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International Law Commission

Seventy-second session (second part)

Provisional summary record of the 3552nd meeting

Held at the Palais des Nations, Geneva, on Wednesday, 28 July 2021, at 3 p.m.

Contents

Present:

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

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Succession of States in respect of State responsibility (agenda item 6) (*continued*) (A/CN.4/743)

Report of the Drafting Committee (A/CN.4/L.954)

Ms. Galvão Teles (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of succession of States in respect of State responsibility (A/CN.4/L.954), said that, at its seventieth session, the Commission had referred draft articles 5 to 11, as contained in the Special Rapporteur's second report (A/CN.4/719), to the Drafting Committee, which, due to lack of time, had not been able to consider draft articles 7 to 11. At the Commission's seventy-first session, the Drafting Committee had adopted draft articles 7, 8 and 9 and, following the plenary debate on the third report of the Special Rapporteur (A/CN.4/731), the Commission had referred draft articles 2 (f), X, Y, 12, 13, 14 and 15, as well as the titles of part II and part III, to the Drafting Committee. At the current session, the Commission had referred draft articles 7 *bis*, 16, 17, 18 and 19, as proposed by the Special Rapporteur in his fourth report (A/CN.4/743), to the Drafting Committee. Draft articles 3 and 4, as proposed by the Special Rapporteur in his first report (A/CN.4/708), remained in the Drafting Committee for consideration at a later stage, while draft article 6, which the Committee had provisionally adopted at the seventieth session, would also be revisited at a later stage.

The Drafting Committee had continued its consideration of the draft articles referred to it at the seventieth session, taking into account the debate in the plenary and in the Drafting Committee. Draft article 10, on uniting of States, was based on the Special Rapporteur's original proposal for draft article 10 (1). Following an extensive and rich discussion on the different scenarios for succession of States, the Drafting Committee had decided to split the proposed draft article 10 into two separate provisions, one on the uniting, or merger, of two or more States to form one successor State, in a new draft article 10, and the other on the incorporation of a State into another State, in a new draft article 10 *bis*. In its 1974 and 1981 draft articles on State succession, the Commission had understood the term "uniting of States" to cover both merger and incorporation and had drawn a distinction between them only in the commentaries. Following the more recent example of article 21 of the 1999 articles on nationality of natural persons in relation to the succession of States, the Drafting Committee had decided to make that distinction more explicit and to have a separate draft article for each of the two situations.

Several members had been in favour of clearly stipulating that there was no rule of automatic succession in the case of a merger of States, while others had considered that option to amount to a "clean slate" approach, which would risk leaving the injured State without remedy. Seeking to find a middle ground between the two positions, the Drafting Committee had considered a revised proposal submitted by the Special Rapporteur, which would establish an obligation on the successor State and the injured State to "endeavour to reach an agreement", a formulation drawn from draft article 9 (2), as provisionally adopted by the Drafting Committee. However, the prevailing view had been that draft article 9 (2) concerned a situation in which the predecessor State continued to exist and was thus responsible for its internationally wrongful act, whereas draft article 10 addressed the case in which it had ceased to exist. Some members of the Drafting Committee had expressed a preference for stronger wording of the obligation of the States concerned to address the injury, which would avoid giving the impression that the "clean slate" rule applied in the circumstances referred to in draft article 10. One suggestion had been to place an obligation of result on the injured State and the successor State, indicating that they "shall engage in negotiations and other means for solving a dispute in accordance with international law" and "shall reach an agreement"; another had been to put greater emphasis on equity and good faith, indicating that they "shall seek a solution in good faith and in the spirit of cooperation and early and equitable settlement for addressing the injury arising from the internationally wrongful act". Wording proposed by the Special Rapporteur, noting that "the obligations arising from any internationally wrongful act of the predecessor State pass on to the successor State unless the States concerned otherwise agreed", had drawn criticism from several members, who were concerned that the reference to the passing of obligations to a successor State effectively

amounted to a rule of automatic succession. They had proposed the inclusion of wording to indicate that succession in respect of responsibility in cases of merger could only take place with the consent of the successor State. The view had been expressed that the decision of the Institute of International Law, in its resolution on succession of States in matters of international responsibility, to provide for the responsibility of the successor State in cases of merger was based not on sufficient State practice, but rather on a policy decision to avoid leaving the internationally wrongful act unrepaired.

