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Summary record of the 2970th meeting

Topic:
<multiple topics>

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6. Secondly, was a State in violation of international law if it expelled an individual with dual nationality without first withdrawing its own nationality from that individual? The rule prohibiting the expulsion of a State’s own nationals tended to support the idea that such an expulsion would be contrary to international law. Although cases of expulsion of dual nationals without prior denationalization by the expelling State were not unusual, practice in the opposite direction could also be observed.

7. Based on an absolute approach to the rule of non-expulsion by a State of its own nationals, some persons claimed that any expulsion of a dual or multiple nationality had to be preceded by his or her denationalization by the expelling State. That was, for example, the opinion of the Director of the International Migration Law and Legal Affairs Department of the International Organization for Migration, for whom paving the way for the expulsion of nationals would be a “step backward” in the development of the law and who would prefer the Commission to discuss the conditions under which a State might or might not deprive its nationals of its nationality in order then to expel a “stateless person” or prevent his or her return. In his own view, the question of an exception to the principle of expulsion by a State of a national was still open to discussion, particularly as, in modern-day practice, States did expel their own nationals. Moreover, the rule stated in draft article 4 was hedged about with a number of safeguards. The Commission therefore had to decide whether to establish an absolute rule of non-expulsion. Requiring the expelling State to denationalize dual nationals prior to expulsion was not without risks, however, because, as indicated in paragraph 11 of the report, that would not necessarily be in the expelled person’s interest. Were he or she to return to the expelling State, for example as a result of a change of government, his or her application would be complicated by the denationalization, since he or she would be treated as an alien requesting admission to a foreign State, or else the expelling State would have to restore its nationality.

8. In light of the foregoing, the Special Rapporteur was of the view that the principle of the non-expulsion of nationals did not apply to persons with dual or multiple nationality unless the expulsion could lead to statelessness, and that the practice of some States and the interests of expelled persons themselves did not support the enactment of a rule prescribing the denationalization of a person with dual or multiple nationality prior to expulsion.

9. The legal issues raised by expulsion could be still more complex, depending on whether the expelling State was the State of dominant or effective nationality. That point was dealt with in fairly great detail in paragraphs 14 to 24 of the report. He continued to have doubts about the interest and practical utility of entering into such considerations, which would involve the Commission in a study of the regime of nationality and take it away from the topic of the expulsion of aliens. The possible scenarios to which the question of multiple nationality and the effect of dominant nationality could give rise could more appropriately be discussed in the framework of a study on the protection of the property rights of expelled persons, which he planned to undertake later.

10. The Special Rapporteur considered that a distinction must be made between the question of the loss of nationality and denationalization in relation to expulsion, which were governed by different legal mechanisms, even though their consequences were similar in the case of expulsion. The loss of nationality was the consequence of an individual’s voluntary act, whereas denationalization was a State decision of a collective or individual nature. Although nearly all national legislation contained rules relating to the loss of nationality, the same was not true of denationalization. The problems that arose in that regard were discussed in paragraphs 30 to 34 of the report. The conclusions he had reached after considering all the questions discussed in the fourth report were contained in paragraph 35, where he once again stated that he was not convinced that it would be worthwhile for the Commission to prepare draft rules for those situations, even in the interest of the progressive development of international law.

The meeting rose at 10:25 a.m.

2970th MEETING

Tuesday, 3 June 2008, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Cachtsch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.


[Agenda item 2]

REPORT OF THE DRAFTING COMMITTEE

1. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the titles and texts of draft guidelines 2.1.6 [2.1.6, 2.1.8], 2.1.9, 2.6, 2.6.5 to 2.6.11, 2.6.12 [2.6.13], 2.6.13 [2.6.14], 2.6.14 [2.6.15], 2.7 and 2.7.1 to 2.7.9 adopted by the Drafting Committee on 7, 9, 13, 14, 16 and 28 May 2008, as contained in the report of the Drafting Committee (A/CN.4/L.723 and Corr.1), which read:

2.1.6 [2.1.6, 2.1.8] Procedure for communication of reservations

1. Unless otherwise provided in the treaty or agreed by the contracting States and contracting international organizations, a communication relating to a reservation to a treaty shall be transmitted:

* Resumed from the 2967th meeting.
2.1.9 Statement of reasons

A reservation should to the extent possible indicate the reasons why it is being made.

2.6 Formulation of objections

2.6.5 Author

1. Any contracting State or any contracting international organization may make an objection to a reservation.

2. Any State or international organization that is entitled to become a party to a treaty may make a declaration by which it purports to object to a reservation. Such a declaration becomes an objection within the meaning of paragraph 1 at the time the State or the international organization expresses its consent to be bound by the treaty.

2.6.6 Joint formulation

The joint formulation of an objection by several States or international organizations does not affect the unilateral character of that objection.

2.6.7 Written form

An objection must be formulated in writing.

2.6.8 Expression of intention to preclude the entry into force of the treaty

When a State or international organization making an objection to a reservation intends to preclude the entry into force of the treaty as between itself and the reserving State or international organization, it shall definitely express its intention before the treaty would otherwise enter into force between them.

2.6.9 Procedure for the formulation of objections

Draft guidelines 2.1.3, 2.1.4, 2.1.5, 2.1.6 and 2.1.7 are applicable mutatis mutandis to objections.

2.6.10 Statement of reasons

An objection should to the extent possible indicate the reasons why it is being made.

2.6.11 Nonrequirement of confirmation of an objection made prior to formal confirmation of a reservation

1. An objection to a reservation made by a State or an international organization before a reservation has been confirmed in accordance with draft guideline 2.2.1 does not itself require confirmation.

2. A declaration formulated under draft guideline 2.6.5, paragraph 2, with regard to a reservation of a State or an international organization made before this reservation has been confirmed in accordance with draft guideline 2.2.1 does not itself require confirmation.

2.6.12 [2.6.13] Time period for formulating an objection

Unless the treaty otherwise provides, a State or an international organization may formulate an objection to a reservation by the end of a period of 12 months after it was notified of the reservation or by the date on which such State or international organization expresses its consent to be bound by the treaty, whichever is later.

2.6.13 [2.6.14] Conditional objections

An objection to a specific potential or future reservation does not produce the legal effects of an objection.

2.6.14 [2.6.15] Late objections

An objection to a reservation formulated after the end of the time period specified in draft guideline 2.6.12 [2.6.13] does not produce the legal effects of an objection made within that time period.

2.7 Withdrawal and modification of objections to reservations

2.7.1 Withdrawal of objections to reservations

Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

2.7.2 Form of withdrawal of objections to reservations

The withdrawal of an objection to a reservation must be formulated in writing.

2.7.3 Formulation and communication of the withdrawal of objections to reservations

Guidelines 2.5.4, 2.5.5 and 2.5.6 are applicable mutatis mutandis to the withdrawal of objections to reservations.

2.7.4 Effect on reservation of withdrawal of an objection

A State or an international organization that withdraws an objection formulated to a reservation is considered to have accepted that reservation.

2.7.5 Effective date of withdrawal of an objection

Unless the treaty otherwise provides, or it is otherwise agreed, the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State or international organization which formulated the reservation.

2.7.6 Cases in which an objecting State or international organization may unilaterally set the effective date of withdrawal of an objection to a reservation

The withdrawal of an objection becomes operative on the date set by its author where that date is later than the date on which the reserving State or international organization received notification of it.

2.7.7 Partial withdrawal of an objection

Unless the treaty provides otherwise, a State or an international organization may partially withdraw an objection to a reservation. The partial withdrawal of an objection is subject to the same formal and procedural rules as a complete withdrawal and becomes operative on the same conditions.

2.7.8 Effect of a partial withdrawal of an objection

The partial withdrawal modifies the legal effects of the objection on the treaty relations between the author of the objection and the author of the reservation to the extent of the new formulation of the objection.

2.7.9 Widening of the scope of an objection to a reservation

A State or international organization which has made an objection to a reservation may widen the scope of that objection during the time period referred to in draft guideline 2.6.12 [2.6.13] provided that the widening does not have as an effect the modification of treaty relations between the author of the reservation and the author of the objection.

2. At its 2917th, 2919th and 2020th meetings, on 10, 15 and 16 May 2007, the Commission had decided to refer draft guidelines 2.6.3 to 2.6.6, 2.6.7 to 2.6.15 and 2.7.1 to 2.7.9 to the Drafting Committee and to review the formulation of draft guideline 2.1.6 in the light of the discussion.
3. At its 2940th meeting, on 20 July 2007, it had decided to refer draft guidelines 2.8 and 2.8.1 to 2.8.12 to the Drafting Committee, and at its 2967th meeting, on 27 May 2008, it had also decided to refer a new draft guideline 2.1.9 to the Drafting Committee.

4. In all, the Drafting Committee had had before it 38 draft guidelines, namely, 37 new draft guidelines and one draft guideline already adopted and which had needed to be reviewed.

5. The new draft guidelines could be divided into four categories: first, draft guidelines relating to the formulation of objections (2.6.3 to 2.6.15); second, draft guidelines relating to the withdrawal and modification of objections to reservations (2.7.1 to 2.7.9); third, draft guidelines relating to acceptance of reservations (2.8 to 2.8.12); and, fourth, a draft guideline relating to a statement of reasons for reservations (2.1.9).

6. In addition, it should be recalled that the Drafting Committee would also have to consider seven draft guidelines from the previous year belonging to two categories: first, draft guidelines relating to competence to assess the validity of reservations (3.2 and 3.2.1 to 3.2.4); and, second, draft guidelines relating to the consequences of the non-validity of a reservation (3.3 and 3.3.1).

