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Summary record of the 2930th meeting

Topic:
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It put the principle of continuity to work in the text without actually spelling it out. The Commission had to decide whether to include in the list in paragraph 2 treaties codifying *jus cogens* rules. The Secretariat memorandum²⁰² had suggested that such treaties should be included, but that raised the problem of borderlines with other subjects. He was not sure that it was even technically correct to include such treaties, and if they were to be included, yet another “without prejudice” clause would be necessary. Throughout its work on State responsibility, the Commission had carefully avoided straying into the sphere of *jus cogens*.

56. On draft article 10, the general view might be that the references to the law relating to the use of force should be strengthened. In its new, redrafted version, the draft article was a fairly careful compromise, and to go any further might be to venture into uncharted juridical territory.

57. One general problem was the question of the extent to which the draft articles should refer to other fields of international law such as neutrality or permanent neutrality. Armed conflict was self-evidently an ineradicable part of the topic, but other areas like neutrality were genuine borderline cases. As to other aspects of the law of treaties, draft article 13 simply made the obvious point that the draft was without prejudice to the provisions already set forth in the 1969 Vienna Convention. As in the law of torts, there might be several overlapping causes of action. Thus, the effect of war on treaties might be paralleled by other types of fundamental change of circumstances. Separability had not been overlooked, but deliberately left aside, although it could be argued that it was a subset of the whole question of evidence of intention.

58. There was also the problem of sources of law, which arose in the context of draft article 7. In categories such as the law relating to diplomatic relations, there was very little explicit or direct evidence of the effect of armed conflict. However, one could to some extent draw safe inferences from the literature, as could be seen from the Secretariat memorandum. Thus, although there was little or no State practice supporting the inclusion of some of the categories in draft article 7, there were some reputable legal sources that could be relied on.

59. He apologized to Mr. Kolodkin for the omission from paragraph 12 of the third report of the Russian Federation as one of the States opposed to inclusion of internal armed conflict in the scope of the draft. The tally now was 10 States opposed to inclusion and 10 in favour.

60. The expository style of drafting would, he hoped, be maintained. If the draft were couched in the language of a diplomatic conference involving two not very friendly parties, the result would be a very mathematical or very political text that would not really be helpful to the Commission's end users. Draft articles 3 to 7 were meant to be read together and sequentially, not in isolation from one another.

The meeting rose at 12.40 p.m.

2930th MEETING

Monday, 4 June 2007, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(Vice-Chairperson)

Present: Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hmoud, Ms. Jacobsson, Mr. Kemicha, Mr. Kolodkin, Mr. McRae, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Ms. Xue, Mr. Yamada.

Reservations to treaties (*continued*)*(A/CN.4/577 and Add.1–2, sect. C, A/CN.4/584, A/CN.4/586, A/CN.4/L.705)

[Agenda item 4]

REPORT OF THE DRAFTING COMMITTEE

1. The CHAIRPERSON invited the Chairperson of the Drafting Committee to introduce the report of the Drafting Committee on the topic “Reservations to treaties” (A/CN.4/L.705).

2. Mr. YAMADA (Chairperson of the Drafting Committee) said that at its 2891st meeting, on 11 July 2006, the Commission had decided to refer draft guidelines 3.1.5 to 3.1.13, 3.2, 3.2.1 to 3.2.4, 3.3 and 3.3.1 to the Drafting Committee.²⁰³ The draft guidelines fell into four general clusters, namely: (a) draft guidelines concerning various ways of addressing the definition of the object and purpose of the treaty (draft guidelines 3.1.5 and 3.1.6); (b) draft guidelines concerning different kinds of reservations that would help to elucidate the notion of incompatibility with the object and purpose of the treaty (3.1.7 to 3.1.13); (c) draft guidelines concerning competence to assess the validity of reservations (3.2 and 3.2.1 to 3.2.4); and (d) draft guidelines concerning the consequences of the invalidity of a reservation (3.3 and 3.3.1). The Drafting Committee had considered the draft guidelines in question for eight meetings but had so far managed to complete only those in the first two clusters. He wished to pay a tribute to the Special Rapporteur, whose mastery of the subject and spirit of cooperation had greatly facilitated the Drafting Committee's work, and to thank the members of the Drafting Committee for their active participation.

3. Introducing the first cluster of draft guidelines (3.1.5 and 3.1.6), he said that the Committee had had before it three alternative texts for draft guideline 3.1.5. The first two, entitled “Definition of the object and purpose of the treaty”, had been based on the proposals made by the Special Rapporteur in his tenth report²⁰⁴ and in the note presented by the Special Rapporteur in 2006.²⁰⁵ The third

* Resumed from the 2920th meeting.

²⁰³ *Yearbook ... 2006*, vol. I, 2891st meeting, p. 151, para. 44.

²⁰⁴ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/558 and Add.1–2.

²⁰⁵ *Yearbook ... 2006*, vol. II (Part One), document A/CN.4/572.