The wording of draft article 10 adopted by the Drafting Committee specified that the provision addressed the situation in which two or more States merged to form one successor State, with the predecessor States ceasing to exist, as was implied in the phrase "when two or more States unite and so form one successor State". The Special Rapporteur's original proposal had been slightly modified to align it with the formulation used in the Commission's previous relevant work: the 1978 Vienna Convention on Succession of States in respect of Treaties, the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts and the 1999 articles on nationality of natural persons in relation to the succession of States. The phrase "and an internationally wrongful act has been committed by any of the predecessor States" linked the provision to the specific context of the succession of States in respect of State responsibility. The last part of draft article 10, based on a revised proposal made by the Special Rapporteur, took into account the comments made during the debate in the Drafting Committee at the seventy-first session. Some members of the Committee had been of the view that the wording of the original proposal, "the obligations arising from an internationally wrongful act of any predecessor State pass to the successor State", could be understood as providing for a rule of automatic succession; others had emphasized that draft article 10 should ensure that States could not evade their international responsibility by forming a new State. Although the phrase "pass to the successor State" mirrored wording found in article 16 of the 1983 Vienna Convention, a distinction should be made between succession in terms of property, archives and debts and succession in respect of responsibility.

The wording finally adopted, "shall agree on how to address the injury", was the result of a compromise between the members' divergent positions and articulated neither a "clean slate" rule nor a rule of automatic succession. Rather, the intention was to encourage States to seek a solution to questions of international responsibility in situations of a merger between States. The wording was meant to be sufficiently flexible to give States the freedom to choose the modalities of the agreement. Such flexibility could even result in agreement between the injured State and the successor State that it was not possible to address the injury. Consideration had been given to the possibility of limiting the obligation to agree on how to address the injury by stating that it only arose "in particular circumstances", a formulation contained in draft article 9 (2), as provisionally adopted, but several members had been of the opinion that such wording might unnecessarily constrain the ability of an injured State to seek redress. The Drafting Committee had decided to align the wording at the end of draft article 10 with that of draft article 9 (2) by replacing the phrase "consequences of the internationally wrongful act" with "injury".

The title of draft article 10, "Uniting of States", was in line with the term used in the Commission's previous work, although it was to be understood in the narrow sense, as covering only the merger of States. The Drafting Committee had decided not to follow the approach taken in the Institute of International Law resolution, article 13 of which was entitled "Merger of States", nor to refer to the "unification of States", a phrase more typically employed in a political context.

Turning to draft article 10 *bis*, on incorporation of a State into another State, she said that a situation of incorporation, in contrast to a merger, involved the incorporation of one or more States into another State that continued to exist. The Drafting Committee had taken account of several examples of State practice and discussed whether "incorporation" could be regarded as a form of "partial succession" because the incorporated State ceased to exist. It had decided against using the terms "succession", "predecessor State" and "successor State" in draft article 10 *bis* so as to clearly distinguish it from the situation envisaged in draft article 10.

Draft article 10 *bis* consisted of two paragraphs that were based on the Special Rapporteur's amended proposal for draft article 10 (2) and (3). After adopting the text of the paragraphs, the Drafting Committee had decided to reverse their order, in line with the Special Rapporteur's original proposal. The first part of draft article 10 *bis* (1) reflected the scope of the provision, referring to a situation in which an internationally wrongful act had been committed by a State prior to its incorporation into another State, where the incorporating State continued to exist, but the State that had committed the act ceased to exist. The common denominator between draft article 10 and draft article 10 *bis* (1) was that neither the new State, under the former, nor the incorporating State, under the latter, had committed the internationally wrongful act. However, as the State that had committed the internationally wrongful act had ceased to exist after the date of succession or incorporation, there was a need to address the injury caused by the internationally wrongful act. Bearing in mind the compromise reached on the wording of draft article 10, the Drafting Committee had adopted the phrase "shall agree on how to address the injury". It had considered referring to a "continuing State" but had found the term "incorporating State" to be more appropriate. As the differing views on draft article 10 had also informed the debate on draft article 10 *bis* (1), the Drafting Committee had considered including the words "in particular circumstances" or, in the alternative, the words "as appropriate". As in the case of draft article 10, the intention had been to make clear that the obligations arising from the internationally wrongful act did not pass automatically to the incorporating State. Some members had wished to include wording indicating that the injured State and the incorporating State "shall" (or "undertake to") "pursue negotiations in good faith". Others had emphasized the need to take account of claims by private individuals, for example under human rights law, while still others had regarded such claims as being outside the scope of the draft articles, which concerned injuries to States. The phrase "shall agree on how to address the injury" had been adopted on the understanding that the commentaries would reflect those different positions.

