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Summary record of the 2958th meeting

Topic:
Shared natural resources

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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. Cafisch, 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.

8. Ms. Escarameia's question regarding the responsibility of a State administering another State's territory was worthy of reflection. He understood her remark to refer mainly to the situation of a State that was acting as an occupying Power; in such cases, the rules of international humanitarian law governing the duties of occupying States might address that concern. However, there might be other instances, such as that of a territory administered by the United Nations pursuant to Chapter VII of the Charter of the United Nations, which would merit further discussion and clarification in the commentaries.

9. Draft article 3 (Sovereignty of aquifer States) was crucial to the balance that the Special Rapporteur and the Commission were seeking to strike between, on the one hand, the legitimate sovereign rights of States to use their natural resources, including underground waters, and, on the other, their responsibility regarding the equitable and reasonable use of resources, including transboundary aquifers, and also their duty not to cause significant harm to another aquifer State through that use. It seemed problematic to require a State to exercise its sovereign rights over its portion of the aquifer solely in accordance with the draft articles, the binding or non-binding nature of which had yet to be decided. Other norms of international law were no doubt relevant to the regulation of transboundary aquifers. The inclusion of a reference to international law in general would therefore improve the draft article, as would an express reference to General Assembly resolution 1803 (XVII) of 14 December 1962, which constituted a significant source of law concerning States' permanent sovereignty over their natural resources.

10. With regard to draft article 4 (Equitable and reasonable utilization), he was in favour of maintaining the current approach. It was necessary to take into account the essentially non-renewable nature of aquifers and the fact that although the waters contained in them should be carefully preserved and used with caution, that should not prevent them from serving socially and economically legitimate purposes in the aquifer State where they were located.

11. While he agreed with the Special Rapporteur's rejection, in paragraph 21 of his report, of the proposal that an aquifer State should be prohibited from assigning, leasing or selling its right to utilize an aquifer to another State, he saw merit in Mr. McRae's remark to the effect that rather than establishing a prohibition, some obligations should probably be placed on a State which acquired the right to use an aquifer. The possibility of one aquifer State selling or leasing its portion of the aquifer to another State might indeed be a cause for concern, given that aquifers might be used to dispose of carbon or other materials. That was a particularly disturbing prospect, in the case of developing or vulnerable States that might be prevailed upon by economic circumstances to allow other States to use their aquifer, with possibly detrimental consequences. While those matters might be covered by international instruments regarding the disposal of hazardous and other materials, some reference to that eventuality could perhaps be included in the commentaries.

12. Article 5 (Factors relevant to equitable and reasonable utilization) adequately established the relevant

factors and the current wording should therefore be retained. He had been surprised to read one Government's criticism of groundwater-based agriculture conducted in arid or semi-arid countries "under the pretext of food security" and by its apparent proposal to limit the use of groundwater to supplying the bare essentials for survival. He wondered what that same Government would have to say about the extensive use of subsidized agriculture and its distorting effects on food production, trade and the use of water.

13. He supported the retention of the threshold of "significant harm" in draft article 6 (Obligation not to cause significant harm to other aquifer States). Ms. Xue's helpful statement at the previous meeting had shown how widespread was the use of that qualifier in legal instruments covering similar situations. As he had indicated in his statement to the Working Group on shared natural resources at the previous session, the obligation of aquifer States to take appropriate measures to avoid significant harm should be regarded as an obligation of conduct, rather than as one of result.

14. Draft article 7 (General obligation to cooperate) should be maintained as it stood. In paragraph (2) it would be advisable to retain the word "should", as it would scarcely be possible to make the establishment of a joint committee mandatory in the absence of consent by the interested parties to do so.

15. On draft article 8 (Regular exchange of data and information), he drew attention to Brazil's view that it would be useful to add a specific reference to the importance of a "collective effort to integrate and make compatible, whenever possible, the existing databases, taking into consideration regional contexts and experiences". While that effort might be covered by paragraph 4 as currently worded, the Special Rapporteur should consider including a reference in the commentaries to the need for such an effort, and also to the desirability of establishing aquifer inventories, as suggested by Switzerland.

16. Generally speaking, he supported the drafting of Part III; however, in draft article 10 (Recharge and discharge zones) the reference to recharge and discharge zones should be qualified by an expression such as "most significant", in order to avoid imposing an obligation which might be difficult to apply in practice. He also endorsed the current wording of draft article 11 (Prevention, reduction and control of pollution) and believed that it was necessary to retain the expression "precautionary approach", in the light of the explanations given by the Special Rapporteur in previous reports¹⁴ and in paragraph 31 of his fifth report.

17. With regard to draft article 13 (Management), given that the draft articles were to be seen as a set of guidelines to serve as a basis for bilateral and regional cooperation and instruments, it would be awkward to stipulate that States must establish and implement plans for the management of aquifers in accordance only with the provisions of the

¹⁴ See, in particular, the third report of the Special Rapporteur in *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1, para. 33.

draft articles. An additional reference should be made to bilateral or regional instruments or arrangements, which might lay down rules for management more in keeping with the characteristics of the aquifers concerned. He took it that the “joint management mechanism” mentioned in the last sentence of the draft article was meant to refer to the transboundary aspects of managing an aquifer, but was without prejudice to the rights of a State concerning the management of its own segment of the aquifer. It was of course desirable to seek to ensure that transboundary aquifers were operated and managed in a complementary and cooperative manner. That goal should be sought by complementing the current draft articles with bilateral or regional arrangements.

18. Mr. OJO commended the seminal work done by the Special Rapporteur on the topic of shared natural resources and his wise recommendation that the Commission should first complete its work on the law of transboundary aquifers, even though other kinds of shared natural resources, namely oil and gas, might be governed by similar rules and principles under international law. He commended the technical expertise evident in the draft articles adopted on first reading: recourse to experts had made it possible to clarify technical concepts and had shown the importance of interaction between law, science and policy in the progressive development of international law. He likewise commended the Special Rapporteur and UNESCO on the regional seminars held to familiarize Governments with the draft articles, a step which would undoubtedly increase the likelihood of their ultimate adoption.

19. Draft article 1 should leave States in no doubt as to the scope of application. Yet the words “other activities” left room for uncertainty. Accordingly, the examples of such activities listed in paragraph (6) of the commentary to the draft article adopted on first reading, namely farming, the utilization of chemical fertilizers and pesticides and the construction of subways,¹⁵ should be incorporated in the text of subparagraph (b).

20. The intention to regulate the utilization, protection, preservation and management of freshwater resources that were vital for human life, made the draft articles extraordinarily important. Accordingly, there was a need for a clear statement that the draft articles applied to freshwater resources—all the more so because the definitions of “aquifer” and “aquifer system” did not make that plain.

21. It was clear that the draft articles drew heavily on the 1997 Watercourses Convention. As both the draft articles and the Convention applied to transboundary aquifers that were hydraulically connected to international watercourses, there was a potential for conflicts of application. Some statement on the relationship between the two instruments, especially in the event of any conflict between them, was therefore desirable.

22. Paragraph (4) of the commentary to draft article 2 explained that the quantity of waters transmitted between aquifers was important in deciding whether they constituted an aquifer system, since an insignificant or *de minimis* quantity of water might not translate to a true

hydraulic connection. It was important that an idea of the quantity of transmissible water necessary for the constitution of an aquifer system should be indicated, by adding the word “significant” to draft article 2 (b), which could be rephrased to read “‘aquifer system’ means a series of two or more aquifers that have significant hydraulic connection”.