²⁰² A/CN.4/550 and Corr.1–2 (see footnote 164 above).

alternative had also been based on a proposal by the Special Rapporteur in paragraph 8 of his note and had been entitled “Incompatibility of a reservation with the object and purpose of the treaty”. While the Drafting Committee had chosen the third alternative, which it considered to be in line with the language of the 1969 and 1986 Vienna Conventions, the text had nevertheless been the subject of lengthy discussion. First, it had been pointed out that the phrases “serious impact” on “essential rules, rights or obligations” “indispensable to the general architecture of the treaty” virtually established a three-tiered threshold of seriousness, essentiality and indispensability that was considered to be too high by some members. The Drafting Committee had finally compressed the wording by adopting the notion of “essential element”. The commentary would clarify that the essential element transcended a treaty provision and contextually embraced a rule, right or obligation as well as the terms of the treaty as a whole. The unduly strong term “indispensable” had been replaced by “necessary”. Secondly, it had been considered that the English expression “general architecture” posed difficulties in terms of scope and meaning. The Drafting Committee had therefore replaced “architecture” by “thrust”, which was closer to the original French “*économie générale*”, although it remained mindful of the legal imprecision of that phrase, which might have to be reviewed on second reading. Thirdly, on the question of whether a treaty had a “*raison d’être*”, some members had requested that the reference to that concept should be deleted as it was too general and demanding, especially since it was not always possible to indicate just what the “*raison d’être*” of a treaty was. The commentary would reflect that viewpoint. Lastly, the Committee had decided to replace the phrase “thereby depriving it of its *raison d’être*”, seen as too demanding, by “in such a way that the reservation impairs the *raison d’être* of the treaty”.

4. In the case of draft guideline 3.1.6, whose title, “Determination of the object and purpose of the treaty”, remained unchanged, the Drafting Committee had had before it a proposal submitted by the Special Rapporteur in his tenth report. Several changes had been made to the text. First, the two paragraphs that had comprised the original draft guideline had been collapsed into one, the first sentence being a simplified version of the original paragraph 1. The reference to the preamble and annexes in the original paragraph 2 had been deleted, on the understanding that they were covered by the first sentence and that the commentary would offer an appropriate clarification. The rest of that paragraph was now captured in the second sentence of the draft guideline, in which the words “the title of the treaty” had been moved to the beginning and the phrase “the articles that determine its basic structure” had been deleted. That matter would be addressed in the commentary. The Drafting Committee had moved away from the structure and language of article 31 of the 1969 Vienna Convention, thus accentuating the focus on guidelines while remaining faithful to the Commission’s practice of avoiding the reproduction of texts of conventional articles in separate guidelines. Some members had felt that the reference to the “subsequent practice” of the parties should be addressed in the commentary because subordinating reservations to such practice might give rise to complications that would have a bearing on the equality of the parties. Others, however, had felt that such

inequality was a remote possibility and that, in practice, parties to a treaty took subsequent practice into account. In the final analysis, the Drafting Committee had considered that the phrase “where appropriate” was sufficiently flexible to allow the inclusion of subsequent practice in the text.

5. The draft guidelines in the second cluster (3.1.7 to 3.1.13) were intended to constitute examples of the type of reservations that could be interpreted as incompatible with the object and purpose of the treaty. In that sense, they contributed to the understanding and further refinement of the notion of “object and purpose of the treaty”.

6. The title originally proposed for draft guideline 3.1.7, “Vague, general reservations”, had been retained, the comma having simply been replaced by “or”. It was anticipated that the terms “vague” and “general” would be explained in the commentary. During the course of the discussion it had been suggested that the draft guideline should be framed in positive terms and placed in the second part, dealing with questions of form. However, it was soon recognized that vague or general wording could be used deliberately in a reservation in order to sidestep the object and purpose of the treaty. Accordingly, it had been deemed necessary to mention compatibility with the object and purpose of the treaty, in order to bring the draft guideline within the realm of the part under consideration. It should be noted that “shall” had been used instead of “should”; the inclusion of the phrase “in particular” was aimed at accommodating the possibility of determination for other purposes, such as “effect” and “meaning” which, while essential, were not the subject matter of the draft guideline. The term “worded” had been preferred to “formulated”, as it placed emphasis on the content of the reservation.

7. The original title of draft guideline 3.1.8, “Reservations to a provision that sets forth a customary norm”, had been replaced by “Reservations to a provision reflecting a customary norm” as a consequence of changes made to the text of the guideline. During the discussion, the Drafting Committee had sought to respond to some views expressed regarding the wording of paragraph 1, which had been inverted to focus on the treaty provisions that were subject to reservation rather than on the customary nature of the norm. The verb “reflects” rather than “sets forth” was intended to accentuate, as it did in the *dictum* of the ICJ in the *Military and Paramilitary Activities in and against Nicaragua* case, the independent existence of a customary law, irrespective of its codification or embodiment in a treaty provision, without taking any position on the form or the substance. The commentary would address the time element by noting that treaty provisions reflected a customary norm at the time a reservation was made. In addition to providing for the formulation of a reservation to a treaty provision that reflected a customary norm, the Drafting Committee had considered it useful to add a positive element, namely that the customary character of a treaty provision was a pertinent factor for the assessment of the validity of the reservation. The logical consequence of the proposition in paragraph 1 in relation to a customary norm was intimated in paragraph 2. The words “in relations between” had been replaced by “which shall continue to apply as such between” in order to give the text clarity and emphasize the continuing effect of the

customary norm, irrespective of whether a reservation had been made to a treaty provision. The phrase “which are bound by that norm” at the end of the paragraph sought only to emphasize that the customary norm continued to apply in situations where the reservation related to a dispute settlement provision of the treaty in question.

