

POLICY BRIEF

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Transboundary Aquifers at the 2019 UN General Assembly 6th Committee: The Invisibility Cape is Still On (at least for another five years...)

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Transboundary Aquifers at the 2019 UN General Assembly 6th Committee: The Invisibility Cape is Still On (at least for another five years...)

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On 22 October 2019, the [UN General Assembly 6th Committee discussed the law of transboundary aquifers](#). This was the fourth time in eleven years that the 6th Committee has addressed the law of transboundary aquifers, having considered the topic at its sixty-sixth, sixty-eighth and seventy-first sessions.¹ In these discussions, countries inevitably turn their attention to the UN International Law Commission (ILC) Draft Articles on the Law of Transboundary Aquifers (Draft Articles), which were annexed to the 2008 UN General Assembly Resolution 63/124.

Nine countries made oral statements in the 2019 meeting, and this short piece highlights those countries' main observations regarding: 1) the legal nature of the current Draft Articles and their future format; 2) the presence of any provision of the Draft Articles that may be prob-

lematic, and 3) the relationship between transboundary aquifer management and other important international community agendas.

The legal nature of the Draft Articles and their future format

According to paragraph 6 of UNGA 63/124 the General Assembly

"Decides to include in the provisional agenda of its sixty-sixth session an item entitled "The law of transboundary aquifers" with a view to examining, inter alia, the question of the form that might be given to the draft articles."

The question of the future format of the Draft Articles was a bone of contention amongst countries during the UNILC work that led to the Draft Articles² and, hence, the issue was reflected in the UN General Assembly Resolution that annexed the Draft Articles. Fast forward to 2016, and UN General Assembly Resolution 71/150 says only that the General Assembly

"Decides to include in the provisional agenda of its seventy fourth session the item entitled "The law of transboundary aquifers" (para 3).

Has interest in the future format of the Draft Articles waned? Are countries not concerned with discussing the normativity of the Draft Articles anymore?

The statements made by the nine countries on 22 October 2019 show not so much a disinterest in the topic of the future format, but rather an emerging consensus on the normative value of the Draft Articles. Denmark on behalf of the Nordic countries considered them as helpful "tools", and Israel referred to the Draft Articles as useful "guidance" for the future and for possible negotiation of case-specific regional or bilateral agreements or arrangements. Israel also added that codification of the Draft Articles was not appropriate, preferring to retain the Draft Articles in their current format (annexed to a UN

¹ UNGA Res 66/104 (9 December 2011), UNGA Res 68/118 (16 December 2013) and UNGA Res 71/150 (13 December 2016).

² UNILC, 'Report of the International Law Commission on the work of its fifty-seventh session' (2 May–3 June and 11 July–5 August 2005) UN Doc A/60/10, para 98.

General Assembly Resolution). This would constitute a more flexible and pragmatic approach compared to an overly dogmatic or rigid one, which is what codification would lead to. The USA mentioned the Draft Articles as a useful “resource” for negotiation. Mauritius, while maintaining that they provided “guidance” for hydro-diplomacy, also suggested that they could constitute a basis for future agreements, with a stated preference for regional agreements. Turkey was probably one of the clearest and strongest advocates against codification in saying that the Draft Articles are voluntary “guidelines” for State practice in their current non-binding form. El Salvador appeared to align itself with most countries in stating that the Draft Articles can serve as “guidance” for regional or bilateral arrangements or agreements, but also expressed a belief that a “binding” Convention would be a positive development. Japan, which has led the debate on the law of transboundary aquifers in the past, considered the Draft Articles as valuable “platform” to establish regional or bilateral agreements. Portugal was alone in supporting codification of the law of transboundary aquifers, advocating for the Draft Articles to move towards a framework Convention. Chile, the last country to provide oral statements, referred to the “guiding” principles of the Draft Articles as seeking to apply the principles of the United Nations Watercourses Convention.

Overall, seven countries (Denmark, Israel, USA, Mauritius, Turkey, Japan and Chile) out of the nine that made oral statements were in favour of considering the Draft Articles merely as guidance for negotiation of regional or bilateral agreements. Only one country (Portugal) considered that the Draft Articles need to move

from their current soft, non-legally binding nature to a binding Convention, albeit of a framework nature. Another country (El Salvador) seemed to align partly with both options.

In conclusion, a consensus seems to be emerging that the Draft Articles serve as valuable guidance in their current format, which reflects the content of UN General Assembly Res. 71/150 according to which the General Assembly

“Commends to the attention of Governments the draft articles on the law of transboundary aquifers annexed to its resolution 68/118 as guidance for bilateral or regional agreements and arrangements for the proper management of transboundary aquifers;” (para 1)

Provisions of the Draft Articles that may [still] be problematic

An overview of the countries’ statements before the UN General Assembly on 22 October 2019 on the law of transboundary aquifers reveals some remaining concerns for some Draft Articles’ provisions. Surprisingly, Article 3’s treatment of sovereignty, which has generated the most heated debate among academics³, was mentioned only by Chile and not as criticism but in a constructive attempt to provide guidance and clarification. According to Chile, sovereignty over an aquifer refers only to the permeable water bearing geological formation situated in the territory of a particular aquifer State, and not to both the geological formation and the