7. To date, the Drafting Committee had considered several draft guidelines concerning objections, particularly those in the first two categories. Its work was continuing.

8. So far, the Drafting Committee had held seven meetings on the topic, on 6, 7, 9, 14, 16 and 28 May 2008. The expertise and collaboration of the Special Rapporteur had greatly facilitated the Committee’s work, as had the invaluable assistance of the Secretariat.

9. The first two draft guidelines on which the Drafting Committee had begun consideration had been draft guideline 2.6.3, entitled “Freedom to make objections”, and draft guideline 2.6.4, entitled “Freedom to oppose the entry into force of the treaty vis-à-vis the author of the reservation”.

10. During the discussion, the Drafting Committee had concluded that those two draft guidelines posed complex problems relating to the validity of objections. Consequently, it had decided to defer their consideration until the following year, by which time the Commission would have completed its examination of questions of validity.

11. The Drafting Committee had had the mandate to revise, if need be, draft guideline 2.1.6, entitled “Procedure for communication of reservations”, which had been provisionally adopted by the Commission in 2002.\footnote{Yearbook ... 2002, vol. II (Part Two), p. 38. The revised draft guideline is reproduced in Yearbook ... 2008, vol. II (Part Two), para. 124.} Indeed, after the adoption by the Committee of the then-draft guideline 2.6.13, “Time period for formulating an objection”, it had seemed appropriate to revisit draft guideline 2.1.6. Members of the Commission would recall that the third main paragraph of that guideline dealt with the period during which an objection to a reservation could be raised.

12. The Drafting Committee had considered an option presented by the Special Rapporteur and consisting mainly in deleting that paragraph, which, in view of draft guideline 2.6.13, had become obsolete. That option had also included the deletion of the last phrase of the previous paragraph (“or, as the case may be, upon its receipt by the depositary”), since any communication relating to a reservation could be considered as having been made only upon its receipt by the State or organization.

13. The Drafting Committee had eventually adopted a simplified and more concise version of the paragraph, expressing the same idea. That was the current second paragraph of guideline 2.1.6. The Drafting Committee had agreed that the old paragraph 3 was superfluous and should be deleted. The commentary would be amended accordingly.

14. Draft guideline 2.1.9 had been referred to the Drafting Committee on 27 May 2008 at its 2967th meeting after consideration by the plenary of the note by the Special Rapporteur on that matter.\footnote{See footnote 94 above.} That draft guideline had not given rise to any debate in the plenary and had seemed to enjoy unanimous support. In the form originally proposed by the Special Rapporteur, it had merely repeated mutatis mutandis the corresponding draft guideline 2.6.10 concerning statement of reasons for objections.

15. The Drafting Committee had examined first the issue of whether the reasons should be part of the actual text of the reservation or could be submitted later in a separate text. During the discussion, it had been pointed out that the draft guideline had the character of a recommendation and that consequently, even if it were desirable to have the statement of reasons simultaneously with the text of the reservation, it would not be necessary to include it in the text of the guideline. It was also doubtful whether a clear distinction could be made between the reservation proper and its reasons whenever they were found in the same text. Moreover, the statement of reasons was part of the “dialogue réservataire”. The commentary could duly clarify that issue.

16. The second question discussed was whether the words “motives” or “motivation” should be used rather than “reasons” in all language versions. The view had been expressed that “motives” might have a wider meaning than “reasons”. However, in the end the Committee had decided to keep the current terminology: “motifs” in French and “reasons” in English.

17. The Committee had also decided that guideline 2.1.9 would have the exact wording, mutatis mutandis, of draft guideline 2.6.10, which it had adopted earlier and which would be presented shortly. The title of the guideline had also remained as proposed by the Special Rapporteur, namely “Statement of reasons”.

18. Draft guideline 2.6.5 had given rise to a very complex and difficult debate in the Drafting Committee,
focusing on the question of who might be the author of an objection. While there had been no disagreement over the fact that contracting States and international organizations could make objections, there had been two schools of thought on the question whether States and international organizations entitled to become parties to a treaty could make objections. Some members had been of the view that any State or international organization entitled to become a party to a treaty could formulate objections; that the idea had been reflected in the original drafting as proposed by the Special Rapporteur; and that the exclusion of objections made by non-contracting parties could not be reconciled with the definition of objections as already adopted in guideline 2.6.1. Others had felt that States or international organizations entitled to become parties to a treaty could not have the same rights as contracting parties and, therefore, could not formulate objections in the full meaning of the term. According to that view, those States could make declarations that would become objections only when the State or international organization author of the declaration became a contracting party to the treaty. That school of thought had questioned the legal effects of such declarations and had contended that they could not be equivalent to those of objections made by contracting parties.

19. Both schools had invoked the 1969 Vienna Convention to reinforce their arguments. For the first school, the Convention was silent on that point. The fact that, in accordance with article 23, paragraph 1, a reservation and an objection were communicated to States entitled to become parties to a treaty strengthened the position that full objections might be formulated by that category of States and international organizations.

20. For the second school, the silence of the 1969 Vienna Convention was an indication that the drafters had not meant to give the category of States or international organizations the right to make objections in exactly the same way as the contracting parties. Moreover, the supporters of the second school had considered that a careful reading of article 20, paragraph 5, of the Convention might show that objections could be formulated only by contracting parties. It necessarily followed that any declaration by that category of States and international organizations purporting to object could not have the same legal effects as a full objection.

21. The current drafting of draft guideline 2.6.5 reflected the fact that the positions of the two schools of thought had remained irreconcilable. In a sense, it constituted a fragile and delicate compromise which might not be entirely satisfactory for either school but might nevertheless allow an honourable solution.

22. The initial drafting had been relatively simple, with a single paragraph composed of two short subparagraphs. The current drafting had resulted in two paragraphs. The first paragraph stated the indisputable fact that any contracting State or contracting international organization could make an objection to a reservation. The new second paragraph dealt with the question of States or international organizations entitled to become parties to a treaty. The wording of that paragraph reflected the compromise reached: it provided that any State or international organization that was entitled to become a party to a treaty could make a declaration whereby it purported to object to a reservation. However, the exact nature of such a declaration was not specified. Suffice it to say that for the supporters of the use of the term “objection” in all cases, it undoubtedly constituted an objection. The second sentence tried to clarify an otherwise somewhat blurry situation by specifying that such a declaration became an objection within the meaning of paragraph 1 of the draft guideline at the moment the State or international organization expressed its consent to be bound by the treaty.

23. As a consequence of the compromise reflected in the content of the draft guideline, the Drafting Committee had decided to change the title to simply “Author”. The Committee had thought that the title as modified was clear enough, since the draft guideline was found in the section dealing with objections; at the same time, any attempt to amplify it would risk making the title too long and cumbersome.

24. Draft guideline 2.6.6 had not given rise to an extensive debate in the Drafting Committee. It had been noted that it was similar to two draft guidelines already adopted, namely draft guidelines 1.1.7 [1.1.1] (“Reservations formulated jointly”) and 1.2.2 [1.2.1] (“Interpretative declarations formulated jointly”). Suggestions had therefore been made to align this draft guideline with the wording of the two others. The content had not been in dispute. Ultimately, however, the Committee had opted for the title “Joint formulation”, following the example of the title of draft guideline 2.6.5. It was understood that this meant joint formulation of objections. In the same spirit, the words “a number of States” had been replaced by “several States”. Moreover, the word “nature” after “unilateral” had been replaced by “character”, which was now the same in both the English and the French versions. That of course created a certain discrepancy with the draft guidelines previously adopted, which should be corrected on second reading of the draft guidelines. Draft guideline 2.6.6 was now entitled “Joint formulation”.

25. Draft guideline 2.6.7 had been adopted as proposed by the Special Rapporteur. It was entitled “Written form” and addressed the question of the form in which an objection needed to be formulated. It had not given rise to any particular debate, as had also been the case in the plenary.

26. Draft guideline 2.6.8 dealt with objections intending to preclude the entry into force of the treaty as between the author of the objection and the author of the reservation. The view had been expressed that the draft guideline should eventually be revisited once the Commission had examined the consequences of invalid reservations. Moreover, it had been felt that its wording should be aligned with that of the 1969 Vienna Convention. The question had also been raised as to the exact meaning of the last phrase (“when it formulates the objection”).

27. It had been pointed out that a State or an international organization could first formulate a “simple objection” and could subsequently declare that it intended to preclude the entry into force of the treaty as between itself and the reserving State or international organization. That argument had been based on the silence of the
1969 Vienna Convention on that issue. The view had also been expressed that one of the purposes of the Guide to Practice was to complete and elucidate the Convention. Some suggestions had also been made concerning a possible link between draft guidelines 2.6.8 and 2.6.13 on the time period for formulating an objection.

28. In that connection, it had been noted that if the intervening period between the formulation of such an objection and the expression of the consent to be bound by the objecting State or international organization was very long, practical problems of uncertainty and legal insecurity might arise. It had therefore been felt that a certain time frame should be indicated in the guideline, to replace the phrase “when it formulates the objection”. After a thorough discussion, the Drafting Committee had taken the view that this intention should be definitely expressed before the treaty would enter into force.

29. Lastly, the Drafting Committee had decided to align the wording of the guideline with that of article 20, paragraph 4 (b), of the 1969 Vienna Convention. The word “oppose”, found originally in the title and the text, had been replaced by “preclude”, and the word “clearly” in the third line had been replaced by “definitely”, as in the Convention.