8. The title of draft guideline 3.1.9, “Reservations to a provision setting forth a rule of *jus cogens*”, had been changed to “Reservations contrary to a rule of *jus cogens*”. It had been changed as a result of the discussions on the substance of the draft guideline which had reflected the doctrinal difficulties of the subject as well as the inconclusiveness of the debate in plenary. The first issue had been to decide whether a different guideline on *jus cogens* was necessary, since draft guideline 3.1.8 dealt with a customary norm and provided a solution which logically, but not necessarily ideologically, was equally applicable to *jus cogens*. The view had been expressed that such a guideline was necessary not only because of the distinct characteristics of a *jus cogens* norm but also in the light of the recent judgment of the ICJ in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*. Another issue that the draft guideline as originally formulated did address was a situation in which a treaty had nothing to do with a *jus cogens* norm but a reservation made to that treaty did have a bearing on such a norm. It had been stressed that the making of a reservation did not necessarily constitute a breach of an obligation and that an alteration of an obligation should not affect the peremptory norm. The Drafting Committee had subsequently decided to approach the matter from the perspective of the reservation itself, since the reservation could not, through its legal effects, affect a treaty in a way contrary to *jus cogens*. Consequently, it had been decided to track more closely the definition of a reservation found in the Vienna Convention, but in a more simplified version, and the result was the text set out by the Drafting Committee in its report.

9. Draft guideline 3.1.10, whose title, “Reservations to provisions relating to non-derogable rights”, remained unchanged, had been the subject of extensive discussion. First, there had been a consensus on the need to give the first sentence a negative formulation to emphasize the exceptional nature of the possibility of formulating a reservation to a non-derogable right. The words “may formulate a reservation ... providing” had thus been replaced by “may not formulate a reservation... unless”. The Drafting Committee had then discussed whether a reservation should relate to a treaty provision or to the treaty as a whole, including the regime that it established. That problem could be solved by deleting the words “treaty provision” and leaving only a reference to “treaty” or by replacing the word “provision” with “treaty” wherever it appeared in the text. Thirdly, after deciding on the change to a negative formulation, the Drafting Committee had discussed which phrase—“compatible with the essential rights and obligations arising out of that treaty” or “preserves the essential rights and obligations arising out of the treaty”—was preferable in the second part of the first sentence. It had been noted that while the two alternatives could be used interchangeably, the former flowed more logically from the language in the second sentence. That had led the Drafting Committee to consider whether the “essential rights and obligations”

arising out of the treaty, mentioned in the first sentence, were coterminous with the “object and purpose of the provision” cited in the second sentence. Some members saw a disconnect between the two sentences and stressed the need for better coherence. Others considered that the two sentences addressed separate issues and thought that they should be separated into two paragraphs, while retaining the test of incompatibility with the object and purpose of the treaty in the second sentence. That minority view would be reflected in the commentary. The majority, however, had felt that the draft guideline dealt with a single issue. Since the guideline, like others in the same cluster, already dealt with matters of compatibility or incompatibility with the object and purpose of the treaty, it had been considered that the deletion of the reference to object and purpose in the second sentence would not obscure the intention. In fact, for a derogation to be made to a non-derogable right, it had to be compatible with the essential rights and objections arising out of the treaty. The term “shall” had been used in preference to “must”.

10. Draft guideline 3.1.11, whose original title—“Reservations relating to the application of domestic law”—had been simplified to read “Reservations relating to internal law”, constituted another illustration of a reservation that could be incompatible with the object and purpose of the treaty if it purported to make application of the treaty subject to the integrity of domestic law. It had been pointed out that the draft guideline was related to draft guideline 3.1.7 in the sense that vague or general reservations very often referred to unspecified provisions of international law, including a State’s constitution. In any event, a reservation could belong to more than one category. The Drafting Committee had opted, for clarity’s sake, to delete the double negative in the final part of the guideline and to replace the phrase “only if it is not incompatible” with the phrase “only insofar as it is compatible”. It had also been observed that while the French expression “*droit interne*” could be used both for States and international organizations, the English equivalent, “domestic law”, could only be applied in respect of States and was seldom used in an international setting. The Drafting Committee, recalling that the expressions “internal law of a State” and “rules of an international organization” were used in article 46 of the 1986 Vienna Convention, had decided to use similar wording in the English text of the draft guideline. Since some members had also felt that the guideline had to be more precise, the Drafting Committee had added the words “specific norms” after “integrity of” in order to broaden the scope to include case law or even unwritten rules. The Drafting Committee had also decided that it would be better to repeat the expression used in the definition of reservations (draft guideline 1.1.1, “Object of reservations”) and to replace the phrase “the application of a provision of a treaty” with “the legal effect of certain provisions of a treaty or of the treaty as a whole”. Lastly, there had been some question as to whether the title ought to be modified in order to reflect the content of the draft guideline more accurately, but the Drafting Committee had ultimately felt that the phrase “*droit interne*”, which would be rendered in the English text as “internal law” rather than “domestic law”, was sufficient, it being understood that when read in conjunction with the text of the draft guideline it would be considered to include rules of international organizations as well.

11. Draft guideline 3.1.12, whose title—“Reservations to general human rights treaties”—had not been changed, dealt with reservations to general human rights treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and not with reservations to treaties relating to specific rights, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Although it was sometimes difficult to make that distinction, the draft guideline was meant to be applied only to general human rights treaties, and an analysis of that distinction would appear in the commentary. There was a wide range of practice in that area, and the draft guideline had been worded in a flexible way to allow sufficient leeway for interpretation. The Drafting Committee had also considered whether it could expand the term “indivisibility” used in the original version by adding terms often used in human rights discourse such as “impartiality” and “non-selectivity”. It had thought, however, that it should be cautious and use only terms that were fairly general and relevant to reservations to human rights treaties. In the final analysis, it had drawn on the Vienna Declaration and Programme of Action adopted in 1993 by the World Conference on Human Rights,²⁰⁶ paragraph 5 of which provided that “[a]ll human rights are universal, indivisible and interdependent and interrelated”, and inserted the words “interdependence and interrelatedness” in the draft guideline to describe the rights in respect of which a reservation might be incompatible with the object and purpose of the treaty. The Drafting Committee had also decided to add the words “or provision” after the words “that the right” in order to broaden the scope of the draft guideline. In the English text the phrase “account should be taken” had been replaced by “account shall be taken” and “rights set out therein” had been replaced by “rights set out in the treaty” for the sake of clarity, while the expression “general structure” had been replaced by “general thrust of the treaty” in order to bring the wording into line with draft guideline 3.1.5. Lastly, the word “seriousness” had been replaced by “gravity”.

