

SHARED NATURAL RESOURCES

Statement of the Chairman of the Drafting Committee

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Mr. Chairman,

I have the honour this time to introduce the 2nd report of the Drafting Committee, as contained in document A/CN.4/L.724, which concerns the topic “Shared Natural Resources”.

The plenary, at its 2958th and 2959th meetings, on 7 and 8 May 2008, respectively, referred draft articles 1 to 13 and 14 to 20 contained in the Fifth report of the Special Rapporteur (A/CN.4/591) to the Drafting Committee. Moreover, the Plenary at its 2965th meeting, on 21 May referred to the draft preamble prepared by the Special Rapporteur in his note (A/CN.4/L.722) to the Drafting Committee. The Drafting Committee held 10 meetings on 8, 13, 14, 15, 21, 22, 23, 27, 28 and 29 May and I am particularly pleased to report that it completed, on second reading, a set of 19 draft articles on the law of transboundary aquifers, together with a preamble, bearing in mind the comments made in plenary, as well as comments and observations of Governments (as contained in document A/CN.4/595).

In this regard, let me pay tribute to the Special Rapporteur, Mr. Chusei Yamada, whose mastery of the subject, perseverance and positive

disposition greatly facilitated the task of the Committee. I would also wish to express my appreciation to the members of the Committee for their active participation in the deliberations of the Committee and their valuable contributions. It is also noteworthy to acknowledge the expertise provided by experts on groundwaters from UNESCO during the various meetings of the Drafting Committee.

Mr. Chairman,

The structure of the draft articles follows the same pattern as adopted on first reading. However, it may be noted that while the first reading draft articles were divided into five parts, the present draft articles are in four Parts. The part entitled “Activities affecting other States, previously part IV, containing an article on Planned activities, was deleted, with the Drafting Committee electing to place the singular article as the last article in Part III on “Protection, Preservation and Management”.

It will be recalled that the text consists of series of draft articles that contain obligations that apply to aquifer States *vis a vis* other aquifer States; in some instances, there are obligations of aquifer States in relation to other States; and in some other situations, certain obligations relate to all States. The extent to which the obligations of aquifer States to other aquifer States should be extended to other States, particularly in relation to the obligation not to cause significant harm was a subject of further discussion in the Drafting Committee and will be addressed when dealing with the relevant draft article.

In addition to the draft articles, a preamble has been formulated to provide a contextual framework for the draft articles. The draft preamble follows previous precedents elaborated by the Commission, in particular on the draft articles on Prevention of transboundary harm from hazardous activities and the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities. The first preambular paragraph is overarching in recognizing the importance of groundwater as a life-supporting resource for humankind. The third preambular paragraph recalls General Assembly resolution 1803 (XVII) on permanent sovereignty over natural resources, while the fourth preambular paragraph recalls the Rio Declaration and Agenda 21, whose chapter 18 espouses the application of integrated approaches to the development, management and use of water resources.

The fifth, sixth and seventh preambular paragraphs project the main purposes of the present draft articles, namely utilization and protection of groundwaters resources, bearing in mind the increasing demands for freshwater, thus the need to protect groundwater resources, the particular problems posed by the vulnerability of the aquifers, as well as the needs of present and future generations. The eighth, ninth and tenth preambular paragraphs accord particular emphasis on international cooperation and, bearing in mind the principle of common but differentiated responsibilities, take into account the special situation of developing countries.

I shall now turn to Part I, which is entitled “Introduction”, consisting of draft articles 1 and 2.

Article 1. Scope

Draft article 1 concerning **Scope** remains substantially the same as adopted on first reading. It addresses three categories of activities, namely (a) utilization; (b) other activities which may have or are likely to have an impact on an aquifer or aquifer system, such as farming or construction, carried out above or below the surface; and (c) the measures for the protection, preservation and management, addressed especially in Parts III of the present draft articles. Paragraphs (a) and (c) cover similar ground as article 1 of the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses. The activities contemplated in paragraph (b) reflect an additional element peculiar to the present draft articles. There was some discussion in the Drafting Committee aimed at refining this paragraph further, mainly to provide clarity to the phrase “have or are likely to have an impact” so as to limit its seemingly broad scope. Suggestions were made to add a threshold such as “significant” or to simplify the whole text to read “The present draft articles apply to transboundary aquifers or aquifer systems”. It was however pointed out that a threshold may not be appropriate for an article dealing with the scope. It was also noted that a simplified text would obscure, from the outset, an essential element that the present paragraph (b) seeks to highlight. In the final analysis, the first reading formulation was retained. It is understood that there would be a causal link between the activities under paragraph (b) and their effects on the aquifer or aquifer system. Moreover, the term “impact” will be a subject of careful clarification in the commentary.