Paragraph 2 of draft article 10 *bis* followed the same structure as paragraph 1, but addressed a situation in which the internationally wrongful act had been committed by the incorporating State, rather than a State that no longer existed owing to its incorporation into another State. The second part of the provision confirmed explicitly that the responsibility of the State having committed the wrongful act was not affected by the fact of the incorporation. The Special Rapporteur had suggested several alternative formulations, including "an injured State is entitled to invoke the responsibility of the successor State" and "the responsibility of the State that committed the internationally wrongful act continues after the date of succession". The view had been expressed that paragraph 2 was unnecessary, since the situation addressed therein was already covered by the 2001 articles on responsibility of States for internationally wrongful acts. However, the Drafting Committee had decided to retain the provision as a useful clarification, especially since the 2001 articles made no reference to the scenario contemplated in paragraph 2. It had nonetheless sought to align the wording with that of the 2001 articles by including the phrase "is not affected by", which the Committee had considered to be sufficiently neutral. In doing so, it had also sought to signal that paragraph 2 was not intended to regulate situations that were adequately addressed by the 2001 articles.

The title of draft article 10 *bis*, "Incorporation of a State into another State", was a slightly modified version of the Special Rapporteur's proposal, "Incorporation of a State in another existing State".

Draft article 11, which concerned the dissolution of a State, was based on a revised proposal by the Special Rapporteur, which took account of comments made in the plenary and the Drafting Committee and wording adopted in other provisions. The first part of the first sentence reflected the scope of the provision: a situation where a State that had committed an internationally wrongful act had dissolved and ceased to exist and where the parts of the territory of the predecessor State had formed two or more successor States. The wording, which had met with general agreement, was taken from articles 18, 31 and 41 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts.

The discussion on how to frame the consequences of the succession, if any, for the successor States had proceeded along the same lines as the debate on draft article 10, with

some members favouring the "clean slate" doctrine and others the rule of automatic succession. After lengthy discussions, the Drafting Committee had again decided to establish an obligation on the States concerned to seek agreement on how to address the injury, with the phrase "the injured State and the relevant successor State or States shall agree on how to address the injury arising from the internationally wrongful act". The words "shall agree on how to address the injury" were to be understood in the same way as in draft articles 10 and 10 *bis*. The phrase "arising from the internationally wrongful act" had been added to establish a link with the first part of the sentence. There was thus consistency between draft articles 10, 10 *bis* and 11, but it had been observed that the divergence from the wording used in draft article 9 (2) should be revisited in view of the question of whether the legal personality of the predecessor State continued in the form of the successor or incorporating State.

Regarding the scope *ratione personae* of the provision, the dissolution of a State could give rise to different kinds of legal relations: the *inter se* relations between the successor States and the relations between the injured State and the successor State or States. Draft article 11 covered only the latter. Nonetheless, it must be borne in mind that the obligation to agree on how to address the injury might not be relevant to all successor States to an equal extent, as some might have a closer connection with the injury than others. The Drafting Committee had sought to reflect that in the text of the provision, with proposed wording referring to "the successor State or States benefiting from the internationally wrongful act committed by the predecessor State" and the proposed addition of the words "as appropriate" to qualify the obligation to agree. After considering the different adjectives "relevant", "appropriate" and "concerned" in relation to the successor State, the Drafting Committee had settled on the phrase "relevant successor State or States" as being the most accurate reflection of the legal situation.

The second sentence, which was based on a proposal by the Special Rapporteur, was intended to offer the States seeking to reach agreement a list of factors to take into account in determining how best to address an injury arising from an internationally wrongful act committed by a predecessor State. The list also served as a guide for determining which successor State or States could be considered relevant for the purposes of draft article 11, with the wording "They should take into account any territorial link, any benefit derived, any equitable apportionment, and all other relevant circumstances." The pronoun "they" referred to "the injured State and the relevant successor State or States", thus connecting the first and the second sentences. While express reference was made to "any territorial link, any benefit derived, any equitable apportionment", the list was not exhaustive, as was indicated by the phrase "all other relevant circumstances", which – like the words "take into account" – was based on article 31 (2) of the 1983 Vienna Convention. The commentaries would explain that relevant circumstances included those that established a link between the successor State or States and the internationally wrongful act, such as the continuity of organs or unjust enrichment. The title of draft article 11, "Dissolution of a State", was also taken from article 31 of the 1983 Convention.