12. Draft guideline 3.1.13, entitled “Reservations to treaty provisions concerning dispute settlement or the monitoring of the implementation of the treaty”, also gave examples of reservations incompatible with the object and purpose of the treaty. In the English text, the title had been changed, with the word “clauses” replaced by “provisions” in order to take account of a change to the *chapeau*, while in subparagraph (b) the words “its author” had been replaced by “the reserving State or international organization” for the sake of clarity. The discussion had focused on two main points: first, some members had wondered whether the statement in subparagraph (a) that the provision to which the reservation related constituted the *raison d'être* of the treaty put the threshold too high. There were not many treaties in which the dispute-settlement or monitoring mechanism provisions constituted the *raison d'être*. Other members had wondered whether a reservation relating to such provisions could be incompatible with the object and purpose of the treaty, bearing in mind the desirability of more universal participation. It had been pointed out, however, that the subparagraph was meant

to cover exactly that category of treaties, most of which were optional protocols whose main object was a commitment to a compulsory dispute-settlement or monitoring mechanism. It had been proposed that the word “constitutes” should be replaced by “is an expression of”, “participates in”, “contributes to” or “is an integral element of”. Ultimately, the Drafting Committee had decided that the simplest solution would be to use the words “essential to”, a choice that was sufficiently clear, neutral and flexible. However, it had decided to modify slightly the beginning of subparagraph (a) so that it started with the words “The reservation” and to use a phrase taken from the definition of reservations (draft guideline 1.1), so that the subparagraph would read: “The reservation purports to exclude or modify the legal effect of a provision of the treaty essential to its *raison d'être*”. Secondly, the Drafting Committee had wondered whether draft guideline 3.1.13 ought to be followed by an additional draft guideline that would deal with reservations to provisions relating to the implementation of the treaty, such as those that provided for its application in internal law, which were essential to the effective implementation of the treaty. It had been pointed out that such provisions, although not very common, might become more frequent. The Drafting Committee, however, had been of the view that at the current stage there was no need for such an additional guideline. That category of reservations could be covered either by the general draft guideline 3.1.5 or by draft guideline 3.1.11, on reservations relating to internal law. The commentary to either of those guidelines should mention that specific category of reservations. The text of an additional draft guideline relating to reservations to provisions for implementation of a treaty drafted by a member of the Commission had been provided to the Drafting Committee, but the proposal had not been formally referred to it by the plenary. The Drafting Committee had taken no action on the proposal, on the understanding that it would be mentioned in the commentary.

13. In conclusion, the Chairperson of the Drafting Committee commended the draft guidelines contained in the report of the Drafting Committee to the Commission (A/CN.4/L.705) for provisional adoption on first reading.

14. The CHAIRPERSON thanked the Chairperson of the Drafting Committee for his statement and invited the members of the Commission to consider the draft guidelines one by one before adopting the report of the Drafting Committee as a whole.

DRAFT GUIDELINES 3.1.5 TO 3.1.11

Draft guidelines 3.1.5 to 3.1.11 were adopted.

DRAFT GUIDELINE 3.1.12

15. Mr. WAKO pointed out that draft guideline 3.1.12 was the only one that applied to a special group of treaties—human rights treaties—which often protected non-derogable rights. Such was the case, for example, with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights. One might then wonder whether draft guideline 3.1.10 adequately covered the treatment of non-derogable rights in those treaties, since it stipulated that a reservation must be compatible

²⁰⁶ A/CONF.157/24 (Part. I), chap. III.

with the obligations arising out of a treaty. Where human rights treaties were concerned, however, no such a window of escape was possible: no reservation could be compatible with obligations relating to non-derogable rights. Clarification on that point would thus be welcome. More generally he thought it would be useful if members could be provided with a copy of the statement by the Chairperson of the Drafting Committee.

16. Mr. YAMADA (Chairperson of the Drafting Committee) said that his statement would be distributed to all members of the Commission. He regretted that the Special Rapporteur was not present, as he was better qualified to reply to Mr. Wako's question. In general, when a reservation was made to a provision in a human rights treaty, it was not only draft guideline 3.1.12 but also draft guideline 3.1.10 that would apply. The draft guidelines must be taken together. Draft guideline 3.1.12 had been added to specify the factors that made it possible to assess a reservation's compatibility with the object and purpose of a human rights treaty.

17. Ms. ESCARAMEIA said that, in her view, the non-derogable nature of the rights concerned was not in doubt. Draft guideline 3.1.10, which contemplated the possibility of formulating a reservation to a provision relating to non-derogable rights, was addressed to provisions relating to the regime of such rights and not to their content. There might be several provisions in a single treaty relating to the regime of a non-derogable right and one could thus formulate a reservation to them without disputing the right as such.

18. The CHAIRPERSON said he took it that Mr. Wako had been simply requesting clarification and was not opposed to the adoption of draft guideline 3.1.12.

Draft guideline 3.1.12 was adopted.

DRAFT GUIDELINE 3.1.13

19. Mr. CANDIOTI pointed out that in the French text of subparagraph (b) the words "*La réserve n'ait pour effet*" should be replaced with "*La réserve ait pour effet*", as agreed with the Special Rapporteur.

