United Nations CCPR/C/SR.3719

International Covenant on Civil and Political Rights

Distr.: General
16 July 2020

Original: English

Human Rights Committee
129th session

Summary record of the 3719th meeting
Held via videoconference on Friday, 10 July 2020, at 12.30 p.m. Central European Time

Chair: Mr. Fathalla

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The meeting was called to order at 12.35 p.m.

Organizational and other matters, including the adoption of the report of the Working Group on Communications (*continued*)

Draft general comment No. 37 on article 21 of the Covenant (Right of peaceful assembly) (*continued*) (CCPR/C/GC/R.37)

1. **The Chair** invited the Committee to resume its second reading of draft general comment No. 37 on article 21 of the Covenant (Right of peaceful assembly). The text of the paragraphs to be considered at the current meeting had been distributed to members and would be displayed on screen.

2. **Mr. Heyns** (Rapporteur for the general comment) said that, before turning to his drafting suggestions for paragraph 53, he would like to present minor revisions to paragraphs 45, 46, 48, 49 and 52, which had been discussed at an earlier meeting.

Paragraphs 45 and 46 (*continued*)

3. **Mr. Heyns** said that the proposal for the new merged paragraph was to refer not, as had been suggested previously, to the "harm" that restrictions caused to the exercise of the right of peaceful assembly but to their detrimental impact. The last two sentences of the revised paragraph thus read: "Moreover, they have to be proportionate, which requires a value assessment, weighing the nature and detrimental impact of the interference on the exercise of the right against the benefit obtained related to one of the grounds for interfering. If the detriment outweighs the benefit, the restriction is disproportionate and thus not permissible."

4. *Paragraphs 45, as amended, was adopted.*

Paragraph 48 (*continued*)

5. **Mr. Heyns** said that, although Committee members had expressed differing views as to the advisability of qualifying the word "threat" with a modifier such as "credible", he believed that a modifier was needed and had amended the first sentence of the paragraph accordingly. As amended, the sentence indicated that only credible threats, not simply any threat and not empty threats, could serve as grounds for restrictions on article 21 rights. He had also proposed a minor editorial change to the last sentence of the paragraph.

6. *Paragraph 48, as amended, was adopted.*

Paragraph 49 (*continued*)

7. **Mr. Heyns** said that, as in the case of paragraph 48, the main unresolved issue was the choice of qualifying adjective. In the case of paragraph 49, the noun to be qualified was "risk". Initially, the risk had been described as "significant and immediate" but, on reflection, he had opted to reword the relevant clause to read: "it must be established that the assembly creates a real and significant risk to the safety of persons (to their life or physical integrity) or a similar risk of serious damage to property".

8. **Mr. Shany** proposed that the clause should be further amended to refer to "security of person", the words used in article 9 of the Covenant, rather than to "the safety of persons". In addition, the parenthetical clarification of "safety of persons" should be deleted, not least because a risk to a person's mental integrity was also a risk to his or her safety.

9. **Mr. Heyns** said that he agreed with the two proposals.

10. *Paragraph 49, as amended, was adopted.*

Paragraph 52 (*continued*)

11. **Mr. Heyns** said that, in view of the Committee's discussion the previous day, he had deleted the word "parochial" from the second sentence of the paragraph. The relevant part of the amended sentence thus read: "If used at all, this ground should not be used to protect understandings of morality deriving exclusively from a single social, philosophical or religious tradition".

12. *Paragraph 52, as amended, was adopted.*

Paragraph 53 (*continued*)

13. **Mr. Heyns**, recalling that he had introduced paragraph 53 and the relevant stakeholder submissions at the Committee's previous meeting, said that the paragraph concerned the protection of other rights as grounds for restricting the exercise of the right of peaceful assembly and had originally included a list of some of those rights. However, that list had now been deleted.

14. **Mr. Shany** said that the decision to remove the list of examples was a sensible one. However, the paragraph would be stronger if it stated that assemblies could entail a degree of disruption not to "ordinary life", which were the words used in the current draft, but to others' ability to enjoy some of their rights and freedoms.

15. **The Chair** asked why Mr. Shany preferred a formulation that suggested that assemblies could disrupt other people's ability to enjoy just some, rather than any or all, of their rights and freedoms.

