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A/CN.4/2831

Summary record of the 2831st meeting

Topic:
<multiple topics>

Extract from the Yearbook of the International Law Commission:-
2005, vol. I

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INTERNATIONAL LAW COMMISSION

SUMMARY RECORDS OF THE FIRST PART OF THE FIFTY-SEVENTH SESSION

Held at Geneva from 2 May to 3 June 2005

2831st MEETING

Monday, 2 May 2005, at 3.10 p.m.

Acting Chairperson: Ms. Hanqin XUE

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kamto, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Mr. Yamada.

Opening of the session

TRIBUTE TO THE MEMORY OF ROBERT ROSENSTOCK

1. The ACTING CHAIRPERSON declared open the fifty-seventh session of the International Law Commission. She began by informing the Commission of the death at the end of 2004 of Robert Rosenstock. Mr. Rosenstock had served the Commission with distinction for more than 10 years, from 1992 to 2003, as a member, chairperson and special rapporteur. He had taken a keen interest and actively participated in every aspect of the Commission's work, particularly the preparation of the draft articles on State responsibility, the draft statute for an international criminal court and, of course, the draft articles on the law of the non-navigational uses of international watercourses, the topic for which he had served as Special Rapporteur. He had never hesitated to express his views on the broad range of issues dealt with by the Commission, although that had not stopped him from being genuinely interested in and respectful of his colleagues' views. In his work he had made a lasting contribution to the codification and progressive development of international law, which had been so important to him. Mr. Rosenstock had been a man of character, substance and high standards. His lively contributions, sense of humour and friendship

would be missed by all members of the Commission. At its first meeting during the fifty-ninth session of the General Assembly, on 4 October 2004, the Sixth Committee of the Assembly had paid a tribute to Mr. Rosenstock, who had been his country's representative to that body for many years. On behalf of the Commission, the Chairperson of the fifty-sixth session had sent a message of condolence to Mr. Rosenstock's family.

At the invitation of the Acting Chairperson, the members of the Commission observed a minute of silence in memory of their friend and colleague, Robert Rosenstock.

2. The ACTING CHAIRPERSON then gave a brief account of the discussions in the Sixth Committee on the report of the International Law Commission, the topical summary of which had been prepared by the Secretariat and issued as document A/CN.4/549 and Add.1. The first week of the Committee's consideration of the report, known as "International Law Week",¹ had given delegates an opportunity to hold high-level consultations on the topics in the Commission's current programme of work, as the Legal Advisers Meeting had been deliberately scheduled for the same week. The Commission had been represented before the Sixth Committee by the Chairperson of the fifty-sixth session and the Special Rapporteurs whose drafts had been adopted on first reading. She drew attention to the adoption by the General Assembly on 2 December 2004 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, which was a significant contribution to the codification and progressive development of international law.

Election of officers

Mr. Momtaz was elected Chairperson by acclamation.

Mr. Momtaz took the Chair.

Mr. Pambou-Tchivounda was elected first Vice-Chairperson by acclamation.

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

¹ According to General Assembly resolution 58/77 of 9 December 2003, para. 11.

Mr. Mansfield was elected Chairperson of the Drafting Committee by acclamation.

Mr. Niehaus was elected Rapporteur by acclamation.

Adoption of the agenda (A/CN.4/548)

The agenda was adopted.

Organization of work of the session

[Agenda item 1]

3. The CHAIRPERSON drew attention to the programme of work and announced that the first Vice-Chairperson and the Chairperson of the Drafting Committee would begin holding consultations with a view to establishing their teams as soon as possible.

Shared natural resources² (A/CN.4/549 and Add.1, sect. B, A/CN.4/551 and Corr.1 and Add.1,³ A/CN.4/555 and Add.1)⁴

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPPORTEUR

4. The CHAIRPERSON invited Mr. Yamada, Special Rapporteur on shared natural resources, to introduce his third report on the topic (A/CN.4/551 and Corr.1 and Add.1).