The title of the draft article has been retained as adopted on first reading.

Article 2. Use of terms

Draft article 2, on the **Use of terms** defines eight terms that have been employed in the present draft articles. As on first reading, the technical terms have been used to make the text friendly to its intended users, namely scientific personnel and water management administrators. 7 of these terms, namely, “aquifer”, “aquifer system”, “transboundary aquifer”, “aquifer State”, “recharging aquifer”, “recharge zone” and “discharge zone” were previously defined in the first reading text and largely retain their original formulation.

Technically, the term “aquifer” in paragraph (a) is more precise than groundwaters. The use of the qualifier “water-bearing” is partly intended to differentiate an aquifer from other geological formations containing, for example, oil and gas. Aquifers are found on the subsurface, and previously “underground” was used to underscore this self evident fact. On the recommendation of the Special Rapporteur “underground” has now been suppressed. There were also some suggestions in the Drafting Committee to include a specific reference to “freshwater” in the definition of aquifer. However, such an express reference was discarded after discussion. It was pointed out that the freshness of the water was implied in the definition, and experts would use the WHO Guidelines for drinking water quality; but at the same time its express inclusion would obscure the range of aquifers, such as those containing brackish water that ought to be included within the scope of the draft articles.

The draft articles relate to aquifer or an aquifer system. The latter, defined in paragraph (b), means a series of two or more aquifers which are hydraulically connected. Aquifers within a system that is hydraulically connected need not have the same characteristics; there may be aquifers of

different geological formations within an aquifer system. The Commentary would seek to identify the various aquifers that are covered by the draft articles. It was acknowledged that the draft articles are not intended to extend to saline aquifers on the continental shelf.

The terms “transboundary aquifer” and “aquifer State” are defined in paragraphs (c) and (d) respectively. The draft articles are intended to apply only to a “transboundary” aquifer or a “transboundary” aquifer system. Thus, a part of an aquifer or an aquifer system should be situated in the territory of another State, in which case each of those States, for the purposes of the present draft articles, qualifies as an “aquifer State”. The Drafting Committee held discussions as to whether it was necessary to also include within the scope of paragraph (d) the situation where an aquifer or an aquifer system is within the “jurisdiction” or “control” of a State. It was viewed that such an extension may not necessarily comport with the orientation of draft article 3 concerning sovereignty. It was also decided to leave the special question of the administration of territories to the commentary.

Each aquifer or aquifer system may have a “recharge zone”, such as a catchment area which is hydraulically connected to an aquifer or aquifer system; and a “discharge zone”, through which water from an aquifer or aquifer system flows to its outlet, including a watercourse, a lake, an oasis, a wetland or an ocean. These terms are defined in paragraphs (g) and (h). The aquifer or aquifer system and its recharge and discharge zones form a dynamic continuum in the hydrological cycle. If the definition of “aquifer” or “aquifer system” may seem confining, practical imperatives to ensure proper protection, preservation and management have influenced the approach taken by the Commission. Other approaches could have possibly

included the recharge or discharge zones within an “aquifer system”. The recognition by the Drafting Committee to protect the “recharge” and “discharge” zones points to the importance it attaches to the protection of the overall environment on which the life of an aquifer or aquifer system depends. These zones are subject of particular measures and cooperative arrangements under the provisions of the present draft articles.

An aquifer may be recharging or non-recharging. Both types of aquifers are covered by the present draft articles. In addition, there are specific additional considerations provided for by the draft articles that are intended to secure the effective functioning of an aquifer or aquifer system as a receptacle of water. Accordingly, paragraph (f) defines a recharging aquifer. This is an aquifer which receives a non-negligible amount of the contemporary water recharge.

Thus far, I have described terms that were defined in the first reading text. The Drafting Committee also considered it useful, on the recommendation of the Special Rapporteur, to define “utilization” in relation to a transboundary aquifer or aquifer system. This term is defined in a non-exhaustive manner in paragraph (e) to include extraction of water for domestic and industrial purposes, extraction of heat for thermo energy, extraction of minerals that may be found in an aquifer, as well as storage as in the case of a recharging aquifer or for disposal, say of waste. Needless to stress that the present draft articles focus on the utilization of the water contained in the aquifer. Storage or disposal is a rather peripheral possibility and would likely occur when the water contained in the aquifer has been exhausted and it is anticipated that any rules applicable to the regime of

waste and disposal of hazardous wastes will also be applicable in the case of storage or disposal in an aquifer.

The title of the draft article has been retained as adopted on first reading.

Part II entitled **General Principles** contains draft articles 3 to 9.