16. **Mr. Shany** said that assemblies were likely to interfere with a person's ability to enjoy some of his or her rights and freedoms – notably, freedom of movement – but not all of them.

17. **Mr. Ben Achour** said that the proposal made by the Rapporteur – namely, to refer to disruption to ordinary life – was preferable as it was less complicated.

18. **Mr. Shany** said that he would defer to the Committee and the Rapporteur.

19. *Paragraph 53, as amended, was adopted.*

Paragraph 54

20. **Mr. Heyns** said that paragraph 54 served as an introduction to the additional considerations relevant to restrictions on the exercise of the right of peaceful assembly. Although several stakeholders, including Amnesty International, had made suggestions for changes to the paragraph, he was not proposing any amendments.

21. **Mr. Shany** asked whether, in the last sentence of the paragraph, the word "potential" might be inserted before the word "tool", as the Committee had come around to the view that peaceful assemblies were not always the tool of participation referred to in the paragraph. He also wondered whether the use of italics in the first sentence was necessary.

22. **Mr. Heyns** said that he would insert the word "potential" in the final sentence of the paragraph and would reflect on the advisability of putting the words "additional considerations" in italics.

23. *Paragraph 54, as amended, was adopted on that understanding.*

Paragraphs 55 and 56

24. **Mr. Heyns** proposed that paragraphs 55 and 56, which explored what was meant by the term "content neutrality", should be combined to form a single paragraph that read:

> The rules applicable to freedom of expression must apply to any expressive element of peaceful assemblies, including when it challenges authority. Restrictions on peaceful assemblies must thus not be used, explicitly or implicitly, to stifle expression of political opposition to a government, including calls for changes of government, the Constitution, the political system or self-determination for part of the country. They should not be used to prohibit insults to the honour and dignity of officials or State organs or to pursue other objectives favoured by the authorities.

25. The merged paragraph contained a number of minor drafting changes that had not been incorporated in the slides shared with Committee members. Those changes included the substitution of the term "self-determination" for "political independence", the replacement of the words "provokes a hostile reaction" with the words "challenges authority", and the insertion of a footnote reference to the Committee's general comment No. 34 (2011) on the freedoms of opinion and expression. The idea expressed in the paragraph was, in sum, that restrictions should not be imposed on the exercise of the right of peaceful assembly simply

because the right was being exercised in pursuit of a goal contrary to goals pursued by the authority empowered to impose restrictions.

26. Colombia, the Russian Federation and Turkey had questioned the position that restrictions on peaceful assemblies should not be used to prohibit insults to the honour and dignity of officials. However, that position was one shared by bodies forming part of the international human rights system. The Russian Federation had also suggested that rules on content neutrality should not prevent State authorities from imposing restrictions on assemblies organized to advocate, for example, separatism.

27. Other stakeholders had also submitted comments on the two paragraphs, including David Kaye, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, a number of non-governmental organizations (NGOs) and Israel. The Association for Progressive Communications had made a pertinent suggestion concerning online activism, which was an issue not addressed in either of the two paragraphs.

28. **Mr. Ben Achour** said that he agreed with the suggestion that the term "political independence" be replaced with the term "self-determination". Noting that restrictions on assemblies convened, for instance, to call on the armed forces to overthrow a democratically elected government might be legitimate, he asked whether the term "constitutional" or a similar word might be inserted before the words "changes of government" in the second sentence of the paragraph.

29. **Ms. Pazartzis**, expressing agreement with the point raised by Mr. Ben Achour, said that inserting the adjective "democratic" before "changes" might address his concern. With regard to the first sentence, although she had not been comfortable with the language initially proposed, as it had been unclear from whom a hostile reaction might be provoked, she was not in favour of the alternative proposal either, since the wording "including when it challenges authority" could be interpreted in a manner at odds with the Committee's intended message. She suggested that the sentence should end at "any expressive element of peaceful assemblies". With regard to the second sentence, she was against replacing the term "political independence" with the term "self-determination". If "self-determination" was used, the text should make clear that the term was to be understood within the meaning of article 1 of the Covenant. She was also uncomfortable with the statement that restrictions should not be used to stifle calls for political independence for "part of the country" and suggested that the sentence should end at "political independence". Lastly, she would appreciate clarification as to the intended meaning of the phrase "or to pursue other objectives favoured by the authorities" in the final sentence.