Noting that the report of the Drafting Committee was intended for information purposes only and that the Commission was not being requested to take action on the draft articles at the current stage, she recommended that the Commission should take note of the report.

Mr. Forteau said that, while he supported the content of the Drafting Committee's report, he had noted a number of inconsistencies in the translation into French, particularly in the final sentence of draft article 11. He would provide the details to the secretariat, with a view to the issuance of a corrigendum.

The Chair said he took it that the Commission wished to take note of the report of the Drafting Committee.

It was so decided.

Draft report of the Commission on the work of its seventy-second session (*continued*)

Chapter IV. Protection of the atmosphere (*continued*) (A/CN.4/L.944 and A/CN.4/L.944/Add.1)

The Chair invited the Commission to resume its consideration of chapter IV (E) (2) of the draft report, as contained in document A/CN.4/L.944/Add.1, beginning with paragraph (7) of the commentary to draft guideline 3.

Paragraph (7)

Mr. Murase (Special Rapporteur) said that paragraphs (7) and (10), both of which addressed the obligation to prevent, reduce or control global atmospheric degradation, should be merged. The first sentence of paragraph (10) should be moved to the beginning of paragraph (7) and the words "global atmospheric degradation" should be replaced with "certain emissions into the atmosphere", an expression found in the relevant conventions. The sentence would thus read: "The obligation to prevent, reduce or control certain emissions into the atmosphere may be found in the relevant conventions." In the original first sentence of paragraph (7), the words "as may be" should be deleted and the word "which" should be inserted after "United Nations Framework Convention on Climate Change" later in the paragraph. The second sentence of paragraph (10) should also be moved to paragraph (7). In footnote 82, which would become new footnote 75, the relevant article numbers of the different conventions should be included: article 212 of the United Nations Convention on the Law of the Sea; article 2 (2) (b) of the Vienna Convention for the Protection of the Ozone Layer; article 4 of the United Nations Framework Convention on Climate Change; the first preambular paragraph and article 3 of the Stockholm Convention on Persistent Organic Pollutants; and articles 2, 8 and 9 of the Minamata Convention on Mercury. The references to the Convention on Biological Diversity and the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, should be deleted, as they were not specifically related to emissions into the atmosphere.

Ms. Oral said that, while she welcomed the Special Rapporteur's explanations and additional revisions to the text of paragraph (7), she had some concerns about the proposed inclusion of the words "may be found" in the new first sentence; the phrase being referred to – "prevent, reduce or control" – was not used in any of the conventions mentioned, except the United Nations Convention on the Law of the Sea. The words "may be found" should therefore be replaced with "draws upon", which better reflected the intention of the sentence.

Mr. Murphy said that he agreed with the proposed changes, but noted that the footnote at the end of the paragraph that referred to the Paris Agreement on climate change should be corrected, as it mentioned the Agreement's article 2 (1), although the words quoted in the sentence actually came from the eleventh and thirteenth paragraphs of the preamble.

Mr. Murase (Special Rapporteur) said that the new first sentence of paragraph (7) would thus read: "The obligation to prevent, reduce or control certain emissions into the atmosphere draws upon the relevant conventions." That would be followed by new footnote 75. Paragraph (7) would then continue: "The reference to 'prevent, reduce or control' denotes a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules relevant to atmospheric pollution on the one hand and atmospheric degradation on the other. The phrase 'prevent, reduce or control' draws upon formulations contained in article 194, paragraph 1, of the United Nations Convention on the Law of the Sea, which uses 'and', and article 3, paragraph 3, of the United Nations Framework Convention on Climate Change, which uses 'or'. Important in the consideration of the guideline is the obligation to ensure that 'appropriate measures' are taken. In this context, it should be noted that the Paris Agreement, 'acknowledging' in the preamble that 'climate change is a common concern of humankind', states 'the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity'."

Mr. Murphy said that he was unconvinced that "may be found in" should be replaced with "draws upon", but would not oppose the majority decision.

Mr. Jalloh said that, while he understood Mr. Murphy's concern, he agreed with Ms. Oral's proposal.

Mr. Murphy said that it was important to show in the commentaries that the obligation laid down in draft guideline 3 had its basis in other instruments. Thus, it would be preferable to use the wording of the draft guideline itself by referring to the obligation "to prevent, reduce or control atmospheric pollution and atmospheric degradation", followed by either the language proposed by the Special Rapporteur, "may be found in relevant conventions", or Ms. Oral's proposal, "draws upon". However, the two should not be combined. His preference was for the former, but he would be prepared to agree to either.

