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Summary record of the 2956th meeting

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE SIXTIETH SESSION

Held at Geneva from 5 May to 6 June 2008

2956th MEETING

Monday, 5 May 2008, at 3.05 p.m.

Outgoing Chairperson: Mr. Ian BROWNLIE

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Opening of the session

1. The OUTGOING CHAIRPERSON declared open the sixtieth session of the International Law Commission and extended a warm welcome to members.

2. The Commission's report on the work of its fifty-ninth session¹ had been considered by the Sixth Committee of the General Assembly at its 18th to 26th and 28th meetings, between 29 October and 19 November 2007. A topical summary of the discussion, prepared by the Secretariat, was contained in document A/CN.4/588. Member States had expressed keen interest in the topics considered by the Commission. Following the formal debates in the Sixth Committee, he himself, together with a number of members of the Commission and Special Rapporteurs, had engaged in an interactive dialogue with members of the Sixth Committee, and subsequently with legal advisers of Member States.

Election of officers

Mr. Vargas Carreño was elected Chairperson by acclamation.

Mr. Vargas Carreño took the Chair.

3. The CHAIRPERSON thanked members for the honour they had conferred upon him in electing him to chair the Commission's sixtieth session. He would strive to carry out his responsibilities efficiently and thoroughly, living up to the legacy of the distinguished jurists who had chaired the Commission in the past.

4. The Commission had a number of interesting new items on its agenda, including protection of persons in the event of disasters and immunity of State officials from foreign criminal jurisdiction, topics on which it could make a great contribution by filling the gaps in international law. The topic of shared natural resources was to be given priority at the current session. It had been decided at the fifty-ninth session to hold a special celebration of the Commission's sixtieth anniversary, and a committee headed by Mr. Pellet had been working on the preparations for that event.

Mr. Kolodkin was elected first Vice-Chairperson by acclamation.

Mr. Hmoud was elected second Vice-Chairperson by acclamation.

Mr. Comissário Afonso was elected Chairperson of the Drafting Committee by acclamation.

Ms. Escarameia was elected Rapporteur of the Commission by acclamation.

Adoption of the agenda (A/CN.4/587)

5. The CHAIRPERSON invited the Commission to adopt the provisional agenda.

The agenda was adopted.

Organization of the work of the session

[Agenda item 1]

6. The CHAIRPERSON suggested that the meeting should be suspended to enable the Enlarged Bureau to hold consultations on the programme of work of the session.

¹ *Yearbook ... 2007*, vol. II (Part Two), document A/62/10.

The meeting was suspended at 3.30 p.m. and resumed at 4 p.m.

7. The CHAIRPERSON drew attention to the programme of work for the first two weeks of the session, which had been drawn up during the consultations. If he heard no objection, he would take it that the Commission wished to adopt the proposed programme of work.

It was so decided.

8. The CHAIRPERSON invited members interested in participating in the Drafting Committee on the topic "Reservations to treaties" to contact the Chairperson of the Drafting Committee.

Shared natural resources² (A/CN.4/588, sect. B,³ A/CN.4/591,⁴ A/CN.4/595 and Add.1,⁵ A/CN.4/L.722,⁶ A/CN.4/L.724⁷)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR

9. Mr. YAMADA (Special Rapporteur), introducing his fifth report on shared natural resources: transboundary aquifers (A/CN.4/591), recalled that at its fifty-eighth session, in 2006, the Commission had adopted on first reading 19 draft articles on the law of transboundary aquifers and commentaries thereto and had decided to transmit them to Governments for comments and observations, to be submitted to the Secretary-General by 1 January 2008. At its fifty-ninth session, in 2007, the Commission had addressed the question of the relationship between the work on transboundary aquifers and that on oil and natural gas⁸ and had indicated its preference to proceed with and complete the second reading of the law of transboundary aquifers independently from its possible future work on oil and natural gas. It had also solicited the views of Governments on the final form of the draft articles. During the debates on the report of the Commission in the Sixth Committee in 2006 and 2007, 45 Governments had offered oral comments and observations, which were summarized in the topical summaries prepared by the Secretariat in documents A/CN.4/577 and Add.1–2⁹ and A/CN.4/588. The relevant summary records of the Sixth Committee were also available. In addition, eight Governments had submitted written comments and observations as he was drafting the fifth report. Subsequently, an additional 11 Governments had submitted written comments. Those 19 written comments were reproduced in summary form in document A/CN.4/595 and Add.1. At the fifty-ninth

² For the text of the 19 draft articles on the law of transboundary aquifers and the commentaries thereto adopted on first reading by the Commission, see *Yearbook ... 2006*, vol. II (Part Two), pp. 91 *et seq.*, paras. 75–76.