30. Draft guideline 2.6.9 was entitled “Procedure for the formulation of objections” and had been adopted as proposed by the Special Rapporteur without giving rise to any particular discussion.

31. Draft guideline 2.6.10 had been adopted with little debate. The Committee had decided simply to replace the words “whenever possible” (in the English version) by the phrase “to the extent possible”. The draft guideline was entitled “Statement of reasons”.

32. Draft guideline 2.6.11 had been extensively discussed in the Drafting Committee. The discussion had focused on its relationship with new draft guideline 2.6.5. It should be noted, before presenting the parameters of the debate, that the draft guideline addressed a situation in which a State or international organization had made a reservation in accordance with draft guideline 2.2.1, in other words upon signing a treaty, that was therefore subject to confirmation. At that point, if a State or international organization made an objection to such a reservation, the objection did not itself require confirmation once the reservation it objected to had been confirmed.

33. Taking into consideration the compromise reflected in the current wording of draft guideline 2.6.5, it had been felt that draft guideline 2.6.11 should also encompass a similar compromise. That being so, the initial drafting as proposed by the Special Rapporteur could not be retained. While it had covered the case of an objection, it had left open the case of declarations made by States or international organizations entitled to become parties to a treaty and by which they purported to object to a reservation that certain, but not all, members defined as being objections. The debate had focused mainly on the necessity of adding something more to cover that latter case. Some members of the Drafting Committee had thought that no addition might be necessary since, in any case, the declarations referred to in guideline 2.6.5, paragraph 2, had subsequently been transformed into objections. Other members had been of the view that a paragraph was still needed in order to make it clear that declarations referred to in paragraph 2 of draft guideline 2.6.5 (and ultimately transformed into objections) did not require confirmation.

34. The Drafting Committee had considered the possibility of combining both cases in one paragraph. However, that exercise had proved to be difficult. Consequently, it had been felt that the best way would be to add a second paragraph to the original draft guideline, which essentially repeated the text of the first paragraph, while replacing the term “objection” by the phrase “declaration formulated under draft guideline 2.6.5, paragraph 2”.

35. The first paragraph remained more or less as originally proposed. The English text had been changed slightly to make it clearer: instead of the words “prior to confirmation of the reservation”, it now read: “before a reservation has been confirmed”.

36. The title of the draft guideline remained as originally proposed and read: “Nonrequirement of confirmation of an objection made prior to formal confirmation of a reservation”.

37. In view of the adoption of draft guidelines 2.6.5 and 2.6.11, the Drafting Committee had considered that former draft guideline 2.6.12, entitled “Nonrequirement of confirmation of an objection made prior to the expression of consent to be bound by a treaty”, had lost its raison d’être. Indeed, the second paragraph of draft guideline 2.6.5 already covered that category, including the nonrequirement of confirmation. As a consequence of that deletion, draft guidelines 2.6.13, 2.6.14 and 2.6.15 had been renumbered. Their former numbers were in brackets.

38. Draft guideline 2.6.12 [2.6.13] was entitled “Time period for formulating an objection”. Article 20, paragraph 5, of the 1969 Vienna Convention partially and indirectly addressed the time period for formulating an objection to a reservation. Accordingly, the present draft guideline, which followed closely the text of paragraph 5, had not posed particular problems in the Drafting Committee. Only in the English text had the phrase “after it is notified” been changed to “after it was notified” to ensure full consistency with article 20, paragraph 5.

39. As a consequence of the adoption of that draft guideline, it had been necessary to remove any duplication between it and draft guideline 2.1.6, already provisionally adopted by the Commission in 2005. To dispel any possible confusion, the Drafting Committee had deleted the third paragraph of guideline 2.1.6, and had also adjusted its second paragraph.
40. Draft guideline 2.6.13 [2.6.14] had also been fully debated in the Drafting Committee. Members would recall that it concerned objections to specific potential or future reservations. The original drafting as proposed by the Special Rapporteur had been very detailed in the sense of actually repeating elements of the definition of objections (draft guideline 2.6.1). The Drafting Committee had been of the view that such repetition was unnecessary and cumbersome. Consequently, it had simplified the wording by deleting those elements pertaining to the definition of objections. It had also decided to change the beginning of the draft guideline by substituting “An objection” for the phrase “A State or international organization may formulate an objection”. It had felt not only that the wording was more concise and elegant but also that it avoided confusion. Indeed, the original wording (“A State or international organization may formulate an objection”) had raised issues of contracting States or international organizations and others entitled to become parties. Of course, the Committee had been aware that this general problem had already been resolved in the compromise included in draft guideline 2.6.5. It had been of the view that further clarification should, if need be, be included in the commentary to the guideline.

41. It had also been decided to change the title from “Pre-emptive objections” to “Conditional objections”, since those objections were in fact conditional and depended on the actual formulation of a corresponding reservation.

42. Finally, the Drafting Committee had decided to delete the last phrase (“until the reservation has actually been formulated and notified”). After debating the point, the Drafting Committee had felt that it was more accurate simply to state that such a conditional objection did not produce the legal effects of an objection, without entering into a more detailed description. Furthermore, once the reservation had been formulated and notified, such effects would be the object of another part of the Guide to Practice, dealing with effects of objections.

43. Draft guideline 2.6.14 [2.6.15] was entitled “Late objections”. The Drafting Committee had wondered whether those late objections should be called objections at all, or instead communications or declarations made outside the established time period. After some debate, the Committee had decided to maintain the term “objections” both in the title and in the text of the draft guideline, on the understanding that the guideline would eventually have to be revisited after proper consideration by the Commission of the effects of objections. The term “objection” as defined in draft guideline 2.6.1 in conjunction with the period during which they could be formulated (as stated in draft guideline 2.6.13) had for the time being been deemed to cover such late communications or declarations. It had also been pointed out that the term “communications” referred to a process rather than to the objection or declaration itself.

44. As finally adopted, the draft guideline was identical to the one proposed by the Special Rapporteur.

45. Currently, the draft guideline stated that such late objections did not produce the legal effects of an objection made within the time period specified in draft guideline 2.6.13 [2.6.14]. It left open the question of its possible legal effects, if any. Such effects would be considered at a later stage, when the Commission came to deal with effects.

46. Draft guidelines 2.7.1, 2.7.2 and 2.7.3 were the first in section 2.7, which dealt with withdrawal and modification of objections to reservations. The first, draft guideline 2.7.1, was entitled “Withdrawal of objections to reservations” and had been adopted without much debate, in the form originally proposed by the Special Rapporteur. The draft guideline repeated verbatim article 22, paragraph 2, of the 1969 Vienna Convention. Draft guideline 2.7.2 was entitled “Form of withdrawal of objections to reservations”. Again, its wording, which repeated article 23, paragraph 1, of the 1969 Vienna Convention, had not been changed from the original proposal. Draft guideline 2.7.3 was entitled “Formulation and communication of the withdrawal of objections to reservations”. It simply stated that draft guidelines 2.5.4, 2.5.5 and 2.5.6 were applicable mutatis mutandis to the withdrawal of objections to reservations.

47. Draft guideline 2.7.4 had not raised any particular problems. The only issue had been whether the withdrawal of an objection had any specific effects that should be mentioned. It had been felt, however, that such effects were sufficiently complex not to be dealt with under section 2.7. The surest way to treat the issue was simply to assimilate the withdrawal of an objection to a reservation with the acceptance of the reservation and to specify as much in the title. The question had been raised whether there should be any reference in the guideline to the time period of such an effect, but it had been pointed out that draft guideline 2.7.5 specifically dealt with that matter.

48. The only changes made had been of a drafting nature. The words “on reservation” had been added to the title, after the word “Effect”. In the text itself, the words “or an international organization” had been added after the word “State”. The words “earlier against”, in the English version, had been considered redundant and had been deleted. The title of the draft guideline, following the amendment, was “Effect on reservation of withdrawal of an objection”.

49. Draft guideline 2.7.5, the title of which was “Effective date of withdrawal of an objection”, had not caused any problems, either. It more or less repeated article 22, paragraph 3 (b), of the 1969 Vienna Convention and had been maintained as originally proposed by the Special Rapporteur. Some questions had been raised about its correct placement, but the Drafting Committee had decided to keep it in its current place.
50. Draft guideline 2.7.6 dealt with cases in which an objecting State or international organization might unilaterally set the effective date of withdrawal of an objection to a reservation. The only changes to the Special Rapporteur’s original wording concerned the replacement of the words “takes effect” by the words “becomes operative” and the addition of the words “or international organization” after the word “State”. As far as the first change was concerned, the commentary to the draft guideline should indicate that fidelity to the 1969 Vienna Convention had dictated the use of the phrase “becomes operative”, which should be taken as meaning “takes effect”.

51. Draft guideline 2.7.7 was entitled “Partial withdrawal of an objection”. The main issue, which had already been mentioned during the debate in plenary, concerned the question of whether the second sentence, on the effects of partial withdrawal, should be retained in the draft guideline, since it related more closely to draft guideline 2.7.8. The Drafting Committee had agreed with that approach and decided to transfer the sentence to the following guideline. Minor changes had also been made to the last sentence. The word “total” had been replaced by the word “complete”; and the words “takes effect” had again been replaced by the words “becomes operative”, for reasons of conformity with the 1969 Vienna Convention. The commentary should, again, explain that the meaning of the term was really “takes effect”.

