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**Summary record of the 2990th meeting**

Topic:  
**Draft report of the Commission on the work of its sixtieth session**

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67. The CHAIRPERSON said that, if he heard no objection, he would take it that the Commission wished to adopt the proposal by Mr. Valencia-Ospina.

*It was so decided.*

*Paragraph (6), as amended, was adopted.*

*Commentary to the draft preamble*

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to the draft preamble was adopted.*

PART ONE. INTRODUCTION

*Commentary to draft article 1 (Scope)*

Paragraph (1)

68. Mr. GAJA proposed that, in the second sentence, the word “perfectly” should be replaced by the word “generally” and that the word “commonly” should be deleted. In the last sentence, the word “an” should be deleted twice and the words “used together” should be replaced by the words “referred to jointly”.

69. Mr. PELLET proposed that the words “, as defined in article 2,” should be added after the words “the technical term ‘aquifer’ ” in the second sentence.

70. The CHAIRPERSON said he took it that the Commission wished to adopt the proposals by Mr. Gaja and Mr. Pellet.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

71. Mr. PELLET said that the fourth sentence of the French text was clumsy and practically incomprehensible as it now stood. He therefore proposed that the words “*possèdent plus de caractéristiques des eaux de surface que des eaux souterraines*” should be replaced by the words “*s’apparentent davantage à des eaux de surface qu’à des eaux souterraines*”. In the same sentence, the word “*également*” should be added after the word “*régies*”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

72. Mr. PELLET said that there was no reason to begin the third sentence with the words “*Dans la version anglaise*” because the comment also applied to the French text. He therefore proposed that those words should be deleted, that the words in inverted commas should be replaced by their French equivalents—“*utilisation*” and “*usages*”—and that the words “*retenu dans la version française*” should be deleted in the last sentence.

*It was so decided.*

73. Mr. GAJA proposed that the words “must be covered” be replaced by the words “are covered”.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) and (5)

*Paragraphs (4) and (5) were adopted.*

*The commentary to draft article 1, as amended, was adopted.*

*Commentary to draft article 2 (Use of terms)*

Paragraph (1)

74. Mr. PELLET proposed that the eighth sentence should be deleted, but, if it was not, he would suggest that the words “as they were a geological formation” should be added at the end, since paragraph (2) contained a lengthy explanation which suggested that the content of that sentence was not self-evident.

75. Mr. CANDIOTI said that the sentence should be retained because it was one of the few changes adopted on second reading.

76. Mr. PELLET proposed that a footnote reading “See paragraph (2) below” should be added to explain that the term was defined in paragraph (2).

77. Ms. ESCARAMEIA (Rapporteur) said that a definition of the term “geological formation” was already given after the sentence Mr. Pellet was proposing to amend.

78. Mr. VALENCIA-OSPINA proposed that half of Mr. Pellet’s proposal should be retained, namely, the addition at the end of the sentence of the words “as they were a geological formation”.

79. He was surprised that the term “‘confined’ ” was used because it did not appear in article 2 (Use of terms).

80. Mr. YAMADA (Special Rapporteur), replying to Mr. Valencia-Ospina’s comment, proposed that the last two sentences should be moved to a footnote.

81. Mr. GAJA said that the problem could also be solved by replacing the words “are termed as ‘confined’ groundwaters” in the last sentence by the words “are called ‘confined’ groundwaters”.

*Paragraph (1), as amended by Mr. Pellet and Mr. Gaja, was adopted.*

*The meeting rose at 1 p.m.*

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## 2990th MEETING

*Monday, 4 August 2008, at 3.05 p.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Caflich, Mr. Candiotti, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

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## Draft report of the Commission on the work of its sixtieth session (continued)

### CHAPTER IV. Shared natural resources (continued) (A/CN.4/L.731 and Add.1-2)

#### E. Draft articles on the law of transboundary aquifers (continued) (A/CN.4/L.731/Add.2)

##### PART ONE. INTRODUCTION (concluded)

###### Commentary to draft article 2 (Use of terms) (concluded)

###### Paragraph (2)

1. Mr. McRAE drew attention to the tenth sentence, which read: "The submarine geological formation off the coast and under the continental shelf does not hold freshwater and accordingly such formations and water therein fall outside the scope of the present draft articles." In fact, however, geological formations under the territorial sea did fall within the scope of the draft articles. He therefore proposed that the first part of the sentence should be amended to read: "The submarine geological formations under the continental shelf do not hold freshwater and accordingly ...".