5. Mr. YAMADA (Special Rapporteur) explained that he had prepared four informal papers⁵ to supplement his third report on shared natural resources: transboundary groundwaters. The first two contained relevant excerpts from the discussions held in 2004 on his second report⁶ by, respectively, the Commission⁷ and the Sixth Committee (see the topical summary of the discussion held in the Sixth Committee of the General Assembly during its fifty-ninth session, prepared by the Secretariat (A/CN.4/549 and Add.1), paras. 40–74), the third was a compilation of instruments related to groundwaters and the fourth contained a selected bibliography.

6. As he felt that the approach he had taken was generally supported by the Commission and the Sixth Committee, Mr. Yamada was proposing a complete set of draft articles that took their comments into account. He had not had time to analyse the comments from Governments and intergovernmental organizations (A/CN.4/555 and Add.1), but he had attended a meeting on aquifers in the Americas organized by UNESCO, which had been attended by experts from throughout the Americas. The General Secretary of the Guaraní Aquifer System Project

² For the history of the Commission's work on the topic, see *Yearbook ... 2004*, vol. II (Part Two), chap. VI.

³ Reproduced in *Yearbook ... 2005*, vol. II (Part One).

⁴ *Ibid.*

⁵ Mimeographed; distribution limited to the members of the Commission.

⁶ *Yearbook ... 2004*, vol. II (Part One), doc. A/CN.4/539 and Add.1.

⁷ See *Yearbook ... 2004*, vol. I, 2797th–2799th meetings.

had given him a CD-ROM that he hoped to be able to present to the Commission soon.

7. The submission of his proposals in the form of draft articles did not prejudice their final form. He would prefer, for the moment, to concentrate on the substance of the topic. He recalled that several delegations had asked for a reference to be included in the preamble to General Assembly resolution 1803 (XVII) of 14 December 1962, on permanent sovereignty over natural resources. Given the sensitive nature of the issue, he had no difficulty with that suggestion, but would prefer to defer the drafting of the preamble to a later stage. The draft articles were contained in the annex to the report, with the article numbers that had been used in the second report⁸ indicated in square brackets.

8. Draft article 1 (Scope) had not changed in substance, but the three categories of activities to be covered had been clarified. The definition of an aquifer in draft article 2 (a) had been reworded to eliminate the vagueness of the terms “rock formation” and “exploitable”. He recalled that an aquifer consisted of two elements: an underground geological formation containing water and the extractable water it contained. The term “geological formation” was preferable to “rock formation” because such a formation could consist not only of rock but also of sand and gravel. Moreover, only the water contained in the saturated zone of the aquifer was extractable, hence his decision to avoid the term “exploitable”, which might cause some confusion.

9. The definition of an aquifer system in article 2 (b) was also new. The phrase in square brackets had been inserted to explain that an aquifer system could consist of a series of aquifers from identical or different geological formations, although the inclusion of such an explanation was open to discussion. The new subparagraphs (e) and (f) were necessary because different rules were applicable depending on whether water resources were renewable (as in recharging aquifers, such as the Guaraní Aquifer System) or non-renewable (as in non-recharging aquifers, such as those in arid zones).

10. Draft article 3 sought to emphasize the importance of bilateral or regional arrangements concerning specific transboundary aquifer systems. Such arrangements had priority over the draft convention, as the latter was to be a framework convention. Draft article 4 was self-explanatory: according to subparagraph 1, the draft convention would take priority over the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (hereafter “1997 Watercourses Convention”) in the event of a conflict between the two instruments.

11. Draft article 5 set out two fundamental, interrelated principles that could be found in most water treaties: the principle of “equitable utilization”, under which a transboundary aquifer State was entitled to benefit in an equitable manner from the utilization of that aquifer, and the principle of “reasonable utilization”, under which an aquifer State was required to manage the aquifer properly. Some aquifer States continued to object to the application

⁸ See footnote 6 above.

of the concept of “shared” natural resources to groundwaters. The Sixth Committee had not, however, changed the title of the topic, as was clear from General Assembly resolution 59/41 of 2 December 2004, paragraph 4 (a). He believed that the utilization and management of a transboundary aquifer were matters for the States in whose territory the aquifer was located; there had never been any question of internationalizing transboundary aquifers. That view was shared by the experts and delegations concerned. He continued to avoid using the word “shared”, but it should be noted that accepting the principle of “equitable utilization” implied recognizing the shared character of a transboundary aquifer and the absence of absolute sovereign rights over it. He had also sought to avoid the concept of “sustainable” utilization, which he felt could only be applied to truly renewable resources such as surface waters. Even in the case of recharging aquifers, “sustainable” utilization was not fully achievable, while it was impossible in the case of non-recharging aquifers, which were a non-renewable resource.