Ms. Oral said that the specific language used in the draft guideline was not present in all the conventions cited, only in the United Nations Convention on the Law of the Sea. Using the words "draws upon" allowed reference to be made to them all.

Ms. Lehto said that, to avoid repetition, the paragraph could begin with the wording "The reference to 'prevent, reduce or control'", followed by either "draws upon a number of conventions" or "is inspired by a number of conventions"; the new footnote 75 would be placed at the end of that sentence. The second sentence might then begin "This obligation denotes a variety of measures".

Ms. Oral said that she agreed with Ms. Lehto's suggestion but that there was also repetition in the next sentence, with its mention of the conventions.

The Chair said that, if the Commission agreed to replace the word "reference" with "obligation", as suggested by Ms. Lehto, he saw no reason not to use the words "also draws upon formulations contained in".

Mr. Murphy said that the proposed text would thus read:

> The obligation to "prevent, reduce or control" denotes a variety of measures to be taken by States, whether individually or jointly, in accordance with applicable rules relevant to atmospheric pollution, on the one hand, and atmospheric degradation, on the other. The phrase "prevent, reduce or control" draws upon formulations contained in article 194 (1) of the 1982 United Nations Convention on the Law of the Sea, which uses "and", and article 3 (3) of the 1992 United Nations Framework Convention on Climate Change, which uses "or".

The footnote referring to the relevant articles of the different conventions would be placed at that point. The wording would then continue:

> Important in the consideration of the guideline is the obligation to ensure that "appropriate measures" are taken. In this context, it should be noted that the Paris Agreement, "acknowledging" in the preamble that "climate change is a common concern of humankind", states "the importance of ensuring the integrity of all ecosystems, including oceans, and the protection of biodiversity".

The footnote referring to the eleventh and thirteenth preambular paragraphs of the Paris Agreement would then be inserted.

With those amendments, paragraph (7) was adopted.

Paragraph (8)

Mr. Murase (Special Rapporteur) said that, in the second sentence, the words "adverse effect" should be replaced with "adverse effects" and the words "confirmed, for example, by" should be replaced with "confirmed, for example, in". In the third sentence, the phrase "as custom" should be replaced with "in customary international law".

With those amendments, paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Commentary to draft guideline 4 (Environmental impact assessment)

Paragraph (1)

Mr. Murase (Special Rapporteur) said that the explanatory part of the third sentence, "– 'States have the obligation to ensure that an environmental impact assessment is undertaken' as opposed to 'States have an obligation to undertake an appropriate environmental impact assessment' –", should be deleted, as it was unnecessary. The word "and" between "conduct" and "given" should be replaced with "because"; the words "attach to" should be replaced with "require". At the end of the last sentence of the paragraph, "these factors" should be replaced with "other factors".

With those amendments, paragraph (1) was adopted.

Paragraphs (2) to (4)

Paragraphs (2) to (4) were adopted.

Paragraph (5)

Mr. Murase (Special Rapporteur) said that, in the first sentence of paragraph (5), the words "from an international law perspective" should be deleted. In the third sentence, the word "not" should be replaced with "rather than".

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Murase (Special Rapporteur) said that, in the third sentence, the phrase "should be applied" should be replaced with "should apply".

Paragraph (6), as amended, was adopted.

Paragraph (7)

Paragraph (7) was adopted.

Commentary to draft guideline 5 (Sustainable utilization of the atmosphere)

Paragraph (1)

Mr. Murase (Special Rapporteur) said that, in the last sentence, the word "natural" should be inserted before the word "resource". After the word "resource", the remainder of the sentence should be amended to read "subject to the principles of conservation and sustainable use", in order to avoid using the word "exploitation".

Paragraph (1), as amended, was adopted.

Paragraphs (2) and (3)

Paragraphs (2) and (3) were adopted.

Paragraph (4)

Mr. Murase (Special Rapporteur) said that, in the first sentence, the words "not overly legalistic" should be replaced with the word "recommendatory", in order to reflect the nature of draft guideline 5 (1). In the second sentence, the phrase "statement of international policy and regulation" should be amended to read simply "statement of policy".

Mr. Grossman Guiloff said that replacing the words "not overly legalistic" with "recommendatory" would give rise to a change in meaning. It was unclear whether that was the Special Rapporteur's intention.

