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Summary record of the 2959th meeting

Topic:
Shared natural resources

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commentary of a list of examples of other activities that had or were likely to have an impact on those aquifers. He wondered whether the Special Rapporteur should consider harmonizing the terminology of draft article 1 (*b*) (“likely to have an impact”) with the expressions “significant harm” and “significant adverse effect” used in draft article 6, paragraph 2, and draft article 14 respectively, both of which referred to activities other than transboundary aquifer utilization. States would be better able to regulate their activities if they could evaluate them on the basis of a single standard.

114. Draft article 3 was an important clarification of the principle that each aquifer State exercised sovereignty over the portion of the transboundary aquifer located within its territory. The exercise of sovereignty by aquifer States entailed not only rights but also obligations under international law, including those stemming from the wrongful use of the aquifer. In his view, there was no need to include principles of State responsibility in the draft articles.

115. On draft article 4, he endorsed the application of the standard of “equitable and reasonable” utilization rather than of “equitable and sustainable” utilization, as application of the latter could give rise to injustice in the case of non-recharging aquifers. The criterion of reasonability was an objective test and easier to measure than that of sustainability in taking into account the relevant factors enumerated in draft article 5.

116. With regard to draft article 5, the indicative factors included were generally acceptable and allowed for flexibility. He asked whether it might be possible to draw a distinction between factors relating to equitable utilization and those relating to reasonable utilization. That might be important, not only from the standpoint of legal clarity—since reasonability and equitability were not interchangeable—but also when it came to establishing the relative weight of each factor. He was not convinced that subparagraph (*i*) actually related to equitable and reasonable utilization; it seemed to have more to do with protecting the related ecosystem.

117. With regard to draft article 6, the obligation to take all appropriate measures to prevent the causing of significant harm was pitched at a suitable level to balance the policy considerations of the various States. Raising or lowering the threshold might cause opposition to the principle and reduce the likelihood of its being recognized by States. Once again, he did not see a need to insert a paragraph on liability or responsibility of the State and its consequences. The general principles of law governed the acts of States and the legal effects of such acts *vis-à-vis* the aquifer and other aquifer States.

118. Turning briefly to Part III of the report, he said he was of the view that, although the protection and preservation of the ecosystem were important goals in international relations, the draft articles should be concerned with regulating or assisting aquifer States in regulating their utilization of transboundary aquifers. He was not sure that the environmental dimension was pertinent unless harm had been caused to other States as a result of the State’s activity in relation to the aquifer. That being said,

if the Commission wished to proceed in that direction, he would have no objection. Lastly, he was in favour of referring draft articles 1 to 13 to the Drafting Committee.

119. The CHAIRPERSON said he took it that the Commission wished to refer revised draft articles 1 to 13 to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2959th MEETING

Thursday, 8 May 2008, at 10.15 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflich, 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. The CHAIRPERSON invited the Commission to continue its debate on the fifth report of the Special Rapporteur.

2. Ms. ESCARAMEIA recalled that, in the Special Rapporteur’s view, the procedures under draft article 14 (Planned activities) should be comparatively simple. However, given that several States, and also some members of the Commission, wished to see a more detailed formulation, it might be desirable to revisit at least some of the procedural requirements provided for in the 1997 Watercourses Convention, such as consultations and negotiations. It would also be desirable to specify in the commentary what was meant by the expression “significant adverse effect”, and perhaps also to replace the expression “as far as practicable” with “as far as possible”, the meaning of which was more restrictive.

3. With regard to draft article 18, it was not clear why the Commission should not follow the standard set in the 1997 Watercourses Convention, which dispensed States from the obligation to provide information “vital” to their national defence or security. By referring instead to “information the confidentiality of which is essential to its national defence or security”, the Commission would

be lowering the threshold. She could see no reason why information that was “essential” rather than “vital” to national defence or security should be better protected where aquifers were concerned.

4. Even though the final form of the text had yet to be decided, it could safely be said that the text to be submitted to the Sixth Committee would have the basic format of a convention, as it consisted of draft articles rather than principles. Against that background, draft article 20 was crucial, but would need to be made more specific, for in its current form it said very little. Reference should be made to the relationship of the draft articles with future and previous treaties, recommending that the former must be in conformity with the draft articles and the latter harmonized with them.

5. Lastly, still with a view to formulating a framework convention, a draft article 21 concerning a dispute settlement mechanism would also be useful, particularly as such a mechanism could serve as a model for future bilateral and regional agreements. With those provisos, she was in favour of referring all the draft articles to the Drafting Committee.