52. Draft guideline 2.7.8, entitled “Effect of a partial withdrawal of an objection”, remained unchanged, except that, as mentioned earlier, the Drafting Committee had decided to transfer to it the second sentence of draft guideline 2.7.7. The result of the merger was still one sentence, since some elements had been repetitive. Otherwise, the substance of the guideline remained as originally proposed.

53. Draft guideline 2.7.9 had been the subject of a lengthy debate. The main points of that debate had their roots in the debate in plenary, when it had become obvious that a number of members of the Commission considered the wording of the guideline to be too categorical and absolute. Since objections could be made during a 12-month period, there was, in their view, nothing to prevent States and international organizations from making subsequent objections widening the scope of the previous objection.

54. According to the opposing view, it was not permissible, as shown by the original wording of the draft guideline, subsequently to widen the scope of an objection, the reason being that such a widening of scope could jeopardize the security of treaty relations, especially in the case of objections with maximum effect, namely those preventing the entry into force of a treaty as between the author of a reservation and the author of an objection. It had been pointed out that, if such an objection had not been made at the time when the objection had originally been formulated, the treaty had already entered into force as between the reserving State or international organization and the objecting State or international organization. It would therefore be extremely detrimental to treaty relations to allow an objection with maximum effect at a later stage. The Drafting Committee had had an interesting debate, during which it had become obvious that the opposing views stemmed from different interpretations of article 23, paragraph 3, of the 1986 Vienna Convention. Those favouring the absolute prohibition of the widening of the scope of an objection claimed that the article should be read in conjunction with article 20, paragraph 5, of that Convention. The two schools of thought had, however, shared one view: both agreed that an objection with maximum effect—one which would affect treaty relations between the author of a reservation and the author of an objection—should not be made subsequently.

55. The draft guideline had therefore been worded in a manner reflecting that consensus. In its current form, it stated that a State or an international organization that had made an objection to a reservation might widen the scope of that objection during a 12-month period, provided that such widening did not have as an effect the modification of treaty relations as between the author of the reservation and the author of the objection, with the inevitable result of precluding the entry into force of the treaty between the two parties. The title of the draft guideline remained unchanged: “Prohibition against the widening of the scope of an objection to a reservation”.

56. The recommendation of the Drafting Committee was that the Commission should adopt those draft guidelines in their entirety.


Draft guideline 2.1.6 [2.1.6, 2.1.8]

58. Mr. VALENCIA-OSPINA, after assuring the Commission that he would not comment on the substance of the draft guidelines, and that he could therefore go along with the recommendation that the draft guidelines should be adopted in toto, expressed concern at the inconsistent use of some terms, both internally, within a given draft, and in relation to other drafts recently adopted or under consideration by the Commission. He had in mind, in particular, the undefined term “contracting organization”, which appeared in the first paragraph of draft guideline 2.1.6 and in other draft guidelines relating to reservations, such as draft guideline 2.1.5 (“Communication of reservations”). Draft guideline 2.5.8 (“Effective date of withdrawal of a reservation”) contained three model clauses referring simply to “Contracting Parties”, while in draft guidelines 2.3.3 and 2.3.4 the reference was to “Contracting Parties to a treaty”. He could understand the distinction that might be drawn in the context of a draft guideline or a model clause, though even there some harmonization of terms was desirable. His main concern, however, was that, although the term “contracting organization” was used throughout the draft guidelines on reservations, references to contracting—or reserving, or withdrawing—international organizations had become more frequent, as in draft guideline 2.6.5, which the Drafting Committee had just adopted. He therefore suggested that, for consistency’s sake, the word “international” should be inserted before the word “organizations” in the first paragraph and subparagraphs (a) and (b) of draft
3. Mr. CANDIOTTI noted that, in the last paragraph of the Spanish text, the phrase “notificación al depositario” was not in line with the English and French texts. Notification was surely made by, not to, the depositary.

4. Mr. PELLET (Special Rapporteur) confirmed that the reference was to notification by the depositary.

5. The CHAIRPERSON suggested that the most appropriate way to decide whether Mr. Valencia-Ospina’s proposed amendment should be adopted would be by a show of hands.

6. Following an indicative vote, the Chairperson said he took it that the Commission wished to insert the word “international” before the word “organizations” throughout draft guideline 2.1.6.

It was so decided.

Draft guideline 2.1.6 [2.16, 2.1.8], as amended, was adopted.

Draft guideline 2.1.9

Draft guideline 2.1.9 was adopted.

2.6 Formulation of objections

Draft guideline 2.6.5

67. Mr. PELLET (Special Rapporteur) said it was unusual for a special rapporteur to ask for the floor after the Chairperson of the Drafting Committee had presented his report, certainly he had never done so before during his many years as Special Rapporteur on the topic. On the current occasion, however, he felt that a decision taken by the Drafting Committee posed a serious problem and called into question one of the basic elements of the draft Guide to Practice. Generally speaking, the Committee improved texts submitted by Special Rapporteurs, including his own. Unfortunately, that was not the case with regard to draft guideline 2.6.5.

68. The Chairperson of the Drafting Committee, to whose kindness, patience, efficiency and competence he wished to pay particular tribute, had presented draft guideline 2.6.5 as constituting an honourable compromise. He himself was all in favour of compromises, when they were reasonable and offered a middle way between two equally tenable positions. That did not, however, apply to the wording cobbled together for draft guideline 2.6.5, which did not constitute an honourable compromise.

69. There was no problem with paragraph 1. The same was not true, however, of the statement in paragraph 2 that “[a]ny State or international organization that is entitled to become a party to a treaty may make a declaration by which it purports to object to a reservation”. The key question was what constituted “a declaration by which it purports to object to a reservation”, and the answer was an objection, according to draft guideline 2.6.1, adopted in 2007,113 which defined the word “objection” as “a unilateral statement ... made by a State or an international organization ... whereby the former State or organization purports to exclude or to modify the legal effects of the reservation”. In other words, the first sentence of paragraph 2 of draft guideline 2.6.5 defined a declaration made by a State that was entitled to become a party to a treaty as just that, an objection, with the result that the second sentence of paragraph 2 was effectively saying “[s]uch an objection becomes an objection ... at the time the State or the international organization expresses its consent to be bound by the treaty”, which was clearly absurd. An objection could not “become an objection” under certain conditions. It was, however, true that an objection would produce its effects only under specific conditions, namely if it was a conditional or, perhaps, rather, a “conditioned” objection, which, like an objection to a potential or future reservation, did not produce the legal effects of an objection, as stated in draft guideline 2.6.13. The point he wished to hammer home was that an objection was defined not by its effects but by the intention of its author. It was not the fact that a unilateral declaration produced effects that made it an objection, but the fact that its author wished it to produce such effects. That was the case with the statements referred to in paragraph 2 of draft guideline 2.6.5, which undoubtedly constituted objections.

70. He had a number of reasons for attaching so much importance to the matter. The first—and least

important—was that the Commission was disregarding the general economy of the 1969 Vienna Convention with respect not only to the procedure relating to reservations but, more generally, to all communications of declarations relating to treaties. It was effectively depriving of its force the obligation contained in article 23, paragraph 1, of the 1969 Vienna Convention to communicate an objection to the “other States entitled to become parties to the treaty” and, more generally, the provisions of article 77, paragraph 1 (e) and (f), of that Convention on the functions of depositaries towards “States entitled to become parties”.

71. The second reason was that the Commission was totally failing to take into account either the travaux préparatoires or existing practice. In that context, he noted that, in the practice of the Secretary-General of the United Nations, objections were the subject of “communications” and not of “depository notification”, but that they were objections nonetheless.

72. The third reason was that, for no valid reason, the Commission was flying in the face of a view that had surely never been disputed since the ICJ had stated, in the operative part of its famous advisory opinion of 1951 on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,

(a) that an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

(b) that an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect. [p. 19 of the opinion]

73. Fourth and last, but not least, the draft guideline called into question not only the definition of the word “objection”, which, as he had said, had been adopted in 2007, but also the logic that he had advocated from the outset and that a majority of the Commission had always accepted, even if there had been some disagreement, whereby the unilateral declarations covered by the draft guidelines—and reservations themselves, above all—should be defined in terms not of the effects that they produced but of the effects that their authors intended them to produce.

74. He maintained that the approach he had outlined was correct: an unlawful reservation was nonetheless a reservation. Before a unilateral declaration could be deemed unlawful, it first had to be classified as a unilateral declaration. Before it could be decided whether a reservation was unlawful, it first had to be qualified as a reservation. The same was true of objections. That reasoning, which permeated the whole of the draft text, was called into question by draft guideline 2.6.5, paragraph 2. As Special Rapporteur, he felt responsible for the overall coherence of the Guide to Practice and he could therefore not accept such surreptitious but nevertheless clear questioning of that logic. Unfortunately it appeared to be a kind of partial but destructive revenge enacted by a minority of colleagues who had never accepted that reasoning and who stubbornly persisted in confusing the effects (and lawfulness) of a reservation, an objection or acceptance, with the intentions of the authors of those unilateral declarations.

75. It would be wise, for the sake of the coherence of the draft as a whole, for the plenary to reaffirm that reasoning by rejecting draft guideline 2.6.5 as proposed by the Drafting Committee. If his advice were not followed on that point, he would not play the old trick of threatening to resign, but he would emphatically decline responsibility for what he sincerely believed to be a blow to the underlying logic of the text, whose coherence he had thus far been able to preserve. It went without saying that if, as he hoped, draft guideline 2.6.5 were rejected by the plenary, that would necessarily have repercussions on draft guideline 2.6.11, which would have to be revised for the same reasons. That revision could be undertaken either by the Drafting Committee, or by the plenary on the basis of texts he himself would present.

