph (3) was now considerably different from the original draft and included some changes that she did not necessarily support, said that she nevertheless considered the addition of the words “as such” to be a minor change, and would not oppose it.

Mr. Park said that he was in favour of the sentence as read out by Mr. Murphy.

The Chair said he understood that the members found the paragraph as amended by the Special Rapporteur and Mr. Park to be acceptable. He would like to know whether they would be prepared to adopt the paragraph as a whole, including the eighth sentence as read out by Mr. Murphy.

Mr. Jalloh said that he still took issue with the eighth sentence of the paragraph, which he proposed should be redrafted to read: “It is understood that the expression identifies a problem that requires cooperation from the international community, while at the same time that its inclusion does not create rights and obligations as such.”

Mr. Petrič said that he could not support Mr. Jalloh’s proposal. He was not opposed to the idea that some legal obligations might arise out of the application of the concept of a “common concern of humankind”, for instance, through the conclusion of a treaty or State practice; paragraph (3) served to emphasize that the concept as such could not create obligations *erga omnes*.

Mr. Murphy said he agreed that deleting the clause beginning with the words “and in particular” would be problematic. The Drafting Committee had discussed in depth the concept of a “common concern of humankind”, and no one had taken the position that its inclusion in the preamble might create *erga omnes* obligations. If the words “as such” were to be inserted between the word “create” and the phrase “rights and obligations”, the clause referring to “*erga omnes* obligations” must also be retained, since there had been claims, including in some of the sources cited in the footnotes to the paragraph, that the phrase did create certain obligations *erga omnes*.

Mr. Forteau said that he supported Mr. Murphy’s position.

The Chair suggested that the Commission should leave paragraph (3) in abeyance to allow for informal consultations to be held.

It was so decided.

Paragraph (4)

Mr. Murase (Special Rapporteur) said that, in the first sentence, the phrase “having regard to considerations of equity” should be deleted and that a reference to the Report of the United Nations Conference on the Human Environment ([A/CONF.48/14/Rev.1](#)) should be added in footnote 14.

Mr. Forteau, noting that the second sentence in footnote 13 had no main verb, suggested that the first two sentences were apparently meant to be a single sentence.

Ms. Oral said that she would like to know the reason for the deletion proposed by the Special Rapporteur.

Mr. Murase (Special Rapporteur) said that he had proposed the deletion of the phrase “having regard to considerations of equity” because the concept of equity was referred to in paragraph (1) of the commentary to draft guideline 6.

Mr. Murphy said that he would support the deletion of the phrase, as the first sentence of the paragraph served simply to introduce the fourth preambular paragraph, and did not need to make reference to specific aspects.

Mr. Tladi said that, generally speaking, he would not support removing language from the commentary on second reading, unless such removal was occasioned by amendments to the text or a particular debate. He also would not support removing the reference to equity merely on the basis that equity was mentioned elsewhere in the

commentary. Lastly, while he agreed that the first sentence of paragraph (4) was an introductory statement of fact about the fourth preambular paragraph, the phrase “having regard to considerations of equity” was significant because it explained the importance of the preambular paragraph. He would therefore be in favour of retaining the phrase.

Mr. Jalloh said that he supported the remarks made by Mr. Tladi. As for the reference to equity later in the commentary, paragraph (1) of the commentary to draft guideline 6 referred to a specific principle, and so the context was quite different from that of the preamble.

Mr. Petrič, supported by **Ms. Oral**, said that he shared the views expressed by Mr. Tladi and Mr. Jalloh. It was important to raise awareness about the situation of developing countries and to explain that equity and justice were at the heart of such awareness.

Sir Michael Wood said he did not agree that a commentary should not be changed on second reading as a general principle; many explanations were given in the commentary adopted on first reading that could later be removed. Nonetheless, in the current case, he did not object to retaining the phrase “having regard to considerations of equity”, even though it was not crucial to the description of the preambular paragraph.

Mr. Murase (Special Rapporteur) said that he had suggested deleting the phrase referring to “equity” because the concept was in itself controversial and its inclusion warranted a detailed explanation, as had been given in the commentary to draft guideline 6. Nevertheless, he would not object if the majority of the members preferred to retain the phrase containing the word.

Paragraph (4) was adopted, with an amendment to footnote 14.

Paragraph (5)

Mr. Murase (Special Rapporteur) suggested that the second half of the paragraph, starting with the words “Scientific research shows that”, should be deleted, as the commentary should focus on legal arguments, rather than on scientific information. The phrase “According to the scientists,” should be inserted at the beginning of the second sentence.

Ms. Lehto said that she would prefer to retain the paragraph as originally drafted. The scientific information referred to was not superfluous, nor were the important references in the footnotes to the reports of the Intergovernmental Panel on Climate Change.

Ms. Oral said that she supported the statement just made by Ms. Lehto; the references cited in the footnotes were important as they backed up the scientific statement made in the fifth preambular paragraph.

Mr. Murphy, noting that the content of the fifth preambular paragraph had simply been relocated from the third preambular paragraph since the first reading, and so the explanations being given in the commentary were no different from those given at the first reading, said that, in his view, the deletions were warranted. However, if the majority of the members wished to retain the second half of paragraph (5), he would like to know what the phrase “atmospheric conditions of flood” meant and how the phrase “impacts on the atmosphere by ... other biospheres, as well as forests, lakes and rivers” related to the content of the preambular paragraph. In addition, although the footnotes did not contain legal analysis, the references cited might need to be double-checked.

Mr. Saboia said that he supported the remarks made by Ms. Lehto and Ms. Oral.

The Chair suggested that the Commission should leave paragraph (5) in abeyance to allow for informal consultations to be held.

It was so decided.

The meeting rose at 1.05 p.m.