The international community has been considering international legal norms and policies for the management of transboundary aquifers for more than ten years. In 2008, the International Law Commission provided a framework with the adoption of the Draft Articles on the Law of Transboundary Aquifers, which are now formally annexed to a United Nations General Assembly (UNGA) Resolution. Since 2008, the topic of the law of transboundary aquifers has thrice been placed on the agenda of the UNGA Sixth Committee with a specific mandate to discuss the future form of the Draft Articles. This article explores the options before the international community regarding the future form of the Draft Articles and considers the possible advantages and disadvantages of each option. The article also discusses the extent to which the actual form of the Draft Articles matters in itself, or whether their impact ultimately will depend on other factors.

INTRODUCTION

Groundwater resources play a critical role in providing fresh water for people, industries, nations and the environment worldwide. Globally, groundwater provides approximately 45% of humanity's freshwater needs for everyday domestic uses, such as drinking, cooking and hygiene, as well as 24% of water used in irrigated agriculture. In many cases, groundwater is found in aquifers that are transboundary. While 276 international watercourses traverse the world's land areas, an ongoing study has identified, to date, 448 aquifers and aquifer bodies traversing international political boundaries. In places like the Middle East, North Africa and the Mexico-United States border, transboundary aquifers serve as the primary or sole source of available freshwater for human and environmental sustenance.

Recognizing the particular importance of transboundary aquifers, nations and international agencies around the world have begun exploring mechanisms for governing these hidden resources. This includes formal efforts to manage and regulate transboundary aquifers, such as the rigorous scheme implemented on the Genevois Aquifer along the French-Swiss border, to more general cooperative regimes, such as the Guarani Aquifer Agreement in South America, to instruments aimed mainly at an initial exchange of scientific data, as developed for the Nubian Sandstone and North Western Sahara aquifer systems in Northern Africa. It also includes informal efforts forged by subnational political entities, like the unofficial arrangements crafted for the Hueco Bolson aquifer underlying the cities of Juárez and El Paso on the Mexico-United States border, and for the

2 It is important to highlight that groundwater is just one component of an aquifer; an aquifer is the geological formation that contains the groundwater. According to the International Law Commission Draft Articles on the Law of Transboundary Aquifers, an aquifer is 'a permeable water bearing geological formation underlain by a less permeable layer and the water contained in the saturated zone of the formation.' The Law of Transboundary Aquifers (UNGA Resolution A/RES/63/124, 11 December 2008), Article 2a.
THE LAW OF TRANSBOUNDARY AQUIFERS

Historically, groundwater resources were treated by nations, water law scholars and practitioners akin to an unwanted stepchild. They were either ignored, cursorily misunderstood or intentionally disregarded, resulting in their omission from public and political discourse and consideration. This was especially true in the international transboundary context, where the number of international agreements for transboundary rivers and lakes continues to vastly outnumber those applicable to transboundary aquifers.12

The earliest articulation of an international legal regime specifically applicable to these transboundary groundwater resources is found in the work of the International Law Association (ILA) in its so-called ‘Helsinki Rules’ of 1966 and ‘Seoul Rules’ of 1986.13 While the product of an unofficial, nongovernmental organization, the norms articulated in its instruments have been recognized as foundational for subsequent efforts. More recently, the UNWC indirectly adopted some of the notions put forward by the ILA, when it applied its proposed regime to transboundary aquifers that were hydraulically connected to transboundary rivers or lakes.14 That latter effort, though, was not comprehensive and left numerous gaps in the management and regulatory regime applicable to transboundary aquifers.15

This article explores the options available for the future form of the Draft Articles and considers the advantages and disadvantages of each possibility. It also considers the extent to which that final form may matter for the development or codification of international law, and whether the impact of the Draft Articles could depend on other factors. The article begins by reviewing the work of the ILC in developing the Draft Articles. It then analyzes the various options for their future form that have been proffered by various governments, scholars and international organizations, including as an independent treaty, a protocol to the UNWC and a statement of guidelines. In this context, it also considers the impact of maintaining the status quo, meaning no action by the UNWC. Finally, the article assesses the relationship between the future form of the Draft Articles and their relevance to the future development and codification of international law for transboundary aquifers.

