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Summary record of the 2957th meeting

Topic:
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capacity as Rapporteur of that Committee. He had been instrumental in drafting the Association's Berlin Rules on Equitable Use and Sustainable Development of Waters of 2004,[13] and had also chaired the Study Group convened to review the draft articles. While the paper, which drew heavily on the Berlin Rules, was extremely interesting and thought-provoking, it was based on a philosophy quite different from that of the Commission. With one exception, no Government had referred to the Berlin Rules in its comments. The one Government that had done so had invoked article 56 (5) of the Berlin Rules, which was not a crucial article, in relation to exceptions to the obligation to exchange information under the Commission's draft article 18, and had proposed to include, not only national defence, but also intellectual property rights, the right to privacy and important cultural or natural treasures, all of which, in the view of that Government, could be endangered by a requirement to share information. He personally did not think it proper for the Commission to engage in the negotiation of draft articles with the non-governmental International Law Association team. Accordingly, he had expressed his gratitude to Professor Dellapenna for the paper and had informed him that, as a subsidiary organ of the United Nations General Assembly, the Commission was required to give priority to the views of Governments in its consideration of the draft articles.

The meeting rose at 4.30 p.m.

2957th MEETING

Tuesday, 6 May 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

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

Shared natural resources (*continued*) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

FIFTH REPORT OF THE SPECIAL RAPPORTEUR (*continued*)

1. Mr. McRAE supported the Special Rapporteur's approach of dealing thoroughly with the second reading and putting aside the question as to whether the Commission should take up the issue of transboundary oil and gas deposits at a later date. Similarly, presenting the rules in the form of draft articles with the possibility of subsequently elaborating a convention kept all the options open, enabling States to decide later whether they wanted to draft a convention, or to leave them as principles applicable in the framework of customary international law or for regional or bilateral adoption. With regard to draft article 1 (Scope), the Special Rapporteur had introduced two important clarifications in his fifth report. First, he had indicated in paragraph 14 that the draft applied both to fresh water and to salt water (or brine) aquifers, as the latter were in some cases desalinated and used for irrigation. He had also proposed, in paragraph 17, a definition of the utilization of transboundary aquifers and aquifer systems that would include storage and disposal, as aquifers were increasingly used for carbon sequestration in the treatment of wastes. Those clarifications were very useful because they ensured that the draft articles covered all types of aquifer and all the uses made of them. They were also linked, because there was evidence of growing interest and developing practice in the use of saltwater aquifers for carbon storage. However, broadening the scope of the draft articles to include storage and disposal might necessitate reconsideration of other parts of the text. For example, it might be necessary to modify the concept of "equitable and reasonable utilization" in draft article 4, and to clarify the words "benefits derived from the use of water" in subparagraph (*b*) so as to indicate that "use of water" could include storage and disposal in water. Similarly, in subparagraph (*c*), overall utilization plans would have to cover not just alternative water sources, but also alternative disposal and storage sites. Moreover, there might be implications for draft article 11 (Prevention, reduction and control of pollution) and draft article 14 (Planned activities).

2. Extension of the concept of utilization to cover storage and disposal had a further implication. If storage of carbon waste in saline aquifers increased, it would not be long before carbon was injected into transboundary aquifers under the continental shelf. Yet such aquifers were excluded from the scope of the draft articles, as had been pointed out by the Netherlands. In paragraph 16 of his report, the Special Rapporteur had defended the exclusion of such aquifers on the ground that few existed, and that they were usually saltwater aquifers associated with rock reservoirs holding oil and natural gas, so that if the Commission were to extend the scope of the draft articles to include the continental shelf, it would be linking the work on transboundary aquifers with that on oil and gas, something it had decided not to do. The Special Rapporteur should therefore rethink his position on that question, for the inclusion of saline aquifers under land made the exclusion of saline aquifers under the continental shelf less justifiable. Further, those aquifers were not necessarily associated with oil and gas reservoirs. The likelihood or otherwise of an oil and gas reservoir being associated with an aquifer was the same, whether the reservoir was located under land or under the continental shelf. Petroleum reservoirs frequently contained a water zone as well as oil and gas. Given that this had not proved to be an impediment to the drafting of articles on aquifers under land, it should not be a barrier to applying the draft articles to transboundary aquifers under the continental shelf. If those aquifers were excluded from the scope of application

