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WORKING GROUP ON SHARED NATURAL RESOURCES

(Groundwaters)

REPORT OF THE WORKING GROUP

Introduction

1. At its 2836th meeting on 11 May 2005, the Commission established a working group on Shared natural resources, whose composition, under the Chairmanship of Mr. Enrique Candioti, was announced at the 2840th meeting of the Commission, on 19 May 2005.¹
2. The Working Group considered the draft articles submitted by the Special Rapporteur in his Third Report (A/CN.4/551 and Corr.1, annex) with a view to the possible submission of a revised text taking into account the debate in the Commission on the topic.

¹ The Working Group was composed as follows: Mr. Enrique Candioti (Chairman), Mr. C. Yamada (Special Rapporteur), Mr. João Clemente Baena Soares, Mr. Pedro Comissário Afonso, Mr. Riad Daoudi, Ms. Paula Escarameia, Mr. Salifou Fomba, Mr. Giorgio Gaja, Mr. Zdzislaw Galicki, Mr. Peter C.R. Kabatsi, Mr. William Mansfield, Mr. Michael Matheson, Mr. Didier Operti Badan, Mr. Pemmaruja Sreenivasa Rao, Mr. Bernardo Sepulveda, Mrs. Hanqin Xue and Mr. Bernd Niehaus (ex-officio).

3. The Working Group held 11 meetings on 19, 30 and 31 May, on 1 June, on 12, 14, 19, 21, 26 and 28 July 2005. The Working Group also had a briefing by the Franco Swiss Geneva Aquifer Authority on 12 July 2005. It also had the benefit of advice and briefings from experts on groundwaters from UNESCO and the International Association of Hydrogeologists (IAH), which greatly facilitated its work.
4. The Working Group proceeded on the basis of an article-by-article consideration of the draft articles, without prejudice as to the final form of the instrument.
5. The Working Group reviewed eight of the draft articles proposed by the Special Rapporteur and revised them as contained in the annex. Footnotes or square brackets have been used as appropriate to indicate aspects that may require resolution, further consideration or clarification at a later stage or elaboration in the commentary.
6. In order to complete its work, the Working Group proposes that the Commission consider reconvening the Working Group during the first segment of the Commission's session in 2006. Once its work is completed the draft articles would be referred to the Drafting Committee by the Commission. It is the hope of the Working Group that efforts be made to complete the first reading of the draft articles in 2006.

Annex

Draft articles² on the law of transboundary aquifers

Article 1 [Article 1]³

Scope of the present draft articles

The present draft articles apply to:

- (a) Utilization of transboundary aquifers and aquifer systems;

² Consistent with the practice of the Commission, the term "draft articles" has been used without prejudice as to the final form.

³ The article numbers in brackets are those given in the Third Report of the Special Rapporteur (A/CN.4/551 and Corr.1).

(b) Other activities that have or are likely to have an impact⁴ upon those aquifers and aquifer systems; and

(c) Measures for the protection, preservation and management of those aquifers and aquifer systems.

Article 2 [Article 2]

Use of terms

For the purposes of the present draft articles:

(a) “Aquifer” means a permeable water-bearing⁵ underground geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation;⁶

(b) “Aquifer system” means a series of two or more aquifers that are hydraulically connected;⁷

(c) “Transboundary aquifer” or “transboundary aquifer system” means, respectively, an aquifer or aquifer system, parts of which are situated in different States;

(d) “Aquifer State” means a State in whose territory any part of a transboundary aquifer or aquifer system is situated;

(e) “Recharging aquifer” means an aquifer that receives [a non-negligible] amount of [contemporary] water recharge;

(f) “Non-recharging aquifer” means an aquifer that receives [a negligible] amount of [contemporary] water recharge.⁸

⁴ The term “impact” would be clarified in the Commentary.

⁵ The Commentary would indicate that “water-bearing” has been employed to simply distinguish coverage from oil and gas.

⁶ The element of quantity of water will be explained in the commentary, indicating that the draft articles are not concerned about formations containing minimal amounts of water.

⁷ The Commentary would explain the meaning of “hydraulically connected”.

⁸ Further clarifications are being sought from scientific experts before settling on the terms “negligible”, “non-negligible” and “contemporary” in subparagraphs (e) and (f).

PART II

GENERAL PRINCIPLES

Article 3

Sovereignty of aquifer States

Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territorial jurisdiction. It shall exercise such sovereignty in accordance with the present draft articles.⁹

Article 4 [Article 5]

Equitable and reasonable utilization

1. Aquifer States shall utilize a transboundary aquifer or aquifer system in a manner that the benefits to be derived from such utilization shall accrue equitably to the aquifer States concerned.
2. Aquifer States shall utilize a transboundary aquifer or aquifer system in a reasonable manner. They shall aim to maximize the long-term benefits derived from the use of the water contained therein and to this end they shall establish an overall plan for utilization of such aquifer or aquifer system, taking into account present and future needs of and alternative water sources for the aquifer States. In the case of a recharging transboundary aquifer or aquifer system, utilization levels should not be such as to prevent continuance of the effective functioning of such aquifer or aquifer system.¹⁰

Article 5 [Article 6]

Factors relevant to equitable and reasonable utilization

1. Utilization of a transboundary aquifer or aquifer system in an equitable and reasonable manner within the meaning of article 4 requires taking into account all relevant factors and circumstances, including:

⁹ The text of the second sentence will be revisited after the consideration of the draft articles as a whole.