With that amendment to the French text, draft guideline 3.1.13 was adopted.

The draft guidelines contained in document A/CN.4/L.705 as a whole, as amended, were adopted.

Shared natural resources (continued)* (A/CN.4/577 and Add.1-2, sect. A, A/CN.4/580, A/CN.4/L.717)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (continued)

20. The CHAIRPERSON invited the members of the Commission to continue their consideration of the fourth report on shared natural resources and to make comments thereon.

21. Mr. KOLODKIN welcomed the very short but useful fourth report on shared natural resources, which dealt among other things with the relationship between the work on groundwaters and that on oil and natural gas. Like the Special Rapporteur, he thought that those two aspects of the topic called for very different approaches. The Commission should therefore continue with and even complete its consideration of the draft articles on the law of transboundary aquifers on second reading and then, and only then, look into whether it should take up oil and natural gas. For that purpose, an in-depth analysis of State practice and applicable instruments should be carried out. Many treaties, including those on maritime delimitation, contained provisions relating to hydrocarbons. Some were in fact reproduced in the *Handbook on the Delimitation of Maritime Boundaries* prepared by the Division for Ocean Affairs and the Law of the Sea of the Office of Legal Affairs.²⁰⁷ It would be useful if the Secretariat drew on that document to prepare a study for the Commission in order to help it in making its decision.

22. Mr. CANDIOTI said that, as he understood it, the Commission already had a mandate to consider the question of oil and natural gas. At best it could consider what form to give to its future work and whether it was advisable to first complete its consideration on second reading of the draft articles on the law of transboundary aquifers, but it could not go back on its decision to address that aspect of the topic.

23. Ms. ESCARAMEIA recalled that the Commission had a mandate to consider "shared natural resources", which included oil and natural gas.²⁰⁸ If, as Mr. Kolodkin suggested, it undertook a study of that aspect of the topic before deciding whether it should deal with it or not, it would behave as if there were no mandate from the Sixth Committee. It seemed logical to first complete the consideration of transboundary aquifers and then to continue working on oil and natural gas, as had been agreed.

24. Mr. KOLODKIN said he thought that the Commission was sufficiently autonomous to decide, after a preliminary consideration of oil and gas, whether it needed to pursue work on that aspect of the topic.

25. Mr. SABOIA said that the comments by States on the draft articles on the law of transboundary aquifers adopted by the Commission needed careful consideration, in view of the complexity of the discussion on the subject at the previous session of the General Assembly. He welcomed the fact that in its work on the topic of shared natural resources, the Commission had succeeded in preserving a crucial balance between recognition of a State's permanent sovereignty over its natural resources and of its right to carry out activities relating to those resources on the one hand and, on the other hand, its duty not to cause significant harm to other States. The work

²⁰⁷ United Nations publication, Sales No.: E.01.V.2.

²⁰⁸ See *Yearbook ... 2002*, vol. II (Part Two), pp. 100-102, paras. 518-520. The General Assembly, in paragraph 2 of its resolution 57/21 of 19 November 2002, took note of the Commission's decision to include in its programme of work the topic "Shared natural resources". See also the topical summary of the discussion in the Sixth Committee of the General Assembly during its sixty-first session, prepared by the Secretariat (A/CN.4/577 and Add.1-2), para. 24.

* Resumed from the 2921st meeting.

in progress could help foster much-needed cooperation among aquifer States in obtaining equitable and reasonable utilization of aquifers.

26. In his fourth report, the Special Rapporteur asked the Commission to take a position on the future course of its work, particularly whether it should consider the question of transboundary resources in oil and natural gas without awaiting completion of the work on transboundary aquifers. At the most recent session of the General Assembly, some delegations had expressed their views on the advisability of taking up the issue of oil and gas, but no clear trend had been discernible on that issue. According to paragraph 24 of the topical summary of the discussion held in the Sixth Committee, prepared by the Secretariat (A/CN.4/577), it had been suggested that consideration of that issue would be complex and that there might be opposition from oil- and gas-producing States that recognized those resources as sovereign property. That opinion seemed to imply that when the Commission dealt with transboundary groundwaters and transboundary aquifers it was not dealing with resources subject to the sovereignty of the States in which those resources were located. It was precisely because those resources were transboundary and therefore fell under the jurisdiction of different States that guidelines were useful in promoting cooperation and adequate protection of the resources without affecting the sovereignty of the aquifer State over the part of the resource that lay in its territory. The use of the word “shared” in the title of the topic should not be construed as qualifying in any way the sovereignty of the State over the natural resources in its territory.

27. After having outlined in paragraphs 13 to 15 of his fourth report the important differences between groundwaters and oil and natural gas, particularly with regard to the location and the form of exploitation of those two types of natural resources, the Special Rapporteur then arrived at the conclusion that the majority of regulations to be worked out for oil and natural gas would not be directly applicable to groundwaters, which meant that a separate approach was required for oil and natural gas, and that the Commission should therefore proceed with and complete the second reading of the law of transboundary aquifers. He agreed with that recommendation.