Article 3. Sovereignty of aquifer States

Draft article 3 reiterates positively the basic principle that States retain sovereignty over an aquifer, or portions of an aquifer, located within their territory, subject to the requirement that the exercise of such sovereignty should be undertaken in accordance with international law and the draft articles. The provision adopted on first reading attracted very little disagreement in the comments of Governments and the plenary debate.

It has been retained largely as formulated on first reading, with the exception of the inclusion of the qualification “in accordance with international law”, which has been added to echo the existence of other applicable rules of international law. Although some members considered this addition superfluous, this was done in order to indicate that, while the present draft articles reflect present international law, there are other rules of general international law which remain applicable. It will be clarified in the commentary that the draft articles have been elaborated against the background of the continued application of customary international law. I also wish to recall that the preamble to the draft articles includes a reference to General Assembly resolution 1803 (XVII) of 14 December 1962.

It will also be explained in the commentary that the term “sovereignty” here is a reference to sovereignty over an aquifer or aquifer system located within the territory of an aquifer State, including the territorial sea, and is to be distinguished from the “exercise of sovereign rights”, such as those exercisable over the continental shelf or in the exclusive economic zone adjacent to the territorial sea. As noted earlier, aquifers in the continental shelf are excluded from the scope of the present articles.

The title of the draft article has been retained as adopted on first reading.

Article 4. Equitable and reasonable utilization

Draft article 4 and 5 are closely related. It should be recalled that on first reading it was decided to keep the two draft articles separate, one laying down the general principle and the other setting out the factors of implementation. Draft article 4 treats the two interrelated concepts of “equitable and reasonable utilization” together, establishing as an overarching principle in the chapeau that aquifer States shall utilize a transboundary aquifer or aquifer system according to the principle of equitable and reasonable utilization. This principle is further elaborated in sub-paragraphs (a) to (d). An inquiry was made whether the considerations in sub-paragraphs (a) to (d) are intended to be exhaustive. While the Drafting Committee was not in a position to give a definitive answer on the matter, it is important to reiterate that draft article 4 lays down the principle of equitable and reasonable utilization in relation to an aquifer or aquifer system. The same minimum standard of equitable and reasonable accrual of

benefits aimed at maximizing the long-term benefits taking into account sub-paragraph (c) applies to both a recharging and non-recharging aquifer. Sub-paragraph (d) is for a recharging aquifer. The principle of equitable and reasonable utilization ought to be implemented bearing in mind the relevant factors set out in draft article 5.

There were some suggestions in the Drafting Committee to break the chapeau into two separate sentences. Ultimately, in order to maintain the balance no change was made. In concrete terms, the application of principle of equitable and reasonable utilization would entail a number of things for aquifer States. In particular, as provided for in sub-paragraph (a), such States shall utilize the aquifer or aquifer system in a manner that is consistent with the equitable and reasonable accrual of benefits therefrom to the aquifer States concerned.

There were also suggestions to replace “equitable and reasonable utilization” with “equitable and sustainable utilization”. Similarly, it was suggested the phrase “present and future needs” should be replaced by the phrase “the needs of present and future generations”. It was however recognized that an aquifer, whether recharging or non-recharging, is more or less non-renewable, unless it is an artificially recharging aquifer. Thus, the principle of sustainable utilization assumes a connotation different from that in respect of a renewable resource. Effectively, the aim would be to maximize the long-term benefits derived from the use of the water contained in the aquifer or aquifer system. Such maximization could be realized through the aquifer States concerned either individually or jointly establishing concretely utilization plans, taking into account present and future needs, as well as alternative water resources available to them. Sub-

paragraphs (b) and (c) reflect these requirements. In order to acknowledge concerns for sustainability and intergenerational equity, the preamble alludes to these matters.

There were proposals in the Drafting Committee to delete the phrase “individually or jointly” on account that it was misleading, giving the impression that an overall plan could be unilaterally established for the entire transboundary aquifer or aquifer system by one aquifer State without the involvement of other aquifer States. It will be recalled that the phrase “individually or jointly” was included in the first reading text to signify first and foremost the importance of having a prior plan. However, it is not necessary that such plan be a joint endeavour, at least initially, by the aquifer States concerned. To overcome the concerns, while also maintaining the actual intention that a plan be prepared for the utilization of the aquifer taking into account all factors, it was decided to replace the word “overall” with “comprehensive”.

One of the functions of an aquifer is to be a receptacle for water. In the case of a recharging aquifer, whether one receiving a natural or artificial recharge, it is crucial that it maintains certain physical qualities and characteristics. Accordingly, paragraph (d) retains the formulation that the utilization levels should not be such as to prevent continuance of the effective functioning of such aquifer or aquifer system. Moreover, the possible utilization of the aquifer or aquifer system for storage and disposal would bear on paragraphs (b) and (d). The extent to which these subparagraphs would be impacted as a consequence of use for storage and disposal will be addressed in the commentary.