76. If the option of adopting an amended draft guideline by consensus were to be rejected, he would call for a vote on the adoption or rejection of that dangerous draft guideline, whose fate was inseparable from that of draft guideline 2.6.11.

77. The CHAIRPERSON suggested that the Commission should hold an indicative vote on draft guideline 2.6.5. If the text were rejected, the draft guideline would be referred back to the Drafting Committee for revision, together with the draft guideline 2.6.11.

78. Mr. HASSOUNA said he saw some merit in the statement of the Special Rapporteur. Perhaps the Chairperson of the Drafting Committee could provide some more background information about the different views put forward by its members, so that the Commission could try to reach a consensus rather than proceeding too hastily to a vote.

79. Mr. KAMTO endorsed Mr. Hassouna’s suggestion. Although the Chairperson of the Drafting Committee had explained in detail how the text of each draft guideline had been arrived at, it was possible that a momentary lapse of attention might have caused members to miss something when the report was presented. It would therefore be helpful if the Chairperson of the Drafting Committee could refresh members’ memories, as a vote should be avoided if at all possible. The Commission did not have to hold a vote merely because the Special Rapporteur had requested one. His well-argued proposals were quite clear and could be followed without resorting to a vote.

80. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee), said it would be very hard to provide an accurate summary of the various positions adopted by members of the Drafting Committee. The report had been presented to the plenary in order to provide each member with an opportunity to explain his or her views. Although the Special Rapporteur was plainly opposed to the draft guideline, most of the members of the Drafting Committee considered its wording to be an honourable compromise. Reopening the question would therefore be an extremely complicated matter. The draft guideline was very clear and not all members of the Drafting Committee thought it was inconsistent with the 1969 Vienna Convention.

81. Ms. ESCARAMEIA, speaking as an ex officio member of the Drafting Committee, recalled that the Drafting
Committee had spent an entire afternoon discussing draft guideline 2.6.5. It has proved hard to reach consensus, because some members had contended that if an entity was not a party to a treaty, it could not object to a reservation to that treaty. They had provided plenty of reasons for their position and had rejected any reliance on the advisory opinion of the ICI on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, which related solely to signatories. The debate should not be reopened in the plenary. The extremely unusual situation in which the Commission found itself had arisen because the Special Rapporteur, who had reluctantly supported the text in the Drafting Committee, was now opposing it. She therefore saw no solution other than to proceed to a vote.

82. Mr. NOLTE, speaking as a member of the Drafting Committee, said it was clearly a serious matter if the Special Rapporteur was having second thoughts about the outcome of a debate on the grounds that it ran counter to the whole approach underlying his draft text. He personally would be inclined to reopen the debate, if only the Special Rapporteur were to reciprocate by showing some understanding for the concerns of those who were reluctant to confer the dignity of the term “objection” upon a declaration that could not yet produce the full effects of an objection. Logically, if a declaration rested on a particular intention, it should be given the name corresponding to that intention. Some declarations did not deserve to be called “objections”. If the Special Rapporteur could see any possibility of reconciling the various views, he might be in favour of making one final effort; if, on the other hand, it was simply a question of dogma, a vote would have to be held.

83. Mr. BROWNLIE said that the presentation by the Chairperson of the Drafting Committee and Ms. Escarameria’s comments had made it obvious that a great deal of attention had been given to the matter. It therefore seemed unlikely that further debate would lead to a reconciliation of views. Although not always very popular, votes were occasionally the only way out. The Special Rapporteur had made a strong case that the issue before the Commission was a systemic problem of fundamental importance to his draft text. The Commission should give serious consideration to his view, even at that late stage.

84. Mr. YAMADA said it would be impossible to resolve the question by holding a debate in the plenary. He asked whether the Special Rapporteur was proposing that draft guidelines 2.6.5 and 2.6.11 should be referred back to the Drafting Committee and that a decision on them should be postponed.

85. Mr. PELLET (Special Rapporteur) said he would like the plenary to reject the text proposed by the Drafting Committee. Either it could be referred back to the Drafting Committee, or else he could present a new draft text to the plenary. On balance, referring the guideline back to the Drafting Committee was probably the better solution.

86. Mr. GAJA said that in the event of a vote, he would wish it to be placed on record that he had been a dissenting member of the Drafting Committee and had sided with the Special Rapporteur on the question. His first reason for having done so was that the qualification of declarations as objections in the 1969 and 1986 Vienna Conventions was irrespective of effects, because an objection did not produce any effect until the reserving State became a contracting State. A second element of greater concern was that many objections made by a State before becoming a contracting party existed in practice and had always been called “objections” by the depositary. The draft guideline as proposed would therefore create confusion. Personally he would not be in favour of reopening the question, but if a vote were to be held, the points he had just made should be borne in mind.

87. Mr. PETRIĆ said that what was at stake was not a minor drafting change, but a very important point of principle about which the Special Rapporteur clearly felt very strongly. If a vote were taken, it should concern only the question of whether the text should be referred back to the Drafting Committee.

88. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) proposed that a somewhat fruitless debate should be curtailed forthwith and that the plenary should refer draft guidelines 2.6.5 and 2.6.11 back to the Drafting Committee which, with the Special Rapporteur’s assistance, would strive to find common ground. If his proposal was unacceptable, the Commission should, on a strictly exceptional basis, immediately proceed to a vote.

89. Mr. PELLET (Special Rapporteur) said he would be perfectly happy to refer the two draft guidelines back to the Drafting Committee without a vote. In that case, however, it must be on the understanding that the previous compromise was unacceptable. While it would be perfectly reasonable to explain in the commentaries that there had been two positions, there was no way of reconciling those positions. If the plenary was unable to accept his position, he would call for a vote, in the hope that the Drafting Committee would reflect on a wording along the lines he had suggested. However, he was adamantly opposed to simply going back to square one. If that were to happen, he would not participate in the discussions and would attend the Drafting Committee’s deliberations solely as a spectator.

90. Mr. HASSOUNA said that while he strongly supported the proposal by the Chairperson of the Drafting Committee to refer the texts back to the Committee, he did not agree with the Special Rapporteur that some preconditions should be set. On the contrary, an earnest effort should be made to come up with a compromise acceptable to all members.

91. Mr. KAMTO said that while he was not opposed to the holding of a vote, the discussions showed that the Commission was increasingly tending to offload its responsibilities with regard to questions of substance and principle onto the Drafting Committee. It was not that body’s task to decide on such matters. The Special Rapporteur was therefore right to query their referral back to the Drafting Committee. The principal body of the Commission was the plenary, which, as a body of experts, must adopt a position on the substance of the topics it was considering, before instructing a smaller look into the formal technicalities. The Commission should debate matters of substance and principle in plenary before coming to an informed decision.
on whether to refer the texts back to the Drafting Committee and, in the affirmative, should provide it with clear guidance. The matter merited a decision in plenary, and if there was not enough time to decide on the matter at the current meeting, the Chairperson should arrange for a further plenary debate to be held on the issue. Mechanical referral back to the Drafting Committee was no solution.

92. Mr. McRAE said that as a member of the Drafting Committee he had favoured the Special Rapporteur’s approach. If the texts were to be referred back to the Drafting Committee, however, no preconditions should be set. Nor was there any point in referring them back to the same small group of people whose positions were already formed, who understood each other’s positions, but who simply disagreed. The real question was which of those views found broader acceptance in the plenary. That could be determined either informally or in a plenary debate, but to refer the text back to the Drafting Committee, unless its membership was expanded, would merely result in a repetition of the present division of opinion.

93. The CHAIRPERSON said that since it had proved impossible to reconcile the two entrenched positions, even after a lengthy debate, he would invite members to vote on draft guideline 2.6.5.

Having been rejected by 14 votes to 5, with 10 abstentions, draft guideline 2.6.5 was referred back to the Drafting Committee.

Draft guidelines 2.6.6 to 2.6.10 were adopted.

Draft guideline 2.6.11

The adoption of draft guideline 2.6.11 was deferred pending the revision of draft guideline 2.6.5 by the Drafting Committee.


Draft guidelines 2.6.12 [2.6.13], 2.6.13 [2.6.14] and 2.6.14 [2.6.15] were referred back to the Drafting Committee (A/CN.4/L.723 and Corr.1), as a whole, as amended, were adopted, with the exception of draft guidelines 2.6.5 and 2.6.11, which were referred back to the Drafting Committee.

Draft guideline 2.7.4, as orally amended, was adopted.

Draft guideline 2.7.5

Draft guideline 2.7.5 was adopted.

Draft guideline 2.7.6

96. Mr. CANDIOTI said that the title of the draft guideline bore little relation to its content. That problem should be rectified during the second reading. In the body of the text, in the French text, either the word “en” should be inserted before “a reçu notification” or the words “du retrait” should be added at the end of the sentence for the sake of greater clarity. He also drew attention to some discrepancies between the English and Spanish versions of the text.

Draft guideline 2.7.6, as orally amended, was adopted.

Draft guidelines 2.7.7 and 2.7.8 were adopted.

Draft guideline 2.7.9

97. Mr. PETRIČ, supported by Mr. PELLET (Special Rapporteur) and Mr. CANDIOTI, said that given the substance of the draft guideline, it would be advisable to omit the words “prohibition against the” from the title.

Draft guideline 2.7.9, as orally amended and with a minor drafting change to the French version, was adopted.