30. **The Chair** said that he agreed with Ms. Pazartzis's proposal for the first sentence. He also agreed that the phrase "for part of the country" should be deleted.

31. **Mr. Heyns** said that he understood the concerns raised with regard to the proposed language. The phrase "including when it challenges authority" was intended to convey the notion that assemblies advocating ideas unpopular from the point of view of the status quo should be protected. The proposed language was perhaps too strongly worded, however. With regard to the second sentence, while he agreed with Mr. Ben Achour's point, he believed that the preceding paragraphs of the draft general comment made clear that calls for violent changes of government were not protected by the Covenant, since incitement to violence did not fall within the scope of the right of peaceful assembly. Nonetheless, he supported the addition of the qualifier "democratic". Assemblies calling for political independence for part of a country were often suppressed. However, it might be sufficient for the purposes of the draft general comment to replace "political independence" with "self-determination" and to remove "for part of the country", without elaborating on how the term "self-determination" should be understood. With regard to the final sentence, he suggested that the second part of the sentence would be clearer if amended to read: "and should not be used in general to pursue other objectives favoured by the authorities."

32. **Ms. Tigroudja** said that the statement that restrictions should not be used "to prohibit insults to the honour and dignity of officials or State organs" was too strong and went beyond the guidance given in paragraph 38 of the Committee's general comment No. 34 on freedoms of opinion and expression, which stated that States should not use criminal law to repress insults against officials. She proposed that the word "dignity" should be replaced with "reputation".

33. **Mr. Bulkan** said he agreed with Ms. Pazartzis that the phrase "challenges authority" in the first sentence was vague and potentially overinclusive. It might be more appropriate simply to reiterate the general position that restrictions should have a legitimate aim. He had no problem with the term "political independence": political expression was one of the key expressive functions of the right of freedom of assembly and was vital to minorities and others.

34. **Mr. Shany** said that the notion of challenges to governments was reflected in the second sentence and therefore did not need to be mentioned in the first sentence. The final sentence was too broad in scope: governments could pursue objectives that were compatible with article 21, such as national security or public health objectives, so it would not be right for the Committee to stipulate that restrictions should not be used to pursue such objectives. The phrase "other objectives favoured by the authorities" should therefore be changed to "objectives incompatible with the Covenant".

35. **Mr. Heyns**, summarizing the proposed amendments, said that the word "democratic" would be inserted before "changes of government" in the second sentence. The phrase "or political independence for part of the country" would be replaced with "self-determination". The phrase "to prohibit insults to the honour and dignity of officials or State organs" would be brought in line with the language of general comment No. 34. In relation to Mr. Shany's proposed amendment to the phrase "objectives favoured by the authorities", whether an objective was compatible with the Covenant was often precisely what was disputed. However, upon reflection, he felt that the phrase was subsumed in the second sentence and could be deleted: the final sentence should therefore end at "of officials or State organs".

36. **The Chair** said he took it that the Committee agreed with the changes proposed by Mr. Heyns. As proposed, paragraph 56, having been merged with paragraph 55, would be deleted. A clean version of the revised paragraph 55 would be presented to Committee members at a subsequent meeting.

37. *Paragraph 55, as amended, was adopted on that understanding.*

Paragraph 57

38. **Mr. Heyns**, recalling that paragraph 57 addressed the interplay between article 20 of the Covenant and article 21, said that the paragraph had included bracketed text upon its provisional adoption on first reading. Stakeholders had been invited to comment on whether only assemblies that "in their entirety" violated article 20 should be prohibited. The Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE) and the International Institute for Non-violent Action were in favour of retaining "in their entirety", while Switzerland and Turkey were opposed. The City of Amsterdam had submitted that, when incitement to discrimination occurred, the individuals responsible should be removed from the assembly but the entire assembly should not be prohibited as a result. Lithuania had called for clarification as to whether the whole assembly or only certain assembly participants should be considered to have violated the law in the event that incitement to discrimination occurred. The United States of America had noted that, in paragraph 57, the Committee made no reference to permissible limitations under article 21 but looked only to article 20 for its discussion of the circumstances in which an assembly must be prohibited. Lawyers' Rights Watch Canada had suggested adding a comprehensive list of forms of prohibited expression, which included propaganda for war, child pornography, direct and public incitement to commit genocide, advocacy of national, racial or religious hatred that constituted incitement to discrimination, hostility or violence, dissemination of ideas based on racial superiority or hatred, and incitement to terrorism.