*Paragraph (2), as amended, was adopted.*

###### Paragraphs (3) to (5)

*Paragraphs (3) to (5) were adopted.*

###### Paragraph (6)

2. Mr. McRAE proposed that the first part of the penultimate sentence, which read: "For disposal, a new technique is experimented to utilize an aquifer", should be amended to read "such as a new experimental technique to utilize aquifers" and appended to the end of the previous sentence, after a comma.

*Paragraph (6), as amended, was adopted.*

###### Paragraphs (7) and (8)

*Paragraphs (7) and (8) were adopted.*

*The commentary to draft article 2 as a whole, as amended, was adopted.*

##### PART TWO. GENERAL PRINCIPLES

###### Commentary to draft article 3 (Sovereignty of aquifer States)

###### Paragraph (1)

*Paragraph (1) was adopted.*

###### Paragraph (2)

3. Mr. SABOIA proposed that the phrase "retain sovereignty" in the second sentence should be replaced by the words "have sovereignty", since "retain" implied that there might be some question or dispute about sovereignty.

*Paragraph (2), as amended, was adopted.*

###### Paragraphs (3) and (4)

*Paragraphs (3) and (4) were adopted.*

*The commentary to draft article 3 as a whole, as amended, was adopted.*

###### Commentary to draft article 4 (Equitable and reasonable utilization)

###### Paragraph (1)

4. Mr. PELLET said that a footnote was needed after the words "As noted previously" in the penultimate sentence to indicate where the information in question had been noted.

5. Mr. McRAE proposed that the words "a new technique is experimented to utilize an aquifer" in the same sentence should be replaced by the phrase "a new experimental technique to utilize aquifers".

*Paragraph (1), as amended, was adopted.*

###### Paragraphs (2) and (3)

*Paragraphs (2) and (3) were adopted.*

###### Paragraph (4)

6. Mr. PELLET objected to the phrase "In plain language" at the start of the fifth sentence, which implied that the Commission did not always speak plainly, and questioned the meaning of the seventh sentence, which read: "Therefore, sustainable utilization fully applies."

7. Mr. YAMADA (Special Rapporteur) recalled that sustainable utilization was the main principle in the 1997 Watercourses Convention and concerned the need to keep watercourses flowing and usable indefinitely.

8. Ms. ESCARAMEIA (Rapporteur) added that the seventh sentence related to the Commission's discussion about sustainable as opposed to reasonable utilization. It had been decided that "sustainability" was a concept that could not be applied to the use of non-renewable resources, and that "reasonable use" was preferable.

9. Mr. PELLET suggested that the sentence should be amended to read: "The principle of sustainable utilization can therefore be brought into play", perhaps even adding the phrase "as opposed to the principle of equitable use".

10. Mr. CANDIOTI suggested that the sentence should be combined with the previous one, thereby making it clear that the concept of sustainable utilization applied specifically to renewable waters which received substantial recharge. The end of the seventh sentence would then read: "and in that context, sustainable utilization fully applied".

11. Mr. CAFLISCH said that a similar approach would be to have the seventh sentence read: "which is why sustainable utilization fully applies". He could, however, go along with the alternative proposed by Mr. Candiotti.

*Paragraph (4), as amended by Mr. Candiotti, was adopted.*

###### Paragraphs (5) and (6)

*Paragraphs (5) and (6) were adopted.*

*The commentary to draft article 4 as a whole, as amended, was adopted.*

*Commentary to draft article 5* (Factors relevant to equitable and reasonable utilization)

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

Paragraph (4)

12. Mr. GAJA said that in the final sentence, the phrase “the input of dissolved chemicals which can be the principal source to the lake” seemed incomplete: it was not clear what the words “principal source” referred to; was it pollution? He would also like to see the phrase “lake’s water budget” reworded to read “the water budget of the lake”.

13. Ms. ESCARAMEIA (Rapporteur) said that as she understood it, the words “of pollution” had indeed been left out.

14. Mr. YAMADA (Special Rapporteur) said that the sentence was not about pollution but about the fact that reducing groundwater discharge altered the ecosystem of the lake.

15. Mr. HMOUD said that since the term “source” meant the constituents of the lake, perhaps “constituents” might be a better term.

16. Mr. McRAE suggested that the phrase “which can be the principal source” should simply be deleted, so that the phrase would then read: “the input of dissolved chemicals to the lake”.