23. Draft article 3 simply restated a basic principle of international law and, as such, it was welcome. He did not, however, subscribe to the suggestion that a specific reference to the application of the principle of sovereignty should be included in the draft article. It was a generally accepted principle of international law that the exercise of sovereignty entailed not only rights but also responsibilities. For that reason, he suggested that the draft article should be left unchanged.

24. In draft article 5, the term “natural characteristics” had a technical meaning which needed to be defined clearly. The commentary to that draft article helpfully explained that the expression referred to the physical characteristics which defined and distinguished a particular aquifer, and set out the three categories of natural characteristics. Similarly the expression “related ecosystem”, used in paragraph 1 (i), required definition in order to guide the interpretation of the draft article. Paragraph 2 should be divided into subparagraphs in order to highlight the importance of each of its components, especially that relating to vital human needs.

25. Since paragraph (5) of the commentary to draft article 6 made it clear that it was “intended to cover activities undertaken in a State’s own territory”, the obligation referred to in the draft article was primarily on the individual State, although a collective obligation on other transboundary States was not excluded. As drafted, however, the article appeared to emphasize that States generally were the primary obligor. Accordingly, paragraphs 1 and 2 should begin with the words “An aquifer State” and the consequential grammatical adjustments should be made.

26. The need for cooperation among aquifer States was central to any meaningful implementation of the proposed draft articles. The principle of cooperation was inherent in draft articles 8 to 16. There was therefore a need for a provision upholding the principles of sovereign equality and territorial integrity, in the interests of weaker States, and reminding stronger States of their traditional obligations under international law. Such a provision should be independent of draft article 7 and might be inserted early in the text, before the current draft article 2. The reference to sovereign equality and territorial integrity could then be deleted from draft article 7.

27. Paragraph (2) of the commentary to draft article 8 stated that the rules set forth therein were residual and applied in the absence of specially agreed regulation of the subject. In fact, however, States should be encouraged to make arrangements for the regular exchange of data and information independently of the provisions of the draft article. He therefore proposed that paragraph 1 should begin with the formulation: “Without prejudice to any other regulation or arrangement which aquifer States

¹⁵ *Yearbook ... 2006*, vol. II (Part Two), pp. 95–96.

may make and pursuant to draft article 7 ...". A provision of that nature would serve to remind aquifer States of the need to act on their own initiative in that regard.

28. Draft article 10 was the only one which imposed obligations on non-aquifer States. The obligation to cooperate with aquifer States might involve the exchange of data and information. He therefore suggested that all non-aquifer States in whose territory a recharge or discharge zone was located should be bound by the obligation established in draft article 8. That result could be achieved by inserting at the end of paragraph 2 the words "and for the purposes of this article, such States shall be deemed to be aquifer States pursuant to articles 7 and 8 and shall be bound thereby".

29. Draft article 11 was intended to ensure that States' efforts to prevent, reduce and control pollution of a transboundary aquifer or aquifer system also extended to the recharge process. Where the recharge process took place in non-aquifer States, those States should also be covered by that obligation. He endorsed the point made by Ms. Escarameia in that regard. He therefore proposed that a second paragraph should be added to draft article 11, to read: "The obligation in this article shall apply *mutatis mutandis* to non-aquifer States where any recharge zone is located within such States."

30. As for draft article 13, the obligation to enter into consultations concerning the management of a transboundary aquifer or aquifer system should attach to aquifer States generally. Accordingly, the words "at the request of any of them" should be deleted from the second sentence of the draft article.

31. Mr. PELLET, referring to the procedure for election of officers, said that the rigid application of the principle of geographical distribution governing the appointment of officers of the Commission was not necessarily always a good thing, although he hastened to add that the comment was not directed against any of his colleagues who had been elected at the start of the current session. He would raise the matter again at the celebrations to mark the Commission's sixtieth anniversary.

32. The topic of shared natural resources was of great practical importance, which was why he had strongly supported its inclusion on the Commission's agenda. Nevertheless, if he took the floor in the present debate, it was more as a mark of his esteem for the Special Rapporteur than out of any conviction that he had an interesting contribution to make.

33. He hoped that the Special Rapporteur would forgive him for voicing one small criticism of the presentation of the fifth report. It was irritating that the revised draft articles had been relegated to an annex, so that the reader had constantly to leaf back and forth through the report in order to relate the Special Rapporteur's comments on the revised texts to the provisions to which they referred. It would have been better simply to juxtapose the revised provisions and the comments. It was also regrettable that the Special Rapporteur had not employed some typographical device to highlight the few changes made to the draft articles since the first reading.

34. As to the final form of the texts, he was *prima facie* in agreement with the proposal in paragraph 9 of the report, although he was sceptical about the wisdom of suggesting the convening of a diplomatic conference, even in the medium or long term, given that views on the topic were strongly coloured by the special features and circumstances of each aquifer. Subparagraph (b) of the recommendation in paragraph 9 seemed to set forth the most desirable outcome, although its wording was somewhat strange. It was recommended that States—presumably aquifer States—should make appropriate arrangements bilaterally or regionally with the States concerned. But which were the States concerned? He supposed that the wording referred to the aquifer States, but it could refer to others. If it referred only to aquifer States, the subparagraph should be reworded to read "recommend that aquifer States make appropriate arrangements ...", in which case no mention need be made of the States concerned. If the latter might include third States, the phrase should read "Invite the aquifer States and the other States concerned to make appropriate arrangements ...". He had drawn particular attention to the wording of subparagraph (b), because it referred to what should constitute the Commission's most important objective when presenting its recommendations to the General Assembly.

35. On draft article 1, he said that, by making it clear that the draft articles applied not only to the utilization of aquifers but also to other activities which had or were likely to have an impact upon aquifers, subparagraph (b) not only obviated the need for a new subparagraph (d), as proposed by Saudi Arabia in paragraph 71 of document A/CN.4/595 and Add.1, but also made subparagraph (c) redundant, since the latter merely listed some of those other activities.

36. He agreed with Mr. Ojo that in draft article 2 (b), it would be advisable for the purposes of the draft articles to limit the definition of an aquifer system to systems with a significant hydraulic connection. The precise wording would need to be determined in due course. The same applied to the definition of the aquifer itself in draft article 2 (a). The current definition was too abstract for the purposes of a draft that was concerned only with aquifers of some considerable size.

37. He was somewhat troubled by the definition proposed for the concept of utilization in the new draft article 2 (d bis). The Special Rapporteur indicated in paragraph 17 of his report that it was not exhaustive. To make that clear, the words "*inter alia*" could perhaps be included in the text itself, which gave examples only of the most common types of utilization of transboundary aquifers or aquifer systems. Where codification and progressive development were involved, he was opposed in principle to the inclusion of examples in the text itself: examples should be relegated to the commentaries, and it would in any case be preferable to draft an all-encompassing formulation that obviated the need for examples.

