I. SHARED NATURAL RESOURCES

1. At the above session, the Commission adopted a set of 19 draft articles on the law of transboundary aquifers, along with the commentaries to each article. The draft articles are divided into four parts and follow the usual scheme of most international treaties on the protection of the environment: substantive obligations of due diligence on the conservation and preservation of natural resources are laid down beside procedural obligations on co-operation, information, and consultation.

Concerning the final form of the draft articles, the Commission decided to recommend a two-step approach. The General Assembly should first annex the draft articles to its resolution and recommend that the States concerned conclude appropriate agreements for the proper management of transboundary aquifers. At a later stage, it should consider the elaboration of a convention on the basis of the draft articles.

Part one of the draft articles is concerned with defining the scope of the draft articles and the clarification of the terms used. An aquifer is an underground geological formation which functions as a container for water. Draft Article 1 speaks of “aquifer systems” because an aquifer is often hydraulically connected to one or more others. An aquifer may be utilized not only for the extraction of water, but also for the extraction of heat for thermo-energy and minerals that may be found there. Other uses include the storage or disposal of waste, in particular through a new experimental technique which utilizes aquifers for carbon dioxide sequestration.

2. Part two of the draft articles sets out the general principles governing the legal regime of transboundary aquifers. These are both substantive and procedural principles.

The basic substantive principle that States have sovereignty over an aquifer located within their territories reiterated in Draft Article 3, is complemented by two obligations of due diligence codified throughout Draft Articles 4 to 6. These are the obligation of equitable and reasonable utilization, and the obligation not to cause significant harm while utilizing a transboundary aquifer.

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As already clarified in dozens of international treaties and non-binding resolutions, the concept of equitable and reasonable utilization concerns the allocation of benefits among the States sharing the same natural resource. It implies that States should take measures on the best scientific evidence available to maintain the resource in perpetuity. Draft Article 5 lists the factors that States have to take into account in determining equitable and reasonable utilization. This draft article is almost a reproduction of Article 6 of the 1997 Watercourse Convention.

Draft Article 6 requires that States take all appropriate measures to prevent the causing of significant harm to other aquifer States. The test for determining whether the harm is significant implies reference to factual considerations.

Draft Articles 7, 8, and 9 of part two lay down procedural obligations which are very common to all international treaties on the regime of shared natural resources.

Draft Article 7 codifies a general obligation of all aquifer States to co-operate in order to attain the substantive purposes specified in previous provisions. The obligation to co-operate has to take into account also the general principle of sustainable development and should be implemented, according to paragraph 2, through the establishment of “joint mechanisms”.

The regular exchange of data and information is dealt with in Draft Article 8, while Draft Article 9 underlines the importance of bilateral agreements and regional arrangements for the purpose of managing a particular transboundary aquifer.

3. Part three on the protection, preservation, and management is also made up of substantive obligations of due diligence and procedural obligations.

The main obligation as to the protection and preservation is set out in Draft Article 10. It is an obligation to protect the ecosystems within a transboundary aquifer. The term ecosystem refers generally to an ecological unit consisting of living and non-living interdependent components that function as a community. The obligation to protect requires that aquifer States shield the ecosystems from harm and damage. The obligation to preserve applies in particular to fresh water ecosystems that are in a pristine or unspoiled condition. Appropriate measures to preserve and protect the ecosystems are particularly important in relation to recharge and discharge zones. Indeed, the maintenance of a normal recharge or a discharge process is vital to the proper functioning of aquifers.

A second substantive provision is that laid down in Draft Article 12. Aquifer States are under an obligation to prevent, reduce and control the pollution of their transboundary aquifers that may cause significant harm to other aquifer States, and the aquifer-related environment. The obligation to “prevent” relates to new pollution, while the obligation to “reduce” and “control” relates to existing pollution. Again the potential of the harm to endanger the environment significantly has to be ascertained by resorting to factual considerations. The second sentence of Draft Article 12 mentions the obligations of aquifer States to take a “precautionary approach”. As explained in the commentary, the principle of the “precautionary ap-