*Paragraph (4), as amended by Mr. McRae, was adopted.*

Paragraph (5)

*Paragraph (5) was adopted.*

*The commentary to draft article 5 as a whole, as amended, was adopted.*

*Commentary to draft article 6* (Obligation not to cause significant harm)

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

*The commentary to draft article 6 was adopted.*

*Commentary to draft article 7* (General obligation to cooperate)

Paragraphs (1) to (4)

*Paragraphs (1) to (4) were adopted.*

*The commentary to draft article 7 was adopted.*

*Commentary to draft article 8* (Regular exchange of data and information)

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

17. Mr. PELLET proposed the replacement, in the fifth sentence, of the conditional phrase “would depend” by “depends”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

18. Mr. GAJA proposed that, in the sixth sentence, the words “water retained by” should be inserted before the word “vegetation”.

*Paragraph (3), as amended, was adopted.*

Paragraphs (4) to (6)

*Paragraphs (4) to (6) were adopted.*

*The commentary to draft article 8 was as a whole, as amended, was adopted.*

*Commentary to draft article 9* (Bilateral and regional agreements and arrangements)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

*The commentary to draft article 9 was adopted.*

PART THREE. PROTECTION, PRESERVATION AND MANAGEMENT

*Commentary to draft article 10* (Protection and preservation of ecosystems)

Paragraphs (1) to (5)

*Paragraphs (1) to (5) were adopted.*

*The commentary to draft article 10 was adopted.*

*Commentary to draft article 11* (Recharge and discharge zones)

Paragraphs (1) and (2)

*Paragraphs (1) and (2) were adopted.*

*The commentary to draft article 11 was adopted.*

*Commentary to draft article 12* (Prevention, reduction and control of pollution)

Paragraph (1)

19. Mr. McRAE suggested that the first phrase in the second sentence, “The harm is that caused to other aquifer States”, should be deleted and that the remainder of the second sentence should be combined with the first sentence.

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

20. Ms. JACOBSSON drew attention to the second sentence and said that references to specific articles of the two Conventions cited should be inserted for the sake of consistency and clarity.

*Paragraph (2), as amended, was adopted.*

Paragraphs (3) and (4)

*Paragraphs (3) and (4) were adopted.*

Paragraph (5)

21. Mr. McRAE drew attention to the fourth sentence and said that there was a difference between saying that the concepts of precautionary principle and precautionary approach were “practically the same when applied in good faith” and saying that they were “the same in practice when applied in good faith”. Since it was his understanding that the second of the two formulations more closely expressed the meaning that the Commission wished to convey, he suggested that the word “practically” should be deleted and that the words “in practice” should be inserted after the word “same”.

22. Mr. CAFLISCH said that it was not necessary to insert the words “in practice” after “same”, since the sentence referred to the application of the concepts, and the term “application” connoted application in practice.

23. Ms. JACOBSSON said that she supported Mr. McRae’s proposal.

24. Mr. WAKO said that he could agree with either of the formulations proposed by Mr. McRae and Mr. Caflich, but he preferred that of Mr. Caflich, since there was no other way to apply something than to apply it in practice, which rendered the phrase “in practice” redundant.

25. Mr. KOLODKIN said that there was indeed a difference between “practically the same” and “the same”. He wondered whether, if the term “practically” was deleted, readers would understand why the Commission had preferred the term “precautionary approach” to that of “precautionary principle”. The current wording indicated that the Commission drew a slight distinction between the two concepts, and if it deleted the word “practically” there would no longer be any indication of that distinction.

26. Mr. McRAE said that he had started from the assumption that the two concepts were different in some respects, which explained why there had been a divergence of opinions as to which one to adopt in draft article 12. In his view, the Commission was not focusing on their distinctiveness but rather on the idea that if, in practice, one applied either of those concepts, the end result would be the same. To say that the concepts were practically the same meant that the concepts were similar, whereas to say that the concepts were the same in practice when applied in good faith meant that their results were similar.

27. Ms. ESCARAMEIA (Rapporteur) said that if the Commission wished to convey that the two concepts were slightly different, then it should retain the original wording, but if it wanted to convey that although they were different they nevertheless produced the same results when applied to specific cases, then it should opt for the wording proposed by Mr. McRae. In her view, the phrase “in practice” should be retained, even though it might seem redundant, because it emphasized the fact that, when applied to a specific case, the two concepts led to the same result. In that case, the Commission might say that although the two concepts were interchangeable, it

had opted for the term “precautionary approach” simply because that was the more commonly used term. Her own preference would have been to use the term “precautionary principle”.

28. Mr. CAFLISCH said that he wished to withdraw his proposed amendment.

29. Mr. SABOIA said that Mr. Kolodkin had just revealed the logic behind the Commission’s choice of the term “precautionary approach”. In his own view, the fact that there was a slight difference between the two concepts made it necessary to retain the term “practically”. If there was no difference between the two terms, then the Commission would not have felt the need to explain its choice.