38. On draft articles 4 and 5, which were crucial to the overall balance of the draft, he regretted the fact that the Special Rapporteur had not taken up Cuba's proposal to replace the expression "present and future needs" by

“the needs of present and future generations”. The use of subterranean aquifers, which were almost exclusively non-recharging, was the perfect example of a situation calling for what might be termed “intergenerational prudence”. Even in the case of a non-renewable resource, he did not see why concerns about sustainability should not be addressed in the draft. They were addressed, and rightly so, in draft article 7, paragraph 1, but that concept should permeate the entire draft and be reflected specifically in draft articles 4 and 5.

39. In his comments on draft articles 9 and 11, the Special Rapporteur seemed averse to the notion that States other than aquifer States might have a role to play in the protection and preservation of ecosystems and the prevention, reduction and control of pollution. That came as a surprise to him, perhaps owing to his limited knowledge of aquifers. However, either non-aquifer States as defined in draft article 2 (*d*) could play no real role in such endeavours, in which case he agreed with the Special Rapporteur, or else they could, in which case he failed to comprehend the Special Rapporteur’s reticence. If there were any specific situations in which States other than aquifer States could play an important role in the preservation of aquifers, they were not described in the report.

40. Even though the Special Rapporteur had asked members to confine their comments to draft articles 1 to 13, he had so little to say on the remaining draft articles that it made good sense to address the entire text in a single intervention. The minor change to the wording of draft article 15 had no effect on the French and, he presumed, on other language versions. Referring to the proposed new draft article 20, paragraph 1, he questioned the advisability of basing it on article 311, paragraph 2, of the United Nations Convention on the Law of the Sea, a provision which he had always found frankly baffling. He could not see the point of saying that a convention did not alter the rights and obligations arising from other agreements with which it was compatible. What mattered was not what happened when texts were compatible, but what happened when they were incompatible. It would be better to say nothing and let the principles of *lex specialis* and *lex posterior priori derogat* come into play. Moreover, the Commission usually left the drafting of final clauses to the diplomatic conferences at which instruments were adopted, and the Special Rapporteur’s proposal appeared to prejudge the decision to be adopted by the General Assembly on the final form of the draft.

41. However, his opposition to the new draft article had an even more pragmatic basis: at some point in the more or less remote future, the draft might well become a convention, but that was not what the Commission would be recommending to the General Assembly if, as he hoped, it adopted the course of action outlined in paragraph 9 of the report. If that was to happen, then throughout the interim period, draft article 20 would at best be devoid of purpose and, more likely, would create needless complications and raise questions concerning the interrelation between soft and hard law. It would be for a diplomatic conference to decide whether the future instrument should include such provisions in its final clauses.

42. Accordingly, he favoured referring to the Drafting Committee draft articles 1 to 13, and also draft articles 14 to 19, but not draft article 20.

43. Mr. FOMBA congratulated the Special Rapporteur on the excellent quality of his report and endorsed his view that the partial similarities between non-recharging aquifers and natural deposits of oil and gas did not mean that the applicable rules were entirely identical or automatically applicable to both categories of natural resources. He likewise agreed that a decision on whether to undertake work on oil and natural gas should be postponed until the work on transboundary aquifers had been completed.

44. A wide divergence of views and a number of options existed with regard to the final form of the draft articles, all of which must be given due consideration so as to evaluate their respective advantages and disadvantages. A case-by-case approach should prevail, and the Commission’s work should be guided by considerations of practical utility. Nevertheless, in view of the topic’s importance to humankind and of the fact that it followed on from the 1997 Watercourses Convention, a legally binding convention should be the ultimate goal.

45. Accordingly, he endorsed the comments in paragraphs 8 and 9 of the report concerning the need for a flexible and graduated approach, the length of time required for codification and the importance of urgent action in the face of the global water crisis. The Special Rapporteur rightly suggested that one way of coping with that situation was for States to enter into bilateral or regional arrangements on the basis of the principles stipulated in the draft articles. However, the question then arose as to what would be the fate of arrangements that predated the principles, in the event that the two sets of arrangements were totally or partially incompatible. Perhaps, as suggested by Mr. Pellet, the *lex specialis* rule would automatically apply. Despite some of the comments made at the previous meeting, he fully endorsed the Special Rapporteur’s suggestion that a two-step approach should be followed, starting with a draft recommendation to the General Assembly. He also agreed with the Special Rapporteur’s view that, since the draft recommendation to the General Assembly foresaw the possibility of a convention, the revised texts needed to be in that form.

46. Retaining the existing title was acceptable, even though the meaning of the term “transboundary” seemed to cause some problems. When draft articles 1 and 2 were read together, it was clear that the draft applied to all aquifers and aquifer systems, regardless of whether they were linked to surface waters. Nevertheless, it would be useful to provide some examples in the commentaries. With regard to subparagraph (*b*) of draft article 1, he commended the Special Rapporteur’s intention to identify the relevant activities in the commentaries. On the question whether to mention the activities of non-aquifer States that could have an impact on aquifers, the Special Rapporteur took the view that the matter could be dealt with in the draft articles dealing with the obligations of States. However, draft articles 6 and 7 did not expressly address that subject. Did the Special Rapporteur plan to propose new provisions for that purpose? Such provisions could perhaps be located in Part IV, concerning activities

affecting other States, and could be entitled “Activities of States other than aquifer States”.

47. The proposal to add a new subparagraph (*d*) to draft article 1 was not appropriate, for the reasons given by the Special Rapporteur. As for the question whether saltwater resources should be excluded, he had expressed a similar concern at the previous session and was glad to see that the Special Rapporteur had admitted that there were some very limited instances of the use of brine aquifers for irrigation, as would be explained in the commentary.

48. In connection with draft article 2, on the use of terms, the Special Rapporteur was to be commended for his efforts to draw on the best technical advice available. As to whether the scope of the draft articles should be extended to continental shelves, he found the Special Rapporteur’s response on the whole convincing. He also agreed with Mr. Pellet’s proposal to modify the definition of “utilization” so as to emphasize that it was not exhaustive; alternatively, the commentary could address the problem. The commentaries could also address other technical issues, as suggested in paragraphs 18 and 19 of the report.

49. He could generally go along with the Special Rapporteur’s reasoning in paragraph 21 of his report with regard to the concept of sustainability, but would like to see further efforts made to define the relationship between the terms “reasonable” and “sustainable”. Consideration should also be given to the question whether a distinction should be made between the cases of non-recharging and recharging aquifers. While he had initially endorsed the use of the phrase “present and future needs”, he now thought that the idea of the needs of future generations should be spelled out. As to whether a State could assign, lease or sell, in whole or in part, its right to utilize aquifers, while agreeing with the Special Rapporteur that the matter must be left to States to decide, he noted that nothing was said in the report about the position of international law on that subject.

50. He endorsed the views, expressed in paragraphs 23 and 25, that the scope of the obligation under draft article 6 not to cause significant harm to other aquifer States and the legal framework relating to compensation should be clarified in the commentaries. As for the suggestion that the scope of draft article 9, concerning protection and preservation of ecosystems, might be broadened to include, not just aquifer States, but all States, it would be helpful if the Special Rapporteur were to submit clarifications making it possible to decide whether non-aquifer States should be required to protect ecosystems located outside aquifers.