The draft guidelines contained in the report of the Drafting Committee (A/CN.4/L.723 and Corr.1), as a whole, as amended, were adopted, with the exception of draft guidelines 2.6.5 and 2.6.11, which were referred back to the Drafting Committee.


[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

98. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) introduced the titles and texts of the preamble and draft articles 1 to 19 on the law of transboundary aquifers adopted, on second reading, by the Drafting Committee, as contained in his report published as document A/CN.4/L.724, which read:

SHARED NATURAL RESOURCES

The law of transboundary aquifers

Conscious of the importance for humankind of life-supporting groundwater resources in all regions of the world,

* Continued from the 2965th meeting.
Bearing in mind Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Recalling General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources,


Taking into account increasing demands for fresh water and the need to protect groundwater resources,

Mindful of the particular problems posed by vulnerability of aquifers to pollution,

Convinced of the need to ensure the development, utilization, conservation, management and protection of groundwater resources in the context of the promotion of the optimal and sustainable development of water resources for present and future generations,

Affirming the importance of international cooperation and good neighbourliness in this field,

Emphasizing the need to take into account the special situation of developing countries,

Recognizing the necessity to promote international cooperation,

...
2. Aquifer States shall, in undertaking activities other than utilization of a transboundary aquifer or aquifer system that have, or are likely to have, an impact upon that transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States or other States in whose territory a discharge zone is located.

3. Where significant harm nevertheless is caused to another aquifer State or a State in whose territory a discharge zone is located, the aquifer State whose activities cause such harm shall take, in consultation with the affected State, all appropriate response measures to eliminate or mitigate such harm, having due regard for the provisions of draft articles 4 and 5.

**Article 7. General obligation to cooperate**

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.

**Article 8. Regular exchange of data and information**

1. Pursuant to draft article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of their transboundary aquifers or aquifer systems, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifers or aquifer systems, as well as related forecasts.

2. Where knowledge about the nature and extent of a transboundary aquifer or aquifer system is inadequate, aquifer States concerned shall employ their best efforts to collect and generate more complete data and information relating to such aquifer or aquifer system, taking into account current practices and standards. They shall take such action individually or jointly and, where appropriate, together with or through international organizations.

3. If an aquifer State is requested by another aquifer State to provide data and information relating to an aquifer or aquifer system that are not readily available, it shall employ its best efforts to comply with the request. The requested State may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

4. Aquifer States shall, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

**Article 9 [19]. Bilateral and regional agreements and arrangements**

For the purpose of managing a particular transboundary aquifer or aquifer system, aquifer States are encouraged to enter into bilateral or regional agreements or arrangements among themselves. Such agreements or arrangements may be entered into with respect to an entire aquifer or aquifer system or any part thereof or a particular project, programme or utilization except insofar as an agreement or arrangement adversely affects, to a significant extent, the utilization, by one or more other aquifer States of the water in that aquifer or aquifer system, without their express consent.

**PART III
PROTECTION, PRESERVATION AND MANAGEMENT**

**Article 10 [9]. Protection and preservation of ecosystems**

Aquifer States shall take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems, including measures to ensure that the quality and quantity of water retained in an aquifer or aquifer system, as well as that released through its discharge zones, are sufficient to protect and preserve such ecosystems.

**Article 11 [10]. Recharge and discharge zones**

1. Aquifer States shall identify the recharge and discharge zones of transboundary aquifers or aquifer systems that exist within their territory. They shall take appropriate measures to prevent and minimize detrimental impacts on the recharge and discharge processes.

2. All States in whose territory a recharge or discharge zone is located, in whole or in part, and which are not aquifer States with regard to that aquifer or aquifer system, shall cooperate with the aquifer States to protect the aquifer or aquifer system and related ecosystems.

**Article 12 [11]. Protection and preservation of ecosystems**

Aquifer States shall, individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifers or aquifer systems, including through the recharge process, that may cause significant harm to other aquifer States. Aquifer States shall take a precautionary approach in view of uncertainty about the nature and extent of a transboundary aquifer or aquifer system and of its vulnerability to pollution.

**Article 13 [12]. Monitoring**

1. Aquifer States shall monitor their transboundary aquifers or aquifer systems. They shall, wherever possible, carry out these monitoring activities jointly with other aquifer States concerned and, where appropriate, in collaboration with competent international organizations. Where monitoring activities cannot be carried out jointly, the aquifer States shall exchange the monitored data among themselves.

2. Aquifer States shall use agreed or harmonized standards and methodology for monitoring their transboundary aquifers or aquifer systems. They should identify key parameters that they will monitor based on an agreed conceptual model of the aquifers or aquifer systems. These parameters should include parameters on the condition of the aquifer or aquifer system as listed in draft article 8, paragraph 1, and also on the utilization of the aquifers or aquifer systems.

**Article 14 [13]. Management**

Aquifer States shall establish and implement plans for the proper management of their transboundary aquifers or aquifer systems. They shall, at the request of any of them, enter into consultations concerning the management of a transboundary aquifer or aquifer system. A joint management mechanism shall be established, wherever appropriate.

**Article 15 [14]. Planned activities**

1. When a State has reasonable grounds for believing that a particular planned activity in its territory may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall, as far as practicable, assess the possible effects of such activity.

2. Before a State implements or permits the implementation of planned activities which may affect a transboundary aquifer or aquifer system and thereby may have a significant adverse effect upon another State, it shall provide that State with timely notification thereof. Such notification shall be accompanied by available technical data and information, including any environmental impact assessment, in order to enable the notified State to evaluate the possible effects of the planned activities.

3. If the notifying and the notified States disagree on the possible effect of the planned activities, they shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation. They may utilize an independent fact-finding body to make an impartial assessment of the effect of the planned activities.

**PART IV
MISCELLANEOUS PROVISIONS**

**Article 16 [15]. Technical cooperation with developing States**

States shall, directly or through competent international organizations, promote scientific, educational, technical, legal and other
cooperation with developing States for the protection and management of transboundary aquifers or aquifer systems, including, *inter alia*:

(a) strengthening their capacity-building in scientific, technical and legal fields;

(b) facilitating their participation in relevant international programmes;

(c) supplying them with necessary equipment and facilities;

(d) enhancing their capacity to manufacture such equipment;

(e) providing advice on and developing facilities for research, monitoring, educational and other programmes;

(f) providing advice on and developing facilities for minimizing the detrimental effects of major activities affecting their transboundary aquifer or aquifer system;

(g) providing advice in the preparation of environmental impact assessments;

(h) supporting the exchange of technical knowledge and experience among developing States with a view to strengthening cooperation among them in managing the transboundary aquifer or aquifer system.

**Article 17 [16]. Emergency situations**

1. For the purpose of the present draft article, "emergency" means a situation, resulting suddenly from natural causes or from human conduct, that affects a transboundary aquifer or aquifer system and poses an imminent threat of causing serious harm to aquifer States or other States.

2. The State within whose territory the emergency originates shall:

(a) without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of the emergency;

(b) in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate any harmful effect of the emergency.

3. Where an emergency poses a threat to vital human needs, aquifer States, notwithstanding draft articles 4 and 6, may take measures that are strictly necessary to meet such needs.

4. States shall provide scientific, technical, logistical and other cooperation to other States experiencing an emergency. Cooperation may include coordination of international emergency actions and communications, making available emergency response personnel, emergency response equipment and supplies, scientific and technical expertise and humanitarian assistance.

**Article 18 [17]. Protection in time of armed conflict**

Transboundary aquifers or aquifer systems and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.

**Article 19 [18]. Data and information vital to national defence or security**

Nothing in the present draft articles obliges a State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with other States with a view to providing as much information as possible under the circumstances.

99. The plenary, at its 2958th and 2959th meetings, held on 7 and 8 May 2008, respectively, had referred to the Drafting Committee draft articles 1 to 13 and 14 to 20, contained in the fifth report of the Special Rapporteur (A/CN.4/591). At its 2965th meeting, on 21 May 2008, the plenary had referred to the Drafting Committee the draft preamble prepared by the Special Rapporteur in his note (A/CN.4/L.722). The Drafting Committee had held 10 meetings between 8 and 29 May 2008 and had completed, on second reading, a set of 19 draft articles on the law of transboundary aquifers, together with a preamble, bearing in mind the comments made in plenary, as well as comments and observations of Governments as contained in document A/CN.4/595 and Add.1.

100. He wished to pay tribute to the Special Rapporteur, whose mastery of the subject, perseverance and positive attitude had greatly facilitated the Drafting Committee’s task. He also wished to acknowledge the expertise provided by experts on groundwaters from UNESCO and the support given by the Government of Japan for the Special Rapporteur’s endeavours. Thanks were also due to the Secretariat for its invaluable support.

101. The structure of the draft articles followed the same pattern as that adopted on first reading. While the draft articles adopted on first reading had been divided into five parts, the present draft articles were in four parts. “Activities affecting other States”, previously Part IV, containing an article on planned activities, had been deleted, with the Drafting Committee electing to place the sole article contained therein as the last article in Part III on “Protection, preservation and management”.

102. It would be recalled that the draft articles contained obligations that applied to aquifer States *vis-à-vis* other aquifer States; in some instances, there were obligations of aquifer States in relation to other States, and in some other situations certain obligations related to all States. The extent to which the obligations of aquifer States to other aquifer States should be extended to other States, particularly in relation to the obligation not to cause significant harm, had been a subject of further discussion in the Drafting Committee and would be addressed when dealing with the relevant draft article.