30. Mr. VÁZQUEZ-BERMÚDEZ said that he supported Mr. McRae’s proposal.

31. Mr. FOMBA said that the problem lay in the fact that the Commission had not wished to take a position on the legal status of the precautionary principle. Therefore, as Ms. Escarameia had pointed out, it was the practical effect that the Commission wished to emphasize in the fourth sentence. Consequently, while he would be content to retain the current wording, he also found Mr. McRae’s proposal acceptable.

32. Mr. PELLET said that the problem facing the Commission could not be dismissed as merely a drafting problem; it was a substantive problem, and the Commission would surely be called to task if it failed to address it. In such cases, the easiest solution would be to take an indicative vote: either the Commission was of the view that the concepts differed but produced the same results when applied, or else it considered the concepts to be very similar, so that no question arose. The problem could not be swept under the carpet simply by accepting Mr. McRae’s proposal.

33. He himself was convinced that the concepts were different, and he had favoured the notion of the precautionary principle. Unfortunately, the Commission had not opted to include that principle in draft article 12, and so it must now take responsibility for its decision. An indicative vote would reveal whether the Commission was ready to take a step forward on the matter or not; he did not think that it was, but only a vote would tell.

34. Mr. GAJA suggested that in order to allay the concerns of those who thought that the two concepts were not the same—a view that he shared, since, if they were the same, members would not be arguing about the distinction between them—the Commission might wish to consider a formulation that indicated that the two concepts led to similar results in practice when applied in good faith.

35. Mr. CAFLISCH said that he could go along with Mr. Gaja’s proposal, since it reflected the point he believed the Commission wished to make.

36. Mr. YAMADA (Special Rapporteur) recalled that for the past several years, the Commission had been debating whether to employ the term “precautionary principle” or

“precautionary approach” in draft article 12. Since it had opted for the term “precautionary approach”, it should explain in the commentary its reasons for doing so. The explanation was that the concepts were different, but when they were applied in good faith, their results were nearly the same. Judging from the debate in the Sixth Committee and the Commission, the term “precautionary approach” was less contentious than “precautionary principle”. In his view, the current wording of the sentence accurately conveyed what had transpired during the debate; however, he could also accept Mr. Gaja’s proposal.

37. Ms. JACOBSSON said she agreed with Mr. Yamada: the current text was an accurate reflection of what had transpired in the Working Group and the Drafting Committee. She was also among those who had advocated the adoption of the term “precautionary principle”; surprisingly, though, she had arrived at a different conclusion than Mr. Pellet. In her view, both the current wording and the wording proposed by Mr. McRae indicated that the Commission had taken the two concepts into account. Most members seemed to believe that there was a substantive difference between the two terms, but in the present situation, she felt that the Commission was, in effect, faced with a drafting problem. She therefore suggested that the Commission should either retain the original wording or adopt Mr. McRae’s proposal.

38. Mr. CANDIOTI endorsed Mr. Gaja’s proposal and suggested that the clause in question might be reworded to read something along the lines of “on the understanding that the two concepts lead to similar results in practice when applied in good faith”. He did not wish to pass judgement on whether the term “precautionary approach” was “the less disputed formulation”.

39. Ms. ESCARAMEIA (Rapporteur) said that she had some reservations about deleting the reference to the notion that the precautionary approach had been the “less disputed formulation”, as that would leave unanswered the question of why the Commission had chosen one concept over the other. The fact that it was the less disputed formulation was the very reason that the term “precautionary approach” had been preferred over “precautionary principle” in the first place. She therefore proposed an alternative formulation for the fourth sentence, which would read: “It decided to opt for the term ‘precautionary approach’ on the understanding that, although the two concepts are different, they lead to similar results when applied in good faith, and the former was the less disputed formulation.” That wording clearly conveyed that the Commission considered the two concepts to be different, that they led in practice to the same results, but that the Commission had opted for the first concept because it was the less disputed formulation.

40. Mr. McRAE said that he was satisfied with Mr. Gaja’s proposal but disagreed with Mr. Candiotti about deleting the reference to the phrase “less disputed formulation”. He agreed with Ms. Escarameia that that had been the main reason for choosing one term over the other, but he preferred not to indicate that the terms conveyed different meanings. There was no reason for the Commission to have to take a position on that question. The advantage of Mr. Gaja’s formulation was that it fully

explained the Commission’s reasoning without taking a position on the extent to which the concepts were or were not similar. His original objection to that sentence had been that the Commission seemed to be claiming that the terms were almost identical, whereas, in his view, it was merely indicating that, in practice, they produced the same result.