39. In the light of the comments received, he proposed that the second sentence of the paragraph should be reformulated and moved to the end of the paragraph. There were two options for the reworked sentence, either: "Participation in assemblies which in their entirety fall within the scope of article 20 must be restricted, in conformity with the requirements posed for restrictions by articles 19 and 21."; or: "Participation in assemblies of which the dominant message falls within the scope of article 20 must be restricted, in conformity with the requirements posed for restrictions by articles 19 and 21".

40. **Mr. Shany** said that he was not in favour of including a comprehensive list of grounds for the introduction of restrictions. While it was possible that, during an assembly, individual participants might, on more than one occasion, call for action in violation of the law that

might have consequences for them personally, such calls would not necessarily characterize the assembly as a whole. With regard to the two options cited for the second sentence, he was in favour of the phrase "of which the dominant message". The notion of "entirety" was difficult to apply to assemblies. He was unsure about the use of the word "restricted" in the final sentence, as it seemed to indicate a preference for restrictions over prohibition, yet in some cases the only appropriate response to incitement to discrimination, hostility or violence was prohibition. He proposed that the word "restricted" should be replaced with a more general formulation such as "dealt with", which would leave more room for an appropriate response to assemblies that contravened article 20.

41. **Ms. Tigroudja** said that she was also against the inclusion of a comprehensive list of grounds for restrictions: the Committee should avoid giving the impression that it was attempting to revise the scope of article 20 in the general comment. With regard to the second sentence, she too preferred the phrase "of which the dominant message" as it was not clear what was meant by "assemblies […] in their entirety".

42. **Mr. Heyns** said he agreed that "of which the dominant message" was the better of the two options. He also agreed that it was best not to include a comprehensive list of grounds for restriction: it was too large an undertaking for the current draft general comment. With regard to Mr. Shany's proposal for replacing the word "restricted", he wished to suggest the alternative wording "must be restricted and, in extreme cases, prohibited", although he did not have a strong preference for either of the two possibilities.

43. **The Chair** said he took it that the Committee was in favour of adopting the phrase "of which the dominant message" for the second sentence, and that it agreed with Mr. Shany's proposal to replace the word "restricted" with "dealt with".

44. *Paragraph 57, as amended, was adopted.*

Paragraph 57 bis

45. **Mr. Heyns**, recalling that paragraph 57 bis was the former paragraph 60 of the revised draft as provisionally adopted on first reading and dealt with the use of symbols such as flags, uniforms, signs and banners during assemblies, said that the paragraph had been moved to appear immediately after paragraph 57, as had been suggested by the Carter Center, since both paragraphs related to activities prohibited under article 20 of the Covenant.

46. Submissions had been received from a number of States and stakeholders. Lithuania had noted that the use of certain symbols in assemblies and other mass events was sometimes banned under domestic law, while Germany had posited that any generally applicable domestic restrictions on the use of symbols should also apply in the context of assemblies. Switzerland had likewise stated that the paragraph should take account of generally accepted restrictions on the use of symbols, and had also suggested that the language should be adjusted to adequately reflect article 20. Amnesty International had recommended deleting the third sentence of the paragraph. Article 19 had invited the Committee to reconsider whether flags or symbols could be considered "intrinsically" or "exclusively" associated with the advocacy of hatred. Equal Rights Trust had also urged the Committee to reconsider its use of the word "intrinsically".

47. In the light of the various submissions, he proposed that the second sentence of the paragraph should be amended to read: "In exceptional cases, where such symbols are [directly/predominantly] associated with incitement to discrimination, hostility or violence, restrictions may be justified". The third sentence should be deleted.

48. **Mr. Shany** said that, in the second sentence, he favoured the use of "predominantly" over "directly" and proposed replacing "restrictions may be justified" with the phrase "justified restrictions should apply". The current wording was too weak, given that any symbols used for purposes of incitement would be automatically prohibited under article 20. The formulation he proposed was still a little weak, but it would serve as a reminder to States of their obligations under article 20.

49. **Mr. Furuya** said that he proposed adding "as prohibited under article 20" after the word "violence" to highlight the connection between the paragraph and that article.

