

Chapter XII

SHARED NATURAL RESOURCES

A. Introduction

374. The Commission, at its fifty-fourth session (2002), decided to include the topic “Shared natural resources” in its programme of work and appointed Mr. Chusei Yamada as Special Rapporteur.¹³⁸³ A Working Group was also established to assist the Special Rapporteur in sketching out the general orientation of the topic in the light of the syllabus prepared in 2000.¹³⁸⁴ The Special Rapporteur indicated his intention to deal with confined transboundary groundwaters, oil and gas in the context of the topic and proposed a step-by-step approach beginning with groundwaters.¹³⁸⁵

375. From its fifty-fifth (2003) to its sixty-first (2009) sessions, the Commission received and considered five reports and a working paper from the Special Rapporteur.¹³⁸⁶ At its fifty-eighth session (2006), the Commission adopted, on first reading, draft articles on the law of transboundary aquifers, consisting of 19 draft articles,¹³⁸⁷ together with commentaries thereto.¹³⁸⁸ At its sixtieth session (2008), the Commission adopted, on second reading, a preamble and a set of 19 draft articles on the law of

¹³⁸³ *Yearbook ... 2002*, vol. II (Part Two), p. 100, paras. 518–519. The General Assembly, in paragraph 2 of resolution 57/21 of 19 November 2002, took note of the Commission’s decision to include the topic “Shared natural resources” in its programme of work. See also Assembly resolution 55/152 of 12 December 2000.

¹³⁸⁴ *Yearbook ... 2000*, vol. II (Part Two), annex, p. 141.

¹³⁸⁵ *Yearbook ... 2002*, vol. II (Part Two), pp. 100–102, para. 520.

¹³⁸⁶ First report: *Yearbook ... 2003*, vol. II (Part One), document A/CN.4/533 and Add.1; second report: *Yearbook ... 2004*, vol. II (Part One), document A/CN.4/539 and Add.1; third report: *Yearbook ... 2005*, vol. II (Part One), document A/CN.4/551 and Add.1; fourth report: *Yearbook ... 2007*, vol. II (Part One), document A/CN.4/580; fifth report: *Yearbook ... 2008*, vol. II (Part One), document A/CN.4/591; and the working paper on oil and gas prepared by the Special Rapporteur: *Yearbook ... 2009*, vol. II (Part One), document A/CN.4/608.

¹³⁸⁷ At the 2885th meeting on 9 June 2006.

¹³⁸⁸ At the 2903rd, 2905th and 2906th meetings on 2, 3 and 4 August 2006. At the 2903rd meeting on 2 August 2006, the Commission decided to transmit the draft articles, through the Secretary General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2008. See the comments and observations by Governments on the draft articles adopted on first reading (*Yearbook ... 2008*, vol. II (Part One), document A/CN.4/595 and Add.1). See also the topical summaries, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its sixty-first session (A/CN.4/577 and Add.1–2, sect. A (mimeographed; available on the Commission’s website, documents of the fifty-ninth session)), its sixty-second session (A/CN.4/588, sect. B (mimeographed; available on the Commission’s website, documents of the sixtieth session)) and its sixty-third session (A/CN.4/606 and Add.1, sect. A (mimeographed; available on the Commission’s website, documents of the sixty-first session)). The draft articles with the commentary thereto adopted by the Commission on first reading are reproduced in *Yearbook ... 2006*, vol. II (Part Two), pp. 94–115.

transboundary aquifers,¹³⁸⁹ with a recommendation that the General Assembly: (a) take note of the draft articles and annex them to a resolution; (b) recommend to States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (c) consider, at a later stage, and in view of the importance of the topic, the elaboration of a convention on the basis of the draft articles.¹³⁹⁰ Also between 2003 and 2009, the Commission established five working groups on shared natural resources, the first of which was chaired by the Special Rapporteur and the other four by Mr. Enrique Candioti.

B. Consideration of the topic at the present session

376. At the present session, at its 3053rd meeting, on 28 May 2010, the Commission decided once more to establish a Working Group on Shared natural resources, chaired by Mr. Enrique Candioti. The Working Group had before it a working paper on oil and gas (A/CN.4/621)¹³⁹¹ prepared by Mr. Shinya Murase.

377. At its 3069th meeting, on 27 July 2010, the Commission took note of the oral report of the Chairperson of the Working Group on Shared natural resources and endorsed the recommendation of the Working Group (see sect. B.2 below).

1. DISCUSSIONS OF THE WORKING GROUP

378. The Working Group held two meetings on 31 May and 3 June 2010. In the main, it continued its assessment on the feasibility of future work on oil and gas on the basis of a working paper prepared by Mr. Shinya Murase (A/CN.4/621), as well as its previous discussions on the subject.

379. The essential recommendation of the working paper by Mr. Murase was that the transboundary oil and

¹³⁸⁹ At the 2971st meeting on 4 June 2008. The preamble and the draft articles with the commentary thereto adopted by the Commission on second reading are reproduced in *Yearbook ... 2008*, vol. II (Part Two), chap. IV, sect. E.

¹³⁹⁰ See General Assembly resolution 63/124 of 11 December 2008.