41. Mr. VALENCIA-OSPINA said that it was not necessary to include the phrase “when applied in good faith” as a condition for the similarity of the two concepts. Their similarity or dissimilarity was intrinsic and did not depend on whether they were applied in good faith. Such a condition did not belong in the commentary.

42. Mr. SABOIA said that Mr. Gaja’s proposal, with the addition of the reference to “less disputed formulation” was balanced and reflected the essence of the debate on the issue. He concurred with Mr. Valencia-Ospina that the reference to good faith was unnecessary.

43. Mr. VALENCIA-OSPINA said that he could accept Mr. Gaja’s proposal if the reference to “good faith” was deleted; if not, he would request that the amendment should be put to a vote.

44. Mr. GAJA said that he could agree to the deletion of the phrase “when applied in good faith”.

45. Mr. PETRIĆ said that the phrase “when applied in practice” was vague and could be interpreted in many different ways. Something that was applied in practice but in bad faith could lead to entirely different results than something applied in good faith. In his view, the question should be put to a vote.

46. Ms. ARSANJANI (Secretary to the Commission) said that Mr. Gaja’s proposal, as it currently stood, read: “It decided to opt for the term ‘precautionary approach’ on the understanding that the two concepts lead to similar results when applied in practice in good faith.”

47. Mr. SABOIA said that, in order to avoid confusion, the Commission should first vote on whether to accept Mr. Valencia-Ospina’s proposal to delete the phrase “when applied in good faith” before voting on Mr. Gaja’s proposal, which had been made along the same lines as that of Mr. McRae and seemed to have the general support of members. Furthermore, it was his understanding that Mr. Gaja had not proposed deleting the phrase “and that it is the less disputed formulation”.

48. Mr. VALENCIA-OSPINA said that he had merely sought to provide wording that all members could agree on constituting the best possible explanation for what had been a difficult decision. In his opinion, the words “when applied in good faith” only created confusion.

49. Mr. YAMADA (Special Rapporteur) said that there was a fundamental difference between the terms “precautionary principle” and “precautionary approach”. Unlike the precautionary approach, the precautionary principle was a legal norm. Opinions within the Commission had been divided on which term to use in draft article 12. The Commission had ultimately opted for the term

“precautionary approach” because those who favoured the use of the term “precautionary approach” objected to the use of “precautionary principle”, whereas those who favoured the term “precautionary principle” did not necessarily object to the use of the term “precautionary approach”—hence the reason for saying it was the “less disputed formulation”. Had the Commission adopted the term “precautionary principle”, States would have been bound by that legal norm. If, on the other hand, States implemented the precautionary approach in good faith, then their results would be practically the same as those achieved on the basis of the precautionary principle. That was what the original wording of the fourth sentence had intended to convey.

50. Mr. PELLET said that, as far as substance was concerned, he agreed with Mr. Yamada’s assessment of the situation; however, he and certain other members considered that overcautious approach to be regrettable. Although the decision to endorse the precautionary approach had already been taken, he and no doubt other members had sought to prevent States from emphasizing the non-binding nature of the precautionary approach instead of its similarity in practice to the precautionary principle. For that reason, he was very much in favour of retaining the expression “when applied in good faith”. The question was fraught with consequences, and he therefore urged the Commission to reject Mr. Valencia-Ospina’s proposal.

51. Mr. HASSOUNA said that after hearing the Special Rapporteur’s explanation of the Commission’s rationale for including the phrase “when applied in good faith”, he hoped that Mr. Valencia-Ospina might reconsider his proposal to delete that phrase, as it appeared that all members were now aware of its importance. He urged members to support Mr. Gaja’s proposal in order to settle the issue.

52. Ms. ESCARAMEIA (Rapporteur) said that she was willing to go along with a vote on Mr. Gaja’s proposal, with the addition of the phrase “and that it is the less disputed formulation” at the end of the sentence. However, she was concerned that readers might not understand what was meant by the phrase “the less disputed formulation”, which gave the impression that most legal instruments used the precautionary approach. Moreover, the inclusion of the phrase “when applied in good faith” did not seem to concur with the explanation provided by Mr. Yamada. In her view, the Commission did not wish to convey the idea that States could construe the precautionary approach as not legally binding and thus use it as an excuse for not acting in good faith. She shared the view that the phrase “when applied in good faith” did not belong in the commentary.

53. Mr. VALENCIA-OSPINA said that the last two speakers had confirmed his doubts. As Ms. Escarameia had pointed out, the Special Rapporteur had said in essence that when confronted with a choice between the legally binding precautionary principle and the precautionary approach, a choice which implied that one needed to be implemented in good faith but that the other did not, the Commission had chosen the one that did not have to be applied in good faith. That was precisely what the Commission seemed to be asserting in the fourth sentence of the commentary to draft article 12.