51. He agreed that procedural measures pursuant to draft article 11 on prevention, reduction and control of pollution would best be explained in the commentaries. While he lacked the technical expertise to respond to the question whether non-aquifer States in whose territory there was neither a recharge nor a discharge zone of a transboundary aquifer of other States had any role to play in preventing, reducing or controlling pollution of that aquifer, he felt that the question certainly deserved further consideration.

52. It was certainly open to debate whether the phrase “precautionary approach” was to be preferred to “precautionary principle” in draft article 11, and the Special Rapporteur’s intention to cite conventions in which those expressions occurred was therefore welcome. However, the Special Rapporteur should be aware that he himself sometimes used the two phrases interchangeably. Lastly, the proposal to alter the word order of the second sentence of that draft article seemed acceptable.

53. Mr. BROWNLIE said that the fifth report contained many sensible and helpful observations on a difficult subject, rightly taking the view that it was not practical to have the topic encompass the qualitatively different subject of oil and natural gas. On the final form of the draft articles, he had initially been attracted by the flexible compromise solution suggested in paragraph 9 of the report, but after hearing Mr. Pellet’s remarks, he had reverted to the idea of preparing a draft convention. While the topic might not necessarily be particularly suited to a positive law approach, drafting in the form of a convention would nevertheless help the Commission to retain control of the subject matter.

54. He did not agree with the Special Rapporteur’s reasoning about sustainability: while fashionable, such environmental law concepts were not yet very well formed. He would be strongly in favour of including sustainability, as long as the notion was properly explained and given precise content. In the context of aquifers, a reference to intergenerational values would be useful and sensible.

55. The legal status of aquifers was surprisingly complex. Draft article 3 spoke of the sovereignty of aquifer States; General Assembly resolution 1803 (XVII) of 14 December 1962 referred to the inherent sovereignty of the aquifer State; and draft article 4 covered the right of equitable and reasonable utilization which seemed indirectly to recognize some legal interest apart from sovereignty as such. Draft article 6 spoke of the obligation not to cause “significant” harm. In the work on international liability in case of loss from transboundary harm arising out of hazardous activities, “significant” was not the strongest qualifier used, and was construed as meaning “subject to proof in quantitative terms”. In the context of transboundary harm, there was indeed a problem with proving damage, a problem that flowed partly from the unfortunate yet longstanding division in the Commission’s work between international liability and State responsibility. Draft article 11 placed on aquifer States a duty of prevention and control. There was a lacuna, however, in respect of the role of principles of general international law in relation to State responsibility, which could not be set aside. There was also a need for a paragraph on compensation.

56. Against that background, some inferences could be drawn. First, there was no shared or proprietary legal interest between aquifer States. Secondly, sovereignty and control connoted a duty to prevent harm to the other aquifer State or States. Thirdly, that necessarily involved a straightforward application of the classical principles of State responsibility, as sovereignty implied a duty to control and therefore a duty not to permit a territory under control to become a source of harm to neighbouring

States. That principle was reflected in the arbitral award in the *Trail Smelter* case, the *Corfu Channel* case and the recent case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*. In his view, an aquifer was clearly a domain under the sovereignty and control of an aquifer State.

57. His conclusion was that there was an awkwardness in the draft articles in relation to State responsibility. Draft article 6 made no reference to State responsibility but created an obligation not to cause significant harm, and draft article 11 posited a duty of prevention and control of pollution. However, there was no reference to the principles of State responsibility under general international law. The key question, then, was whether those provisions inferentially indicated the absence of State responsibility under general international law. It was strange to see references in draft article 11 to the precautionary principle, in the absence of any reference to the principles of State responsibility. The numerous principles of customary or general international law already in existence should be recognized as applying to sovereignty and to the duty to control pollution or other damage to other aquifer States that derived from sovereignty over part of an aquifer.

58. Mr. CANDIOTI, referring to the final point made by Mr. Brownlie, said that the intention of the Working Group and of the Special Rapporteur had never been to exclude responsibility for transboundary harm in relation to aquifers. A reference to responsibility under general international law was included in the commentaries produced by the Special Rapporteur. In addition, there was a general reference to responsibility for transboundary harm in the Commission's earlier work on responsibility of States for internationally wrongful acts¹⁶ and for activities not prohibited by international law.¹⁷

59. Mr. VASCIANNIE congratulated the Special Rapporteur on an excellent fifth report. On the question of the final form of the draft articles, there seemed little point in producing a framework convention, as many members of the Sixth Committee might be disinclined at the current time to proceed to a binding multilateral treaty. That circumstance, together with the fact that some "specially affected" States already had bilateral or regional obligations concerning transboundary aquifers, counselled against the framework convention approach. On the other hand, for the Commission merely to provide a report seemed to be an unduly modest way of going about the codification and/or progressive development of what was acknowledged to be a topic of some urgency in international law.

60. Partly by elimination of the alternatives, he supported the Special Rapporteur's recommendation in paragraph 9 of the report. It would probably be unnecessary to suggest the establishment of a working group of States; States themselves could determine the pace at which to move the matter forward.

¹⁶ See footnote 12 above.

¹⁷ Draft articles on prevention of transboundary harm from hazardous activities, *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 146 *et seq.*, paras. 97–98, and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Yearbook ... 2006*, vol. II (Part Two), pp. 58 *et seq.*, paras. 66–67.

61. He endorsed the Special Rapporteur's suggestion that consideration of oil and natural gas should be deferred until the work on aquifers had been completed. Even although some of the arguments put forward by States for keeping the issues separate, as summarized in paragraph 5 of the report, were not entirely convincing, nevertheless, if there was significant State resistance and a rational basis for treating oil and natural gas differently from water, it might be prudent to maintain the distinction in the Commission's work. The justification for making the distinction appeared to be simply that the commercial treatment of the one resource had traditionally differed from that of the other two.

62. With regard to draft article 1 (Scope), the Special Rapporteur maintained that the intention to apply the adjective "transboundary" to both aquifer and aquifer system was clear; he personally agreed with that assessment. However, in the context of litigation, one could press the point, particularly if an ambiguity arose in translation. Perhaps draft article 2, on use of terms, could spell out that intention in order to eliminate any doubt.

63. A substantive matter arose in connection with the words "other activities" in draft article 1 (b). Someone reading the draft articles in years to come might legitimately ask which other activities were contemplated within the scope of the document and might not necessarily be helped by the qualifier that the activity had or was likely to have "an impact", given the subjective nature of the word. Nor was it sufficient to say that the other activities would be identified in the commentary, because if the instrument eventually became a framework convention, States would want to know, from the text, precisely what activities were contemplated. He suggested the insertion of a brief list of the activities contemplated in draft article 1 (b).

64. Turning to the use of terms, he said that Ms. Escarameia's reminder that the word "territory", as used in the definition of "aquifer State" in draft article 2 (d), would not include the continental shelf was of course correct; it was also consistent with the Special Rapporteur's view that the continental shelf should not be included in the topic unless the transboundary aquifer between two States extended to the continental shelf, because it was rare for aquifers to extend to the shelf and because rock reservoirs usually held oil and natural gas, and sometimes brine. As had been argued by Mr. McRae and Ms. Escarameia, however, those arguments were not conclusive, not least because the Special Rapporteur was now of the opinion that the utilization of brine fell within the scope of the topic in respect of land territory. Nonetheless, he personally was inclined to support the Special Rapporteur's approach, because he agreed that oil and natural gas should not be addressed in the draft articles, and also because the law pertaining to the continental shelf had developed, in some senses, in a manner independent of the law on resources in land territory. It was not clear to him why those two regimes—land and shelf—should be conflated for the purposes of transboundary aquifers. The fact that the Special Rapporteur had made provision for brine under land territory did not necessarily mean that the same should be done for brine within the seabed and subsoil of the continental shelf, which was an area of sovereign rights, not of sovereignty.

