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Summary record of the 2931st meeting

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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. Candiotti, 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. Candiotti.

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.

of principles embodied in guidelines would be easier to adopt as a first step, while deferring a decision on the final outcome, pending a careful reading of the preferences of States, whose position would eventually determine their willingness to abide by the provisions of a binding convention.

7. Mr. GALICKI said that the Special Rapporteur was to be congratulated for his fourth report on shared natural resources which, though brief, was rich in substance. The report had been prepared at a time of uncertainty, in the interim between the Commission's adoption on first reading of the draft articles on the law of transboundary aquifers in 2006 and the deadline of 1 January 2008 for the submission of comments and observations on the draft articles by States. Faced with the dilemma of whether to wait passively for the reaction of States to the draft articles or to continue the work on the remaining part of the general topic of shared natural resources, the Special Rapporteur had rightly decided to continue the work on unfinished business. Since the question of transboundary groundwaters was just part of the general topic of shared natural resources, and on the basis of opinions expressed both in the Commission and in the Sixth Committee, the Special Rapporteur had turned in the fourth report to other shared natural resources such as oil and natural gas.

8. In paragraph 5 of the report, the Special Rapporteur had raised the crucial question of whether it was appropriate for the Commission to proceed with the second reading of the draft articles on the law of transboundary aquifers independently from the work on oil and natural gas. In paragraph 15, he answered that question in the affirmative. Although in general he himself agreed with the Special Rapporteur's conclusion and the technical and legal justification provided for it, which revealed the many differences between those two categories of shared natural resources, he thought it would be difficult for the Commission to ignore the reciprocal impact that regulations governing the categories of resources would have.

9. He fully agreed that it would not be wise for the Commission to postpone embarking on the oil and natural gas exercise until work on the elaboration of rules on transboundary aquifers was complete. Such a delay would be totally unreasonable and unjustified. On the other hand, there was no certainty that the Commission's future work on legal regulations governing oil and natural gas would be independent of the results of its earlier work on transboundary groundwaters—quite the contrary. Simply by looking at the titles of the draft articles on the law of transboundary aquifers adopted on first reading, one could see that for the most part they could be transposed to form future rules regulating oil and natural gas. There were, of course, some exceptions, deriving mainly from differences in the physical characteristics of those two categories of natural resources. Article 10 dealing with recharge and discharge zones could not be applicable to oil and natural gas. Similarly, questions of prevention, reduction and control of pollution, regulated by article 11, were totally different in the case of oil and natural gas. Groundwaters should be protected against pollution, while oil and natural gas themselves might be dangerous sources of pollution.

10. On the other hand, he did not agree with the view that one of the main reasons justifying different regulation of the two resources was connected with the fact that groundwaters enjoyed the status of "life-supporting" resources, while oil and natural gas were purely energy resources. That seemed to be a simplification that failed to take into account the importance of those energy resources for the improvement of living conditions for ordinary people.

11. In short, the Commission should not dismiss *a priori* all possible links between the two fields of the codification exercise, which should remain two closely related elements of one general topic, namely the legal status of shared natural resources. Without delaying the work on the law of transboundary groundwaters, the Commission could turn that work to the benefit of its future work on oil and natural gas, following, at least in part, previously elaborated rules. The Commission would probably not be able to avoid some obvious duplication of certain rules; such duplication should not be seen in a negative light, but rather as strengthening the status and importance of such regulations.

12. For that reason, Mr. Galicki was in favour of ensuring that both codification exercises took the same final form—either as conventions, including, possibly, framework conventions, or as draft articles. Formal harmonization of the final results of the Commission's work on codifying the legal status of natural resources would undoubtedly enhance the legal significance of the exercise. However, a final decision as to the form to be adopted should not be made in undue haste. The Commission should be flexible and listen carefully to the opinions and comments of States, in order to avoid confusion or dissatisfaction.

13. Mr. SINGH thanked the Special Rapporteur for his informal presentation on transboundary aquifers, which had been extremely helpful for new members of the Commission. The fourth report dealt with the crucial question of how the Commission should proceed in its further consideration of the topic, and in particular with the relationship between the work on groundwaters and that on oil and natural gas. The Special Rapporteur considered that while some of the regulations of the law of the non-recharging transboundary aquifer might be relevant to the question of oil and natural gas, the majority of regulations to be worked out for oil and natural gas would not be directly applicable to groundwaters; furthermore, trying to link the work on groundwaters with the work on oil and natural gas might result in undue delay in the completion of the work on groundwaters. Accordingly, the Special Rapporteur recommended a separate approach for oil and gas.