54. Mr. GAJA said that he was prepared to revise his proposal slightly and to include the “good faith” clause, since a majority of members were apparently in favour of it. Personally, he did not think that the phrase added much, but he had nothing against good faith. The recast sentence would then read: “It decided to opt for the term ‘precautionary approach’ because it is the less disputed formulation, on the understanding that the two concepts lead to similar results in practice when applied in good faith.”

55. Mr. VALENCIA-OSPINA said that perhaps he was too attached to the principle of good faith, which had been included in the Charter of the United Nations in San Francisco on the basis of a Colombian proposal, but he would not hold up the discussion any longer and would bow to members’ judgement. If the Commission felt that the wording proposed by Mr. Gaja reflected the correct understanding of the matter, then at least his own understanding would be reflected in the record.

56. The CHAIRPERSON said he took it that members agreed to accept the amended version of the fourth sentence of paragraph (5) just proposed by Mr. Gaja.

*It was so decided.*

*Paragraph (5), as amended, was adopted.*

*The commentary to draft article 12 as a whole, as amended, was adopted.*

*Commentary to draft article 13 (Monitoring)*

Paragraph (1)

57. Mr. GAJA proposed that the last sentence should be amended to read: “Where it is not feasible for the aquifer States to act jointly, it is important that they share data on their monitoring activities.”

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

*Paragraph (2) was adopted.*

Paragraph (3)

58. Mr. YAMADA (Special Rapporteur) said that the Terms of Reference for Monitoring and Data Sharing mentioned in the third sentence had not yet entered into force. He therefore proposed that a footnote should be inserted to clarify the situation.

*Paragraph (3), as amended, was adopted.*

Paragraph (4)

59. Mr. WAKO proposed that the words “As far as” in the first sentence should be replaced by the word “Where”.

*Paragraph (4), as amended, was adopted.*

Paragraph (5)

60. Mr. GAJA drew attention to the phrase in the tenth sentence that read “the two sides started with each other’s data standard and, with time and practice, reached the level of harmonized data which are comparable” and proposed that the words “each other’s data standards” should be replaced by the words “their own data standards”.

61. Mr. CAFLISCH endorsed that proposal.

62. Mr. McRAE, while agreeing with Mr. Gaja, pointed out that the words “which are comparable” should also be deleted, since data that were harmonized could not be comparable. He further proposed deletion of the word “what” from the eighth sentence.

*Paragraph (5), as amended by Mr. Gaja and Mr. McRae, was adopted.*

Paragraph (6)

*Paragraph (6) was adopted.*

Paragraph (7)

63. Mr. GAJA said that the last sentence introduced a restriction that was not contained in the text of the draft article and ought perhaps to be deleted.

64. Mr. YAMADA (Special Rapporteur) said that the sentence could be deleted: the issue at stake was monitoring, and if an aquifer was not utilized it could not be monitored.

65. Mr. VALENCIA-OSPINA drew Mr. Gaja’s attention to the last sentence of draft article 13, paragraph 2, which implied that the monitoring of aquifers was conditional upon their utilization.

66. Mr. GAJA said that if an aquifer was not utilized, its monitoring was less important, but might still be useful in the event the aquifer was utilized in the future.

67. Mr. VALENCIA-OSPINA said that he now understood Mr. Gaja’s concern.

68. Mr. HASSOUNA said that he agreed with Mr. Gaja and wished to hear his specific proposal.

69. Mr. GAJA proposed that the last sentence should be redrafted to read: “Monitoring would generally be less important when the aquifer (system) is not utilized.”

*Paragraph (7), as amended, was adopted.*

*The commentary to draft article 13 as a whole, as amended, was adopted.*

*Commentary to draft article 14 (Management)*

Paragraphs (1) to (6)

*Paragraphs (1) to (6) were adopted.*

*The commentary to draft article 14 as a whole was adopted.*

*Commentary to draft article 15 (Planned activities)*

Paragraph (1)

*Paragraph (1) was adopted.*

Paragraph (2)

70. Mr. GAJA questioned the appropriateness of the term “subsidiary organs” in the first sentence. Since the activities to be regulated in the draft article were carried out by States, he saw no reason why the Commission should not follow the approach adopted in the draft articles on State responsibility for internationally wrongful acts<sup>305</sup> by simply referring to “States” and “private enterprises”; the words “subsidiary organs” could therefore be deleted.