50. **Mr. Heyns** said that he agreed with Mr. Shany's and Mr. Furuya's proposals. Via the online chat function, Mr. Santos Pais, supported by Mr. Shany, had proposed using the phrase "directly or predominantly", and he supported that proposal.

51. *Paragraph 57 bis, as amended, was adopted.*

Paragraphs 58 and 59

52. **Mr. Heyns** said that, whereas the position put forward elsewhere in the draft general comment was that assemblies provoking hostile reactions should be allowed to proceed, and that, in such cases, the authorities were required to provide the protection necessary for the primary assembly to continue unaffected and for any secondary counter-assembly to proceed, the paragraph now before the Committee, which combined paragraphs 58 and 59 of the revised draft, addressed those exceptional cases where the State could not fulfil that obligation.

53. A number of comments had been received from States and stakeholders in connection with the paragraphs. The Russian Federation had said that it could not agree with the idea that an assembly which provoked, or had the potential to provoke, a hostile reaction would not as a general rule be prohibited. In its view, the threat of violence was sufficient grounds for using restrictive measures to protect the rights and interests of other citizens. The OSCE Office for Democratic Institutions and Human Rights had noted that the terms "restrictions" and "prohibition" were sometimes used interchangeably in the text.

54. The International Network of Civil Liberties Organizations had noted that there was a risk that the exceptions envisaged in the second sentence might become routine in the absence of a higher threshold for the imposition of restrictions involving, at the very least, judicial oversight. The International Center on Nonviolent Conflict had also called for a higher threshold, suggesting that restrictions should be permitted only when the State was manifestly unable to protect participants from "direct and imminent danger".

55. In response to those observations, he wished to emphasize that any action or inaction on the part of the authorities during an assembly was subject to judicial oversight under the terms of the general comment. In the light of the various stakeholder submissions, he proposed changing "prohibition" to "restriction" in the first sentence of the merged paragraph; "such threat" to "a severe threat" and "restrictions on the assembly" to "restrictions on participation in the assembly" in the second sentence; and "In such cases" to "As always" in the last sentence.

56. **Mr. Furuya** said that, while he agreed with the paragraph's overall content, he found the logic somewhat curious: whereas, under article 21, a State party was required to protect the right of peaceful assembly, the paragraph at hand seemed to indicate that the State could be absolved of that obligation if it lacked the capacity to protect the right, and could instead be permitted to restrict the right that it was supposed to be protecting. The paragraph also appeared to introduce a new permissible ground for restriction that was not clearly set out in article 21, which provided a list of legitimate grounds on which the right of peaceful assembly might be restricted that was, as confirmed in paragraph 47 of the general comment, intended to be exhaustive. Accordingly, any restrictions permitted under the merged paragraph 58/59 should be linked to one of those grounds. He therefore proposed adding the phrase "and expects a real and significant risk to the safety of persons for the protection of public safety" after the words "severe threat" in order to provide that link.

57. **Mr. Heyns**, expressing agreement with Mr. Furuya's proposal, said that he would clarify the language used in the paragraph along those lines.

58. **Mr. Bulkan** said that he shared Mr. Furuya's concern in part but did not agree that the paragraph created an additional ground for restriction, as the reference to the State being "unable to protect the participants" provided a clear link to the public safety concerns that were protected under article 21. However, he did agree with those stakeholders who had called for a higher threshold for the imposition of restrictions.

59. **Mr. Shany** said that he too agreed with Mr. Furuya, and that he was in favour of the Rapporteur's proposal to establish a link with safety. He had grave doubts as to whether a hostile reaction could ever justify prohibition and proposed deleting the last sentence, which seemed to suggest that prohibition was a legitimate solution. The content of that sentence also overlapped with earlier paragraphs, making it redundant.

60. **The Chair** said that the Committee appeared to be in agreement on the addition of the phrase "to their safety" after the words "severe threat". Turning to the last sentence, he said that he would appreciate an explanation as to why the phrase "As always" was used.

61. **Mr. Heyns** said that, using the online chat function, Mr. Santos Pais had proposed deleting the words "resort to prohibition" from the end of the final sentence. The logic for the suggestions was that, although in extreme cases, where there was a risk of an assembly turning into a bloodbath, the possibility of prohibition might be envisaged, it was perhaps better not to acknowledge that possibility explicitly because of the potential for abuse. The phrase "As always" was intended to emphasize that, as stated previously, States must always consider less restrictive measures first. However, he would rework the sentence to take account of the Chair's concern.