65. He supported Ms. Escarameia's view that sovereignty in draft article 3 could be said to be exercised "in accordance with the principles of international law". However, he saw no need to qualify the word "sovereignty" in the draft article with the adjective "inherent", as had been suggested by one Government.

66. The concept of "equitable and reasonable utilization" was carefully elaborated upon in draft articles 4 and 5. The advantage to be gained by changing the phrase to read "equitable and sustainable utilization" was yet to be fully demonstrated, given the need to strike a balance among various social, economic and other factors, a need pointed out by Ms. Xue at the previous meeting. Reasonable use incorporated considerations of sustainability.

67. He assumed that the list of considerations in draft article 4 was meant to be exhaustive, but that the list of factors in draft article 5 was not; that the sovereignty of an aquifer State encompassed its power to assign to third States its rights to utilize its aquifer; and that the aquifer State could assign no greater rights than it had. That was consistent with the approach to permanent sovereignty over natural resources taken by the General Assembly.

68. With regard to draft article 7, paragraph 2, on the general obligation to cooperate, it would be helpful to indicate some of the specific purposes for which States should establish joint mechanisms of cooperation.

69. He noted that draft article 8, on regular exchange of data and information, included a "best efforts" provision in paragraph 3. That might be as far as one could go at the current time, but he wondered whether the economic challenges facing a country, or the terms of its national law on proprietary information, might perhaps serve to bar the provision of information under that clause.

70. Mr. WISNUMURTI expressed his gratitude to the Special Rapporteur for his fifth report, which set out the views of Governments in a balanced manner. The Special Rapporteur had rightly concluded that an overwhelming majority of Governments and members of the Commission supported his suggestion that the law on transboundary aquifers should be treated independently of any future work on the issues related to oil and gas. That conclusion gave clear direction to the work of the Commission.

71. Regarding the final form of the draft articles, he shared the Special Rapporteur's view that the ultimate goal should be their adoption as a legally binding convention. That might, however, be a lengthy process, involving difficult negotiations in a diplomatic conference whose protracted nature would undermine the effectiveness of efforts to take urgent measures to deal with the global water crisis. He therefore believed that the two-step approach suggested by the Special Rapporteur in paragraph 9 of his fifth report was realistic and reasonable, and welcomed the decision to draft the revised texts in the form of a convention.

72. However, if the General Assembly agreed to the two-step approach suggested, there should be few illusions as to the likelihood of Governments demonstrating sufficient interest and political will to examine the

draft articles with a view to concluding a convention, as suggested in subparagraph (c) of the draft recommendations contained in paragraph 9 of the report. That said, if Governments were really to put into practice the recommendation formulated in subparagraph (b) of the draft recommendations, by making appropriate bilateral or regional arrangements on the basis of the principles enunciated in the draft articles, and if they saw the usefulness of such arrangements, that might in turn create the conditions necessary for the convening of a diplomatic conference.

73. On draft article 1, he had taken note of the Special Rapporteur's clarification regarding an observation by one Government, referred to in paragraph 14 of the report, to the effect that the draft article did not exclude cases of utilization of brine (saltwater) aquifers where salt water was extracted and the desalinated water used for irrigation. It might be sufficient to make that clarification in the commentary, rather than in the draft article itself.

74. On the use of terms (draft article 2), the Special Rapporteur indicated in paragraph 16 of the report that he was opposed to the suggestion that the definition of "aquifer State" should be extended to cover shared natural resources found under the continental shelves of States. He sympathized with the Special Rapporteur's concern that such an extension of the definition would cause complications and would be contrary to the accepted approach that the drafting of articles on transboundary aquifers should be pursued independently of any future work of the Commission on issues related to oil and natural gas. However, while it was true, as noted by the Special Rapporteur, that extension of such aquifers beyond territorial seas was possible but rather rare, the Commission should not *a priori* exclude the need for a definition which covered cases in which the transboundary aquifers extended to the continental shelves of States. Continental shelves were considered to be the extension of the land mass of the States concerned, which had sovereign rights over the natural resources contained therein. For those reasons, and as there was the possibility, as indicated by the Special Rapporteur in paragraph 16 of the report, that transboundary aquifers might be found beneath the continental shelves under the jurisdiction of the States concerned, there was no reason to exclude transboundary aquifers that extended to the continental shelves from the definition in draft article 2 (d).

75. He had no serious difficulty with the new draft article 2 (d *bis*) proposed by the Special Rapporteur, which made it clear that the notion of utilization of transboundary aquifers and aquifers systems included withdrawal of water, heat, storage and disposal. He took the point made that the provision should be understood as being applicable to other relevant draft articles, including draft articles 4 and 5.

76. With regard to the provisions on equitable and reasonable utilization (draft article 4), he supported the proposal by some Governments, referred to in paragraph 21 of the fifth report, to include the concept of sustainability in the text of draft article 4 by substituting "equitable and sustainable utilization" for "equitable and reasonable utilization". The concept of sustainability was a broad

one, covering not only renewable, but also non-renewable resources, including the waters in non-recharging aquifers. The proposal for a new subparagraph (*e*) that 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”, deserved further study, and the Commission should take a clear position in that regard. Leaving the question to States to decide might be a convenient way to address the matter, but it would be at the expense of legal certainty.

77. On the issue of protection and preservation of ecosystems (draft article 9), he welcomed the Special Rapporteur’s intention, as stated in paragraph 28, to submit the clarification on the scope of ecosystems located outside aquifers so that the decision could be made whether non-aquifer States should be required to protect such ecosystems.

78. Mr. NOLTE, commending the Special Rapporteur’s exemplary work, said that the draft articles set out in the fifth report left little room for criticism, carefully balancing the values and interests at stake. He supported the Special Rapporteur’s strategy of separating the work on transboundary aquifers from the issues of oil and natural gas and endorsed his careful approach with regard to the final form of the draft articles, for the reasons set out in the report. He also agreed on the need to limit their scope so as to avoid possible complications and overlap. He endorsed the reference in draft article 1 (*b*) to “other activities”, a reference that had been criticized by a number of members. He understood that formulation to have the function of a catch-all clause; it would be asking too much to enumerate all possible activities which might affect aquifers, in particular in view of the difficulty of predicting future developments.

79. The balance that must be struck between the interests of aquifer States and the need for the conservation of aquifers had been well formulated in draft article 3. The use of the word “sovereignty” was legitimate in the context. He wondered, however, whether the exercise of sovereignty should be described as having only to be “in accordance with the present draft articles”, as draft article 3 provided. He rather thought, like Ms. Escarameia and Mr. Brownlie, that there should also be a reference to general international law. As far as he could see, the draft articles did not expressly refer to general international law or customary international law. It should be specified that the draft articles were without prejudice to such rules of customary international law as might provide greater protection to transboundary aquifers or aquifer systems. It could be argued that in certain areas, general principles of customary international environmental law provided more protection to transboundary aquifers or aquifer systems than did the draft articles. It should be made clear that the purpose of the draft articles was not to reduce the existing protection of aquifers under general or customary law or to freeze the development of those rules of law; indeed, in a time of fragmentation of international law, there should be an explicit reference to them.