71. Mr. SABOIA said that the reference to subsidiary organs made more sense in the context of federations, where the State was responsible for international obligations, but the federative entities carried out activities. He nonetheless proposed that “subsidiary organs” should be replaced by “organs of the State”.

72. Mr. CAFLISCH said that he, too, preferred the phrase “organs of the State”.

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

73. Ms. JACOBSSON said that a good example of a treaty that established an obligation to undertake environmental impact assessments was the Protocol on Environmental Protection to the Antarctic Treaty. She therefore proposed that a sentence making reference to that Protocol should be added between the second and third sentences. The new sentence would read: “The Protocol on Environmental Protection to the Antarctic Treaty, in particular annex 1, also contains obligations to undertake environmental impact assessments.”

74. Mr. HASSOUNA said that, for the sake of consistency with the references to other treaties made in the paragraph, the proposed new text should cite the obligation in question.

75. Ms. JACOBSSON said that she would need more time to redraft her proposal along those lines and requested that consideration of the paragraph should be deferred.

*It was so decided.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

76. Mr. GAJA proposed that the words “original State” should be replaced by the words “State of origin”.

*Paragraph (5), as amended, was adopted.*

<sup>305</sup> See *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, pp. 26 *et seq.*, para. 76.

Paragraph (6)

77. Mr. YAMADA (Special Rapporteur) said that, as currently worded, the last sentence was slightly one-sided. For a more balanced text, he proposed that it should be reworded: "For instance, the States could, in principle, refrain, upon request, from implementing or permitting the implementation of the planned activity during the course of the consultation or negotiation, which must be amicably completed within a reasonable time period."

*Paragraph (6), as amended, was adopted.*

Paragraph (7)

*Paragraph (7) was adopted with a minor editorial amendment to the French text.*

PART FOUR. MISCELLANEOUS PROVISIONS

*Commentary to draft article 16* (Technical cooperation with developing States)

Paragraph (1)

78. Mr. PETRIČ questioned the need for the last part of the second sentence, since the fostering of sustainable growth in developing States was unrelated to the protection and proper management of aquifers.

79. Ms. ESCARAMEIA (Rapporteur) said that the phrase was necessary to make it clear in that sentence why the Commission had chosen to use the word "cooperation" rather than "assistance". She wondered whether the phrase "to foster sustainable growth in developing States" might be replaced with "to protect aquifers in developing States".

80. Mr. PETRIČ proposed the phrase "to properly manage and protect aquifers in the interests of developing States".

81. Mr. WAKO, recalling the discussions that had taken place on the topic, said that the reference to sustainable growth in developing States was correct and should be retained; the term "cooperation" was more appropriate than "assistance" in the context of technical cooperation, and the general purpose of such cooperation was indeed to foster sustainable growth in developing countries. He therefore suggested that the reference should be supplemented with the wording proposed by Mr. Petrič.

82. Mr. PERERA proposed a modified version of the amended phrase, which would read "to foster sustainable growth through the protection and management of transboundary aquifers or aquifer systems".

*Paragraph (1), as amended, was adopted.*

Paragraph (2)

83. Mr. PELLET said that he was puzzled by the wording of the penultimate sentence of the paragraph and wondered whether it would not be better to say: "It would be appropriate to require the aquifer States to provide for the obligation to promote scientific and technical cooperation"; otherwise, the meaning of the sentence was unclear.

84. Mr. SABOIA said that when the Drafting Committee had discussed draft article 16, the point had been made that all States were under an obligation to promote scientific and technical cooperation and that developed States had a general obligation in that respect towards developing States.

85. Mr. McRAE proposed the deletion of the sentence, as it was inconsistent with the mandatory wording of the article, which read "States shall ... promote scientific, educational, technical, legal and other cooperation with developing States ...".

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted.*

Paragraph (4)

86. Mr. GALICKI said that, in the third sentence, rather than repeating the full title of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes to which reference had already been made in the second sentence, it might be preferable, from a drafting standpoint, to say "the Protocol on Water and Health to that Convention".

*Paragraph (4), as amended, was adopted.*

Paragraphs (5) to (7)

*Paragraphs (5) to (7) were adopted.*

*The commentary to draft article 16 as a whole, as amended, was adopted.*

*Commentary to draft article 17* (Emergency situations)

Paragraph (1)

87. Mr. PELLET said that, in the third sentence of the French version, the words "*il serait souhaitable*" should be replaced with "*il a paru nécessaire*".