[13] International Law Association, *Report of the Seventy-first Conference, Berlin, 16–21 August 2004*, London, 2004, pp. 335–412.

of the draft articles, they would not be regulated, even though they were becoming increasingly attractive for carbon storage. Moreover, it seemed illogical to exclude them, as the Commission had not yet decided whether it would take up the question of transboundary gas and oil deposits. If it decided not to take up that issue, aquifers located under the continental shelf would either be left out altogether or else would have to be dealt with as a separate topic. In addition, if it decided to take up the issue of gas and oil and to deal with transboundary continental shelf aquifers at the same time, it would indeed be mixing together the two subjects—precisely what it had decided not to do.

3. The Commission was therefore in danger of leaving a gap in its work. In recognizing that the draft articles covered saltwater aquifers, storage and disposal, the Special Rapporteur had acknowledged that carbon storage in saline aquifers was likely to be an increasingly frequent practice in the future. He should therefore take the next logical step of applying the draft articles to transboundary aquifers under the continental shelf, an area that would become increasingly attractive for carbon storage.

4. It had sometimes been asked whether further obligations should be placed on non-aquifer States. The draft articles already placed some obligations on them, particularly in draft article 10 (Recharge and discharge zones), under which non-aquifer States in whose territory there was a recharge zone were obliged to cooperate with the aquifer States. The question was whether that obligation to cooperate went far enough. Should non-aquifer States also have an obligation under draft article 11 (Prevention, reduction and control of pollution) to prevent pollution of the recharge zone that would cause significant harm to an aquifer State? While some reservations had been expressed in that regard, the specific duty of preventing pollution that would cause significant harm was a logical consequence of the obligation to cooperate provided for in draft article 10.

5. A further aspect of the relationship of the draft articles to non-aquifer States called for comment. In paragraph 21 of his fifth report, the Special Rapporteur had noted a suggestion made to add a new subparagraph (*e*) which would read "no State may assign, lease or sell, in whole or in part, to any other State, whether an aquifer State or a non-aquifer State, its right to utilize aquifers", and had indicated that, in his view, the matter must be left to States to decide. If that were so, no limitation would be imposed on the State that wished to assign its right to utilize an aquifer to a non-aquifer State, perhaps under some regional arrangement, and the other aquifer State would have no say in the matter. Yet an aquifer State was surely entitled to expect that, if its neighbour that shared a transboundary aquifer decided to assign its right to utilize the aquifer to another State, this would be done on terms that ensured that the assignee assumed the same obligations towards its neighbour as the assignor had. In short, assignment of the right to utilize the aquifer should not leave a neighbouring aquifer State worse off than it had been before the assignment. It would therefore be appropriate, without going so far as to prohibit assignment of that right, to include a provision protecting the interests of an aquifer State in the event of an assignment.

6. In paragraph 21, the Special Rapporteur also stated that it was not appropriate to apply the concept of sustainability to aquifers, because the waters in non-recharging aquifers were not renewable resources and even recharging aquifers were only partially recharged. For all that, the concept of sustainability as an objective—rather than an obligation—could find a place in the draft articles and inform the rights of equitable and reasonable utilization and the obligation not to pollute or cause significant harm. True "sustainable development" was mentioned in draft article 7, paragraph 1, but that might not be enough to provide an overall objective or direction. That was no doubt why the International Law Association had advocated a stronger commitment to the concept of sustainability in the draft articles, and had proposed linking utilization to the recharge rate in the case of recharging aquifers. The draft articles would benefit from being more explicit about a commitment to sustainability, rather than simply leaving the issue implicit in draft article 4 (*b*). If the draft were to become a convention, that concept could be clearly set forth in a preamble, but as its future was uncertain, some other way should be found of incorporating it in the main body of the text, something that could perhaps be dealt with in the Drafting Committee.

