

SHARED NATURAL RESOURCES

Statement of the Chairman of the Drafting Committee Mr. Roman A. Kolodkin

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Delivered by Mr. William Mansfield

Mr. Chairman,

I have the pleasure of introducing the fifth report of the Drafting Committee on behalf of its Chairman, Mr. Kolodkin. The fifth report, contained in document A/CN.4/L.688, relates to the topic “Shared Natural Resources” and I am pleased to report that the Drafting Committee completed, on first reading, a set of 19 draft articles on the law of transboundary aquifers.

The plenary, at its 2879th meeting, on 19th May 2006, following the completion of its consideration of the Report of the Working Group on Shared Natural Resources, referred to the Drafting Committee the draft articles contained in the annex to the report of the Working Group (A/CN.4/L.683). The Drafting Committee considered the draft articles during 5 meetings, on 31 May, and on 1, 2, 3 and 7 June 2006.

Before turning to the results of the Drafting Committee’s work, I wish to pay tribute to the Special Rapporteur, Mr. Chusei Yamada, whose mastery of the subject, perseverance and positive disposition greatly facilitated the task of the Committee. I would also wish to express my appreciation to the members of the Committee for their active participation in the deliberations of the Committee and their valuable contributions. It is equally important

that I should acknowledge the outstanding work accomplished by the Working Group of Shared Natural Resources, chaired by Mr. Enrique Candioti. Its invaluable work greatly facilitated and eased the task of the Committee. Indeed, several draft articles were adopted by the Committee without change as a result of this important contribution.

As you are aware, the efforts of the Commission in this project have had the benefit of advice and briefings from experts on groundwaters from UNESCO and the International Association of Hydrogeologists (IAH) during the various meetings of the Working Group. That contribution is also worthy of acknowledgement.

Mr. Chairman,

The draft articles on the law of transboundary aquifers are divided into five parts. They are structured in such a way that some obligations apply to aquifers States *vis a vis* other aquifer States; some obligations relate to States other than aquifer States, and in some other cases there are obligations of aquifer States in relation to third States. Where applicable, the number of the draft article appearing in square brackets corresponds to the number of the draft article proposed by the Special Rapporteur in his Third report (A/CN.4/551 and Corr.1).

Part I entitled **Introduction** contains draft articles 1 and 2.

Article 1. Scope

Draft article 1 concerning Scope remains the same as was drafted by the Working Group, except for the title which has been shortened instead of “Scope of the present draft articles”, as previously.

Draft article 1 addresses three categories of activities, namely (a) utilization; (b) other activities, such as farming or construction, carried out above or below the surface which may have or likely to have an impact on an aquifer or aquifer system; and (c) the measures for the protection, preservation and management of these activities, addressed especially in Parts III and IV of the present draft articles. It should be noted that paragraphs (a) and (c) cover similar ground as article 1 of the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses, on which these draft articles are essentially modeled. The activities contemplated in paragraph (b) reflect a new and additional element. It is worth noting that there should be a causal link between these activities and their effects on the aquifer or aquifer system. The term impact in paragraph (b) will be clarified in the commentary.

Article 2. Use of terms

Draft article 2 defines seven terms that have been employed in the present draft articles. The draft article deliberately uses technical terms since they are intended for use by scientific personnel and water management administrators. Except for stylistic changes in paragraph (g), draft article 2 remains the same as drafted by the Working Group.

It should be noted that the term “aquifer” in paragraph (a) is technically more precise than groundwaters, which had been employed in the earlier proposals by the Special Rapporteur. The term already implies

water-bearing. The apparent tautology that is involved in the use of the term “water-bearing” in the definition is partly intended to differentiate aquifers from other underground geological formations that may be implicated by the treatment envisaged in the consideration of the current topic with respect to oil and gas. The reference to a geological formation, which is “underground” underscores the fact that aquifers are found on the subsurface.

The draft articles cover both an aquifer and an aquifer system. The latter, defined in paragraph (b), means a series of two or more aquifers which are hydraulically connected. Aquifers within a system that is hydraulically connected need not have the same characteristics; there may be aquifers of different geological formations within an aquifer system. Accordingly, the word “series” has been retained instead of “ensemble”, as was suggested during discussions of the Committee. The Commentary will explain the meaning of “hydraulically connected”.

The draft articles also only apply to a “transboundary” aquifer or a “transboundary” aquifer system. By this it is meant that a part of an aquifer or an aquifer system is situated in the territory of a different State, which for the purposes of the present draft articles is an “aquifer State”. The terms “transboundary aquifer” and “aquifer State” are defined in paragraphs (c) and (d) respectively.