9 Memorandum of Agreement Related to Referral of Water Right Applications Related to the Transboundary Abbotsford-Sumas Aquifer between the State of Washington and the Canadian province of British Columbia.9

Possibly the most significant global effort to address the governance of transboundary aquifers is that undertaken by the United Nations (UN) International Law Commission (ILC). In December 2008, following six years of intense research and debate, the UN General Assembly (UNGA) adopted Resolution 63/124, which contains 19 Draft Articles on the Law of Transboundary Aquifers.10 Prepared by the ILC, the Draft Articles were modelled largely on the 1997 UN Watercourses Convention (UNWC).11 Since 2008, the Draft Articles have thrice been on the agenda of the UNGA for the purpose of discussing the future form of the principles and norms articulated in the ILC’s work product. In 2008 and 2011, the topic was tabled for consideration at subsequent meetings. In October and November 2013, the Draft Articles were again raised at the UNGA and their status and final form considered. While the member States gave the topic considerable attention, they again failed to form a consensus on whether and how to move the topic forward.

This article explores the options available for the future form of the Draft Articles and considers the advantages and disadvantages of each possibility. It also considers the extent to which that final form may matter for the development or codification of international law, and whether the impact of the Draft Articles could depend on other factors. The article begins by reviewing the work of the ILC in developing the Draft Articles. It then analyzes the various options for their future form that have been proffered by various governments, scholars and international organizations, including as an independent treaty, a protocol to the UNWC and a statement of guidelines. In this context, it also considers the impact of maintaining the status quo, meaning no action by the UNGA. Finally, the article assesses the relationship between the future form of the Draft Articles and their relevance to the future development and codification of international law for transboundary aquifers.

12 G. Eckstein and Y. Eckstein, ‘A Hydrogeological Approach to Transboundary Ground Water Resources and International Law’, 19:2 American University International Law Review (2003), 222. In contrast to the handful of transboundary aquifer agreements currently in force (all of which were forged in the past 35 years), more than 3,600 treaties governing transboundary rivers and lakes have been implemented over the past 1,200 years. United Nations Environment Programme (UNEP), Atlas of International Freshwater Agreements, United Nations Environment Programme (UNEP), 2002, at 6.
14 UNWC, n. 11 above, Article 2(a).
15 Gaps in the UNWC, as it applies to ground water resources, include the Convention’s non-applicability to transboundary fossil aquifers and, more generally, to transboundary aquifers without a hydraulic link to a transboundary surface water body. See G. Eckstein, ‘A Hydrogeological Perspective of the Status of Ground Water Resources under the UN Watercourse Convention’, 30:3 Columbia Journal of Environmental Law (2005), 529. The ILC sought, at least, to partly bridge this gap through the adoption of the 1994 ILC Resolution on Confined Transboundary Groundwater, which can be found in: Yearbook of the International Law Commission 1994, Volume II, Part 2 (UN Doc. A/CN.4/SER.A/1994/Add.1, 1994), 135. This effort, though, has been criticized as both inadequate and technically imprecise. See C. Yamada, Shared Natural Resources: Addendum to the First Report on Outlines (UN Doc. A/CN.4/533/Add.1, 30 June 2003), at paragraph 5; and G. Eckstein and Y. Eckstein, n. 12 above, 251.