12. Draft article 6 listed factors to be taken into account in assessing the equitable and reasonable utilization of an aquifer. With regard to draft article 7, the idea of retaining a threshold of “significant harm” continued to be controversial. In his view, such a threshold was relative and took account of the fragility of resources. Another source of objections was the reference to compensation, in paragraph 3. That provision was based on an almost identical one in the 1997 Watercourses Convention, which had been proposed by the Commission in the light of State practice and adopted without any objections. Moreover, it did not constitute an obligation but was one possible means of mitigating harm. However, he was prepared to continue to debate that point.

13. Draft articles 8 and 9 dealt with the obligation to cooperate. The former recommended the establishment of joint mechanisms, a practice that was already widespread in respect of transboundary natural resources. He proposed a separate article, draft article 10, to stress the importance of monitoring in the management of transboundary aquifers. Draft articles 11 to 15 were self-explanatory. Draft article 13 was intended to solve any problems that might arise when the recharge and discharge zones of an aquifer were located in the territory of a State that received no benefits from the aquifer concerned. Such zones were vital and must therefore be protected, but a non-aquifer State could not be obliged to restrict its activities.

14. Draft articles 16 and 17 concerned activities affecting other States. He believed it was preferable to avoid setting out elaborate procedures like those in the 1997 Watercourses Convention, and to leave aquifer States to draw up such procedures themselves. Draft articles 18 to 21, on miscellaneous provisions, and 22 to 25, on final clauses, were self-explanatory. Draft article 18 was necessary because hydrogeology was still a young science and was mainly the preserve of the developed countries, whereas many aquifers were located in developing countries.

15. The future direction of his work would be guided by the comments of Commission members; he hoped to

complete the draft articles for a first reading in 2006. If the Commission found it premature to move on to the drafting phase, it would be preferable to set up working groups to study certain articles in depth.

16. The CHAIRPERSON thanked the Special Rapporteur for his report and invited members of the Commission to make preliminary observations.

17. Mr. CANDIOTI asked how the discussion on the report would be organized.

18. Mr. OPERTTI BADAN said that the relationship between the general principles set out in the draft articles and any existing bilateral or regional treaty provisions should be examined in depth.

19. Mr. YAMADA suggested that the report should be considered chapter by chapter.

20. Ms. ESCARAMEIA wished to know if the Special Rapporteur was referring to parts of the report or to something else.

21. The CHAIRPERSON explained that each chapter of the report consisted of several articles of the draft convention, as grouped in the annex to the report.

22. Mr. Sreenivasa RAO proposed that articles 5, 6, 7 and 8 in part II should be considered first, as had been done in the case of the 1997 Watercourses Convention, and that the definitions should be discussed last.

23. Mr. YAMADA said that part II, on general principles, contained some key articles, and so it was possible to begin there. However, part I was just as important, as it concerned, *inter alia*, the scope of the draft convention.

24. Mr. OPERTTI BADAN pointed out that some of the points addressed in part I with regard to other conventions and international agreements, including regional and bilateral instruments, were also related, in his opinion, to the general principles.

25. Ms. XUE agreed with Mr. Rao that it would be best to concentrate on part II first. According to draft article 1, on the scope of the convention, the convention applied to three categories of activities. The activities mentioned in subparagraphs (a), on the utilization of transboundary aquifers and aquifer systems, and (c), on measures of protection, preservation and management of those aquifers and aquifer systems, were covered in part II, which dealt with general principles. However, she could not tell which part of the text covered subparagraph (b), on other activities that had or were likely to have an impact upon those aquifers and aquifer systems. If the Commission decided to consider the question on the basis of those three categories of activities, it would therefore be logical to begin with part II.