28. Mr. FOMBA said that the idea of postponing the consideration of comments and observations by States on the draft articles on the law of transboundary aquifers until January 2008 was reasonable: it followed from the idea of gaining fuller information on their points of view. As to the fundamental question of the relationship between the work on groundwaters and that on oil and natural gas, in his fourth report the Special Rapporteur had built a solid case based on the following main arguments: the existence of a dialectical link between the two subjects in terms of the implications of the proposed measures (para. 3); the need for in-depth study of the scientific and technical aspects as well as the political and economic aspects of the question of oil and natural gas (para. 5); the non-renewable nature of oil and natural gas as a resource, based on an analysis of the processes of their formation and accumulation and the implications of the fluid nature of oil and natural gas for the exploitation of transboundary oilfields (para. 11); the identification

of certain specific aspects of pollution involving oil and natural gas (para. 12) which would make it necessary to take a different approach when considering environmental problems of oil and gas; the need to treat oil and gas as a single resource because they coexisted in the same geological formation (para. 13); and the similarities and differences between groundwaters and oil and natural gas, particularly from the standpoint of their extraction and commercial value (paras. 13–14).

29. From that generally coherent line of argument, the Special Rapporteur drew a number of conclusions that were set out in paragraph 15 of his report, chief among which was that the Commission should proceed with and complete the second reading of the law of transboundary aquifers independently from its future work on oil and natural gas. He fully agreed, but would like clarification on a number of points. For example, paragraph 10 of the report contained the statement that “[i]n general, States or their political subdivisions retain the right to lease oilfields under their jurisdiction”. He wished to know if this meant that it was not always the case, and if so, what became of the principle of permanent sovereignty of States over their natural resources. In any event, it would be better to amend the first sentence in that paragraph to read: “By virtue of the principle of permanent sovereignty of States over their natural resources, they have the right to lease oilfields under their jurisdiction”. The use of the phrase “It seems” at the beginning of paragraph 11 reflected uncertainty as to the existence of transboundary oilfields: he wished to know when the necessary information would be available. He would also like to know if oil and gas always coexisted in the same reservoir rock, as stated in paragraph 13, and whether survey and extraction of groundwaters took place only on the land or, if submarine groundwaters existed, in which case the wording of the fourth sentence in paragraph 14 should be slightly revised by changing the phrase “take place on the land” to read “generally take place on land”. The paragraph also indicated that groundwater was not internationally traded, with a few exceptional cases, and it would have been useful to give at least one example thereof, if only in a footnote.

30. Mr. COMISSÁRIO AFONSO said that, as a member of the Working Group on shared natural resources, he welcomed the General Assembly’s favourable reaction to the draft articles on the law of transboundary aquifers adopted on first reading by the Commission at its fifty-eighth session.²⁰⁹ It was now for the Commission to decide on the future course of its work on the topic. In that connection, he supported the Special Rapporteur’s proposal to deal with the question of oil and natural gas separately and suggested that the Commission should establish a fixed timetable for that purpose in order to give the question priority consideration. The fact that transboundary aquifers and oil and natural gas were being treated separately in no way meant that one or the other was being neglected. Some members of the Commission had expressed concern on that subject, but since the Commission had already embarked on that route, it should go all the way.

²⁰⁹ *Yearbook ... 2006*, vol. II (Part Two), Chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.

31. He was firmly convinced that the Commission should seek, insofar as possible, to establish a comprehensive legal regime for shared natural resources. Of course, one might think that since water was the central element linking the 1997 Watercourses Convention and the law of transboundary aquifers, the Commission should not extend its work on the topic of shared natural resources to cover oil and natural gas, yet it would seem that the “shared” nature of the resources should be the primary consideration. Even if oil and natural gas were not indispensable to human life, they held strategic importance for States, and elaborating rules of law on the subject would promote greater stability in international relations. It was after all the lack of rules that caused uncertainty and, at times, conflicts. The Commission should look into the issue of energy, but given that it was currently a particularly sensitive question, it must take a cautious approach.

32. For the time being, it was difficult to know what the content and structure of the work on oil and natural gas were to be. Nevertheless, despite the definite differences between that question and the question of transboundary aquifers, one could find links between the two subjects, including in terms of the general principles that applied, such as the principle of State sovereignty, the obligation not to cause damage, the obligation to cooperate and respect for environmental protection rules. The Commission should, of course, expect to run into technical or other problems, but that should not prevent it from addressing that aspect of the topic.

33. Mr. WISNUMURTI said that the issue of whether the Commission should also take up the question of oil and gas had indeed been contentious, as reflected in the debate in the Sixth Committee. In his report, the Special Rapporteur had diligently explained the respective characteristics of groundwaters and oil and gas, noting their similarities and dissimilarities. He agreed that groundwaters were a life-supporting resource for which there was no alternative, whereas oil and natural gas were important resources but were not essential to human life and could be replaced by various alternative resources.

34. With regard to future work, he was of the view that priority should be given to transboundary aquifers in order not to divert the Commission from that topic, on which much progress had been made. The question of oil and natural gas deserved separate study, given its complexity and the specific characteristics of that type of natural resource as compared with groundwaters. He agreed with the Special Rapporteur that the Commission should proceed with and complete the second reading of the law on transboundary aquifers independently from its future work on oil and natural gas. In the meantime, the Secretariat should be tasked with preparing a study on that question in order to facilitate its consideration when the Commission decided to take it up.

35. Mr. McRAE said that in his fourth report the Special Rapporteur clearly set out the differences as well as some similarities between groundwaters on the one hand and oil and natural gas on the other; he also showed that there was no basis for linking the work on the two subjects or delaying the final consideration of the draft articles on transboundary aquifers.

36. He agreed with the idea put forward by Mr. Gaja in the Working Group on the topic that a working group should be established to consider whether and how the Commission should deal with the question of oil and natural gas, especially in view of the differences of view expressed by States in the Sixth Committee on the future work on shared natural resources. The Commission should be cautious and start by considering a variety of issues relating to oil and natural gas, such as the conclusion of agreements between Governments and private parties for the exploitation of oil and gas fields.