80. He agreed with the Special Rapporteur that there was no need for an additional subparagraph in draft article 4 prohibiting the assignation, lease or sale of an aquifer

to another State. Either the draft articles would become a non-binding declaration, in which case they were equally applicable to all States regardless of any assignation, or they would become a binding treaty, in which case a treaty State would not be able to shed its obligations by transferring parts of its rights over the aquifer to another State or entity.

81. He agreed with the obligation formulated in draft article 6 not to cause significant harm. Like Ms. Escarameia and Mr. Pellet, he was not fully persuaded that the obligation should be limited to aquifer States. It was true that draft article 10 covered non-aquifer States, but only those in whose territory a recharge or discharge zone was located. Like Mr. Pellet, he wondered whether it was not conceivable, for example, that pollution emitted by a third State might affect a recharge or discharge zone or whether, in the present period of climate change and technological development, it would not become possible for some States that were neither aquifer States nor non-aquifer States in which a recharge or discharge zone was found to use climate-modification techniques that might affect aquifers. In his view, the draft articles should cover such eventualities.

82. With regard to draft article 20, on the relation to other conventions and international agreements, he agreed with its basic idea, assuming that the draft articles were to become a convention, although like Mr. Pellet, he was not certain that article 311 of the United Nations Convention on the Law of the Sea was the right model. The instruments on biological and cultural diversity could serve as more recent and convincing models. He did not understand, however, whether the Special Rapporteur intended to include draft article 20 in the event that the draft articles remained a non-binding document or one reflecting customary international law. He endorsed Ms. Xue’s point that it should be made clear in the draft articles themselves that draft article 20 applied only if the draft articles took the form of a convention. In either case, they should contain a clause specifying that they left customary law unaffected to the extent that it afforded greater protection to aquifers or aquifer systems.

83. He agreed with previous speakers who recommended that the draft articles should be referred to the Drafting Committee.

84. Mr. CAFLISCH said that while he had no objection to referring draft articles 1 to 13 to the Drafting Committee as they stood, he would also like to comment on them briefly.

85. In view of the warm welcome given to the draft articles adopted on first reading, every effort should be made not to make too many changes to them. The detailed commentary of the International Law Association, regardless of its merits, came rather late in the day.

86. As rightly noted by Mr. McRae, aquifers were not watercourses, and thus the Commission should not follow too closely the 1997 Watercourses Convention. Another reason for not doing so was the relative lack of success of that instrument: after 11 years of virtual existence, only 15 ratifications had been received out

of the 35 needed—not exactly an impressive result. That should probably be borne in mind when deciding what form the draft articles would take. On the other hand, it must be acknowledged that there were many similarities with the law of international watercourses, which explained the presence of a number of provisions that were modeled, at least in part, on those of the 1997 instrument.

87. The two-step approach proposed in paragraph 9 seemed appropriate, especially having regard to the difficulties to which the negotiations on the 1997 Watercourses Convention had given rise. However, if that approach were adopted, it would be necessary, as rightly pointed out by Ms. Xue, to leave out draft article 20 for the time being. That would not be a serious matter, because there seemed to be general agreement that the draft articles could become be a soft law instrument.

88. He also wished to raise a number of more specific points. Apparently there were underground watercourses in some seabeds that were not part of what was commonly known as the “territory of the State”, an expression which might, at most, cover the territorial and archipelago seabed, but not the continental shelf. Consequently, if the Commission decided that the draft articles would not cover the aquifers of the continental shelf, the text should be left as it stood; if it decided they would indeed cover the continental shelf, the relevant provisions would have to be recast. In the latter case, the Commission would have, in draft article 2, to define the word “territory” as including the maritime areas over which the State exercised sovereign rights. On no account could the problem be dealt with in the commentary to draft articles 2, 3 and 6.

89. With regard to draft article 3, he supported Mr. Nolte’s proposal to include a reference to general international law, particularly where international law offered greater protection than did the draft articles. On draft articles 4 and 5, he said that the words “equitable and reasonable” in draft article 4 were a standard formulation. The word “equitable” basically referred to the factors enumerated in draft article 5. The word “reasonable” meant “in a rational manner”, “in an optimal manner” or “in the best way possible”; it denoted a non-wasteful utilization of the resource—in other words, its sustainable utilization. The idea of “sustainability” was thus clearly included in the draft article. That had been the intention in article 5 of the 1997 Watercourses Convention, and that was what should be made clear in the present case. It would be very strange to juxtapose the terms “equitable” and “sustainable”. Furthermore, inserting the word “sustainable” would not add anything to the text. On the contrary: if the phrase “equitable and sustainable” was employed, it might suggest that the Commission interpreted the standard formulation in a manner that differed from its common interpretation. Accordingly, he was against any change.

90. The same problem that had arisen in connection with the relationship between articles 5, 6 and 7 of the 1997 Watercourses Convention resurfaced in revised draft article 6, namely, the problem of the relationship between new uses of resources—the “planned activities” covered by draft article 14—and existing uses. New uses often encroached upon existing ones, thereby causing

significant “harm” to initial users. That meant that, in cases in which a particular resource was nearly exhausted, if the “no harm” rule was enforced strictly, there would simply be no room for the activities of new watercourse States. The drafters of the 1997 Watercourses Convention had ultimately resolved the problem by providing—rather nebulously, it might be added—that the existence of significant harm was to be evaluated on the basis of and subject to the rule of equitable and reasonable utilization set forth in article 5 and the criteria specified in article 6 of the Convention. That was not his own interpretation but reflected that of the ICJ in the case concerning the *Gabčíkovo–Nagymaros Project*. The Special Rapporteur had opted for exactly the same solution in revised draft article 6, paragraph 3, a solution that he found acceptable, not because it echoed the wording used in the 1997 Watercourses Convention, but because it was based on the interpretation of articles 5 and 6 of that Convention by the ICJ.

91. As for the term “significant harm”, used in draft article 6, that wording had less to do with the extent of the harm than with its susceptibility to proof, as had been pointed out by Mr. Brownlie. Put differently, it implied a level of harm not so insignificant as to be impossible to establish. The adjective “significant” should therefore be retained.

92. Lastly, with regard to draft article 11, he would prefer to retain the expression “precautionary approach” since it had the advantage of leaving open the controversial question of whether a duty of precaution existed in general international law. The term “approach” did not favour either solution, instead leaving the question open.

93. Ms. JACOBSSON offered congratulations to the newly elected members of the Bureau, and in particular to Mr. Vargas Carreño, who would no doubt serve ably as Chairperson during the Commission’s commemorative session. She thanked the Secretariat for facilitating preparations for the current session by making the topical summary of the discussion held in the Sixth Committee (A/CN.4/588) available at an early stage, by circulating two reports informally, and, especially by producing and distributing a CD-ROM containing statements made during the Sixth Committee’s debate at its sixty-second session (2007). That initiative would help to ensure that even members of the Commission who had not been able to attend the debate were duly informed of the proceedings.