³ Gabriel E Eckstein, ‘Commentary on the U.N. International Law Commission’s Draft Articles on the Law of Transboundary Aquifers’ (2007) 18 *Colorado Journal of International Environmental Law & Policy* 537, 561; Stephen C McCaffrey, ‘The International Law Commission Adopts Draft Articles on Transboundary Aquifers’ (2009) 103 *American Journal of International Law* 272, 286-292; Gabriel E Eckstein, ‘Managing buried treasure across frontiers: the international Law of Transboundary Aquifers’ (2011) 36 *Water International* 573, 581; Kerstin Mechlem, ‘Past, Present and Future of the International Law of Transboundary Aquifers’

(2011) 13 *International Community Law Review* 209, 219; Owen McIntyre, ‘International Water Resources Law and the International Law Commission Draft Articles on Transboundary Aquifers: A Missed Opportunity for Cross-Fertilisation?’ (2011) 13 *International Community Law Review* 237, 249; Renée Martin-Nagle and Stephanie Hawkins, “Transboundary Aquifers” in Mara Tignino and Christian Brethaut (eds), *Research Handbook on Fresh Water Law and International Relations* (Edward Elgar 2018) 324.

water itself, as the Draft Articles currently provide.

The provision that two countries (Denmark and El Salvador) highlighted as still problematic⁴ was Draft Article 6, which declares an obligation not to cause significant harm. According to Denmark, the “significant” threshold is too high for such a delicate natural resource like a transboundary aquifer. El Salvador was concerned not so much about the threshold, but about the uncertainty surrounding the meaning of “significant” harm. El Salvador went as far as to call for a legal definition of significant harm.

Only three countries (Denmark, El Salvador and Chile) raised legal questions related to the content of the Draft Articles. The other six countries did not criticise the Draft Articles directly, which could indicate support not only for considering them as useful guidance for future agreements, but also for their content.

The relationship between transboundary aquifer management and other important international community goals

Several countries made clear and strong linkages between the importance of transboundary aquifer management and other important common goals currently pursued by the international community, such as climate change (Denmark, Israel and Mauritius) and the Sustainable Development Goals (Denmark).

However, what we wish to highlight is the point made by Portugal about the strong relationship between the law of transboundary aquifers and conflict management. Portugal’s representative maintained that the Draft Articles constitute a valuable contribution for the proper management of transboundary aquifers and by doing so they promote peace. Mauritius, referring to water in general, expressed the belief that water is

a catalyst for cooperation in otherwise confrontational relationships.

See you in 5 years (2024)

Ultimately, the 2019 discussion at the UN General Assembly 6th Committee has confirmed an emerging consensus amongst countries according to which the Draft Articles should be considered as guidance in the negotiation of future context-specific transboundary aquifer regional or bilateral agreements or arrangements. The discussion also highlighted that, although some countries raised questions about the obligation not to cause significant harm, there seems to be a growing acceptance that the Draft Articles as a whole serve as a valuable resource to guide negotiations over aquifers. Further, the discussion emphasised the links between the law of transboundary aquifers and other goals of the international community, such as mitigating and adapting to climate change, achieving the Sustainable Development Goals and promoting peace.

Japan in its statement made it clear that it wished the UN General Assembly 6th Committee would take a five-year break before reconvening on this topic. The reasons for such a long break would be the necessity to give time for countries to develop some more state practice before taking a final decision on the future format of the Draft Articles. A slightly less optimistic interpretation of the decision to postpone a new discussion and a potential final decision for another is that, although transboundary aquifers are vital in so many respects, the law of transboundary aquifers has not been able to become mainstream within the international community. Countries have not really engaged with the Draft Articles as much as one could have hoped back in 2008. Only one country – Denmark – made reference to state practice in its statement by highlighting the Guarani Aquifer Agreement, which was signed in 2010 but has yet to come into force.

⁴ The debate about the meaning of significant harm and its role in protecting the aquifer began during the drafting phase. ILC, ‘Third report on shared

natural resources: transboundary groundwaters, by Mr Chusei Yamada, Special Rapporteur’ (2005) UN Doc A/CN.4/551 and Add 1, para 25-6.

In conclusion, the first question for policy makers, experts, civil society and any other stakeholders interested in the law of transboundary aquifers after the 2019 debate at the UN General Assembly 6th Committee is the same question that has haunted groundwater for so many years. How can the groundwater community remove the invisibility cape from the law of transboundary aquifers in the next five years in order to reveal the critical importance of aquifers and stimulate active progress on governance?⁵ In addition, there is a second, possibly even more important, question. If the law of transboundary aquifers has not received adequate attention within the UN family, are there other international and national fora, public or private, where the law of transboundary aquifers and, more generally, transboundary aquifer management should be addressed? We remain optimistic

that States will eventually move toward open discussions about governance regimes for transboundary aquifers, spurred by both a critical mass of current practices and the need for an agreed set of clear guiding principles. Meanwhile, we remain committed to supporting dialogue on these issues in any forum.

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⁵ Gabriel Eckstein and Francesco Sindico, 'The Law of Transboundary Aquifers: Many Ways of Going Forward, but Only One Way of Standing Still'

(2014) 23 *Review of European, Comparative and International Environmental Law* 32.



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