62. *Paragraphs 58, as amended, was adopted on that understanding.*

Paragraph 61

63. **Mr. Heyns**, recalling that paragraph 61 introduced the elements of "time, place and manner", which were each developed individually in subsequent paragraphs, said that several of the comments received from stakeholders in relation to that paragraph were already reflected elsewhere in the general comment. For example, Michael Hamilton, Associate Professor of Public Protest Law at the University of East Anglia, United Kingdom, had suggested that the principles of "content neutrality" and "sight and sound" might be set out in separate paragraphs: however, both content neutrality and sight and sound were addressed in earlier paragraphs. David Mead, Professor of UK Human Rights Law at the University of East Anglia, had recommended giving fuller recognition to issues such as collective expressive purpose and individual autonomy: however, those issues were also addressed earlier, including in the very first paragraph.

64. He proposed adding, at the end of the last sentence, the clause "or at whatever site is otherwise important to the purpose of the assembly" to allow for the possibility of online assemblies, and of physical assemblies with differing needs in respect of the place where participants assembled.

65. *Paragraph 61, as amended, was adopted.*

Paragraphs 62 and 63

66. **Mr. Heyns** said that paragraphs 62 and 63 of the revised draft had been combined so that all time-related issues could be dealt with in a single paragraph. The Committee had received a number of stakeholder submissions on those paragraphs, several of which highlighted the potential importance of long-term protests. For example, Mr. Hamilton had expressed concern about assemblies being described as "by their nature" temporary, while the City of Amsterdam had expressed agreement with the view that the frequency of demonstrations should not, as a general rule, be considered to provide grounds to impose limits on time or place. The Special Rapporteur on the rights to freedom of peaceful assembly and of association had suggested removing the reference to sustained gatherings: although they were important, especially since it was often the most disenfranchised members of society and those advocating for the most overlooked causes that engaged in such gatherings, it would be very difficult to conduct a proportionality assessment of the kind mentioned.

67. In response to those observations, he wished to highlight that the intended meaning of the combined paragraph was that sustained gatherings should generally be allowed, but that their recurring or prolonged nature should carry weight in any balancing that needed to be done. In that context, the consortium of Latin American NGOs had suggested that the final sentence should be amended to read: "In the event that the cumulative impact of sustained gatherings impacts the rights of others, the State must weigh up the competing and conflicting interests in each individual case". In addition, Amnesty International had recommended providing guidance as to the level of disruption that the frequency and duration of an assembly would need to cause before being deemed disproportionate.

68. A submission from individuals affiliated with the University of East Anglia and the Centre of Governance and Human Rights at the University of Cambridge had raised an interesting point about the potential lack of synchronicity in digital gatherings. They had suggested the addition of two sentences, to state, inter alia, that a lack of synchronicity should

not preclude a digital gathering from being considered to constitute an assembly, thereby addressing situations where, for example, participants visited a particular online platform but not necessarily at the same time. The Association for Progressive Communications had suggested that the paragraph should explicitly state that assemblies could last for extended periods of time, particularly in online spaces.

69. On the basis of the comments received, he proposed amending the text of the combined paragraph to read:

> Concerning restrictions on the *time* of assemblies: participants must have sufficient opportunity effectively to manifest their views or to pursue their other purposes. Peaceful assemblies are usually temporary, and should be left to end by themselves. Restrictions on the precise time of day or date when assemblies can or cannot be held, raise concerns about their compatibility with the Covenant. Assemblies should, moreover, not be limited solely because of their frequency: the duration or frequency of a demonstration may, for example, play a central role in conveying its message. For example, certain assemblies held at night in residential areas might have a significant impact on those living nearby.

He had added the phrase "or to pursue their other purposes" in the first sentence to indicate that participants' purposes were not necessarily limited to expressive ones.

70. Important issues still to be addressed by the Committee at a later meeting included whether assemblies were "usually" temporary or "by their nature" temporary, and whether a series of assemblies could be considered cumulatively, that is, whether all related assemblies could be considered together as a whole or whether each assembly should be considered separately, even if related to others.

The meeting rose at 2.30 p.m.