6. Mr. FOMBA, referring to the proposal to replace the words “shall include” with “could include”, in draft article 15, said that the provision was not intended to impose a strict obligation on the developed countries, and that cooperation in that area could proceed only on the basis of respect for sovereignty and the will to achieve consensus.

7. Draft article 20 was justified within the formal context of a convention, in order to avoid conflicts with other texts by defining the legal relationship between them. However, it was not clear what would happen in the event of incompatibility between the provisions of the draft articles and those of other treaties. The Special Rapporteur rightly considered that there could be no general rule establishing priority of one text over another, and that a decision on such priority would be possible only after the contents of the relevant provisions had been fully examined. However, he went on to propose that the draft articles should prevail over the 1997 Watercourses Convention; while that seemed appropriate, one might wonder whether that primacy should be relative or absolute. All in all, the wording of draft article 20 should be reviewed in the light of the various comments made, particularly by Ms. Escarameia. With that proviso, the draft articles could be referred to the Drafting Committee.

8. Mr. CAFLISCH said he was unsure why draft article 14 referred only to disagreements “on the possible effect of the planned activities”. He would prefer a reference to disagreements “on the planned activities and their effect”. Furthermore, in paragraph 3, the list of procedures for peaceful settlement of the dispute (consultations, negotiations and a fact-finding body) should be expanded, or at least not limited. The Special Rapporteur was right to wish to simplify the complicated provisions of the 1997 Watercourses Convention in that draft article, the wording of which could, however, be improved.

9. Draft article 19 was also in need of some reformulation. It would be better not to deny States the option of

concluding a plurality of bilateral or regional agreements or arrangements if they so wished, and accordingly to use those expressions in the plural.

10. The inclusion or otherwise of a dispute settlement mechanism raised a question of principle, namely whether the Commission wished to embellish the draft articles with such a mechanism, or whether it preferred to leave the matter to a still hypothetical conference on the codification or progressive development of the law of nations.

11. Mr. PELLET said that a broader question of principle arose, namely whether the text proposed was a set of draft articles or a draft convention. The former usually contained no final clauses, and that was why he personally was not in favour of referring draft article 20 to the Drafting Committee. There was no call to change the usual practice of the Commission, which was to deal with the codification of problems of substance, leaving it to the General Assembly to decide what form it wished to give to the product of the Commission’s work. To do so would be all the more regrettable because the proposed final clause had been introduced at the second reading stage, which was tantamount to presenting the General Assembly with a *fait accompli*.

12. Mr. CAFLISCH said he was of the view that clauses concerning peaceful settlement of disputes were not final clauses, but part of the main body of the treaty. He himself was not always in favour of including a dispute settlement mechanism in treaties. Nonetheless, he held to the views he had expressed on the peaceful settlement procedure outlined in draft article 14.

13. Mr. CANDIOTI endorsed Mr. Pellet’s remarks on final clauses. On the other hand, he favoured the suggestion, made by Mr. Vázquez-Bermúdez at the previous meeting, to add a preamble. That would be in conformity with the practice of the Commission, which had already adopted that course of action even in the case of texts that did not take the form of a draft convention. Such a preamble would serve, *inter alia*, to recall the importance of the topic, the object of the draft articles and the precedents in international law on which they were based. Regardless of the final form to be decided on by the General Assembly, a preamble would be useful, and the Drafting Committee could be entrusted with its formulation.

14. Mr. SABOIA said he agreed with the views expressed by Mr. Pellet and Mr. Candiotti with regard to draft article 20. The Commission should not engage in the drafting of such clauses without first having decided on the final form it intended to give to the text. It should therefore continue to prepare draft articles that might later become a convention. Only if the final decision taken were to opt for a convention would it be necessary to draft final clauses or other articles appropriate to an instrument of that type. On the other hand, he was open to the idea of drafting a preamble.

15. Ms. ESCARAMEIA agreed with Mr. Caflich that a draft article on dispute settlement could not be regarded as a final clause. However, that was not the

question: the question was whether it was simply a procedural matter. In her view, it was not a procedural but a substantive matter. It was essential that the General Assembly should know what the Commission thought about a question as important as that of the relationship between the present draft articles and existing—and perhaps future—bilateral and regional agreements and arrangements. That would not be tantamount to presenting the General Assembly with a *fait accompli*, as it might very well disregard the Commission's opinion, as it had occasionally done in the past.