103. In addition to the draft articles, a preamble had been formulated to provide a contextual framework for the draft articles. It followed precedents previously elaborated by the Commission, in particular in the draft articles on prevention of transboundary harm from hazardous activities and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The first preambular paragraph was overarching in recognizing the importance of ground-water as a life-supporting resource for humankind. The third preambular paragraph recalled General Assembly resolution 1803 (XVII) of 14 December 1962 on permanent sovereignty over natural resources, while the fourth preambular paragraph recalled the Rio Declaration and

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114 *Yearbook* ... 2006, vol. II (Part Two), pp. 91 et seq., paras. 75–76.
115 *Yearbook* ... 2001, vol. II (Part Two) and corrigendum, pp. 146 et seq., paras. 97–98.
116 *Yearbook* ... 2006, vol. II (Part Two), pp. 58 et seq., para. 66.
Agenda 21,118 whose chapter 18 espoused the application of integrated approaches to the development, management and use of water resources.

104. The fifth, sixth and seventh preambular paragraphs projected the main purposes of the draft articles, namely utilization and protection of groundwater resources, bearing in mind the increasing demands for fresh water, thus the need to protect groundwater resources, the particular problems posed by the vulnerability of the aquifers, and also the needs of present and future generations. The eighth, ninth and tenth preambular paragraphs accorded particular emphasis to international cooperation and, bearing in mind the principle of common but differentiated responsibilities, took into account the special situation of developing countries.

105. Part I, entitled “Introduction”, consisted of two draft articles. Draft article 1, on the scope, remained substantially the same as adopted on first reading. It addressed three categories of activities, namely (a) utilization; (b) other activities which might have or were likely to have an impact on an aquifer or aquifer system, such as farming or construction, carried out at or below the surface; and (c) measures for the protection, preservation and management of those activities, which were addressed specifically in Part III. Subparagraphs (a) and (c) covered similar ground to article 1 of the 1997 Watercourses Convention. The activities contemplated in subparagraph (b) reflected an additional element specific to the present draft articles. There had been some discussion in the Drafting Committee aimed at refining the subparagraph further, mainly to clarify and thereby limit the seemingly broad scope of the phrase “have or are likely to have an impact”. Suggestions had been made to add a threshold such as “significant” or to simplify the whole text to read: “The present draft articles apply to transboundary aquifers or aquifer systems”. It had been pointed out, however, that a threshold might not be appropriate for an article dealing with the scope. It had also been decided to leave the special question of whether it was necessary also to include within the scope of subparagraph (d) a situation where an aquifer or aquifer system was within the “jurisdiction” or “control” of a State. The view had been that such an extension might not necessarily be consistent with the general thrust of draft article 3 concerning sovereignty. It had also been decided to leave the special question of the administration of territories to the commentary.

106. The title of draft article 1 had been retained as adopted on first reading.

107. Draft article 2, on the use of terms, defined eight terms employed in the draft articles. As on first reading, technical terms had been used to make the text friendly to its intended users, namely scientific personnel and water management administrators. Seven of those terms, “aquifer”, “aquifer system”, “transboundary aquifer”, “aquifer State”, “recharging aquifer”, “recharge zone” and “discharge zone”, had already been defined in the text adopted on first reading and largely retained their original formulation.

108. Technically, the term “aquifer” in subparagraph (a) was more precise than “groundwaters”. The use of the qualifier “water-bearing” was partly intended to differentiate an aquifer from other geological formations containing, for example, oil and gas. Aquifers were found on the subsurface, and previously “underground” had been used to underscore that self-evident fact. On the recommendation of the Special Rapporteur, the word “underground” had been deleted. It had also been suggested that a specific reference to “freshwater” should be included in the definition of aquifer. However, such an explicit reference had not been retained after discussion. It had been pointed out that the freshness of the water was implied in the definition, and experts would use the Guidelines for Drinking-water Quality produced by the World Health Organization (WHO),119 but at the same time, inclusion of a reference to water freshness would obscure the range of aquifers, such as those containing brackish water, that ought to be included within the scope of the draft articles.

109. The draft articles related to an aquifer or an aquifer system. The latter, defined in subparagraph (b), meant a series of two or more aquifers that were hydraulically connected. Aquifers within a system that was hydraulically connected need not have the same characteristics; there might be aquifers of different geological formations within an aquifer system. The commentary would seek to identify the various aquifers that were covered by the draft articles. It had been acknowledged that the draft articles were not intended to extend to saline aquifers on the continental shelf.

110. The terms “transboundary aquifer” and “aquifer State” were defined in subparagraphs (c) and (d) respectively. The draft articles were intended to apply only to a “transboundary” aquifer or a “transboundary” aquifer system. Thus, a part of an aquifer or an aquifer system should be situated in the territory of another State, in which case each of those States, for the purposes of the draft articles, qualified as an “aquifer State”. The Drafting Committee had held discussions as to whether it was necessary also to include within the scope of subparagraph (d) a situation where an aquifer or an aquifer system was within the “jurisdiction” or “control” of a State. The view had been that such an extension might not necessarily be consistent with the general thrust of draft article 3 concerning sovereignty. It had also been decided to leave the special question of the administration of territories to the commentary.

111. Each aquifer or aquifer system could have a “recharge zone” such as a catchment area which was hydraulically connected to an aquifer or aquifer system, and a “discharge zone” through which water from an aquifer or aquifer system flowed to its outlet, including a watercourse, a lake, an oasis, a wetland or an ocean. Those terms were defined in subparagraphs (g) and (h). The aquifer or aquifer system and its recharge and discharge zones formed a dynamic continuum in the hydrological cycle. While the definition of “aquifer” or “aquifer system” might seem confining, the practical imperatives of ensuring proper protection, preservation and management had...

influenced the approach taken. Other approaches could have been to include the recharge or discharge zones within an aquifer system. The Drafting Committee’s recognition of the need to protect the recharge and discharge zones pointed to the importance it attached to the protection of the overall environment on which the life of an aquifer or aquifer system depended. Those zones were the subject of particular measures and cooperative arrangements under the provisions of the draft articles.

112. An aquifer could be recharging or non-recharging. Both types of aquifer were covered by the draft articles. Specific additional considerations were provided for that were intended to secure the effective functioning of an aquifer or aquifer system as a receptacle of water. Accordingly, subparagraph (f) defined a recharging aquifer. That was an aquifer which received a non-negligible amount of the contemporary water recharge.

113. Thus far he had described terms that had been defined in the text adopted on first reading. The Drafting Committee had also considered it useful, on the recommendation of the Special Rapporteur, to define “utilization” in relation to a transboundary aquifer or aquifer system. The term was defined in a non-exhaustive manner in subparagraph (e) to include extraction of water for domestic and industrial purposes, extraction of heat for thermal energy, extraction of minerals that might be found in an aquifer, as well as storage, as in the case of a recharging aquifer, or disposal, for example of waste. Needless to say, the draft articles focused on the utilization of water contained in an aquifer; storage or disposal were a peripheral possibility and would most likely occur when the water contained in the aquifer had been exhausted. It was anticipated that any rules applicable to the regime of waste and the disposal of hazardous waste would also be applicable in the case of storage or disposal in an aquifer.

114. The title of draft article 2 had been retained as adopted on first reading.

115. Part II, entitled “General Principles”, contained draft articles 3 to 9 [19]. Draft article 3, on sovereignty of aquifer States, reiterated the basic principle that States retained sovereignty over an aquifer, or portions of an aquifer, located within their territory, subject to the requirement that the exercise of such sovereignty should be undertaken in accordance with international law and the draft articles. The provision adopted on first reading had attracted very little disagreement in the comments of Governments and the plenary debate.

116. It had been retained largely as formulated on first reading, except for the inclusion of the qualification “in accordance with international law”, which had been added to echo the existence of other applicable rules of international law. Although some members had considered such an addition superfluous, it had been added in order to indicate that, while the draft articles reflected present international law, there were other rules of general international law that remained applicable. It would be made clear in the commentary that the draft articles had been elaborated against the background of the continued application of customary international law. As noted earlier, the preamble to the draft articles included a reference to General Assembly resolution 1803 (XVII). It would be explained in the commentary that the term “sovereignty” was a reference to sovereignty over an aquifer or aquifer system located within the territory of an aquifer State, including the territorial sea, and was to be distinguished from the exercise of sovereign rights, such as those that could be exercised over the continental shelf or in the exclusive economic zone adjacent to the territorial sea. As already noted, aquifers in the continental shelf were excluded from the scope of the draft articles.

117. The title of draft article 3 had been retained as adopted on first reading.

118. Draft articles 4 and 5 were closely related. On first reading, it had been decided to keep them separate, one laying down the general principle and the other setting out the factors relevant to implementation. Draft article 4 treated the interrelated concepts of “equitable” and “reasonable” utilization together, establishing as an overarching principle in the chapeau that “[a]quifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization”. That principle was further elaborated in subparagraphs (a) to (d). The question of whether the considerations in those subparagraphs were intended to be exhaustive had been raised. While the Drafting Committee had not been in a position to give a definitive answer, it was important to reiterate that draft article 4 laid down the principle of equitable and reasonable utilization in relation to an aquifer or aquifer system. The same minimum standard of equitable and reasonable accrual of benefits aimed at maximizing long-term benefits, taking into account subparagraph (c), applied to both a recharging and a non-recharging aquifer. Subparagraph (d) concerned a recharging aquifer. The principle of equitable and reasonable utilization ought to be implemented bearing in mind the relevant factors set out in draft article 5.