Aquifers are either recharging or non-recharging. Both types are covered by the present draft principles. In view of a specific reference to a recharging aquifer in draft article 4, the present paragraph (e) defines such an aquifer. This is an aquifer which receives a non-negligible amount of the contemporary water recharge. The terms “non-negligible” and

“contemporary” water have particular technical meanings and these will be clarified in the commentary.

Each aquifer or aquifer system has a “recharge zone”, for example a catchment area; and a “discharge zone”, such as a watercourse, a lake, an oasis, a wetland or an ocean. These terms are defined in paragraphs (f) and (g) and are zones that are subject of particular measures and cooperative arrangements under the provisions of the present draft articles. As mentioned earlier, there was a slight stylistic change to paragraph (g). Each example is now preceded by an appropriate indefinite article and the disjunctive word “or” has been used instead of “and”.

Part II entitled **General Principles** contains draft articles 3 to 8.

Article 3. Sovereignty of aquifer States

The Drafting Committee made a few changes to Draft article 3. In the debate in plenary comments were made regarding the need to take into account the principles of territorial sovereignty and permanent sovereignty over natural resources, with particular reference to General Assembly resolution 1803 (XVII) of 14 December 1962. This draft article reflects the proposition that an aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. The word “territory” has been used instead of “territorial jurisdiction” in the Working Group text for purposes of clarity and to ensure consistency throughout the text of the draft articles and between them and the Watercourses Convention. It is understood that sovereignty is not absolute.

The two sentences of draft article 3 seek to achieve a certain balance by first reaffirming the principle and then addressing how it should be exercised for the purposes of the present draft articles.

There was some discussion in the Committee as to whether the two sentences should be combined into one sentence, as well as whether the second sentence could be further qualified by some reference to international law. In the final analysis, the two sentences have been retained. However, the phrase “such sovereignty” has been replaced by “its sovereignty”. It is understood that the present draft articles do not cover all limits imposed by international law on the exercise of sovereignty. Accordingly, the commentary will explain that the draft article, of course, will have to be interpreted and applied against the background of general international law.

Article 4. Equitable and reasonable utilization

Draft article 4 was a subject of considerable discussion in the Committee. The issues revolved around the following: whether any overlaps that seemed to exist between draft article 4 and 5 could be avoided; whether the concepts of equitable and reasonable utilization could easily be separable particularly when the factors in draft article 5 did not envisage such separation; and whether considering the difficulty of defining equity the phrase “the benefits to be derived from such utilization shall accrue equitably to the aquifer States concerned” was precise enough to convey the meaning intended;

After reviewing several proposals and suggestions, it was decided to view draft articles 4 and 5 as separate draft articles, one setting out the general principle and the other, factors of implementation. Moreover, it was

decided to treat equitable and reasonable utilization together, although they are two different but interrelated concepts. Thus, the chapeau provides that aquifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization. This is the overarching principle. In concrete terms, this means several things for the aquifer States. Since the draft articles deal with an aquifer or an aquifer system that is shared it is important that the interests of all aquifer States concerned in its utilization are taken into account. Accordingly, paragraph (a) provides that such States shall utilize the aquifer or aquifer system in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned. This replaces the earlier provision which by asserting “that the benefits to be derived from such utilization shall accrue equitably” seemed to focus more on the benefits of utilization than on the utilization itself. Such utilization may be present or future utilization. It is understood that “equitable” is not coterminous with “equal”.

It also bears noting that both a recharging and a non-recharging aquifer are non-renewable resources. The principle of sustainable utilization in the case of aquifers therefore has a connotation that is different from that in respect of a renewable resource. Thus, the aim is to maximize the long-term benefits derived from the use of the water contained in the aquifer or aquifer system, and in order to do so the States concerned either individually or jointly shall establish an overall utilization plan, taking into account present and future needs and alternative water resources available to them. These requirements are reflected in paragraph (b) and (c). They were in the original formulation but have now been treated in separate paragraphs. The

words “either individually or jointly” have been added to signify the importance of having a prior overall plan, while at the same time stressing that such a plan need not necessarily emanate from a joint endeavour by the aquifer States concerned.