16. With regard to draft article 20 and a possible draft article 21, she felt that the logic of the text called for the inclusion of draft article 20. That same logic would lead the Commission also to include a draft article 21 on peaceful settlement of disputes, there again to enable the General Assembly to know the Commission's view on that subject.

17. Mr. PELLET said that if the Commission wished to include a preamble in the draft articles, it would not be for the Drafting Committee to formulate it, *pace* Mr. Candioti. That task should be entrusted to a working group.

18. Mr. GAJA said that a decision should be reached on the final form of the draft articles before those questions were considered, and that the Commission should give some guidance to the Drafting Committee. In their current form, the draft articles more closely resembled a set of general principles. If the Commission wished to draft a text that could become a convention, some elements of reciprocity should be taken into account. Otherwise there would be a danger of imposing on aquifer States which were contracting parties certain obligations that other aquifer States would not have. The approach adopted thus far had been to set forth general principles applicable to States, whether or not they had expressed their consent to be bound. On that understanding, the Commission should continue to elaborate a set of draft articles which might be annexed to a resolution. The Commission could also recommend that the General Assembly consider the conclusion of a convention in the future.

19. Mr. McRAE said that a distinction should be drawn between draft article 20 and other so-called "final provisions". As some States had pointed out, if the Commission decided to propose a draft convention, it would be necessary to deal with the relationship between the draft articles and other international conventions and agreements. The present draft article 20 did not serve that purpose, and it would therefore be necessary to revise it.

20. Ms. XUE reiterated her previous position regarding the two-step approach proposed by the Special Rapporteur. If account was to be taken of State practice, it would not be necessary to consider a draft article 20, at least for the moment; that would be necessary only when States were ready to adopt a binding legal instrument.

21. With regard to settlement of disputes, Ms. Escarameia had raised a substantive issue. Given that the utilization of aquifers was likely to give rise to disputes between States, a procedure to settle them was needed.

Nevertheless, the Commission had already adopted, *inter alia*, draft article 7, which provided for a general obligation of States to cooperate in good faith when a dispute arose. The Commission must thus ask itself whether some particular aspects of the law of transboundary aquifers called for the adoption of special clauses concerning the settlement of disputes. Furthermore, Article 33 of the Charter of the United Nations, which constituted a general principle of international law on the matter, would in any case apply. Against that background, the current draft articles seemed to her to be perfectly adequate.

22. Mr. SABOIA said he was fairly satisfied with the current drafting of articles 14 to 19. As for draft article 20, he shared the views of members who considered that the clause was not necessary for the moment. He nevertheless wished to reaffirm his view that, as currently drafted, draft article 14 achieved a balance of factors regarding cooperation and communication between aquifer States with regard to planned activities. Any attempt to introduce additional factors risked upsetting that balance, and he would therefore be opposed to it. What was needed in the context of notification was a set of guidelines based on the practice of States that could serve for the elaboration of bilateral or regional arrangements.

23. Mr. YAMADA (Special Rapporteur) said he regretted having misled Mr. McRae through his inadequate description of draft article 1 (*d*) in paragraph 14 of his fifth report. Although most aquifers held fresh water, some of them, particularly in arid regions, contained brackish water that was less saline than seawater and was used, untreated or after treatment, for irrigation. Furthermore, the water contained in the rock reservoirs located under the continental shelf was always brine, and at present there was no foreseeable way in which it could be utilized. For that reason, he had proposed that aquifers located under the continental shelf should be excluded from the scope of the draft articles.

24. With regard to the concept of sustainability, he sometimes felt that the term was used to refer to totally different concepts. Many treaties dealt with the management of renewable natural resources, among them the United Nations Convention on the Law of the Sea, in which the principle was defined as the "maximum sustainable yield". That was a scientific principle for the management of renewable natural resources. Initially, he had thought that this principle could be applied to recharging aquifers. However, having met with strong resistance from Governments and members of the Commission, he had abandoned the term "sustainability", and the current drafting of article 4 (*d*) had been adopted instead.

25. The "intergenerational" principle was referred to in article 2, paragraph 5 (*c*), of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which provided that: "Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs." Furthermore, under the terms of Principle 3 of the Rio Declaration on Environment and Development ("Rio Declaration"), "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present

and future generations”.²² That notion, which was to be found again in article 5, paragraph 1 (b), of the draft articles (“the social, economic and other needs, present and future, of the aquifer States concerned”) was sometimes also referred to as the principle of sustainability. But, in his view, that was more a social than a scientific principle, and thus the two concepts must not be confused.