¹³⁹¹ The Working Group also had before it: (a) the comments and observations received from Governments on the 2007 questionnaire on oil and gas (*Yearbook ... 2009*, vol. II (Part One), document A/CN.607 and Add.1), and document A/CN.4/633 (reproduced in *Yearbook ... 2010*, vol. II (Part One)); (b) the topical summary, prepared by the Secretariat, of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session (A/CN.4/620 and Add.1, sect. E (mimeographed; available on the Commission’s website, documents of the sixty-second session)); and (c) a compilation of excerpts from the summary records of the debate in the Sixth Committee on oil and gas, in 2007, 2008 and 2009. With regard to the 2007 questionnaire, see *Yearbook ... 2007*, vol. II (Part Two), paras. 159 and 182.

gas aspects of the topic should not be pursued further by the Commission. It was recalled that the topic "Shared natural resources" was included in the programme of work of the Commission on the basis of a 2000 syllabus prepared by Mr. Robert Rosenstock which sketched out the general orientation of the topic, noting that the Commission should focus "exclusively on water, particularly confined groundwater, and such other single geological structures as oil and gas".¹³⁹² However, there was no specific syllabus concerning oil and gas resources. It was for that reason, consistent with the step-by-step approach proposed by the Special Rapporteur, Mr. Chusei Yamada, that following the completion of the work on transboundary aquifers it had become necessary to consider the feasibility of work on oil and gas.

380. In selecting a topic, the Commission was generally guided by established criteria, including: that the topic reflected the needs of States in respect of the progressive development and codification of international law; that the topic was sufficiently advanced in stage in terms of State practice to permit progressive development and codification; and that the topic was concrete and feasible for progressive development and codification.¹³⁹³

381. An analysis of comments received from Governments, as well as statements made in the Sixth Committee, revealed three essential trends: one set of views favoured that the Commission take up work on oil and gas, while another took a middle course, advising a more cautious approach advocating that, whatever final position was taken on how to proceed, it should be on the basis of broad agreement. Yet another set, expressing a preponderant view, suggested that the Commission should not proceed further with the subject. In the main, the reasons that were advanced for each of these views were varied but revolved around: (a) the extent to which similarities could be drawn between oil and gas and aquifers; (b) whether the extent to which oil and gas issues were closely intertwined with the bilateral interests of the States posed particular hurdles for codification; (c) whether oil and gas issues could be separated from maritime delimitation; (d) whether oil and gas issues were suitable for codification; and (e) whether the political sensitivity and technical difficulty involved in oil and gas issues might be overcome.

¹³⁹² *Yearbook ... 2000*, vol. II (Part Two), annex, p. 141.

¹³⁹³ See *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238, and *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553. It may be recalled that the Commission further agreed that it should not restrict itself to traditional topics, but could also consider those reflecting new developments in international law and pressing concerns of the international community as a whole.

382. The working paper noted that a majority of States was of the view that the transboundary oil and gas issues were essentially bilateral in nature, as well as highly political and technical, involving diverse situations. Doubts were expressed as to the need for the Commission to proceed with any codification exercise on the issue, including the development of universal rules. It was feared that an attempt at generalization would inadvertently lead to additional complexity in an area that may have been adequately addressed through bilateral efforts. Given that oil and gas reserves were often located on the continental shelf, there was also a concern that the subject had a bearing on maritime delimitation issues. Maritime delimitation, which, in political terms, was a very delicate issue for the States, would be a prerequisite for the consideration of this as sub-topic, unless the parties had mutually agreed not to deal with delimitation.

383. Furthermore, it was considered that the option of collecting and analysing information about State practice concerning transboundary oil and gas or elaborating a model agreement on the subject would not lead to a fruitful exercise for the Commission,¹³⁹⁴ precisely because of the specificities of each case involving oil and gas. The sensitive nature of certain relevant cases could well be expected to hamper any attempt at a sufficiently comprehensive and useful analysis of the issues involved.

2. RECOMMENDATION OF THE WORKING GROUP

384. The Working Group considered all aspects of the matter taking into account the views of Governments, including as reflected in the working paper by Mr. Murase. In light of the foregoing, it decided to recommend that the Commission should not take up the consideration of the transboundary oil and gas aspects of the topic "Shared natural resources".

¹³⁹⁴ Attempts were made in the 1980s to elaborate model agreements. See H. Fox (ed.), *Joint Development of Offshore Oil and Gas: a Model Agreement for States for Joint Development with Explanatory Commentary*, vol. I, London, British Institute of International and Comparative Law, 1989; and A. Székely, *et al.*, "Transboundary hydrocarbon resources: the Puerto Vallarta draft treaty", *Natural Resources Journal*, vol. 31, No. 3 (Summer 1991), pp. 609 *et seq.* (joint project between a United States university and a Mexican university). It may be noted that the International Committee on the Exclusive Economic Zone of the International Law Association stopped short of coming up with a model agreement; see "Joint development of non-living resources in the Exclusive Economic Zone", Report of the International Committee on the Exclusive Economic Zone, International Law Association, *Report of the Sixty-third Conference* (Warsaw, 1988), pp. 509–558.