The title of the draft article has been retained as adopted on first reading.

Article 5. Factors relevant to equitable and reasonable utilization

Draft article 5 on **Factors relevant to equitable and reasonable utilization** does not contain an exhaustive list of the factors. It will be recalled that, on first reading, it was recognized that it was not easy to reorganize the factors so as to separate those that apply to “equitable utilization” from those that apply to “reasonable utilization”; indeed in some instances the factors apply to both. The sub-paragraphs were nevertheless rearranged then to achieve an internal coherence and logic without establishing any order of priority. However, as noted in paragraph 2, in weighing the different kinds of utilization, special regard shall be given to vital human needs.

The draft article remains largely the same as adopted on first reading. However, there were two minor changes. The first change was to qualify further “the effects of utilization” in sub-paragraph (f) with the words “actual and potential”.

The second change was to reformulate the phrase “different utilizations” in paragraph (2) to read “different kinds of utilization” to make it more felicitous.

In further discussions of the factors it was questioned whether sub-paragraph (i) fell perfectly into the category of factors relevant to equitable and reasonable utilization. It will be recalled that draft article 5, includes both “factors” and “circumstances” and this sub-paragraph was considered

important particularly for an aquifer or an aquifer system in an arid zone. The word “role” had been favoured instead of the word “place” to better signify the variety of purposive functions that an aquifer or aquifer system has in a related ecosystem, and which ought to be taken into account when utilizing the aquifer. In this case, the term “ecosystem” embraces both the ecosystem outside the aquifer, such as supporting the functioning of an oasis, as well as inside the aquifer.

The title of the draft article has been retained as adopted on first reading.

Article 6. Obligation not to cause significant harm

Draft article 6 addresses questions of significant harm arising from utilization, significant harm from activities other than utilization as contemplated in draft article 1 as well as questions of mitigation of significant harm occurring despite appropriate measures to prevent such harm. These aspects are respectively addressed in paragraphs 1, 2 and 3. The Drafting Committee retained the threshold of “significant” harm. In its previous work, the Commission has recognized that the threshold of “significant” is not without ambiguity so much so that a factual determination has to be made in each specific case. It has understood “significant” as something which is more than “detectable” but need not be at the level of “serious” or “substantial”.

A number of other questions also arose in the discussion of the draft article. The first issue was whether or not the “no harm” principle should only apply to relations among aquifer States. Considering that the *sic utere tuo ut alienum non laedas* principle is a principle of international law, also

reflected in the Stockholm and Rio Declarations, applicable to all States, there was a view that the draft article ought to apply to significant harm caused to all States. Without denying the application of the principle to all States, the other view pointed to the fact that the focus of the present project was relations between aquifer States. The restriction to harm caused to other aquifer States was not intended to exclude the application of general international law to situations in which States other than aquifer States would be affected. In the final analysis, a compromise was found in determining that other than aquifer States, the State in whose territory a discharge zone is located may also be most likely to be affected by the circumstances envisaged in the draft article. Accordingly, the draft article was extended to other States in whose territory a discharge zone is located.

The second aspect consisted in proposals to improve the text to take into account contemporary considerations relevant in the protection of the environment, including response measures and restoration. Thus, a suggestion was made to amend paragraph 3, to include not only response measures but also measures to restore the environmental status of the aquifer or its water quality. As the paragraph now stands, the “appropriate measures” to be taken include “response measures”. The notion of restoration is implied by the phrase “mitigate such harm, having due regard for the provisions of draft articles 4 and 5” and will be clarified further in the commentary.

Thirdly, there was a suggestion that there should be a specific provision on compensation. It was recalled that the earlier draft articles proposed by the Special Rapporteur had a provision corresponding to article 7, paragraph 2 of the 1997 Watercourses Convention. On first reading the

text was deleted, it being understood that this is an area that will be governed by other rules of international law, such as those relating to State responsibility or to liability for acts not prohibited by international law and did not require specialized treatment in the draft articles. The Commentary will reflect this understanding.

In view of the extended scope, the title of the draft article now reads “Obligation not to cause significant harm”

Article 7. General obligation to cooperate

Draft article 7 sets forth the general obligation to cooperate. This is an important provision for shared natural resources arrangements and it is understood that it serves as a background context for the application of other provisions on specific forms of cooperation such as the draft articles concerning regular exchange of data and information, as well as protection, preservation and management. There were suggestions in the comments by Governments to delete the reference to good faith in paragraph 1. The Drafting Committee, however, decided to retain the article as it is. The principle of good faith is crucial in the attainment of equitable and reasonable utilization and appropriate protection of a transboundary aquifer or aquifer system.