26. Mr. ECONOMIDES said that he was not sure whether Commission members would have enough time to share their views on the draft articles if that procedure

was followed. He thought that parts I and II of the draft were equally important and that the general principles could not be discussed until the scope of the convention had been considered. The idea of considering the draft articles on a part-by-part basis therefore seemed to him to be artificial, if not arbitrary.

27. Mr. GALICKI said that while part II appeared to constitute the core of the draft articles, it would be difficult to discuss that part before part I, which also contained some crucial points.

28. Mr. PELLET said that it would be wise to begin with part I before considering part II, and to leave the rest of the draft for later. Flexibility would be needed, and members of the Commission who wished to speak more than once should be allowed to do so.

29. Mr. DAOUDI said that the Commission should start at the beginning, as all the elements of the draft were linked.

30. Mr. YAMADA (Special Rapporteur) said that he did not mind beginning with part I or part II, and would leave the decision to the Commission.

31. Referring to the comments made by Ms. Xue, he said that the draft groundwaters convention, unlike the 1997 Watercourses Convention, provided for the regulation of "other activities", which would include, for example, the use of pesticides in agriculture, which might pollute groundwaters.

32. The CHAIRPERSON invited members of the Commission to constitute the Planning Group and Drafting Committee.

The meeting rose at 5.20 p.m.

2832nd MEETING

Tuesday, 3 May 2005, at 10.05 a.m.

Chairperson: Mr. Djamchid MOMTAZ

Present: Mr. Addo, Mr. Brownlie, Mr. Candioti, Mr. Chee, Mr. Comissário Afonso, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kemicha, Mr. Kolodkin, Mr. Mansfield, Mr. Matheson, Mr. Niehaus, Mr. Opertti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Sepúlveda, Ms. Xue, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/549 and Add.1, sect. B, A/CN.4/551 and Corr.1 and Add.1, A/CN.4/555 and Add.1)

[Agenda item 4]

THIRD REPORT OF THE SPECIAL RAPporteur (*continued*)

1. The CHAIRPERSON invited the Commission to continue its consideration of the third report of the Special Rapporteur on shared natural resources (A/CN.4/551, Corr.1 and Add.1).

2. Ms. ESCARAMEIA congratulated the Special Rapporteur on his exhaustive research into the legal and scientific aspects of the topic. As general comments, she endorsed the proposed structure of the draft convention and considered part II particularly important, as general principles were fundamental. She did not agree with those who argued that bilateral or regional agreements in specific areas provided sufficient guidance: such agreements would always favour the stronger parties, a state of affairs that was totally unacceptable where environmental issues were at stake.

3. The 1997 Watercourses Convention should not be followed too slavishly. While it set out useful principles, such as equitable and sustainable utilization, the obligation not to cause significant harm and a general obligation to cooperate, the new convention covered bodies of water that raised far more sensitive issues.

4. It was her understanding that the proposed articles dealt only with those States that had an aquifer in their territory, or had some connection to an aquifer. However, third States could also play a role in the maintenance of aquifers, through charges and discharges. Accordingly, they too should be covered in the draft articles, as they clearly had an obligation to cooperate and exchange information.

5. The issue of compensation in the event of harm should also be addressed in the draft articles, rather than simply left to the operation of general rules on liability. She would also like to see the precautionary principle referred to by the Special Rapporteur in the report spelled out more strongly, in a separate article.

6. Turning to the individual draft articles, she said it would be useful to specify, perhaps in the commentary either to article 1 or to article 4, those situations in which aquifers were not covered by the present convention, being already covered by the 1997 Watercourses Convention. She also strongly endorsed the use of the term "impact", which was broader than "harm", in draft article 1, paragraph (b).

7. Turning to draft article 2, paragraph (a) (Use of terms), she agreed with the use of the expression "geological formation" rather than "rock formation", for the reasons given by the Special Rapporteur. There might be some merit in retaining the term "water-bearing", as it corresponded to the layperson's notion of an aquifer. She also endorsed the deletion of the word "exploitable". In paragraph (b), the bracketed phrase "[each associated