Mr. Murase (Special Rapporteur) said that the words "not overly legalistic" were somewhat ambiguous, while "recommendatory" better encapsulated the meaning he had had in mind.

Mr. Tladi said that the word “legalistic” had negative connotations and should be deleted. In his view, the word “recommendatory” did not accurately reflect the sense that had been intended. The wording in the first sentence should be amended to read “is intended to be simple and reflects a paradigmatic shift”.

Mr. Cissé said that the second sentence should be deleted in its entirety.

Sir Michael Wood said that he supported the suggestions made by Mr. Tladi and Mr. Cissé. The deletion of the second sentence would strengthen the paragraph and ensure that it contained an entirely positive statement.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Paragraph (5) was adopted.

Commentary to draft guideline 6 (Equitable and reasonable utilization of the atmosphere)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murase (Special Rapporteur) said that, in the first sentence, the phrase “the principle of equity” should be amended to read simply “equity”. In the fourth sentence, the word “requires” should be replaced with the word “indicates”.

Ms. Oral, noting that the principle of equity was widely recognized and accepted, said that she would appreciate some explanation of the Special Rapporteur’s motivation for his proposal.

Mr. Tladi said that the matter had been discussed at the first-reading stage and that the words “principle of equity” should be retained.

Mr. Jalloh said that, in footnote 102, the reference to the judgment of the International Court of Justice in *Frontier Dispute (Burkina Faso/Mali)* should be placed at the beginning of the list of references, rather than in the middle of a number of references to academic works.

Mr. Murase (Special Rapporteur) said that, in the literature, some works referred to “equity” and some to “principle of equity”. The deletion of the words “principle of” would thus do no harm. He accepted Mr. Jalloh’s proposal to adjust the order of the references in footnote 102.

Mr. Cissé said that “equity” and “principle of equity” amounted to the same thing. In any event, the reference to equity should be retained to ensure consistency with the earlier reference in the commentaries to intergenerational equity and human rights protection.

Mr. Forteau said that he had no objection to the phrase “principle of equity”, since the term “principle” had a number of meanings in international law. However, if that phrase was retained, the reference in footnote 102 to *Frontier Dispute (Burkina Faso/Mali)* should be removed. In that case, the International Court of Justice had discussed only equity *infra legem* and not equity *praeter legem* or equity *contra legem*.

Mr. Murphy said that he shared Mr. Forteau’s view. On the basis of Mr. Tladi’s reminder that the Commission had already discussed the wording at the first-reading stage, he could accept the retention of the phrase “principle of equity”. That notwithstanding, his own initial reaction had been that there would be some value in using simply “equity”, for two reasons. First, it was unclear how the fact that draft guideline 6 was “stated in general terms” facilitated the application of the principle of equity, as indicated in the first sentence of paragraph (2). Second, the draft guideline contained the words “should be utilized”, which sounded more like a recommendation than a legal requirement and appeared to undermine the principle of equity as a legal term.

Sir Michael Wood said that he had reservations about footnote 102, which directed readers to a limited number of academic articles on equity. Instead of providing a selective list of references, the Commission should delete the footnote altogether.

Mr. Park said that he supported the deletion of the words "principle of". In addition, the word "equity" should be placed in quotation marks.

Mr. Grossman Guiloff said that he would prefer to retain the term "principle of equity", without quotation marks, and to delete footnote 102. In the text of draft guideline 6 itself, he would have preferred the words "having due regard to" or "safeguarding" before "the interests of present and future generations", instead of "taking fully into account", especially as the International Court of Justice judgment in *Fisheries Jurisdiction (United Kingdom v. Iceland)* used the expression "have due regard to" in the context of conservation.

Mr. Cissé said that he supported the deletion of the reference to *Frontier Dispute (Burkina Faso/Mali)* if "principle of equity" was retained. If the reference to that case was kept, it would be necessary to add references to all the relevant jurisprudence on maritime boundaries relating to equity or the principle of equity.

Ms. Lehto said that she also supported the deletion of footnote 102 and the retention of the phrase "principle of equity".

Mr. Murase (Special Rapporteur) said that he was strongly opposed to the deletion of footnote 102. As he had explained in his third report, the judgment in *Frontier Dispute (Burkina Faso/Mali)* was the only one that differentiated between equity *infra legem*, equity *praeter legem* and equity *contra legem*. Furthermore, the academic references that had been selected for inclusion in the footnote were the most influential ones on the issue.