The Drafting Committee also decided to retain the more permissive “should” instead of “shall” in paragraph 2 as proposed in the comments by Governments. Paragraph 2 does not exclude the possibility of using existing mechanisms.

The Commentary would indicate the types of mechanisms that are envisaged in paragraph 2. It would also specify the types of cooperation foreseen such as management, monitoring and assessment, exchange of information on databases and ensuring their compatibility, coordinated communication, early warning and alarm systems, as well as research and development.

The title of the draft article has been retained as adopted on first reading.

Article 8. Regular exchange of data and information

Article 8 deals with the obligation of aquifer States to exchange information on a regular basis. While the Committee considered a number of proposals for amendments made in the comments by Governments, it decided to retain the formulation as adopted on first reading, with no change in substance.

The commentary will clarify, as was suggested in the comments by Governments, that a collective effort should be made to integrate and make compatible, whenever possible, existing databases of information. Reference will also be made in the commentary to the need to encourage States to establish inventories of aquifers.

The title of the draft article has been retained as adopted on first reading.

Article 9 [19]. Bilateral and regional agreements and arrangements.

The Drafting Committee did not make any substantive changes to this draft article, which originally was draft article 19. In view of its programmatic nature, it was decided to have it placed in the Part projecting General principles. Pursuant to this draft article, which serves as an exaltation, aquifer States are encouraged to enter into bilateral or regional agreements or arrangements with respect to the activities concerning their transboundary aquifers. However, such arrangements may not adversely affect, to a significant extent, the utilization of other aquifer States without their express consent. The reference to “without consent” is not intended to signify a veto and this will be further clarified in the commentary.

The title of the draft article has been retained as adopted on first reading.

Part III entitled Protection, Preservation and Management consists of draft articles 10 to 15.

The draft articles in this Part constitute a sequence of obligations. The Committee recognized that their formulation had been painstakingly negotiated during the first reading, and that, accordingly, any amendments were largely to be in the nature of refinement. As noted earlier, the article on Planned activities was also included in this part. To bring economy to the text, it was considered unnecessary to have a separate Part with only one article.

Article 10 [9]. Protection and preservation of ecosystems

Draft article 10, entitled “Protection and preservation of ecosystems”, formerly draft article 9, requires aquifer States to protect the ecosystem

dependent on the aquifer or aquifer system. The Drafting Committee considered a proposal to also include activities in all States, including where a recharge zone is located. The Committee decided not to make the amendment as it would have resulted in tilting the balance achieved in the draft articles, including imposing more onerous an obligation on the State in whose territory a recharge zone is located than is already envisaged in draft article 11, particularly its paragraph 2. It was viewed that any effort to extend protection to a non aquifer States could have to be dealt with in the context of that article.

The question of the possible impact of storage and disposal on the protection and preservation of ecosystems will be discussed in the commentary to the draft article.

The title of the draft article has been retained as adopted on first reading.

Article 11[10]. Recharge and discharge zones

As regards draft article 11, previously draft article 10, the Drafting Committee decided to provide for a greater level of precision in paragraph 1 to indicate that aquifer States are to undertake measures *vis-à-vis* recharge and discharge zones “that exist within their territory”. This was only implied in the previous formulation. The resulting amendment accordingly serves to more clearly distinguish the situation of paragraph 1, which deals with the obligations of aquifer States, from that in paragraph 2, which deals with the obligations of non-aquifer States in whose territory a recharge or discharge zone is located.

Paragraph 1 has been divided into two sentences, in order to distinguish the scope of the obligations involved. In the first sentence, the obligation on aquifer States relates to recharge or discharge zone located on their territory. In the second sentence, the obligation on aquifer States relates to impacts on recharge and discharge processes not only on their territory but also potentially on the territory of other States.

The Committee further decided to replace the concept of “special” measures with “appropriate” measures in order to ensure consistency in formulation, in this case with draft article 10.

The Committee further considered a number of proposals. In particular, the Committee considered a suggestion to temper the obligation in paragraph 1 by requiring that aquifer States “to the extent practicable, eliminate detrimental impacts on the recharge and discharge processes”. However, the Committee decided against such proposal. The Committee settled on inserting a reference to the obligation of prevention before the word “minimize”, so as to strengthen the obligation of protection of aquifer systems, and to harmonize the protection requirement with that laid down for aquifer systems in draft article 6, paragraph 2. The obligation to “prevent and minimize” would imply that, in the first place, whenever possible, the obligation is to prevent a detrimental impact. However, in cases where that is not possible, the obligation would be to minimize such detrimental impacts.