³ Mimeographed; available on the Commission's website.

⁴ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

⁵ *Idem.*

⁶ Mimeographed; available on the Commission's website.

⁷ *Idem.*

⁸ See *Yearbook ... 2007*, vol. II (Part Two), p. 58, paras. 168–173.

⁹ Mimeographed; available on the Commission's website, documents of the fifty-ninth session.

session of the Commission, the newly elected members had commented on the draft articles adopted on first reading. Their comments were reflected in the Commission's report on the work of its fifty-ninth session¹⁰ and in the relevant summary records.¹¹

10. The comments and observations made by Governments and members of the Commission on the draft articles adopted on first reading and the commentaries thereto were generally favourable and supportive; a number of useful suggestions for improvements had been made; and the Commission had been encouraged to proceed to the second reading on the basis of the text of the draft articles adopted on first reading. On the question of the relationship between the work on transboundary aquifers and that on oil and natural gas, an overwhelming majority of Governments supported the Commission's suggestion that the law on transboundary aquifers be treated independently of any future work on the issues related to oil and natural gas. On the question of the final form of the draft articles, the views of Governments diverged. Some favoured a legally binding instrument, while others preferred a non-legally binding text.

11. In view of the comments received from Governments, he believed that the Commission should proceed expeditiously with the second reading of the draft articles. The question of any possible future work on oil and natural gas should be addressed only after the second reading of the draft articles on the law of transboundary aquifers had been completed.

12. He wished, however, to raise the question of the final form of the draft articles at the outset, as it would also affect their substance. As previously noted, some Governments thought that a framework convention would be of greater value than a non-binding document, although some of them had also stressed that such an instrument should not supersede existing bilateral or multilateral agreements. Others, however, favoured a non-binding declaration of the General Assembly that would guide States in framing regional agreements. In the absence of a consensus among Governments, the Commission should avoid committing itself either way. If it were to recommend a legally binding document, the text would most likely be shelved indefinitely by the General Assembly, thereby defeating the whole purpose of the exercise. If, on the other hand, the Commission were to recommend a non-binding document, it would be likely to meet with resistance from some Governments and in the Sixth Committee.

13. The problem of water was a matter of global urgency, and the most desirable outcome would be for the principles which the Commission was formulating on transboundary aquifers to be implemented as expeditiously as possible by Governments in their management of specific transboundary aquifers. Such implementation should not be delayed by procedural wrangling over the final form. Accordingly, he recommended the adoption of a two-step approach, following the precedent of the 2001 draft articles on responsibility of States for internationally

¹⁰ *Yearbook ... 2007*, vol. II (Part Two), pp. 58–59, paras. 174–176.

¹¹ *Ibid.*, vol. I, 2930th and 2931st meetings.

wrongful acts,¹² whereby the Commission would recommend that the General Assembly should first take note of the draft articles and annex them to the resolution, and should then consider at a later stage the possibility of convening a negotiating conference with a view to concluding a convention. He hoped that this approach would be acceptable to all Governments. Paragraph 9 of the fifth report contained proposed language for the Commission's recommendation to the General Assembly, which he commended to members' attention.

14. Having carefully examined the various comments and observations from Governments with the valuable assistance of experts from UNESCO, he had formulated the revised texts of draft articles for second reading. The basic structure and conception of the draft articles adopted by the Commission on first reading were essentially maintained. Explanations of all the articles were provided in paragraphs 11 to 41 of the fifth report. For the sake of convenience, the revised texts were formulated in the form of legally binding articles, as had been the case with the draft articles adopted on first reading, but it should be clearly understood that this approach was without prejudice to their final form.