Mr. Forteau said that he supported the deletion of footnote 102 for a substantive reason. In draft guideline 6, equity was mentioned in substantive terms, whereas in *Frontier Dispute (Burkina Faso/Mali)* it was invoked as a means of interpreting an existing rule. It was for that reason that the International Court of Justice had stated that it would have regard only to equity *infra legem*. If it was necessary to include a reference to a judgment of the Court, the one issued in the case concerning *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* would be more appropriate.

Mr. Jalloh said that he supported the Special Rapporteur's argument for retaining footnote 102. In the first sentence of paragraph (2), the words "principle of equity or equity" could perhaps be used in order to address the opposing views in the Commission.

Mr. Grossman Guiloff proposed that the footnote could be introduced using the phrase "See generally on equity the following".

Mr. Ouazzani Chahdi said that the term "principle of equity" should be retained. The footnote should not be deleted; on the contrary, it should be fleshed out with additional references.

Mr. Forteau said that if footnote 102 was retained, only the word "equity", and not the phrase "principle of equity", should be used.

The Chair said that paragraph (2) would be kept in abeyance until the Special Rapporteur had consulted with those members who had expressed their views in the plenary.

Paragraph (3)

Mr. Murase (Special Rapporteur) said that his proposal was to delete the words "of equity" from the second sentence, as the nature of the "aspects" in question was very clear from the first sentence. In the fourth sentence, the words "is purposive and" could be deleted after the word "fully". The final sentence could be deleted entirely, since it merely reflected the drafting history of the draft guideline and the debate at the first part of the session.

Mr. Jalloh said that he had no objection to the proposed deletion of the last sentence and of the words "is purposive and", but, in his view, the deletion of the words "of equity" in the second sentence introduced a degree of ambiguity for the reader. He would thus prefer to retain the original formulation.

Mr. Cissé said he agreed that, without the words “of equity”, the reference to “the two aspects” was unclear and incomplete.

Mr. Tladi said that, if the words “of equity” were deleted, perhaps the words “the two aspects” should be replaced with “these two aspects” to make the connection between the first and second sentences clear.

Sir Michael Wood said that the original footnote 103, which contained references to a number of articles on equity, should be updated with more recent writings. For example, just that day an updated article on intergenerational equity by Edith Brown Weiss had been uploaded to the *Max Planck Encyclopedia of Public International Law*. The Special Rapporteur could perhaps review that article and, if he considered it suitable, should be given the authority to add a reference to it in the footnote.

Mr. Murphy said that he had no objection to any of the proposed amendments. In the first sentence, the word “questions” could perhaps be replaced with “aspects”, which would clarify the link with the revised second sentence.

The Chair said he took it that the Commission wished to adopt paragraph (3) with the amendments proposed by the Special Rapporteur and Mr. Murphy. The Special Rapporteur would review the suggestion made by Sir Michael Wood and make the necessary inclusion if appropriate.

Paragraph (3) was adopted on that understanding.

Commentary to draft guideline 7 (Intentional large-scale modification of the atmosphere)

Paragraph (1)

Mr. Murase (Special Rapporteur) proposed that the word “very” before “purpose” in the first sentence should be deleted.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Murase (Special Rapporteur) said that the wording and capitalization of the title of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques should be corrected.

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Forteau said that the last sentence of paragraph (3), which referred to afforestation, and the words “enhanced weathering” in the penultimate sentence should be deleted. In his view, those two techniques were not activities aimed at the intentional large-scale modification of the atmosphere and should thus not be classified as geoengineering. In his opinion, it was very dangerous to suggest in the last sentence that afforestation, a technique that was now widely used to limit climate change, should “only be conducted with prudence and caution”, as advised in draft guideline 7.

Mr. Park said that, if he understood correctly, the Special Rapporteur was proposing that the original paragraph (4) of the commentary should become a footnote to paragraph (3). However, as currently formulated, paragraph (4) did not contain any references to the academic literature or official documents on geoengineering. He therefore proposed the insertion of a new footnote at the end of paragraph (3) containing some of the relevant references that had been included in the Special Rapporteur’s third report (A/CN.4/692), such as the one in footnote 276.

Ms. Oral said that she supported Mr. Forteau’s proposal to delete the last sentence on afforestation, as it did seem to equate the common and important practice of afforestation with geoengineering.

Mr. Saboia said that he also supported Mr. Forteau’s proposal to delete the sentence on afforestation.