Paragraph (d) relates to a recharging aquifer. A recharging aquifer may receive a natural or an artificial recharge. It is therefore important that the aquifer, as a water bearing container, maintains certain physical qualities and characteristics. Accordingly, paragraph (d) provides that the utilization levels should not be such as to prevent continuance of the effective functioning of such aquifer or aquifer system. However, this does not imply that the level of utilization must necessarily be limited to the level of recharge. This aspect, together with other notions such as “long term benefits” and “agreed lifespan of such aquifer and aquifer system”, a phrase contained in earlier drafts but implied by the notion of “establishing an overall utilization plan” will be explained in the Commentary.

Article 5. Factors relevant to equitable and reasonable utilization

I shall now turn to draft article 5. A number of changes were introduced to this draft article. The first change was to delete “and circumstances” in paragraph 1 for purposes of economy: “factors” includes “circumstances”. The factors referred to in this draft article will be considered in the context of particular circumstances surrounding each case.

It is worth noting that the factors referred to in paragraph 1 are not exhaustive. Although they have now been reorganized, the rearrangement is not based on any particular order of priority; rather it has been influenced by the need for internal coherence and logic. However, as noted in paragraph 2,

in weighing the different utilizations, special regard shall be given to vital human needs.

The second change was to redraft subparagraph (b). It now reads: The social, economic and other needs, present and future, of the aquifer States concerned. This was partly intended to align the text with some aspects of draft article 4, namely present and future needs referred to in its paragraph (c).

The third change was in subparagraph (i). The word “role” has been used instead of the word “place” to better signify the variety of purposive functions that an aquifer or aquifer system has in a related ecosystem. This paragraph may be an important consideration for an aquifer or an aquifer system in an arid region.

The fourth change was with respect to paragraph 2. The phrase “with regard to a specific transboundary aquifer or aquifer system” has been added to provide specificity to the paragraph.

Aspects such as “natural characteristics” in subparagraph (c); elements concerning viability and costs in the availability of alternatives in subparagraph (g), and “ecosystem” in subparagraph (i) will be further elaborated in the commentary. It may be noted that the term “ecosystem” embraces both the ecosystem outside the aquifer, as well as inside the aquifer.

Articles 6. Obligation not to cause harm to other aquifer States

Draft article 6 addresses questions of harm arising from utilization, harm from activities other than utilization as contemplated in draft article 1

as well as questions of elimination and mitigation of significant harm occurring despite due diligence efforts to prevent such harm. These are covered in paragraph paragraphs 1, 2 and 3, respectively. The Committee did not make any changes to the text of this draft article. However, the word “significant” was added to the title to align it with the content of the draft article.

Unlike the corresponding article 7 of Watercourses Convention, the present draft article does not address aspects concerning compensation in situations where harm occurs despite efforts to eliminate or mitigate such harm. It is understood that this is an area that will be governed by other rules of international law, such as those relating to liability and does not require specialized treatment.

The Commentary to this draft article will reflect that the draft article is intended to cover activities undertaken in a State’s own territory, as well as point to the relative nature of the threshold of “significant” harm. It will also explain that the reference to “activities” in paragraph 3 refers to both “utilization” and “other activities” in paragraph 1 and 2

Article 7. General obligation to cooperate

Draft article 7 deals with the general obligation of cooperation. The Committee made a slight change to this draft article. To ensure clarity, the word “their” was introduced to qualify “transboundary” in place of the original indefinite article “a”. There was also some discussion as to whether “general” in the title was necessary. This is an important provision for shared natural resources arrangements and it is understood that it serves as a background context for the application of other provisions on specific forms

of cooperation such as the draft articles concerning regular exchange of data and information, as well as protection, preservation and management. Partly for this reason, “general” is the retained in the title.

The Commentary would indicate the types of mechanisms that are envisaged in paragraph 2, as well as the need to take into account the experience of other existing joint mechanisms and commissions in various regions.

Article 8. Regular exchange of data and information

Turning now to draft article 8, I wish to note that there was a change to paragraph 2. To make it clearer, the previous long sentence has now been broken into to three sentences. Regular exchange of data and information that is readily available constitutes the first step in the cooperative arrangements envisaged under the present draft articles. It therefore sets forth general, minimum and residual requirements. The fact that there is little knowledge on the nature and extent of some aquifer or aquifer system requires employing best efforts in the collection and generation of complete data, as well as enhancing cooperation with other aquifer States. The Commentary will explain the scientific terms used in the phrase “geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system...”. The “generation” of data involves the processing of raw data into usable information.

Part III entitled **Protection, Preservation and Management** contains draft articles 9 to 13.