7. In conclusion, while he was in favour of referring the draft articles to the Drafting Committee, he hoped that the changes he had suggested would first be debated in plenary session.

8. Ms. ESCARAMEIA said she would have preferred a set of draft articles more focused on the protection of transboundary aquifers and less on the rights and duties of aquifer States, thus including all the States that could affect aquifers and be affected by them. She would also have preferred certain fundamental principles—the precautionary principle, the principle of sustainable utilization and the principle of compensation for harm caused—to be clearly enunciated, but she was aware that that approach was opposed by some members of the Commission. Finally, she would have liked the draft articles to follow less closely the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter "1997 Watercourses Convention"), as the topic under consideration differed from it in many respects, and also because that Convention had not been a success, few States having ratified it.

9. On the final form, she understood the Special Rapporteur's concerns and agreed that the adoption by the General Assembly of a resolution, to which the draft articles would be annexed and that would recommend States to adopt bilateral and regional agreements following the principles set forth therein, would be a good solution. However, she had some concerns about the Special Rapporteur's proposal that the General Assembly should consider the possibility of convening a negotiating conference. It would be better for the General Assembly to state in its resolution that it would set up a working group in the Sixth Committee with a view to the convening of a conference—in other words, it should adopt some stronger wording, because the matter was urgent and called for the setting up of a procedural mechanism likely to lead to more compelling conclusions.

10. On draft article 1 (Scope), Mexico's proposal to refer to the activities of non-aquifer States that might have an impact on aquifers was a good idea. Perhaps the Special Rapporteur could explain why he had stated in paragraph 13 of his report that the authors of the activities should be clearly specified in the subsequent draft articles. In the informal document of the International Law Association circulated at the previous meeting, it was stated that the draft articles should also cover aquifers that were located in the territory of a single State but were hydraulically connected to international watercourses, or whose discharge and recharge zones were situated in other States. Although such aquifers were not transboundary aquifers, given that they were located in a single State, they could perhaps be regarded as such from the physical standpoint, in view of their particular characteristics. Perhaps reference could be made to that special case, at least in the commentaries, and it would also be interesting to hear the comments of the UNESCO expert on that matter.

11. On draft article 2 (Use of terms), she did not understand why the Special Rapporteur wished to delete the word "underground", which was a useful qualifier, even though any geological formation was, by its very nature, at least partially underground. Some technical advice on that matter from the Special Rapporteur or the expert would be welcome. The current wording of subparagraph (*d*) was simultaneously too specific and not specific enough: on the one hand, it excluded the continental shelf, and, on the other, it did not cover the case of States administering a territory other than their own. In paragraph 16 of his report, the Special Rapporteur had stated that aquifers were mostly located under land territories of States and therefore had no connection with continental shelf transboundary aquifers. One wondered, however, whether exceptions to that general rule were not covered. That situation should at least be mentioned in the commentaries, and there, too, technical advice would be welcome.

12. With regard to draft article 3 (Sovereignty of aquifer States), several Governments had noted that the expression "in accordance with international law", which was used in a good many legal instruments, should be added to the current wording; she could not see why there should be any objection to its inclusion. On draft article 4 (Equitable and reasonable utilization), she would prefer, like several States, to replace the term "reasonable" with "sustainable". The concept of sustainability was not necessarily confined to the utilization of renewable resources, but referred more to the possibility for future generations to utilize a resource, or a substitute for that resource. It would therefore be regrettable not to use the term "sustainable", which was a term of art used by most legal institutions, added to which, as the majority of aquifers were renewable, it would be strange for the Commission to base itself on confined aquifers, which were the exception. Nevertheless, it might be possible, as Mr. McRae had proposed, to indicate that sustainability did not necessarily mean maintenance at a level identical to that which had been obtained before the utilization of the resource.