Paragraph 2, of this draft article, deals with the obligation of all States in whose territory a recharge or discharge zone is located. For example, in the case of a recharge zone located in a non-aquifer State, that State would

be obliged not to disrupt any such recharge process as it could have a detrimental effect on the entire aquifer system.

Since the Committee decided not to extend the scope of draft article 10 to include States in whose territory a recharge zone is located, it preferred instead to add a reference, at the end of paragraph 2, to the obligation on non-aquifer States to cooperate also in the protection of related ecosystems. Accordingly, under draft article 10, aquifer States have an obligation to take appropriate measures to protect and preserve ecosystems dependent on their aquifers or aquifer systems. Under this paragraph, all States on whose territory a recharge or discharge zone is located are also obliged to cooperate with aquifer States to protect the related ecosystems.

The title of the draft article has been retained as adopted on first reading.

Article 12 [11]. Prevention, reduction and control of pollution

Draft article 12, formerly draft article 11, entitled “prevention, reduction and control of pollution”, whose substance concerns a specific type of “harm”, namely pollution, places emphasis on the management of pollution control of the aquifer, regardless of whether the aquifer is actually utilized or not.

The Drafting Committee considered the use of the term “precautionary approach” as opposed to “precautionary principle”, but decided to retain the former, as adopted on first reading, as the two concepts are substantively the same and because it was the less disputed formulation

in the context of the protection, preservation and management of aquifers and had a more practical orientation to it.

The Committee also considered a proposal in the comments by Governments to include a reference to “eliminate, to the extent practicable”, but decided against its inclusion since the existing formulation contemplated preventive action before any pollution occurred. It was also necessary to balance the obligations required with the lawful activities that would, in practice, allow human access to the water in the aquifer.

Accordingly, the draft article was adopted with the same formulation as was adopted on first reading.

The title of the draft article has been retained as adopted on first reading.

Article 13 [12]. Monitoring

Draft article 13, on monitoring, once draft article 12, applies to aquifer States and serves as precursor to draft article 14 on management. In order to manage an aquifer or an aquifer system properly it has to be monitored. Where feasible this can be done jointly. If not, it is important that that aquifer States share data on their monitoring activities. Paragraph 1 sets forth the general obligation to monitor and the sequence of such monitoring activities whether jointly or singly. Two minor amendments were introduced in paragraph 1. The definite article “the” initially qualifying “competent international organizations” was deleted since no particular international organization is intended to be singled out. The second sentence was recast by deleting “however” and replacing “are not” with “cannot be”.

Paragraph 2 addresses more directly the modalities and parameters for monitoring. It is important that aquifer states agree on the standards and methodology to be used for monitoring or on ways to have their different standards or methodology harmonized as a language for monitoring. There was a suggestion to qualify the first sentence of paragraph 2 with “where possible”. It is however understood that the paragraph already uses flexible language. It may be standards and methodologies that are “agreed” or “harmonized”, including through international practices developed by experts in the field.

The title of the draft article has been retained as adopted on first reading.

Article 14 [13]. Management

Draft article 14, previously draft article 13, is concerned with establishment and implementation of plans for the management of the aquifer or aquifer system. Consultations among aquifers States are an essential component of the management process. In the view of groundwater experts there is great value in the joint management of an aquifer or an aquifer system, and this should be done wherever appropriate. However, it is also recognized that, in practice, it may not always be possible to establish such a mechanism. Thus, the establishment and implementation of such plans may be done individually or jointly.

There was a suggestion that the establishment and implementation plans for the management of an aquifer or aquifer system should not only be “in accordance with the provisions of the present draft articles”, as provided for in the first reading text but also in accordance with regional agreements

or arrangements. In view of the forward looking and general nature of the draft articles there was no clear consensus in the Drafting Committee on whether or not it would be appropriate to also make such a reference. As a compromise, it was agreed to delete the phrase “in accordance with the provisions of the present draft articles”, it being understood that the commentary would clarify that the principles provided by the draft articles are intended to provide a framework to assist States in elaborating plans for the management of the aquifer or aquifer system.

The title of the draft article has been retained as adopted on first reading.