94. She endorsed the views expressed by other members regarding the importance of separating the Commission’s work on issues relating to oil and natural gas from its work on those relating to water and transboundary aquifers. While the question of the final form of the draft articles should remain open for debate, she believed that, ideally, in view of the importance of aquifers to humankind, the final result should be a legally binding convention. In the absence of global regulations, she would welcome bilateral and regional arrangements, but only to the extent that they were based on the norms and principles laid down in international law in general and the draft articles in particular, for an issue that was of global concern must be regulated in a wider global context. It was against that background that she was prepared to discuss how best to develop the Special Rapporteur’s proposal for a two-step approach, should the

Commission decide to take that course. On the other hand, the Special Rapporteur's proposal for a draft recommendation in paragraph 9 of his report needed further discussion, since it suggested that not even the Commission was entirely convinced of the importance of its work, and also risked engendering a passive rather than an active approach on the part of the General Assembly.

95. She wished to comment on the use of terms in the draft articles from the perspective of someone who had not participated in the initial work on the topic. Endorsing the view of the Special Rapporteur, in paragraph 6 of his third report, that "[t]he term 'impact' used in subparagraph (b) should be construed as a wider concept than 'harm'",¹⁸ she was somewhat concerned that the Commission might have lost sight of that basic assumption. Although the term "impact" might sometimes be used to refer to adverse or negative effects, more often, as in the 1991 Protocol on Environmental Protection to the Antarctic Treaty, it had a more neutral connotation, describing effects that might be minor or transitory, and hence negligible, in nature. Yet paragraph (7) of the commentary to article 1 of the draft articles adopted on first reading stated that "in the context of subparagraph (b), 'impact' relates to a forceful, strong or otherwise substantial adverse effect, while the threshold of such effect is not defined here".¹⁹ The explanation given in the commentary, that the term "impact" was used in a sense different from its ordinary meaning, might lead to confusion, since even the scope of the draft articles pursuant to draft article 1 (b) remained unclear in the absence of a definition of "impact" in the text itself. Similarly, in draft article 6, it was unclear how the term "impact" differed from "significant harm". The same problem arose in draft article 10 in connection with the use of the expression "detrimental impacts". She therefore welcomed the Special Rapporteur's intention to return to the subject in the commentaries, particularly as the word "impact" occurred in so many of the draft articles.

96. Still on draft article 2 (Use of terms), she welcomed the fuller explanation of the definition of the term "aquifer" and sought clarification, as to whether the term encompassed subglacial and other confined groundwaters.

97. Regarding draft article 3, on the sovereignty of aquifer States, although she had no problem with the general legal principle whereby States exercised sovereignty over their natural resources, she favoured the inclusion in that draft article of a reference to the other rules and principles of international law, as suggested by some members and by Governments in the Sixth Committee.

98. Turning to draft article 6, she agreed with those who considered the threshold of "significant harm" to be too high. If in its earlier work the Commission had indeed construed the term "significant harm" to refer to a degree of harm that could be proved, as had been suggested by Mr. Brownlie and Mr. Caflisch, that should be made explicit. Furthermore, the draft articles did not deal at all with the matter of compensation. The connection between "significant harm" and compensation appeared to have been lost sight of.

99. Another important lacuna was the absence from both draft article 6 and draft article 11 of a general obligation on aquifer States to restore the environment, namely the aquifer or aquifer system to which they had caused significant harm, given that those who were dependent on the aquifer or aquifer system would derive greater benefit from a restored environment than from the award of financial compensation to the injured aquifer State. Furthermore, the draft articles should clearly establish an obligation of aquifer States to adopt immediate response measures to prevent a situation from worsening. The advisability of such an obligation was increasingly being recognized, as evidenced by the Commission's draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities,²⁰ and by Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty, on liability arising from environmental emergencies.

100. Draft article 11 was one of the most important of the draft articles since it was aimed at giving aquifer States a tool to prevent, reduce and control pollution of their transboundary aquifers and obliged them to take a precautionary approach. Draft article 11 had been criticized in the Sixth Committee and in the Commission on the grounds that the threshold of "significant harm" was too high, and that the obligation for an aquifer State to take a "precautionary approach" was too vague, so that the term "precautionary principle" should be used instead. She shared those concerns. Lastly, she was of the view that further consideration should be given to Mr. Ojo's suggestion to add a paragraph to draft article 11 that would confer on all States in whose territory recharge and discharge processes took place the obligation to take measures to prevent, reduce and control pollution.

101. Mr. VÁZQUEZ-BERMÚDEZ thanked the Special Rapporteur for having facilitated the work of the Commission with regard to its consideration of the revised draft articles for second reading. The cooperation organized by the Special Rapporteur between the Commission and agencies and bodies of the United Nations system and other institutions had been of inestimable value in increasing the Commission's scientific and technical understanding of the subject of transboundary aquifers. Particularly praiseworthy was the contribution made by UNESCO through its International Hydrological Programme.

102. With regard to the final form of the draft articles, the ultimate goal of the Commission should be a framework convention, which, provided that it was sufficiently flexible, could be used to guide the conclusion of regional and bilateral agreements and to encourage the accession to such a convention of States that already possessed a bilateral or regional legal framework. However, given that there was no uniformity in the views expressed by States in that regard, he supported the Special Rapporteur's view that it would be unrealistic to expect that a convention could be produced in a reasonably short period of time and that the Commission should therefore follow the two-step approach that it had adopted in 2001 for the draft articles on responsibility of States for internationally wrongful acts. Accordingly, he supported the proposal to

¹⁸ *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1, p. 66.

¹⁹ *Yearbook ... 2006*, vol. II (Part Two), p. 96.

²⁰ *Ibid.*, pp. 58 *et seq.*, para. 66.

recommend to the General Assembly that it should take note of the draft articles on the law of transboundary aquifers in a resolution, annexing the draft articles to the resolution in order to give them the necessary exposure to the international community; recommend that States should establish bilateral or regional arrangements on the basis of the draft articles; and consider, at a later stage, the possibility of concluding a convention.

103. Consequently, the draft articles should be presented in the form of a convention, as envisaged by the Special Rapporteur, but with the addition of a preamble setting out general considerations such as the desirability of achieving sustainable aquifer utilization, with a view to avoiding, *inter alia*, unduly restrictive interpretations of the “present and future needs” referred to in draft article 4 (c). Draft article 7 already contained an explicit reference to “sustainable development”. However, reference to the sustainable use of transboundary aquifers should also be made in the text of the draft articles themselves since, as Mr. Pellet had pointed out, an even more important aspect of the topic was the issue of intergenerational solidarity. A precedent for the inclusion of a preamble was to be found in the draft articles on prevention of transboundary harm from hazardous activities adopted in 2001. A two-stage approach had also been adopted by the General Assembly for the topic “Nationality of natural persons in relation to the succession of States”.²¹

104. Having presided over the Sixth Committee when it had negotiated resolutions on the topics of “Nationality of natural persons in relation to the succession of States” and “Responsibility of States for internationally wrongful acts”, he could vouch for the fact that a consensus text had been achieved in both cases following arduous negotiations. Given that in the case of the draft articles on the law of transboundary aquifers there were no substantive objections from States—only proposals for improving or strengthening their content, most of which could be included in the commentaries—he tended to think that a draft resolution submitted by the Special Rapporteur stood a good chance of being received favourably by the Sixth Committee.