13. On draft article 6 (Obligation not to cause significant harm to other aquifer States), she had been pleased to note that several States had called for the deletion of the term "significant", a qualifier to which she had always been opposed. Greece, for example, had pointed out that by qualifying harm, one accepted that a certain degree of harm could be caused without entailing any consequence. The word "harm" was already sufficiently flexible, and there was no need to create a threshold above which it would be taken into consideration. Bearing in mind the particular vulnerability of aquifers to pollution, the time it took for the effects of that pollution to be noted and felt and, very often, the irreversible nature of the harm, it was essential to establish a standard stricter than that provided for in the 1997 Watercourses Convention, particularly as scientists did not yet fully understand the workings of all those mechanisms. She also endorsed the comments by a number of States that felt that a paragraph concerning compensation for harm should be included.

14. On draft article 9 (Protection and preservation of ecosystems), she supported the proposal by the Netherlands to extend its scope of application to all States, rather than simply to aquifer States, as all States whose activities could have an effect on an aquifer should be obliged to protect and preserve ecosystems. On draft article 11 (Prevention, reduction and control of pollution), she felt that the threshold of "significant harm" was too high, as the Nordic countries had pointed out; that the scope should be extended to cover all States; and that the expression "precautionary approach" should be replaced by "precautionary principle", as requested by the Netherlands. In paragraph 31 of his report, the Special Rapporteur had noted that the utilization of aquifers was not hazardous *per se* and should not necessarily entail resort to a precautionary approach, and that he intended to cite instances in legal instruments to justify his choice of that term in preference to "precautionary principle". However, in her view, the precautionary principle applied to uses that might possibly have harmful consequences—in other words, it applied to the effects and not to the utilization itself. Given that it was very difficult, in the case of aquifers, to detect the effects of a given utilization before they caused harm, the precautionary principle should be applied in full. She would therefore welcome further clarification of that matter, as the drafting change proposed by the Special Rapporteur was not entirely satisfactory. Nevertheless, she was broadly in agreement with the draft articles and considered that they could be referred to the Drafting Committee. She hoped that her suggestions would be taken into consideration, and was greatly looking forward to the debate to be held with the UNESCO experts, and possibly with members of the International Law Association.

15. Mr. GAJA welcomed the fifth report on shared natural resources, which would enable the Commission to draw closer to the final stage of its work, namely the adoption of the draft articles on second reading. Most of the suggestions made since the first reading concerned matters of detail or of wording which could be resolved in the Drafting Committee.

16. On the final form of the draft articles, the Special Rapporteur favoured proposing a set of general principles, with the option of later considering the possibility of adopting a convention. Since a number of States were

opposed to a convention, it would seem appropriate to recommend at the present stage only the adoption of a non-binding text, without ruling out possible moves towards a convention. Furthermore, a widespread view—as in the case of the topic of watercourses—was that issues concerning an aquifer should be dealt with by agreements between the States that shared sovereignty over that aquifer. The model of a framework convention supplemented by protocols had yielded appreciable results in other fields relating to global protection of the environment, for example the ozone layer, but neither the gradual introduction of standards nor a monitoring mechanism seemed appropriate in the case of aquifers.

17. With regard to draft article 19 (Bilateral and regional agreements and arrangements), it would be unrealistic to suggest that the general principles enunciated by the Commission should supersede existing agreements concluded between aquifer States. Draft article 19 could be modified so as to encourage States to reconsider and supplement existing agreements in the light of those principles, or to conclude such agreements where none existed. For that purpose, it did not really matter whether the set of principles was binding or non-binding. The main thing was for States to become aware of the importance of aquifers, and it was more likely that this end would be achieved through that approach than by negotiating a convention that would perhaps never enter into force.

