

Chapter IX

SHARED NATURAL RESOURCES

A. Introduction

369. The Commission, at its fifty-fourth session in 2002, decided to include the topic “Shared natural resources” in its programme of work.⁴⁹⁶

370. The Commission further decided to appoint Mr. Chusei Yamada as Special Rapporteur.⁴⁹⁷

371. The General Assembly, in paragraph 2 of its resolution 57/21, took note of the Commission’s decision to include the topic “Shared natural resources” in its programme of work.

B. Consideration of the topic at the present session

372. At the present session the Commission had before it the first report of the Special Rapporteur (A/CN.4/533 and Add.1).

373. The Commission considered the first report of the Special Rapporteur at its 2778th and 2779th meetings, held on 22 and 23 July 2003, respectively. The Commission also had an informal briefing by experts on groundwaters from FAO and the International Association of Hydrogeologists on 30 July 2003. Their presence was arranged by UNESCO.

1. INTRODUCTION BY THE SPECIAL RAPPORTEUR OF HIS FIRST REPORT

374. The Special Rapporteur indicated that the report before the Commission was of a preliminary nature; it sought to provide the background on the topic and to seek general guidance from the Commission on the course of the future study, as well as provide a tentative timetable for the endeavour.

375. In relation to the title, the Special Rapporteur felt that it should be retained as it was, since the General Assembly had officially approved it.

376. He recalled that the problem of shared natural resources had first been dealt with by the Commission during its codification of the law of non-navigational uses of international watercourses. At the time, the Commission had decided to exclude confined groundwaters unrelated to surface waters from the topic; nonetheless, it was also felt then that a separate study was warranted due to the importance of confined groundwaters in many parts of

the world. It was noted that the law relating to groundwaters was more akin to that governing the exploitation of oil and gas.

377. Under the topic, the Special Rapporteur proposed to cover confined transboundary groundwaters, oil and gas and to begin with confined transboundary groundwaters. In order to ascertain the extent to which the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses could be applicable, he deemed it indispensable to know exactly what such groundwaters were. He also pointed out that the work carried out on the topic of international liability, particularly regarding the prevention aspect, would be relevant.

378. Part two of the report was technical in nature and sought to provide a better understanding of what constituted confined transboundary groundwaters. He noted that international efforts to manage groundwaters were taking place in different forums.

379. The Special Rapporteur pointed out that although sharing the same atmospheric source, confined groundwaters were distinct from surface waters in several respects. Unlike the latter, the management of groundwaters was quite recent, as was the science of hydrogeology; if extracted, some groundwater resources could be depleted quickly; unrelated activities on the surface of the soil could have adverse effects on groundwaters, so it might be necessary to consider regulating activities other than uses of groundwaters.

380. Although the term “confined transboundary groundwaters” was understandable in an abstract manner, he indicated that it was not so clear whether the concept was viable in implementing groundwater management. Even in regions with more advanced management of groundwaters, no categorization had been made between related and unrelated groundwaters. In addition, he noted that hydrogeologists used the term “confined” in the sense of pressurized aquifers. In the light of the fact that for the experts a shallow aquifer was not considered confined—only a fossil one could have that categorization—it appeared necessary to find terminology that could be readily understood by all.

381. The Special Rapporteur concluded by indicating that he intended to conduct studies on the practice of States with respect to uses and management, including pollution prevention, and cases of conflict, as well as domestic and international rules. Furthermore, he would attempt to extract some legal norms from existing regimes and possibly prepare some draft articles.

⁴⁹⁶ *Yearbook ... 2002*, vol. II (Part Two), p. 100, para. 518.

⁴⁹⁷ *Ibid.*, p. 11, para. 20.

2. SUMMARY OF THE DEBATE

382. The speakers welcomed the first report which set out the background of the topic and the main issues that could be dealt with. As the report indicated, given the fundamental role played by water in satisfying basic human needs, there were long-term impacts of the topic on international peace and security. Support was expressed for the prudent approach taken by the Special Rapporteur that emphasized the need for further study of the technical and legal aspects before making a final decision on how the Commission should proceed.

383. Some members drew attention to the link with the topic of international liability and felt that some harmonization of the work on the two subjects was feasible.

384. Some members considered that the title was too broad and could be clarified, for example, by adding a subtitle that would specify the three subtopics the Special Rapporteur intended to deal with or by referring exclusively to the subtitle of confined transboundary groundwaters. The title also needed more precision as to the meaning of the term "shared". Who would share and when? Would it also apply to oil and gas? In that connection, it was said that, given the extremely varied nature of aquifers, the metaphor of sharing was hardly applicable.

385. As regards the suggested changes to the title of the topic, it was noted that the General Assembly had officially approved it and that, if necessary, it could nonetheless be modified at a later stage.

386. Some misgivings were voiced concerning the exclusion from the first report of shared resources such as minerals and migratory animals. Nonetheless, it was stated that the problems posed by minerals were of a different nature and that the issues posed by migratory animals could best be addressed through bilateral or multilateral agreements.

387. The view was expressed that a single report encompassing oil and gas in addition to groundwater would have given a better overview of the subject, particularly as regards the principles applicable to the three resources and the differences among them.