Article 9. Preservation and protection of ecosystems

The Committee made a slight change to draft article 9 in order to clarify the text and to correct grammar: The word “measures” has been inserted between “including” and “to” and the word “are” has been used to qualify the “quality and quantity of water”. This obligation of aquifer States under this draft article is limited to the taking of “all appropriate measures” to protect and preserve relevant ecosystems, including the quality and quantity of water in the aquifer or aquifer systems, as well as that released in the discharge zones. The commentary will explicate the meaning of ecosystems within or dependent upon the aquifers.

Article 10. Protection of recharge and discharge zones

Draft article 10 deals with the protection of recharge and discharge zones. The Committee made a slight change to paragraph 2 to add clarity to the text. The phrase “with regard” has been used instead of the previous “for”.

The draft article contains two types of obligations, which seek to realize the same objective, namely the protection of recharge or discharge zones from activities that may have an adverse impact on the aquifer or aquifer system. Paragraph 1 addresses the duty of aquifer States to take special measures to minimize detrimental impacts on the recharge and discharge zones, terms which have been defined in draft article 2.

Paragraph 2 is addressed to all States in whose territory a recharge or discharge zone is located. These States have a duty to cooperate with the aquifer States to protect the aquifer or aquifer system. This duty is complementary to the general obligation on aquifer States to cooperate in draft article 7.

Article 11. Prevention, reduction and control of pollution

Draft article 11 deals with the obligation of prevention, reduction and control of pollution. The Committee introduced some changes to the last sentence of this draft article to capture both the uncertainty due to lack of knowledge that relates to the nature and extent of the aquifer or aquifer system as well as to their vulnerability, particularly to pollution. The use of “In view of” instead of “In the light of” is intended to add clarity to the intended meaning of the sentence. The precautionary approach applies to an entire range of activities, including the process of recharging an aquifer or an aquifer system. This would be particularly the case where there is an artificial recharge.

Article 12. Monitoring

Draft article 12 concerns monitoring. The Committee did not introduce any changes to this draft article. This provision applies to aquifer States and serves as a precursor to the management provisions in draft article 13. Paragraph 1 sets forth the general obligation to monitor transboundary aquifers or aquifer systems, jointly wherever possible. Paragraph 2 addresses more directly the modalities and parameters for monitoring

The technical aspects of implementation concerning the agreed or harmonized models for monitoring will be further clarified in the commentary.

Article 13. Management

Draft article 13 deals with the establishment and implementation of plans for the management of the aquifer or aquifer system, and consultations that are essential component of international cooperation. Groundwater experts value the need for joint management of an aquifer or an aquifer system. Whenever appropriate such management should be done jointly by the aquifer States. However, the draft article also recognizes that, in practice, it may not always be possible to establish such a mechanism.

The Commentary will note that the establishment and implementation of such plans may be done individually or jointly.

The Committee did not make any changes to this draft article.

Part IV entitled **Activities affecting other States** contains only draft article 14.

Article 14. Planned activities

Draft article 14 deals with planned activities. The Committee made a slight change to this draft article. In last sentence of paragraph 3, the phrase “which may be able” was deleted to remove the negative connotation of partiality that was cast on such an independent fact-finding body.

Unlike the Watercourses Convention which has detailed provisions on planned measures based on State practice, a minimalist approach is taken with respect to aquifers and aquifer systems. It should be noted that the draft article applies to any State that has reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system and thereby cause a significant adverse effect on another State. Assessment, timely notification, consultations, and if necessary, negotiations, or independent fact-finding are envisaged in this draft article with a view to reaching an equitable solution to a particular situation.

Part V entitled **Miscellaneous provisions** contains draft article 15 to 19.

Article 15. Scientific and technical cooperation with developing States

The text of draft article 15 before you is the same worked out in the Working Group. The draft article seeks to accentuate “cooperation” rather than “assistance”. Under the first sentence of the chapeau, States are required to promote scientific, technical and other cooperation for the protection of transboundary aquifers or aquifer systems. The list of activities is neither cumulative nor exhaustive. States are not required to engage in each of the types of cooperation listed, but will be allowed to choose their means of cooperation. The commentary will indicate that the types of cooperation listed represent some of the various options available to States to fulfill the obligation to promote the cooperation in the areas contemplated by this draft article.

Article 16. Emergency situations

Draft article 16 deals with emergency situations. The Committee made several changes to this draft article. First, the paragraphs have been reorganized. The order of the previous paragraphs 2 and 3 has been reversed. Paragraph 2, formerly paragraph 3, has been collapsed further into paragraphs 2(a) (i) and (ii) and (b).