18. Consideration of the question of the relationship between the draft articles and existing or future treaties on the same subject had been postponed pending a decision on the final form of the draft. If the Commission intended to propose the adoption of a convention, that question would clearly have to be addressed, not only with regard to the mutually compatible provisions, as draft article 20 (Relation to other conventions and international arrangements) already did, but especially with regard to conflicting provisions. If it intended to adopt a non-binding set of general principles, that was less important, but it would nevertheless be useful to clarify the relationship between these principles and the 1997 Watercourses Convention, *inter alia* to provide an answer to the possibly misplaced concerns expressed by the International Law Association study group, which claimed that any solution other than a protocol to that Convention would be inappropriate, given that some aspects of the Convention were not covered by the draft articles. Without seeking to interpret the 1997 Watercourses Convention, something which it had no remit to do, the Commission could make it clear that aquifers were not part of a "system of surface waters and groundwaters" to which the Convention referred; that instrument regulated only waters starting from the discharge zone of an aquifer, whereas the present draft articles dealt with the waters that flowed into that zone.

19. Lastly, it would also be useful to specify that the release of water into a discharge zone was a form of utilization—albeit involuntary—of the aquifer, the implications of which should be considered.

20. Ms. XUE said that the Special Rapporteur had given due consideration to the comments by Governments and had incorporated them in the revised draft articles. The abundance of those comments was encouraging evidence of the importance attached by States to the Commission's work on the topic. She supported the decision to concentrate first on the work on aquifers, before turning to other shared resources. While it was now clear that this was the prevailing view, she was appreciative of the fact that, regardless of his own opinion, the Special Rapporteur had also taken full account of the concerns of those who wished also to deal with natural gas and oil. Similarly, with regard to the final form of the draft articles, the Commission should adopt a two-step approach, as it had done with the articles on responsibility of States. With regard to article 20, as the draft essentially consisted of guidance for States rather than a binding text, it did not seem necessary to refer to its relationship with other international instruments. State practice would constitute an empirical basis for deciding at a later stage whether a clause such as the one envisaged in draft article 20 was desirable. For the moment, the Commission should ascertain whether, in practice, the principles set forth fulfilled the object and purpose of the draft articles. In so doing, it did not intend to—and must not—restrict the right of States to conclude any arrangements or agreements they deemed appropriate having regard to the specific characteristics of the aquifer concerned. Furthermore, the relationship with the 1997 Watercourses Convention did not pose a problem, as that Convention had not yet entered into force and the matter could be dealt with later when it was necessary.

21. By and large, the revised draft articles reflected the practice of States, and also a long-term vision of sustainable utilization of shared water resources. With regard to Ms. Escarameia's comments on the criterion "significant" to qualify "harm", it was interesting to note that the modifier was generally used to qualify the notions of harm and adverse effects in international environmental treaties. Human activities tended to create effects on the natural environment. The Commission was not seeking to prohibit the utilization of aquifers, but to preserve a reasonable balance between, on the one hand, their utilization for purposes of social and economic development and, on the other, the protection of the environment. The term "significant" expressed that balance. Similarly, in European practice, the "precautionary principle" was often defined to weigh the risk against scientific certainty when it came to utilizing a given resource. There again, a balance had to be maintained. The Special Rapporteur was right to prefer the expression "precautionary approach" when utilization alone was at issue. The message was that scientific knowledge must always be taken into consideration when utilizing a resource, but that in the event of uncertainty, a precautionary approach must nevertheless be adopted.

22. Lastly, some of the provisions adopted on first reading could be interpreted as having a very broad scope of application, particularly those concerning management and planned activities. States should be given enough leeway to adopt such cooperation mechanisms as they saw fit in order to utilize and conserve water resources on a sustainable basis. That matter should be further elaborated in the commentaries.