14. The considerations relating to transboundary oil and gas resources were clearly different from those relating to transboundary aquifers, and he therefore supported the Special Rapporteur's recommendation 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. However, issues relating to oil and gas should be studied, and the Secretariat could be asked to look into the relevant State

practice and agreements and to identify suitable experts and institutions which could assist the Commission in its consideration of the topic.

15. Mr. YAMADA (Special Rapporteur), summing up the debate on his fourth report on shared natural resources, said he was grateful to have received almost unanimous approval for his suggested approach of proceeding with and completing the second reading of the law of transboundary aquifers. His fifth report, which he hoped to submit in February 2008, would contain the whole set of draft articles for consideration on second reading, and would take into account the comments and observations to be submitted by Governments by 1 January 2008 and incorporate the necessary improvements to the text adopted on first reading.

16. Although differing views had been expressed on whether it had already been decided that oil and natural gas were to be included in the topic of shared natural resources, there seemed to be a consensus as to the need to conduct some preliminary feasibility studies on oil and natural gas. Several members had proposed that a compilation of relevant State practice, regulations and agreements should be prepared. The Working Group on shared natural resources already had a mandate to consider that issue, and its Chairperson would in due course report to the plenary on its findings.

17. Members had raised the question of the final form of the draft articles: some favoured model principles, others a framework convention. The debate had not been conclusive. As the issue was included in the mandate of the Working Group, the Commission would be well advised to await its report. The text adopted on first reading had been drafted in normative form, but without prejudging the final form, a decision on which must be made during the second reading.

18. He had taken due note of the comments made on the first-reading text. As members would not have an official forum in which to express their views on the text until the start of the second reading, he would be glad to receive their views informally.

19. On the matter of continued dialogue with experts, he informed members that from 29 to 30 May 2007 UNESCO had organized a workshop on transboundary aquifers, held in Paris with the cooperation of the French Water Academy (Académie de l'eau) and the French Geological Survey. About 25 officials from Ministries of Foreign Affairs and the environment and scientists from Western and Eastern Europe had been briefed on the text adopted by the Commission on first reading and requested to urge their Government to submit written comments by the deadline. UNESCO was also planning to organize a workshop in Montreal, Canada, in September 2007 with the participation of officials and experts from the Americas. Mr. Yamada had asked UNESCO to endeavour to organize workshops in Africa and Asia, but it had not yet identified cooperative agencies or organizations in those regions. Meanwhile, the Asian-African Legal Consultative Organization would hold its annual meeting from 2 to 6 July 2007 in Cape Town, South Africa. Forty-six member States from Africa and Asia

would take part in that meeting. One important aspect of that organization's work was dealing with the topics considered by the Commission. He was now consulting with the Secretary-General, Mr. Kamil, to find a way of briefing the members and requesting them to submit their comments in time for the second reading.

20. Mr. Fomba had raised several issues concerning the fourth report. First, regarding paragraph 10, Mr. Fomba had said that States or their political subdivisions always retained the right to lease oilfields under their jurisdiction, and that the words "in general" must therefore be deleted. His own understanding was that in most cases, oil and natural gas were treated as public property and States or political subdivisions had jurisdiction over those resources. However, he had been informed that in exceptional cases, oil and gas were treated as the private property of the owner of the land above the reservoir rock. That was why the words "in general" had been inserted. He would investigate further and try to find some concrete examples.

21. Secondly, Mr. Fomba thought that the words "it seems that", at the beginning of paragraph 11, cast uncertainty upon the description that followed. That was correct. When writing the report, he had been informed by experts that there were transboundary oilfields in many parts of the world, and in particular, on continental shelves. As yet, he had been unable to obtain a world map of transboundary oilfields, and could not make a definitive statement on that subject; however, he would look further into the matter.

22. Thirdly, on paragraph 13, Mr. Fomba had asked whether oil and natural gas were always to be found together. Citing paragraph 6 of the report, Mr. Yamada replied that oil and natural gas often coexisted in the same rock reservoir, natural gas accumulating in the upper zone and oil in the lower zone, but that in some cases only oil and in other cases only natural gas was present.

23. The fourth and fifth questions related to paragraph 14. He could provide no definitive answer to the question whether there were groundwaters under the seabed. Hydrogeologists informed him that there were submarine aquifers, but that they usually consisted of brine. He was not sure whether there were submarine aquifers containing fresh water, but he would look further into the question. As to whether groundwaters were internationally traded, he had not yet heard of the existence of such a trade on a large scale. He had incorporated the phrase "with a few exceptional cases" in the light of cases such as the daily supply of water by Malaysia to Singapore. Water supplied there was mostly surface water but might include some extracted groundwaters.

24. That concluded his summing up of the debate on the fourth report on shared natural resources.

The meeting rose at 10.45 a.m.