¹⁰ The notion of “long-term benefits” will require explication in the commentary. The notion of “agreed lifespan of such aquifer and aquifer system” contained in the earlier draft by the Special Rapporteur would also require elaboration. The Commentary would also make clear that this paragraph does not imply that the level of utilization must necessarily be limited to the level of recharge.

- (a) The natural characteristics¹¹ of the aquifer or aquifer system;
- (b) The contribution to the formation and recharge of the aquifer or aquifer system;
- (c) The social and economic needs of the aquifer States concerned;
- (d) The population dependent on the aquifer or aquifer system in each aquifer State;
- (e) The effects of the utilization of the aquifer or aquifer system in one aquifer State on other aquifer States concerned;
- (f) The existing and potential utilization of the aquifer or aquifer system;
- (g) The development, protection and conservation of the aquifer or aquifer system and the costs of measures to be taken to that effect;
- (h) The availability of alternatives¹² to a particular existing and planned utilization of the aquifer or aquifer system;
- [(i) The place of the aquifer or aquifer system in the related ecosystem].¹³

2. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is reasonable and equitable utilization, all relevant factors are to be considered together and a conclusion reached on the basis of all the factors. However, special regard shall be given to vital human needs.

Article 6 [Article 7]

Obligation not to cause harm to other aquifer States

1. Aquifer States shall, in utilizing a transboundary aquifer or aquifer system in their territories, take all appropriate measures to prevent the causing of significant harm¹⁴ to other aquifer States.

¹¹ The Commentary should cite examples of the various natural characteristics.

¹² The Commentary would address the element of viability and cost.

¹³ The concept of “ecosystem” will be further clarified by the Special Rapporteur with scientific advice, also taking into account draft article 12 in his Third Report.

¹⁴ The Commentary would elaborate in detail the relative nature of “significant harm” for purposes of the draft articles.

2. Aquifer States shall, in undertaking [in their territories]¹⁵ activities other than utilization of a transboundary aquifer or aquifer system that have or are likely to have an impact on a transboundary aquifer or aquifer system, take all appropriate measures to prevent the causing of significant harm through that aquifer or aquifer system to other aquifer States.

3. Where significant harm nevertheless is caused to another aquifer State, the aquifer States whose activities cause such harm shall take, in consultation with the affected State, all appropriate measures to eliminate or mitigate such harm, having due regard for the provisions of articles 4 and 5.¹⁶

Article 7 [Article 8]

General obligation to cooperate

1. Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development,¹⁷ mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of a transboundary aquifer or aquifer system.

2. For the purpose of paragraph 1, aquifer States should establish joint mechanisms of cooperation.¹⁸

¹⁵ The bracketed language indicates that there was a difference of opinion in the Working Group as to whether this obligation should be confined to activities undertaken within the territories of aquifer States or extend to activities conducted in other territories.

¹⁶ It was understood that the issue of compensation in circumstances where harm resulted despite efforts to eliminate or mitigate such harm would be addressed in a separate article.

¹⁷ The term “sustainable development” denotes the general principle of sustainable development and should be distinguished from the principle of sustainable utilization in the context of draft article 4.

¹⁸ The Commentary would indicate the types of mechanisms envisaged, such as Joint Commissions. It will also allude to the need to take into account the experience of other existing joint mechanisms and commissions in various regions.

Article 8 [Article 9]

Regular exchange of data and information

1. Pursuant to article 7, aquifer States shall, on a regular basis, exchange readily available data and information on the condition of the transboundary aquifer or aquifer system, in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry¹⁹ of the aquifer or aquifer system, as well as related forecasts.
2. Where knowledge about the nature and extent of some transboundary aquifer or aquifer systems is inadequate, aquifer States concerned shall employ their best efforts to collect and generate, taking into account current practices and standards, individually or jointly and, where appropriate, together with or through international organizations, more complete data and information relating to such aquifer or aquifer systems.
3. If an aquifer State is requested by another aquifer State to provide data and information relating to the aquifer or aquifer systems that is not readily available, it shall employ its best efforts to comply with the request. The requested State may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.
4. Aquifer States shall, where appropriate, employ their best efforts to collect and process data and information in a manner that facilitates their utilization by the other aquifer States to which such data and information are communicated.

¹⁹ The Commentary would explain in lay terms the meaning of the terms in the phrase “in particular of a geological, hydrogeological, hydrological, meteorological and ecological nature and related to the hydrochemistry of the aquifer or aquifer system”.