Secondly, in paragraph 1 “the present” draft article has been used for consistency instead of “this” draft article and in the last part of the sentence the broader phrase “harm to aquifer States or other States” has been used rather than “harm to States”. In paragraph 2 (a) the phrase “the State within whose territory the emergency originates” has been used to qualify both (i) and (ii). The definite article “the” has been preferred to qualify “the State” and “the emergency” instead of an indefinite article “a” for a State and “an” or “such an” emergency.

Thirdly, paragraph 3, formerly paragraph 2, has been recast in order to temper the consequences that may have been entailed by a derogation clause, as originally proposed. Instead, it provides that notwithstanding draft articles 4 and 6, aquifer States may take measures that are strictly necessary to meet such vital human needs in the case of an emergency. The reference to draft article 5 has been deleted to remove any contradiction that seemed to exist since paragraph 2 of draft article 5 accords special regard to vital human needs in weighing the different utilizations. In addition in order to apply draft article 4, the factors listed in draft article 5 have to be taken into account. It is therefore unnecessary to specifically mention draft article 5, as was in the original text.

The concept of “emergency” is defined in paragraph 1 as a situation resulting suddenly that poses an imminent threat of causing serious harm to aquifer States or other States. The Commentary will make clear the requirement of suddenness would not exclude situations which could be predicted in a weather forecast.

The modalities for responding to an emergency which affects a transboundary aquifer are set forth in paragraph 2. They require notification without delay of, and cooperation with, potentially affected States, as well as the provision of scientific, technical, logistical and other cooperation.

It is understood that the reference to articles 4 and 5 in paragraph 3 is without prejudice to the application of rules concerning circumstances precluding wrongfulness in international law to the draft articles.

Article 17. Protection in time of armed conflict

I now draw your attention to draft article 17 to which the Committee did not introduce any amendment. This draft article reaffirms that, during times of armed conflict, the principles and rules of international law applicable in international and non-international armed conflicts shall apply to the protection and the utilization of transboundary aquifers and related installations. The 1907 Hague Convention concerning the Laws and Customs of Land Warfare and the 1977 Two Additional Protocols to the 1949 Geneva Conventions make provision concerning the protection of water resources and related works; as well as the utilization of such water resources and works during armed conflict.

Article 18. Protection of data and information concerning national defence or security

Draft article 18 deals with protection of data and information concerning national defence or security. The Committee amended the title of the draft article by deleting “vital to” and replacing it with “concerning”. The deleting of such a reference and the retention of “essential” in the text instead of “vital” were only resolved through a straw vote. It should be noted that article 31 of the Watercourses Convention, on which this provision is modeled uses the phrase “provide data or information vital to its national defence or security”. The present formulation uses the word “essential” to appropriately qualify the confidentiality of such data or information. The two provisions have a similar import.

As was reported by the Chairman of the Working Group in his report to the Plenary the inclusion of this draft article was a contentious issue. The Commentary shall indicate the existence of the disagreement as to whether or not there is need for the draft article, as well as the disagreement as to whether or not there should be a reference to the protection of industrial secrets and intellectual property.

Article 19. Bilateral and regional agreements and arrangements.

Draft article 19 is the last draft article. The Committee introduced a number of changes to this draft article. First, the title now includes a reference to “agreements” and “agreements or” or “agreement or” has been inserted in the text where “arrangement” appears to denote the binding character of some of the interactions envisaged for aquifer States. Secondly, in view of the fact that an aquifer State is defined in draft article 2, the

phrase “in whose territory such an aquifer or aquifer system is located” already contained in the definition of aquifer State has been deleted.

Pursuant to this draft article, aquifer States are encouraged to enter into bilateral or regional agreements or arrangements with respect to the activities concerning their transboundary aquifers. However, such arrangements may not adversely affect, to a significant extent, the utilization of other aquifer States without their express consent. This will be further clarified in the commentary.

It should be noted that this draft article does not deal with the relationship between the present draft articles and existing or future obligations. It also does not address questions concerning the relationship between the present draft articles and an international agreement or general international law. These matters are linked to the decision on the final form for the draft articles. Should the draft articles be adopted in the form of a binding instrument, the Commission will have to address these and other matters, such as dispute settlement provisions.

Mr. Chairman,

This concludes my presentation of the report of the Committee which is submitted to plenary with the recommendation for adoption on first reading of the set of 19 draft articles on the law of transboundary aquifers.

Thank you very much.