37. As to the final form that the draft articles on transboundary aquifers should take, he did not think that they should become a multilateral treaty since the issues raised were essentially settled by regional and bilateral agreements. Assistance for States wishing to conclude such agreements was thus important, and model principles or a model convention might be more appropriate for that purpose.

38. Mr. SABOIA agreed with Mr. McRae that the draft articles on transboundary aquifers should take the final form of a model convention on which States could rely in concluding more specific regional or bilateral agreements. That approach would also help to build cooperation among aquifer States in the sharing of natural resources.

39. Ms. ESCARAMEIA, referring to Mr. McRae’s comments on whether the Commission should proceed with work on oil and natural gas, recalled that a feasibility study on the question had been undertaken by a former member of the Commission, Mr. Rosenstock, who had concluded that the work should be done.²¹⁰ A copy of that document should be distributed to members of the Working Group on shared natural resources, along with the text of the resolution in which the General Assembly had tasked the Commission with considering the topic “shared natural resources”,²¹¹ so that they could see whether the exact nature of the resources was mentioned. She also pointed out that, under article 18, paragraph 3, of the Statute of the International Law Commission, the Commission had to give priority to requests from the General Assembly to deal with any question.

40. Mr. WISNUMURTI said that Mr. McRae should be more specific about Mr. Gaja’s proposal regarding the establishment of a working group to study the question of oil and natural gas. As he recalled it, Mr. Gaja had in fact proposed that the Secretariat should be asked to carry out research on the question, including on the relevant State practice, something that would be perfectly appropriate. For his part, he thought that the Working Group on shared natural resources should continue to consider whether the Commission should take up the question of oil and natural gas. It appeared in fact that its members had reached a consensus on the matter.

41. As to the final form of the draft articles, he agreed with Mr. McRae that the Commission should address that

²¹⁰ *Yearbook ... 2000*, vol. II (Part Two), Annex, pp. 147–148.

²¹¹ General Assembly resolution 57/21 of 19 November 2002, para. 2.

question early on or solicit the views of States on it, since its work would be affected by the decision made.

42. Mr. KEMICHA endorsed both proposals made by Mr. McRae, i.e. that a working group should be established to study the advisability of working on the question of oil and natural gas as “shared” natural resources and that the draft articles should take the final form of a model convention rather than a multilateral treaty.

43. Mr. CANDIOTI said that the Working Group on shared natural resources had not yet decided whether the Commission should undertake work on oil and natural gas, and it did not seem appropriate for the plenary to address matters that were still pending. Mr. Gaja’s proposal had been to request the Secretariat to carry out a preliminary study on State practice and existing agreements on oil and natural gas, but the proposal had not yet been given thorough consideration.

44. As to the final form of the draft articles, he wished to emphasize that on first reading the Commission had adopted a set of general principles whose purpose was precisely to encourage States, particularly transboundary aquifer States, to conclude more specific and detailed supplementary regional or bilateral agreements. The draft that had been adopted thus fully acknowledged the importance of rules established by States at the regional or bilateral levels.

45. Mr. PERERA said first of all that the draft articles on the law of transboundary aquifers carefully preserved the balance between the principle of reasonable and equitable utilization of aquifers and the corresponding obligation not to cause significant harm to other aquifer States and to ensure the protection, preservation and management of transboundary aquifer formations. They also provided for both general and specific measures to enhance international cooperation.

46. On the relationship between the work on transboundary aquifers and possible future work on oil and natural gas, he said that he had read with interest the explanations given by the Special Rapporteur in paragraphs 13 to 15 of his fourth report on shared natural resources. During the debate on that topic in the Sixth Committee some delegations had expressed the view that the Commission should not forgo the opportunity to develop an overarching set of rules for all shared natural resources, including oil and natural gas (see A/CN.4/577 and Add.1–2, para. 24). He therefore broadly agreed with the Special Rapporteur’s view that the Commission should proceed with and complete the second reading of the draft articles on the law of transboundary aquifers. At the same time, he saw merit in the idea that the Secretariat should initiate an independent study on existing State practice and norms relating to oil and natural gas, as such a study could provide guidance that would enable the Commission to take an informed decision on the matter. The work on oil and natural gas could result in an independent set of draft articles, or perhaps a separate chapter of the draft articles on transboundary aquifers, without in any way jeopardizing the valuable work already done by the Commission on groundwaters.

47. Mr. VÁZQUEZ-BERMÚDEZ said that he fully endorsed the idea that the Secretariat should carry out a study on State practice regarding oil and natural gas so that the Commission might have all the information it needed to successfully complete its work on that question within the Working Group on shared natural resources, and that it therefore seemed unnecessary to set up a new working group for that purpose. Nevertheless, as the Special Rapporteur had rightly pointed out, the topic of oil and natural gas raised specific questions related to the location of oilfields, most of which were on the continental shelf, and the particular environmental problems posed by their exploitation, in particular the conservation of the marine environment. The Special Rapporteur stressed that some regulations in the law of non-recharging transboundary aquifers might be relevant to the question of oil and natural gas, but pointed out that the majority of regulations to be worked out in that field would not be directly applicable to groundwaters. The Special Rapporteur accordingly concluded that the Commission should proceed with and complete the second reading of the draft articles on the law of transboundary aquifers independently of its future work on oil and natural gas. He himself endorsed that conclusion.

48. Ms. XUE said it was unfortunate that, in general, States did not give sufficient attention to the question of shared natural resources, as could be seen from the paucity of agreements concluded in that area. The Arrangement on the Protection, Utilization and Recharge of the Franco–Swiss Genevese Aquifer, which had entered into force on 1 January 1978, was merely an isolated case.²¹² As for international regulations on groundwaters, they were largely similar to regulations on international watercourses. Consequently, she thought it of the highest importance that the Commission continue its work in that area.