26. With regard to draft article 20, the lack of any provisions on the relationship between the draft articles and other international conventions and agreements in the text adopted on first reading²³ had been strongly criticized by Governments in the Sixth Committee. Accordingly, he had felt it was his duty to present a draft article on that issue, to enable members of the Commission to debate it.

27. The CHAIRPERSON said he would take it that the Commission wished to refer parts IV and V (articles 14–20) of the draft articles to the Drafting Committee.

It was so decided.

28. Mr. PELLET said that the Drafting Committee could not do as it pleased but must base its work on what had been said in plenary session. Conversely, it was not desirable for the plenary Commission to offload its responsibilities onto the Drafting Committee. It should provide guidance to the latter on matters of principle, in particular concerning the recommendation to be addressed to the General Assembly. The Drafting Committee would have to reformulate draft article 20 in the light of what had been said in plenary session. In order to do that properly, it must know whether the Commission was going to recommend to the General Assembly that the draft articles should be annexed to a resolution, or that they should become a convention, in which case article 20 would have to be drafted differently. He therefore suggested that the Commission should give the Drafting Committee some indication as to the decision it was intending to take with regard to the final form of the draft.

29. Mr. VÁZQUEZ-BERMÚDEZ said that Mr. Pellet’s comments on the Drafting Committee’s mandate were pertinent. He thought he could discern the beginnings of a consensus with regard to the proposal made by the Special Rapporteur in paragraph 9 of his fifth report, that the General Assembly should annex the draft articles to a resolution and consider the possibility of concluding a convention. He also reminded members of his own suggestion to add a draft preamble.

30. Mr. SABOIA said he agreed with Mr. Pellet that the Commission should instruct the Drafting Committee. Paragraph 9 of the report, containing the recommendation of the Special Rapporteur, was quite clear in advocating a two-step approach. Thus, if the Commission approved the content of that paragraph, the Drafting Committee would have to complete the work on the draft articles as

submitted, without prejudicing the outcome by engaging in the preparation of a draft convention.

31. Mr. CANDIOTI said that the Commission should request the Drafting Committee to prepare a text concerning the final form of the draft articles, which could then be considered in plenary. The Drafting Committee could also be entrusted with the task of preparing a draft preamble.

32. Mr. WISNUMURTI thanked Mr. Pellet for raising the problem. Up until the present, the Commission had confined itself to working on the draft articles, without placing emphasis on their final form. He endorsed the content of the recommendation formulated by the Special Rapporteur in paragraph 9 of the report, and suggested that the Commission should indicate, in its own annual report, that it regarded the draft articles as constituting the text of a convention—without prejudice, of course, to the decision to be taken by the General Assembly on that question. He also supported the proposal to prepare a draft preamble, which would enable the Commission to submit a complete text of a convention.

33. Mr. GAJA said that the problem was not so much deciding whether final clauses were needed or draft article 20 should be amended, but rather what final form the draft articles would take, as a convention could not use the same language as would be used to state general principles. In a convention, one could not conceivably impose obligations on aquifer States if other aquifer States were not parties to that convention; if the convention was ever to be ratified, reciprocity must be taken into account. Since the majority of members of the Commission seemed to support the two-step approach proposed by the Special Rapporteur, he suggested following that approach.

34. Mr. GALICKI said that, as a member of the Drafting Committee, he would like the plenary Commission to indicate clearly to that Committee what was expected of it and how much leeway it had. The suggestion to add a clause at the end of the draft articles went beyond the mandate normally conferred on a committee of that type; the same went for the drafting of a preamble, which, furthermore, was likely to cause the Drafting Committee to lose precious time. For all that, the suggestion was nonetheless welcome, and the Chairperson of the Drafting Committee could be asked to designate a few of its members to draft a preamble, so as to avoid monopolizing the Drafting Committee’s time for several days.

35. The CHAIRPERSON, noting that the Commission had been unable to come to a decision, suggested that a working group should be set up, with the task of formulating recommendations with a view to assisting the plenary in taking a decision on the questions still pending.

36. After a discussion in which Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee), Mr. CANDIOTI and Mr. SABOIA participated, concerning the desirability of establishing such a working group, the CHAIRPERSON announced that he would suspend the meeting in order to hold consultations with members.

The meeting was suspended at 11.40 a.m. and resumed at noon.