15. In his introduction, he would limit himself to a few basic points, in order to clarify the conception underlying his undertaking, and to dispel the considerable confusion and a number of misunderstandings revealed in the comments from Governments.

16. On the scope of the draft articles, two basic points needed to be made. First, the topic dealt exclusively with transboundary aquifers—those located under the territories of two or more States. Aquifers located outside the territory of any State but across the continental shelves of more than one State were excluded for the reason given in paragraph 16 of the fifth report. Aquifers located within the territory of one State—domestic aquifers—were also excluded, regardless of their links to international surface waters. Secondly, concerns had been expressed about the inclusion in the scope of the draft articles of activities other than utilization of aquifers that would have a direct impact upon aquifers. Assessment of such activities was indispensable for the proper management of aquifers; that did not necessarily mean, however, that the activities in question should be prohibited. In the final analysis, the benefits derived from such activities must be carefully weighed against those deriving from the utilization of aquifers.

17. There were various ways of defining the term “aquifer” scientifically. In the context of the topic, the definition must of course be scientifically correct, but it must also be legally viable for purposes of aquifer management. He believed that the current definition met those requirements. In a sense, an aquifer was a container which held water. The container's outer limit must be clearly delimited. Such a geological formation constituted a single deposit of water for the proper management of which the Commission was seeking to formulate rules. Recharge

and discharge zones and any other areas which might be hydraulically linked to the aquifer itself were outside the aquifer. A hydraulically linked area could theoretically be deemed to extend not only to rivers and lakes but also to rainfall and oceans, or indeed to the whole globe and its atmosphere. The Commission should not concern itself with the global commons.

18. With respect to equitable and reasonable utilization, many Governments had called for a reference to sustainability. It should be borne in mind, however, that the Commission was essentially considering non-renewable resources. Aquifers in arid areas did not receive any recharge and, as with such non-renewable resources as oil, natural gas and mineral resources, sustainability did not play a role. Even in the case of recharging aquifers, recharge represented only a fraction of the total amount of water accumulated over thousands of millions of years. During the first reading, the Commission had avoided referring to sustainability with regard to recharging aquifers in draft article 4 (*d*) and had even included a specific clarification in the commentary to the effect that it was not necessary to limit the level of utilization of a recharging aquifer to the level of recharge. Of course, there were some fully recharging aquifers, such as the Franco-Swiss Genevese Aquifer System, but they were exceptions.

19. With regard to the obligation not to cause harm to other aquifer States, it should be clearly understood that such harm was limited to the harm caused by aquifer States and also to the aquifer concerned. The current exercise was not meant to ensure general protection of the environment. The main players were aquifer States, and, while third States were also called upon to cooperate for specific purposes, they played a subsidiary role.

20. An additional draft article 20 was proposed, on the relationship between the draft articles and other conventions and international agreements. Such a provision would not be necessary as long as the draft articles remained a non-binding instrument. The draft article was proposed mainly to allay the concerns of Governments.

21. Many policy and technical aspects of the topic remained to be addressed. Before doing so, he wished first to listen to the statements of members. He hoped that, with their assistance and cooperation, it would be possible to complete the second reading during the current session of the Commission. The UNESCO expert, due to arrive in Geneva the following day, would be available to assist the Commission in dealing with technical details.

22. Before concluding, he informed the Commission that a document containing the comments and observations of a study group of the International Law Association on the Commission's draft articles had been transmitted to him by Professor Joseph Dellapenna of the Villanova University School of Law in Pennsylvania, United States of America, who had also requested a meeting with himself and the Commission. A copy of the paper had been distributed for information, in English only, as an informal document. Several years earlier, the Commission had held an informal meeting with members of the Water Resources Committee of the International Law Association, a meeting in which Professor Dellapenna had participated in his

¹² See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76. See also General Assembly resolutions 56/83 of 12 December 2001, 59/35 of 2 December 2004 and 62/61 of 6 December 2007.