388. Some doubts were voiced regarding the contribution which the Commission might be able to make as regards the suggested subtopics of oil and gas, whose problems were of a different nature and which were usually addressed through diplomatic and legal processes.

389. It was suggested that priority be given to the subject of confined groundwaters and, in particular, to the issue of non-connected groundwater pollution. The view was expressed that any consideration of the topic of oil and gas should be postponed until the Commission had concluded its work on groundwaters.

390. Given the characteristics of groundwaters, the question was also posed as to whether a framework regime might be applicable to groundwaters. It was also

stressed that the principle of sovereignty was as relevant to groundwaters, as it was for oil and gas, and that, accordingly, any reference to the concept of common heritage of mankind would raise concerns.

391. The point was made that more detailed consideration of the scope of the study on confined transboundary groundwaters was required. The research should, it was suggested, include not only the practice regarding the protection of the quality of aquifers, but also of their exploitation. In this connection, it would be important to look at the criteria for sharing a resource: the needs of a State, proportionality or fairness.

392. The view was expressed that a terminological clarification on the precise meaning of the term "groundwaters" was warranted and that the assistance of experts would be most helpful in that regard. It was also pointed out that there was a need to understand the differences between confined groundwaters and surface waters, as proposed in the report and to clarify the meaning of "confined" since it did not seem to be a term used by hydrogeologists.

393. It was also suggested that the Commission needed to develop a definition of transboundary groundwaters not connected to surface water and to determine their significance for States, in particular developing ones. In addition, the inclusion in future reports of additional statistics from developing countries, which had a greater reliance on groundwaters than developed ones, was deemed desirable.

394. Support was also expressed for the idea that the Special Rapporteur should obtain an inventory of confined transboundary groundwaters at a global level with an analysis of the regional characteristics of the resources.

395. Some members suggested that it was crucial to be very cautious in the approach to the topic, which should avoid being too global and should take into consideration relevant regional developments. In this regard it was highlighted that existing international agreements only referred to the management of the natural resources, not to their ownership or exploitation.

396. Some members expressed the view that the means of dealing with the world water crisis mentioned in the report was a matter that fell under the responsibility of States under whose surface the resources were found; that was the case insofar as oil and gas resources were concerned and there was no reason why a different approach should be applied to groundwater resources. It was also stated that the principles governing the permanent sovereignty of States over natural resources enshrined in General Assembly resolution 1803 (XVII) of 14 December 1962 should be taken into account.

397. Some other members voiced their doubts regarding the applicability to the topic of the principles contained in the Convention on the Law of the Non-navigational Uses of International Watercourses; it was felt that some of those principles could not be transposed automatically to the management of a fundamentally non-renewable and

finite resource such as groundwaters. This was for example the case of article 5 of the Convention which dealt with the principle of equitable and reasonable utilization. In other cases, however, the provisions of the Convention were too weak or required modification; given the vulnerability of fossil aquifers to pollution, article 7 of the Convention regarding the measures to prevent causing significant harm to other States was not sufficient. Some members also expressed concern regarding the scope of the present study *vis-à-vis* the Convention.

398. Other members were of the view that for then, the specific features of groundwaters required analysis and that analogies with international conventions could be made at a later stage.

399. The point was made that, in the light of the complexity of the topic, the study on groundwaters might require more time than foreseen by the Special Rapporteur.

400. Based on the information provided by the report, it did appear likely that stricter standards of use and pollution prevention than those applied to surface waters would be required; it was also suggested that stricter standards than those falling under the topic of liability and the notion of “significant harm” would be appropriate. The need for a mechanism for the settlement of disputes was also mentioned.

401. The view was also expressed that there would not be any legal “solution” to the problems raised, but that success in dealing with such issues would entail a complex combination of political, social and economic processes. Accordingly, the Commission should not embark on the development of a prescriptive set of rules, but rather a regime that helped States to cooperate with each other and to identify appropriate techniques for resolving differences which might arise in accessing and managing the resources referred to.

402. The view was expressed that the Commission could elaborate general principles on the topic, taking due account of regional mechanisms. It was also stated that a decision on the form of the norms which the Commission could elaborate could be taken at a later stage.

3. THE SPECIAL RAPPORTEUR’S CONCLUDING REMARKS

403. The Special Rapporteur indicated that, as regards the concerns expressed about the term “shared”, his understanding of the notion of “shared” was that it referred not to ownership, but to the responsibility for resource management and that the controversy could be overcome by defining the scope of the topic in physical terms.

404. He expressed his preference for focusing first on the subject of confined transboundary groundwaters and deferring a final decision regarding scope to a later stage. The debate had also highlighted the need to reconsider the definition of the groundwater to be dealt with in the study.

405. In regard to the problems posed by confined transboundary groundwaters, the Special Rapporteur concurred with the view that a legal solution did not constitute a panacea and that it might therefore be preferable to formulate certain principles and cooperation regimes, including dispute settlement. He also conceded that further analysis was required before being able to ascertain the extent to which the principles embodied in the Convention on the Law of the Non-navigational Uses of International Watercourses were applicable to confined transboundary groundwaters; the same could be said of the elaboration of stricter thresholds in relation to transboundary harm.

406. In addition, the Special Rapporteur noted that regional regimes might be more effective than a universal one and therefore felt that their important role could be adequately recognized in the formulation of rules.