119. There had been some suggestions in the Drafting Committee to break the chapeau of draft article 4 into two separate sentences. Ultimately, in order to maintain the balance, no change had been made. In concrete terms, the application of the principle of equitable and reasonable utilization would entail a number of things for aquifer States. In particular, as provided for in subparagraph (a), such States “shall utilize transboundary aquifers or aquifer systems in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned”.

120. There had also been suggestions to replace “equitable and reasonable utilization” with “equitable and sustainable utilization”. Similarly, it had been suggested that the phrase “present and future needs” should be replaced by the phrase “the needs of present and future generations”. It had been recognized, however, that an aquifer, whether recharging or non-recharging, was more or less non-renewable, unless it was an artificially recharging aquifer. The principle of sustainable utilization thus assumed a connotation different from its connotation in respect of a renewable resource. Effectively, the aim would be to maximize the long-term benefits derived from the use of the water contained in the aquifer or aquifer system. Such maximization could be realized through the
aquifer States concerned establishing, either individually or jointly, concrete utilization plans, taking into account present and future needs, as well as alternative water resources available to them. Subparagraphs (b) and (c) reflected those requirements. In order to acknowledge concerns for sustainability and intergenerational equity, the preamble alluded to those matters.

121. There had been proposals to delete the phrase “individually or jointly” on the grounds that it gave the misleading impression that an overall plan could be unilaterally established for the entire transboundary aquifer or aquifer system by one aquifer State without the involvement of other aquifer States. The phrase “individually or jointly” had been included in the text adopted on first reading to signify first and foremost the importance of having a prior plan. However, it was not necessary that such plan should be a joint endeavour, at least initially, by the aquifer States concerned. To overcome the concerns, while maintaining the actual intention that a plan should be prepared for the utilization of the aquifer taking into account all factors, it had been decided to replace the word “overall” with “comprehensive”.

122. One of the functions of an aquifer was to be a receptacle for water. In the case of a recharging aquifer, whether one receiving a natural or an artificial recharge, it was crucial that it should maintain certain physical qualities and characteristics. Accordingly, subparagraph (d) retained the formulation that the utilization levels should not be such as to prevent continuance of the effective functioning of such aquifer or aquifer system. Moreover, the possible utilization of the aquifer or aquifer system for storage and disposal would have a bearing on subparagraphs (b) and (d). The extent to which those subparagraphs would be affected by use for storage and disposal would be addressed in the commentary.

123. The title of draft article 4 had been retained as adopted on first reading.

124. Draft article 5, on factors relevant to equitable and reasonable utilization, did not contain an exhaustive list of those factors. On first reading, it had been recognized that it was not easy to reorganize the factors so as to separate those that applied to equitable utilization from those that applied to reasonable utilization; indeed in some instances the factors applied to both. Subparagraphs 1 (a) to (i) had nevertheless been rearranged to achieve an internal coherence and logic without establishing any order of priority. However, paragraph 2 noted that “in weighing different kinds of utilization ... special regard shall be given to vital human needs”.

125. The draft article remained largely as adopted on first reading. However, there had been two minor changes. The first change was to qualify further the “effects” of the utilization in subparagraph 1 (f) with the words “actual and potential”. The second was to reformulate the phrase “different utilizations” in paragraph 2 to read “different kinds of utilization”, to make it more felicitous.

126. In further discussions of the factors, it had been questioned whether subparagraph 1 (i) fell perfectly into the category of factors relevant to equitable and reasonable utilization. Draft article 5 included both “factors” and “circumstances”, and subparagraph 1 (i) was considered important particularly for an aquifer or an aquifer system in an arid zone. The word “role” had been favoured instead of the word “place”, as better signifying the variety of purposive functions that an aquifer or aquifer system had in a related ecosystem and that ought to be taken into account when utilizing the aquifer. The term “ecosystem” embraced both the ecosystem outside the aquifer, for instance one supporting the functioning of an oasis, and that inside the aquifer.

127. The title of the draft article had been retained as adopted on first reading.

128. Draft article 6, entitled “Obligation not to cause significant harm”, addressed questions of significant harm arising from utilization, significant harm from activities other than utilization as contemplated in draft article 1, and questions of mitigation of significant harm occurring despite appropriate measures to prevent such harm. Those matters were respectively addressed in paragraphs 1, 2 and 3. The Drafting Committee had retained the threshold of “significant” harm. In its previous work, the Commission had recognized that the threshold of “significant” was not without ambiguity—so much so that a factual determination had to be made in each specific case. It had understood “significant” as referring to a level that was more than “detectable” but need not be “serious” or “substantial”.

129. A number of other questions had arisen in the discussion of the draft article. The first was whether the “no harm” principle should apply only to relations among aquifer States. Considering that the sic utere tuo ut alienum non laedas principle was a principle of international law, also reflected in the Declaration of the United Nations Conference on the Human Environment (“Stockholm Declaration”) and the Rio Declaration, which were applicable to all States, there was a view that the draft article ought to apply to significant harm caused to all States. Without denying the application of the principle to all States, the other view had pointed to the fact that the focus of the present project was relations between aquifer States. Restricting the focus to harm caused to other aquifer States was not intended to exclude the application of general international law to situations in which States other than aquifer States would be affected. In the final analysis, a compromise had been found in determining that, other than aquifer States, the State in whose territory a discharge zone was located could also be most likely to be affected by the circumstances envisaged in the draft article. Accordingly, the draft article had been extended to other States in whose territory a discharge zone was located.

130. The second question concerned proposals to improve the text to take into account contemporary considerations relevant to the protection of the environment, including response measures and restoration. Thus, a suggestion had been made to amend paragraph 3

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to include not only response measures but also measures to restore the environmental status of the aquifer or its water quality. As the paragraph now stood, the “appropriate measures” to be taken included “response measures”. The notion of restoration was implied by the phrase “mitigate such harm, having due regard for the provisions of draft articles 4 and 5” and would be clarified further in the commentary.

131. Thirdly, there had been a suggestion that there should be a specific provision on compensation. It had been recalled that the earlier draft articles proposed by the Special Rapporteur had contained a provision corresponding to article 7, paragraph 2, of the 1997 Watercourses Convention. On first reading, the text had been deleted on the understanding that this was an area that would be governed by other rules of international law such as those relating to State responsibility or to liability for acts not prohibited by international law, and thus did not require specialized treatment in the draft articles. The commentary would reflect that understanding.

132. In view of the extended scope, the title of the draft article now read “Obligation not to cause significant harm”.

133. Owing to time constraints, he would complete his introduction of the remaining draft articles at the Commission’s next plenary meeting.

The meeting rose at 1.05 p.m.

2971st MEETING

Wednesday, 4 June 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candiotti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kamto, Mr. Kolodkin, Mr. McRae, Mr. Niehaus, Mr. Nolte, Mr. Ojo, Mr. Perera, Mr. Petrić, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vascianenie, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.


1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to resume his introduction to the draft articles on the law of transboundary aquifers contained in document A/CN.4/L.724, as adopted on second reading by the Drafting Committee.

2. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that draft article 7 (General obligation to cooperate) was an important provision for shared natural resources arrangements and also served as a backdrop for the application of other provisions on specific forms of cooperation, such as the draft articles on regular exchange of data and information, as well as on protection, preservation and management. Some Governments had proposed that the reference to good faith in paragraph 1 be deleted, but the Drafting Committee had decided not to amend the draft article because the principle of good faith was crucial to the achievement of equitable and reasonable utilization and the appropriate protection of a transboundary aquifer or aquifer system. In paragraph 2, it had also decided to retain the more permissive term “should”, rather than the term “shall” proposed by Governments. Paragraph 2 did not exclude the possibility of using existing mechanisms. The commentary would indicate the type of mechanisms to be envisaged, as well as the types of cooperation, such as management, monitoring and assessment, exchange of information on databases and ensuring their compatibility, coordinated communication, early warning and alarm systems and research and development. The title of the draft article had been retained as adopted on first reading.

3. Draft article 8 (Regular exchange of data and information) dealt with the obligation of aquifer States to exchange information on a regular basis. After having considered a number of proposals for amendments made in the comments by Governments, the Drafting Committee had decided to retain the wording adopted on first reading, with no change in substance. The commentary would make it clear, as suggested in the comments by Governments, that a collective effort should be made to integrate existing databases of information and make them compatible, whenever possible. It would also indicate that States must be encouraged to establish inventories of aquifers. The title of the draft article adopted on first reading had not been changed.

4. Draft article 9 (Bilateral and regional agreements and arrangements), which had originally been draft article 19, had not been amended as to substance. In view of its programmatic nature, it had been decided to place it in the part relating to general principles. Pursuant to that draft article, aquifer States were encouraged to enter into bilateral or regional agreements or arrangements in respect of activities relating to their transboundary aquifers. However, such arrangements must not adversely affect, to a significant extent, the utilization of water by other aquifer States without their express consent. The commentary would explain that the words “without their express consent” were not intended to signify a veto. The title of the draft article adopted on first reading had not been changed.

5. Part III, entitled “Protection, preservation and management”, consisted of draft articles 10 [9] to 15 [14], which constituted a sequence of obligations. Since their wording had been painstakingly negotiated by the Drafting Committee on first reading, it had considered that any amendments were to be primarily in the nature of refinements. As noted at the preceding meeting, the draft article

132 Yearbook ... 2006, vol. II (Part Two), pp. 91 et seq., paras. 75–76.