49. As to the final form of the draft articles on the law of transboundary aquifers, she thought it was a bit too early to consider that question. It was States that would have the final word on that subject, since the Commission could only make proposals. Nevertheless, it seemed appropriate to think in terms of a model agreement. She supported the proposals made by the Special Rapporteur in paragraphs 14 and 15 of his fourth report and thought that a study needed to be carried out on the question of oil and natural gas so that the Commission could make an informed decision on the approach it should take to that subject, as distinct from that of groundwaters.

50. Mr. HMOUD said that there were major differences not only between transboundary aquifers and oil and natural gas, but also in the manner in which States dealt with shared oil and natural gas. That stemmed from the fact that States dealt with oil and natural gas as an economic and industrial necessity and had therefore, in certain cases, entered into bilateral and multilateral

²¹² Signed in Geneva and Saint Julien-en-Genevois on 9 June 1977, L. A. Teclaff and A. E. Utton, *International Groundwater Law*, Oceana Publications, London, 1981, pp. 464–477. For more information on the Franco–Swiss Genevese Aquifer, see the second report of the Special Rapporteur, *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/539 and Add.1, Annex IV, sect. C.

arrangements to regulate cooperation and exploitation. The general principles set out in the draft articles on transboundary aquifers could be pertinent in developing a legal regime on transboundary oil and natural gas, although they had to be adapted to that type of resource. The legal regime should codify existing legal practice and cover areas where no agreement was usually reached among States, without going into issues that raised political and economic tensions among the States that shared such resources.

51. Regarding the Commission's future approach to the topic of shared natural resources, he supported the proposal that the Commission, after having received the comments of States on the draft articles on the law of transboundary aquifers adopted on first reading, should undertake the second reading of the draft while at the same time exploring the legal literature and State practice on shared oil and natural gas resources.

The meeting rose at 12.40 p.m.

2931st MEETING

Tuesday, 5 June 2007, at 10.05 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO
(*Vice-Chairperson*)

Present: Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Perera, Mr. Saboia, Mr. Singh, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

Shared natural resources (*continued*) (A/CN.4/577 and Add.1–2, sect. A, A/CN.4/580, A/CN.4/L.717)

[Agenda item 2]

FOURTH REPORT OF THE SPECIAL RAPPORTEUR (*concluded*)

1. Mr. HASSOUNA thanked the Special Rapporteur for submitting a concise report clearly setting out the issues on which he wanted members of the Commission to express their views. Those issues had also been discussed intensively in the Working Group on shared natural resources chaired by Mr. Candioti.

2. In presenting his fourth report and during his briefing for new members on the law of transboundary aquifers, the Special Rapporteur had frequently referred to the valuable contribution made by experts on groundwaters, who had helped to enlighten members on the difficult technical aspects of the issue. The inference to be drawn was that, in view of the possibility of having recourse to experts, the Commission need no longer be sceptical about the feasibility and wisdom of its taking up difficult and complex subjects.

3. In his report, the Special Rapporteur had also referred to the role played by UNESCO in organizing regional seminars in Europe, Latin America and North Africa with a view to briefing Governments on the draft articles adopted by the Commission on first reading²¹³ so as to assist them in formulating their comments. Similar seminars should be organized by UNESCO, in association with the regional organizations concerned, in Africa and Asia, in view of the importance of shared natural resources—whether water, oil or gas—for countries in those regions, including those in the Middle East.

4. The draft articles adopted on first reading took a balanced approach to the utilization, protection, preservation and management of transboundary aquifers and aquifer systems. That approach was based on fundamental principles of international law underlying the sovereignty of aquifer States, the equitable and reasonable utilization of a transboundary aquifer or aquifer system, the obligation not to cause significant harm to other aquifer States and the obligation for aquifer States to cooperate and exchange data and information. The decision to draft the text in general terms had been wise, giving States flexibility in devising arrangements to cooperate in managing and protecting aquifers. At the same time, enhanced cooperation and a strengthened system for monitoring among States should be encouraged, since that would ensure better protection and preservation of ecosystems.

5. The fourth report rightly emphasized the similarities and dissimilarities between aquifers on the one hand and oil and natural gas on the other. While there were some physical similarities, there were significant differences as to their political, economic, environmental and human implications, which was why they warranted different approaches. He supported the approach suggested by the Special Rapporteur of proceeding with the consideration of the draft articles on the law of transboundary aquifers on second reading so as to complete that process expeditiously, in view of the urgency of the issue, irrespective of whether any future work was to be undertaken on oil and natural gas. Concurrently with that step, the Commission could seek Governments' and expert opinions on existing State practice and legal instruments pertaining to the issue of oil and natural gas, without prejudice to any future action the Commission might take in dealing with the subject.

6. Lastly, concerning the Special Rapporteur's request for guidance as to whether the final product on the law of transboundary aquifers should take the form of a convention or of guidelines, he noted that the text as currently drafted most closely resembled the substantive provisions of a framework convention. From a legal standpoint, a binding convention would be a more appropriate legal instrument, since it would have stronger legal authority and offer better terms of reference. However, its relationship with other bilateral and regional agreements affecting the management and protection of transboundary aquifers would have to be determined, and that could prove a complex issue. On the other hand, from a practical viewpoint, a declaration

²¹³ *Yearbook ... 2006*, vol. II (Part Two), Chap. VI, sect. C, pp. 91 *et seq.*, paras. 75–76.