Article 15 [14]. Planned activities

Draft article 15, previously draft article 14, deals with planned activities. The Drafting Committee did not make any change to this draft article. It will be recalled that that the 1997 Watercourses Convention has detailed provisions on planned activities, elaborated on the basis of State practice. In contrast, a minimalist approach was adopted on first reading with respect to an aquifer or aquifer system. The draft article applies to any State that has reasonable grounds for believing that a planned activity in its territory could affect a transboundary aquifer or aquifer system and thereby cause a significant adverse effect on another State. The threshold of “significant adverse effect” is different from that of “significant harm” and will be fully described in the commentary. The draft article sets out a sequence of actions that may be contemplated. In particular, an assessment of possible effects, timely notification of such effects, consultations, and if necessary, negotiations, or independent fact-finding are envisaged in this

draft article with a view to reaching an equitable solution to a particular situation. It will be clarified in the commentary that States concerned have an obligation to refrain, upon request, from implementing or permitting the implementation of the planned activity during the course of the consultations or negotiations.

The title of the draft article has been retained as adopted on first reading.

Part IV, previously Part V is entitled **Miscellaneous provisions and contains draft article 16 to 19.**

Article 16 [15] Technical cooperation with developing States

It will be recalled that the orientation of draft article 16, formerly 15, is to accentuate “cooperation” rather than “assistance”. The original two sentences comprising the chapeau have been collapsed into one. Pursuant to the beginning of the sentence of the chapeau, States are required to promote scientific, educational, technical, legal and other cooperation for the protection and management of the transboundary aquifer or aquifer system, and they may do so directly or through competent international organizations. Legal cooperation has been included in the list. As was understood on first reading the list of activities accompanying this particular type of obligation to cooperate, is neither cumulative nor exhaustive.

The types of cooperation listed represent some of the various options available to States to fulfill the obligation to promote cooperation in the areas contemplated by the draft article. States are not required to engage in each of the types of cooperation listed, but will be allowed to choose their

means of cooperation, including the provision of financial assistance, which would be mentioned in the commentary. The Drafting Committee nevertheless made a couple of changes to the list. First in paragraph (a), the broader concept of strengthening capacity building as envisioned in Agenda 21 is employed to emphasize the need for training, including endogenous training. Secondly, paragraph (g) has been restructured for consistency with the preceding paragraphs to read “providing advice in the preparation of environmental impact assessments”. Finally, with a view to strengthening cooperation among developing States in managing the transboundary aquifer or aquifer system, a new sub-paragraph (h) has been added to stress the need to provide support or the exchange of technical knowledge and experience among them.

The title of the draft article now reads **Technical cooperation with developing States**, partly because the scope of the article has been broadened to include other forms of cooperation.

Article 17 [16]. Emergency situations

Draft article 17, previously 16, deals with emergency situations. The Committee made several changes to this draft article. First, the paragraphs have been reorganized. The chapeau of paragraph 2 has been deleted in light of the incorporation of some of its elements into paragraph 1. Accordingly, sub-paragraph (a) has become paragraph 1, while subparagraph (a) (i) and (ii), have become (a) and (b), respectively. Former, subparagraph (b) has been renumbered as paragraph 4.

On the substance, there were a number of aspects that were considered. Concerning paragraph 1, there was a suggestion to include in paragraph 1

not only serious harm to aquifer States or other States but also serious harm affecting the environment. Without discounting the importance of protecting the environment, it was considered that the purpose of this draft article is to provide a mechanism to cope with an emergency situation. Accordingly, the focus was on the responder aquifer States and other States. The expression “other States” refers to non-aquifer States that may be affected by an emergency, in particular those which may have a relation with an aquifer or an aquifer system.

It was also pointed out that there was some inconsistency between paragraph 1 and paragraph 2, as previously formulated. While paragraph 1 was broadly formulated to define an emergency as posing an imminent threat of serious harm to aquifer State or other States, paragraph 2 seemed to focus on an emergency that affected a transboundary aquifer or an aquifer system, a link which was missing in paragraph 1. The apparent inconsistency was overcome by adding in paragraph 1, after “...that...” the phrase “...affects a transboundary aquifer or aquifer system and ...” and then deleting the entire chapeau of the previous paragraph 2.

There was a further suggestion on the basis of comments from Governments to delete “suddenly” and to replace the notion of “imminent threat with the notion of “imminent risk”. It was viewed that the element of “suddenness” was crucial for the application of the draft article. As pointed out in the commentary on the draft article adopted on first reading “suddenness” does not exclude situations which could be predicted in a weather forecast. Moreover, it may include a creeping situation, including those that occur suddenly but are a consequence of factors accumulated over a period of time. Thus, a rise of sea levels occasioned by global warming

may lead to salination of an aquifer that may lie adjacent to the seacoast or in the territorial sea.

As regards, the replacement of “imminent threat”, it was recalled that the 1997 Convention employs similar terminology. It will be explained in the commentary that imminent threat has a factual meaning which should not be conflated with notions associated with threats to international peace and security and any attendant consequences that may ensue in accordance with the Charter of the United Nations.