Organization of the work of the session (*continued*)

[Agenda item 1]

23. Mr. COMISSÁRIO AFONSO (Chairperson of the Drafting Committee) said that the Drafting Committee on the topic of reservations to treaties would be composed of 13 members: Mr. Candioti, Ms. Escarameia (Rapporteur), Mr. Fomba, Mr. Gaja, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Ojo, Mr. Pellet (Special Rapporteur), Mr. Perera, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Ms. Xue. The Drafting Committee on the topic of shared natural resources would comprise 12 members: Mr. Candioti, Ms. Escarameia (Rapporteur), Mr. Gaja, Mr. Galicki, Mr. Kolodkin, Mr. McRae, Mr. Ojo, Mr. Saboia, Mr. Vasciannie, Mr. Vázquez-Bermúdez, Mr. Wisnumurti and Ms. Xue.

The meeting rose at 11.15 a.m.

2958th MEETING

Wednesday, 7 May 2008, at 10 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

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

Shared natural resources (*continued*) (A/CN.4/588, sect. B, A/CN.4/591, A/CN.4/595 and Add.1, A/CN.4/L.722, A/CN.4/L.724)

[Agenda item 4]

Fifth report of the Special Rapporteur (*continued*)

1. Mr. SABOIA said that, although the abundant oral and written comments received from Governments on the draft articles on the law of transboundary aquifers adopted by the Commission on first reading in 2006 were generally supportive of the approach taken by the Special Rapporteur and the Commission, the number and scope of those comments, which covered both legal and technical aspects of the topic, posed a challenge to the Commission as it commenced its second reading of the draft articles.

2. As to the final form of the Commission's work on the topic, he continued to prefer a non-binding set of guidelines which might serve as a basis for drawing up bilateral or regional agreements and possibly lead to the adoption of more effective norms, or even binding legal instruments, that took account of the specific characteristics of the aquifers to which they related. He agreed with the Special Rapporteur that if the Commission were to present the General Assembly with a draft convention, there was a danger that its work might be shelved for a number of years. The question raised by Ms. Xue at the 2957th meeting, as to whether there was any need at the current stage for an additional article referring to the relationship between the draft articles and other international legal instruments, was also pertinent.

3. The solution suggested by the Special Rapporteur in paragraph 9 of his fifth report had the advantage of not prejudging the issue of the final form and of leaving it to the General Assembly to decide whether the final product was to be binding or non-binding. He noted that the decision to use mandatory language in the draft articles was without prejudice to the final form of the Commission's work on the topic.

4. He concurred with the Special Rapporteur's views on the informal document submitted by the International Law Association, which took a rather different approach to the subject from that which had guided the Commission for a number of years. It would be detrimental to the whole process to reopen so many issues on second reading without a compelling reason. In any case, the Commission, as a subsidiary organ of the General Assembly, had to give priority to the comments presented by States. He would be reluctant to engage in drafting exercises involving the experts of other organizations unless such was the Commission's established practice.

5. Turning to the wording of the draft articles, he said that in draft article 1 (Scope), the unduly broad reference to "other activities" in subparagraph (*b*) could hamper legitimate activities, particularly in agriculture and related sectors, in aquifer States. Although in paragraph 13 of his report the Special Rapporteur had expressed his willingness to identify the relevant activities in detail in the commentaries, he personally thought that the subparagraph could be deleted, or at least qualified by the insertion of a reference to "significant harm", in order to establish an appropriate threshold for the possible harmful effects that a specific activity might have on an aquifer. Like Ms. Xue, he considered it important to maintain an approach that did not unduly restrict the legitimate use of aquifers for social and economic development.

6. With regard to draft article 2 (Use of terms), it would be interesting to have clarification of some of the technical matters touched upon in some Governments' comments, such as whether it was correct or necessary to refer to an underlying less permeable layer; whether aquifers whose waters could not be extracted should be included in the definition; and whether the definition of recharge and discharge zones was accurate.

7. While he endorsed Mr. McRae's comments on the importance of including subparagraph (*d* bis) in the draft articles, even though the concepts of the withdrawal of water and heat needed elucidation, he was somewhat concerned about Mr. McRae's proposal, supported by Ms. Escarameia, to extend the scope to include aquifers in areas under the continental shelf. He supported the Special Rapporteur's position on that question.