*Paragraph (1) was adopted with that drafting amendment to the French version.*

Paragraph (2)

88. Mr. PELLET said that, in the French version, the sixth sentence was meaningless and should be replaced either with "*mais il couvre aussi les cas auxquels les prévisions météorologiques permettent de s'attendre*" or with "*mais il couvre aussi les cas que les prévisions météorologiques permettent de prévoir*". In the last sentence in the French version the words "*plus grave*" should be replaced with "*plus important*".

*Paragraph (2), as amended in the French text and with a minor editorial amendment to the English text, was adopted.*

Paragraph (3)

89. Ms. JACOBSSON welcomed the reference to the 1986 Convention on early notification of a nuclear

accident and the 1982 United Nations Convention on the Law of the Sea, but said that it was too vague. For the sake of consistency with earlier commentaries which had quoted specific articles of the Conventions they mentioned, she requested the Secretariat to specify the articles of those Conventions which established an obligation of speedy notification.

*Paragraph (3) was adopted on the understanding that the Secretariat would insert a reference to the relevant articles.*

Paragraph (4)

*Paragraph (4) was adopted.*

Paragraph (5)

90. Mr. GAJA said that, according to the first sentence, paragraph 2 (b) of draft article 17 “anticipates a corollary obligation of assistance by all the States regardless of whether they are experiencing in any way the serious harm arising from an emergency”, yet paragraph 2 dealt only with the obligation of the State in whose territory the emergency arose. The sentence should therefore be deleted, especially as the need for States to cooperate was mentioned later in the commentary. Moreover, as there was no commentary on paragraph 4 of the draft article, and since some reference needed to be made to it, he proposed that paragraph (5) of the commentary should be moved to the end of the commentary and amended to read: “Paragraph 4 states an obligation of assistance by all the States ...”.

91. Mr. McRAE said that while he agreed with moving paragraph (5), paragraphs (6) and (7) really related to the obligation of notification. It would therefore be illogical to move paragraph (5) and to leave paragraphs (6) and (7) standing alone without any link.

92. Mr. GAJA said that paragraphs (6), (7) and (8) of the commentary all dealt with notification, which was the subject of paragraph 2 (a) of draft guideline 17. The position of the paragraphs of the commentary was therefore logical.

93. The CHAIRPERSON said that if he heard no objection, he would take it that the Commission wished to move paragraph (5) to the end of the commentary to draft article 17.

*It was so decided.*

Paragraphs (6) to (9)

*Paragraphs (6) to (9) were adopted.*

*The commentary to draft article 17 as a whole, as amended, was adopted.*

*Commentary to draft article 18 (Protection in time of armed conflict)*

Paragraphs (1) to (3)

*Paragraphs (1) to (3) were adopted.*

*The commentary to draft article 18, as a whole was adopted.*

*Commentary to draft article 19 (Data and information vital to national defence or security)*

Paragraph (1)

*Paragraph (1) was adopted with a minor editorial amendment to the English text.*

Paragraph (2)

94. Mr. GAJA said that, for the sake of greater consistency with the text of the draft article itself, the last sentence of paragraph (2) should be amended to read: “The exception created by draft article 19 does not affect obligations that do not relate to the transmission of data and information.”

*Paragraph (2), as amended, was adopted.*

Paragraph (3)

*Paragraph (3) was adopted with minor editorial amendments to the English text.*

*The commentary to draft article 19 as a whole, as amended, was adopted.*

*The meeting rose at 6 p.m.*

## 2991st MEETING

*Tuesday, 5 August 2008, at 10.05 a.m.*

*Chairperson:* Mr. Edmundo VARGAS CARREÑO

*Present:* Mr. Brownlie, Mr. Caflisch, Mr. Candioti, Mr. Comissário Afonso, Ms. Escarameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Hassouna, Mr. Hmoud, Ms. Jacobsson, Mr. Kolodkin, Mr. McRae, Mr. Nolte, Mr. Pellet, Mr. Perera, Mr. Petrič, Mr. Saboia, Mr. Singh, Mr. Valencia-Ospina, Mr. Vázquez-Bermúdez, Mr. Wako, Mr. Wisnumurti, Mr. Yamada.

### Draft report of the Commission on the work of its sixtieth session (continued)

CHAPTER IV. *Shared natural resources (concluded)* (A/CN.4/L.731 and Add.1–2)

E. *Draft articles on the law of transboundary aquifers* (A/CN.4/L.731/Add.2)

PART THREE. PROTECTION, PRESERVATION AND MANAGEMENT (concluded)

*Commentary to draft article 15 (Planned activities) (concluded)*

Paragraph (3) (concluded)

1. The CHAIRPERSON invited Ms. Jacobsson to read out the sentence she was proposing for inclusion at the end of paragraph (3) of the commentary to article 15 of the draft articles on transboundary aquifers.