capacity as Rapporteur of that Committee. He had been instrumental in drafting the Association's Berlin Rules on Equitable Use and Sustainable Development of Waters of 2004,¹³ and had also chaired the Study Group convened to review the draft articles. While the paper, which drew heavily on the Berlin Rules, was extremely interesting and thought-provoking, it was based on a philosophy quite different from that of the Commission. With one exception, no Government had referred to the Berlin Rules in its comments. The one Government that had done so had invoked article 56 (5) of the Berlin Rules, which was not a crucial article, in relation to exceptions to the obligation to exchange information under the Commission's draft article 18, and had proposed to include, not only national defence, but also intellectual property rights, the right to privacy and important cultural or natural treasures, all of which, in the view of that Government, could be endangered by a requirement to share information. He personally did not think it proper for the Commission to engage in the negotiation of draft articles with the non-governmental International Law Association team. Accordingly, he had expressed his gratitude to Professor Dellapenna for the paper and had informed him that, as a subsidiary organ of the United Nations General Assembly, the Commission was required to give priority to the views of Governments in its consideration of the draft articles.

The meeting rose at 4.30 p.m.

2957th MEETING

Tuesday, 6 May 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caffisch, Mr. Candiotti, Mr. Comissário Afonso, Mr. Dugard, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. McRAE supported the Special Rapporteur's approach of dealing thoroughly with the second reading and putting aside the question as to whether the Commission should take up the issue of transboundary oil and gas deposits at a later date. Similarly, presenting the rules

in the form of draft articles with the possibility of subsequently elaborating a convention kept all the options open, enabling States to decide later whether they wanted to draft a convention, or to leave them as principles applicable in the framework of customary international law or for regional or bilateral adoption. With regard to draft article 1 (Scope), the Special Rapporteur had introduced two important clarifications in his fifth report. First, he had indicated in paragraph 14 that the draft applied both to fresh water and to salt water (or brine) aquifers, as the latter were in some cases desalinated and used for irrigation. He had also proposed, in paragraph 17, a definition of the utilization of transboundary aquifers and aquifer systems that would include storage and disposal, as aquifers were increasingly used for carbon sequestration in the treatment of wastes. Those clarifications were very useful because they ensured that the draft articles covered all types of aquifer and all the uses made of them. They were also linked, because there was evidence of growing interest and developing practice in the use of saltwater aquifers for carbon storage. However, broadening the scope of the draft articles to include storage and disposal might necessitate reconsideration of other parts of the text. For example, it might be necessary to modify the concept of "equitable and reasonable utilization" in draft article 4, and to clarify the words "benefits derived from the use of water" in subparagraph (b) so as to indicate that "use of water" could include storage and disposal in water. Similarly, in subparagraph (c), overall utilization plans would have to cover not just alternative water sources, but also alternative disposal and storage sites. Moreover, there might be implications for draft article 11 (Prevention, reduction and control of pollution) and draft article 14 (Planned activities).

2. Extension of the concept of utilization to cover storage and disposal had a further implication. If storage of carbon waste in saline aquifers increased, it would not be long before carbon was injected into transboundary aquifers under the continental shelf. Yet such aquifers were excluded from the scope of the draft articles, as had been pointed out by the Netherlands. In paragraph 16 of his report, the Special Rapporteur had defended the exclusion of such aquifers on the ground that few existed, and that they were usually saltwater aquifers associated with rock reservoirs holding oil and natural gas, so that if the Commission were to extend the scope of the draft articles to include the continental shelf, it would be linking the work on transboundary aquifers with that on oil and gas, something it had decided not to do. The Special Rapporteur should therefore rethink his position on that question, for the inclusion of saline aquifers under land made the exclusion of saline aquifers under the continental shelf less justifiable. Further, those aquifers were not necessarily associated with oil and gas reservoirs. The likelihood or otherwise of an oil and gas reservoir being associated with an aquifer was the same, whether the reservoir was located under land or under the continental shelf. Petroleum reservoirs frequently contained a water zone as well as oil and gas. Given that this had not proved to be an impediment to the drafting of articles on aquifers under land, it should not be a barrier to applying the draft articles to transboundary aquifers under the continental shelf. If those aquifers were excluded from the scope of application

¹³ International Law Association, *Report of the Seventy-first Conference, Berlin, 16–21 August 2004*, London, 2004, pp. 335–412.