The present paragraph 2, sub-paragraph (b) was a subject of a detailed discussion in the Drafting Committee, which was only resolved by a vote cast in favour of the initial formulation proposed by the Special Rapporteur. There were those who preferred to delete the word “eliminate” or to attenuate it with some flexible formulation such as “to the extent possible” or “prevent and limit” or “prevent, mitigate and control”. It was considered that the inclusion of “eliminate” imposed an obligation that was onerous to fulfill and gave rise, legally, to an implicit obligation to pay compensation. On the other hand, there were those who argued that the obligation was not to “eliminate harmful effects” but to “take practicable measures necessitated by the circumstances”. The twin requirements to “take practicable measures”, which were “necessitated by the circumstances” allowed for a wider margin of appreciation for action. It was an obligation of conduct rather than result. It was also pointed out that obligation itself did not denote an implied obligation to compensate.

As pointed out in the commentary on the draft article adopted on first reading the paragraph requires only that all practicable measures be taken,

meaning those that are “feasible, workable and reasonable”. Further, only such measures as are “necessitated by the circumstances” need to be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States.

It may also be noted that to the extent that the draft article is concerned with response measures of notification without delay of, and cooperation with, potentially affected States, taken immediately following an emergency, questions of compensation are not as such contemplated. These would remain governed by the relevant rules of general international law.

The commentary would indicate that the phrase “any harmful effects of the emergency” refers back to “the aquifer or aquifer system or any affected States”.

As was noted when adopting the first reading text the reference to articles 4 and 6 in paragraph 3 is without prejudice to the application of rules concerning circumstances precluding wrongfulness in international law to the draft articles.

Paragraph 4, originally paragraph 2(b) sets out the obligation of assistance and addresses the types of assistance that all other States may render to the States affected by the emergency situation. The word “trained” to qualify “emergency response personnel” has been suppressed and “equipments” now appropriately reads “equipment” .

The title of the draft article has been retained as adopted on first reading.

Article 18 [17]. Protection in time of armed conflict

The Drafting Committee did not make any substantive change to draft article 18, formerly 17, which reaffirms that, during times of armed conflict, the principles and rules of international law applicable in international and non-international armed conflict shall apply to the protection and the utilization of transboundary aquifers and related installations. For instance, the 1907 Hague Convention concerning the Laws and Customs of Land Warfare and the 1977 Two Additional Protocols to the 1949 Geneva Conventions make provision concerning the protection of water resources and related works; as well as the utilization of such water resources and works during armed conflict.

The title of the draft article has been retained as adopted on first reading.

Article 19 [18]. Protection of data and information vital to national defence or security

As was noted in the commentary to the first reading text, this draft article creates a very narrow exception to the requirement on provision of information. The same rule is provided in the 1997 Watercourses Convention. Consequently, the main issue before the Drafting Committee was whether there was a compelling reason to depart from the language of the 1997 Convention. As will be recalled this was one of the contentious provisions during its consideration in the Working group and in the Draft Committee on first reading. At that time, it was decided to focus on the confidentiality aspects by using the word “essential” to appropriately qualify the confidentiality of such data or information than on whether or not such

information was vital to national defence or security, without meaning to change the substance of the text.

The preponderant view in the Drafting Committee was that there was no compelling reason to deviate from the language of the 1997 Watercourses Convention. If anything, this may give rise to queries as to whether a different meaning was intended. Accordingly, it was decided to revert to the language of the 1997 Convention. Thus the first sentence now reads “information vital to its national defence or security”. This change also led to a consequential change in the title.

Questions concerning the possible protection of industrial secrets and intellectual property will be dealt with in the commentary.

Mr. Chairman, it should be noted that these draft articles do not deal with the relationship between the present draft articles and existing or future obligations. These matters are linked to the decision on the final form for the draft articles. As will be recalled, the Plenary referred draft article 20 entitled “Relation to other conventions and international agreements” as proposed by the Special Rapporteur in his fifth report to the Drafting Committee. Following the consideration of the draft article, the Drafting Committee decided to omit the draft article from the current text, on the understanding that the discussion on it will be reflected in the relevant part of the Commission’s report. In the main, it was felt that issues concerning relationship with other instruments were linked to questions concerning final form. Accordingly, it was premature for the Commission to address these issues, particularly considering also that questions of relationship raised a

variety of policy considerations which were best left to negotiating parties to resolve.

Mr. Chairman,

This concludes my presentation of the report of the Drafting Committee which is submitted to plenary with the recommendation for adoption on second reading of the set of 19 draft articles on the law of transboundary aquifers.

Thank you very much.