²² *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigenda), vol. I: *Resolutions adopted by the Conference*, resolution 1, Annex I.

²³ *Yearbook ... 2006*, vol. II (Part Two), pp. 91 *et seq.*, paras. 75–76 (see footnote 2 above).

37. The CHAIRPERSON said that the consultations just held had shown that the differences of opinion among members were greater than he had initially thought. However, all members considered that the proposal to adopt a two-step approach made by the Special Rapporteur in paragraph 9 of his fifth report was acceptable for the moment. With regard to the proposal to draft a preamble, nothing appeared to justify the establishment of a working group for that purpose. If he heard no objection, he would therefore consider that the Commission wished to entrust that task to the Special Rapporteur, who would submit a draft text to the plenary Commission, which would then refer it to the Drafting Committee.

It was so decided.

The meeting rose at 12.05 p.m.

2960th MEETING

Friday, 9 May 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Cafisch, 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.

Responsibility of international organizations²⁴ (A/CN.4/588, sect. E,²⁵ A/CN.4/593 and Add.1,²⁶ A/CN.4/597,²⁷ A/CN.4/L.725 and Add.1²⁸)

[Agenda item 3]

SIXTH REPORT OF THE SPECIAL RAPPORTEUR

1. Mr. GAJA (Special Rapporteur), introducing his sixth report on responsibility of international organizations (A/CN.4/597), said that the report considered issues relating to the implementation of the international responsibility of international organizations. Questions concerning the final clauses and the placement of the chapter on the responsibility of a State in connection with the act of an international organization would be addressed in his seventh report. In the course of the session, a working group

²⁴ For the text of the draft articles with commentaries thereto provisionally adopted by the Commission at its fifty-ninth session, see *Yearbook ... 2007*, vol. II (Part Two), chap. VIII, sect. C, pp. 81 *et seq.*

²⁵ Mimeographed; available on the Commission's website.

²⁶ Reproduced in *Yearbook ... 2008*, vol. II (Part One).

²⁷ *Idem.*

²⁸ Mimeographed; available on the Commission's website. For the text of the articles as adopted by the Commission at the present session and the commentaries thereto, see *Yearbook ... 2008*, vol. II (Part Two), chap. VII, sect. C.2.

should be convened for a brief discussion of some of the questions to be addressed in the seventh report. As hitherto it had been the Commission's practice to adopt the draft articles provisionally at the same session at which they had been submitted by the Special Rapporteur, the comments submitted by Governments and international organizations always related to texts already provisionally adopted. Accordingly, his seventh report would provide the occasion for responding to comments made by States and international organizations on the draft articles already adopted, and would also contain proposals to review some of its draft articles.

2. International responsibility of an international organization could exist *vis-à-vis* a State, another international organization or other entities or persons. Yet the draft articles that he now proposed addressed only the invocation of responsibility of an international organization by a State or another international organization. That was consistent with the approach taken in Part Two of the draft articles, article 36 of which stated that this Part covered only obligations owed to one or more organizations, to one or more States, or to the international community as a whole, while the Part was without prejudice to any right, arising from the international responsibility of an international organization, which might accrue directly to a person or entity other than a State or an international organization. Thus, although not expressly stated in a separate provision, the limitation on the scope set forth in Part Two of the draft articles also applied to Part Three, and clearly resulted from draft article 46. The reason for not including a separate provision was to maintain consistency with the approach taken in the draft articles on responsibility of States for internationally wrongful acts,²⁹ in which a similar limitation had been expressed in Part Two with regard to the obligations of the responsible State, and an implied limitation had been reflected in Part Three, with regard to the implementation of the international responsibility of a State. That being said, if members considered it necessary for the sake of clarity to introduce a separate provision, he would have no objection.

3. The question of the implementation of the responsibility incurred by a State *vis-à-vis* an international organization clearly related to the responsibility of States and thus lay outside the scope of the present draft articles. The fact that this position had not been covered in the draft articles on responsibility of States did not justify its inclusion in the current draft; one would have to amend several articles on responsibility of States, a course of action which it would probably be unwise to undertake at the present juncture. Obviously, some of the issues to be discussed under the current topic with regard to relations between a responsible international organization and an injured State or international organization might also be relevant where the responsible entity was a State. There was also a more extensive body of practice for cases in which the State rather than the international organization was responsible. Nonetheless, the Commission should resist any temptation to extend the scope of the topic to cover that lacuna.

²⁹ See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76 (see footnote 12 above).