105. Generally speaking, he could support the revised text of the draft articles. However, he concurred with Mr. Vasciannie on the desirability of including in draft article 1 (b) a brief list of the “other activities that have or are likely to have an impact upon those aquifers and aquifer systems”. However, the Special Rapporteur had already indicated his intention to provide a detailed description of those activities in the commentary.

106. On draft article 2, he agreed with the Special Rapporteur that the definition of the term “aquifer” was scientifically and technically correct and also legally precise. For the purposes of greater clarity, the term “underground” in draft article 2 (a), should be retained before the phrase “geological formation” since he was not certain

that all geological formations were necessarily entirely underground. He agreed with the observation made by Ms. Escameia in that regard.

107. On the Special Rapporteur’s proposal to include in draft article 2 a definition of the phrase “utilization of transboundary aquifers or aquifer systems”, he would appreciate clarification of the terms “storage” and “disposal”, which would need to be explained in the commentary. He was concerned by the reference made to “acceptable ‘storage’ and ‘disposal’”, particularly in the light of the statement that “[i]t is understood that regulations are in force in many States prohibiting the injection of toxic, radioactive or other hazardous wastes”. For those and other reasons, the draft articles should refer to a “precautionary principle” rather than to a “precautionary approach”.

108. He endorsed the views expressed by one State and by Mr. McRae with regard to extending the scope of application of the draft articles to include transboundary aquifers located, in whole or in part, under the continental shelf.

109. He also endorsed the views of various members, including Mr. Caffisch, Ms. Jacobsson and Mr. Nolte, concerning the need to include in the draft articles a reference to the rules and principles of international law, including international liability and environmental protection. Such a reference should also appear in a draft preamble and in the commentary.

110. Mr. HMOUD reiterated his support for the approach of separating the work on aquifers from that on oil and natural gas, for the reasons set forth in the Special Rapporteur’s previous reports, including the nature, utilization and economic dimensions of the two types of resources. In preparing the revised draft articles for second reading, the Special Rapporteur had succeeded in striking a balance between the views transmitted by States, the views of members, and the practical and legal considerations peculiar to transboundary aquifers.

111. Although the 1997 Watercourses Convention had not, to date, attained the necessary recognition, there was no alternative to taking its principles as a starting point in preparing the draft articles on transboundary aquifers, given that such principles as the duty to cooperate, equitable utilization and the prevention of harm were cornerstones that applied *mutatis mutandis* to both legal regimes.

112. As to the final form of the draft articles, he supported the two-step approach whereby the draft articles would be annexed to a General Assembly resolution and, after allowing States time for reflection, negotiations would be entered into with a view to concluding a convention. That was the most practical way of attracting a higher level of acceptance of the draft articles by States confronted with a new body of law.

113. With regard to draft article 1, he supported the view that the chief aim of the draft was to address States’ utilization of transboundary aquifers. Since the draft articles also dealt with the protection, preservation and management of aquifers, he looked forward to the inclusion in the

²¹ *Yearbook ... 1999*, vol. II (Part Two), pp. 20 *et seq.*, paras. 47–48. See also General Assembly resolution 54/112 of 9 December 1999, resolution 55/153 of 12 December 2000, in which the draft articles adopted by the Commission are reproduced in annex, and resolution 59/34 of 2 December 2004, in which the General Assembly decided to include the topic in the agenda of its sixty-third session (2008).

commentary of a list of examples of other activities that had or were likely to have an impact on those aquifers. He wondered whether the Special Rapporteur should consider harmonizing the terminology of draft article 1 (*b*) (“likely to have an impact”) with the expressions “significant harm” and “significant adverse effect” used in draft article 6, paragraph 2, and draft article 14 respectively, both of which referred to activities other than transboundary aquifer utilization. States would be better able to regulate their activities if they could evaluate them on the basis of a single standard.

114. Draft article 3 was an important clarification of the principle that each aquifer State exercised sovereignty over the portion of the transboundary aquifer located within its territory. The exercise of sovereignty by aquifer States entailed not only rights but also obligations under international law, including those stemming from the wrongful use of the aquifer. In his view, there was no need to include principles of State responsibility in the draft articles.

115. On draft article 4, he endorsed the application of the standard of “equitable and reasonable” utilization rather than of “equitable and sustainable” utilization, as application of the latter could give rise to injustice in the case of non-recharging aquifers. The criterion of reasonability was an objective test and easier to measure than that of sustainability in taking into account the relevant factors enumerated in draft article 5.

116. With regard to draft article 5, the indicative factors included were generally acceptable and allowed for flexibility. He asked whether it might be possible to draw a distinction between factors relating to equitable utilization and those relating to reasonable utilization. That might be important, not only from the standpoint of legal clarity—since reasonability and equitability were not interchangeable—but also when it came to establishing the relative weight of each factor. He was not convinced that subparagraph (*i*) actually related to equitable and reasonable utilization; it seemed to have more to do with protecting the related ecosystem.

117. With regard to draft article 6, the obligation to take all appropriate measures to prevent the causing of significant harm was pitched at a suitable level to balance the policy considerations of the various States. Raising or lowering the threshold might cause opposition to the principle and reduce the likelihood of its being recognized by States. Once again, he did not see a need to insert a paragraph on liability or responsibility of the State and its consequences. The general principles of law governed the acts of States and the legal effects of such acts *vis-à-vis* the aquifer and other aquifer States.

118. Turning briefly to Part III of the report, he said he was of the view that, although the protection and preservation of the ecosystem were important goals in international relations, the draft articles should be concerned with regulating or assisting aquifer States in regulating their utilization of transboundary aquifers. He was not sure that the environmental dimension was pertinent unless harm had been caused to other States as a result of the State’s activity in relation to the aquifer. That being said,

if the Commission wished to proceed in that direction, he would have no objection. Lastly, he was in favour of referring draft articles 1 to 13 to the Drafting Committee.

119. The CHAIRPERSON said he took it that the Commission wished to refer revised draft articles 1 to 13 to the Drafting Committee.

It was so decided.

The meeting rose at 1.05 p.m.

2959th MEETING

Thursday, 8 May 2008, at 10.15 a.m.

Chairperson: Mr. Edmundo VARGAS CARREÑO

Present: Mr. Brownlie, Mr. Caflisch, Mr. Candiotti, 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. The CHAIRPERSON invited the Commission to continue its debate on the fifth report of the Special Rapporteur.

2. Ms. ESCARAMEIA recalled that, in the Special Rapporteur’s view, the procedures under draft article 14 (Planned activities) should be comparatively simple. However, given that several States, and also some members of the Commission, wished to see a more detailed formulation, it might be desirable to revisit at least some of the procedural requirements provided for in the 1997 Watercourses Convention, such as consultations and negotiations. It would also be desirable to specify in the commentary what was meant by the expression “significant adverse effect”, and perhaps also to replace the expression “as far as practicable” with “as far as possible”, the meaning of which was more restrictive.

3. With regard to draft article 18, it was not clear why the Commission should not follow the standard set in the 1997 Watercourses Convention, which dispensed States from the obligation to provide information “vital” to their national defence or security. By referring instead to “information the confidentiality of which is essential to its national defence or security”, the Commission would