Mr. Murase (Special Rapporteur) said that the last sentence of paragraph (3) was merely a statement of fact: afforestation had traditionally been employed to reduce carbon dioxide and, accordingly, was classified as geoengineering. He therefore did not see why it should be deleted. He agreed with Mr. Park's proposal on the insertion of a footnote with references from the third report.

Mr. Grossman Guiloff said that he agreed with the Special Rapporteur that the final sentence was a statement of fact on the nature of afforestation. Due regard should be given to the Special Rapporteur's views on such matters.

Sir Michael Wood said that, based on his understanding of the process of enhanced weathering, he would be in favour of retaining the reference to that practice.

Mr. Forteau said that paragraph (6) of the commentary to draft guideline 7 stated that afforestation had been incorporated into various other legal instruments and regimes. However, article 5 (2) of the Paris Agreement encouraged States to take such measures, whereas draft guideline 7 dissuaded them from doing so. Including afforestation under draft guideline 7 would thus be contrary to the Paris Agreement. That contradiction was a further argument in favour of deleting the last sentence.

Mr. Murphy said that part of the problem was that draft guideline 7 concerned the large-scale modification of the atmosphere and not activities such as planting trees. Paragraph (3) of the commentary, however, broadly described measures that would remove carbon dioxide from the atmosphere, and thus combined two different kinds of activities. The Commission should avoid the implication that the typical activities that countries were encouraged to undertake, such as planting forests, were considered intentional large-scale modifications covered by draft guideline 7.

Mr. Murase (Special Rapporteur) said that many tree-planting projects were being undertaken on a large scale, for example in Mongolia.

Ms. Oral said that, while she understood the Special Rapporteur's point that afforestation was an important part of carbon sequestration and that large-scale afforestation might thus be considered geoengineering, the issue was that draft guideline 7 was framed in discouraging terms, and the Commission should not be seen to be discouraging afforestation.

Mr. Cissé said that the problem was that paragraph (3) dealt with negative forms of geoengineering. If afforestation was to be included in the same paragraph, a reformulation would be required in order to emphasize that afforestation had a positive impact in terms of carbon sequestration.

Mr. Grossman Guiloff said that one solution might be to reformulate the opening sentence of paragraph (3) to make it clear that the draft guidelines did not discourage States from engaging in activities that were commonly understood as geoengineering.

Sir Michael Wood, responding to Mr. Grossman Guiloff's proposal, said that the Commission should not, at the current stage, begin a renegotiation of the draft guideline. The simplest solution might be to delete the last sentence of paragraph (3) but to retain the footnote.

Ms. Lehto said that, in her view, the wording of the original paragraphs (8) and (9) of the commentary, which stipulated that it was not the intention of draft guideline 7 to stifle innovation and scientific advancement or to authorize or prohibit such activities, already struck the necessary balance and addressed the concerns expressed in respect of afforestation. She would therefore support the deletion of the problematic last sentence of paragraph (3).

Mr. Murase (Special Rapporteur) said that a compromise might be to delete the word "indeed" at the beginning of the last sentence. The fact that afforestation had been incorporated into the Kyoto Protocol to the United Nations Framework Convention on Climate Change was an element in support of geoengineering; if the last sentence of paragraph (3) was deleted, a strong argument in support of geoengineering would be lost.

Ms. Oral said that the simplest solution would be to delete the last sentence. Paragraph (3) mixed different types of activities that might be called geoengineering: those

that were controversial, for example involving the oceans, and those that should be encouraged, such as afforestation. It was confusing and would send the wrong message.

Mr. Murphy said that the reference in the second sentence to activities intended to remove carbon dioxide from the atmosphere through natural sinks might implicitly include afforestation and would thus allow the final sentence to be deleted.

Mr. Petrič said that he supported the proposal made by Sir Michael Wood.

Mr. Ruda Santolaria, speaking via video link, said that he agreed with all those in favour of deleting the last sentence.

Mr. Murase (Special Rapporteur) said that, since the reference to the removal of carbon dioxide from the atmosphere through natural sinks related to afforestation, perhaps the last sentence of paragraph (3) could be moved to a footnote inserted after the word "sinks".

Mr. Forteau said that, given that there seemed to be a majority in favour of deleting the last sentence, moving it elsewhere or adding further to it would not solve the problem.

The Chair said he took it that the Commission wished to adopt paragraph (3) with the deletion of the last sentence and its footnote and the addition of a new footnote, as proposed by Mr. Park.

Paragraph (3), as amended, was adopted.

The meeting rose at 5.30 p.m.