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In 2002, at the request of the UNGA, the ILC began working on the topic of ‘shared natural resources’. While the effort was conceptualized to encompass water, oil, gas and other natural resources that traversed international political boundaries, in 2003 the ILC decided to confine its initial work to the subject of transboundary groundwater resources. Its objective was to build on its prior work on transboundary watercourses (which resulted in the UNWC), and to address those transboundary aquifers that were excluded under the UNWC. Under this mandate, the ILC elected Ambassador Chusei Yamada of Japan as its Special Rapporteur for the topic and embarked on a rigorous study of the law, science and policy of transboundary aquifers globally.16

In late 2008, following six years of intense research and debate, and five reports and supplements prepared by Ambassador Yamada, the UNGA adopted a Resolution containing 19 Draft Articles on transboundary aquifers.17 The Resolution recognized the work of the ILC, and commended the Draft Articles ‘to the attention of Governments without prejudice to the question of their future adoption or other appropriate action’.18 It also expressed its appreciation to the UN Educational, Scientific and Cultural Organization International Hydrological Programme (UNESCO-IHP), which had been instrumental in providing scientific and technical assistance to the ILC and the Special Rapporteur.19 In addition, it encouraged ‘the States concerned to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of these draft articles’.20 Finally, it placed the topic of the law of transboundary aquifers on its provisional meeting agenda three years hence.21

Since that initial consideration, the law of transboundary aquifers has been discussed by the UNGA’s Sixth Committee on two occasions, in 2011 and 2013. In both sessions, while some delegates offered substantive comments on the Draft Articles, the primary focus was on their final form. Some delegates favoured commencement of deliberation on a binding treaty, either immediately or in a stepped fashion. Others argued that codification was premature because of a lack of State practice evidencing the status of the international law of transboundary aquifers. Still others, while sceptical of the state of international law on the subject, suggested adopting the Draft Articles in the form of a Resolution or declaration of principles that could serve as guidelines as States explore their applicability in bilateral or regional agreements.22

In 2011, the UNGA took note of the importance of ‘the need for reasonable and proper management of transboundary aquifers’, further encouraged the member States ‘to make appropriate bilateral or regional arrangements for the proper management of their transboundary aquifers, taking into account the provisions of the draft articles’,23 and tabled consideration of the final form of the Draft Articles to its meeting in 2013.24 UNESCO-IHP was referred to specifically and encouraged ‘to offer further scientific and technical assistance to the States concerned’.25

The discussions before the UNGA in late 2013 did not differ significantly from those of prior deliberations. Countries continued to disagree over the status to be given to the Draft Articles and over their future form. Despite the discord, the UNGA agreed, once more, to postpone further consideration of the law of transboundary aquifers until 2016.26 It also encouraged UNESCO-IHP to continue its valuable work.27 Where the outcome did change is in the relationship put forward between States interested in taking forward more cooperative approaches in the management of transboundary aquifers and the Draft Articles. Significantly, the latest Resolution makes no reference to the final form of the Draft Articles. The Resolution, however, commends: ‘to the attention of Governments the draft articles on the law of transboundary aquifers annexed to the present resolution as guidance for bilat-

18 UNGA Resolution A/RES/63/124, n. 2 above, paragraph 4.
19 Ibid., at paragraph 3.
20 Ibid., at paragraph 5 (emphasis added).
21 Ibid., at paragraph 6.
22 For a review of the 2013 session, see below. See also UNGA Sixth Committee: Summary Record of the 16th meeting (UN Doc. A/C.6/66/SR.16, 14 February 2012); UNGA Department of Public Information, News and Media Division; Sixth Committee, 16th Meeting: Praising Draft Texts on Transboundary Harm, Aquifers, Allocation of Loss, Delegates Disagree Over Final Forms, Seek Further Examination (UN Doc. GA/L/3464, 22 October 2013).
23 The Law of Transboundary Aquifers (UNGA Resolution A/RES/66/104, 13 January 2012), at paragraph 1.
24 Ibid., at paragraph 3.
25 Ibid., at paragraph 2.
27 See Report of the Sixth Committee, n. 26 above, at paragraph 2.
eral or regional agreements and arrangements for the proper management of transboundary aquifers.26

Until this Resolution, countries were only commended to ‘take into account’ the Draft Articles when discussing bilateral or regional agreements. This latest Resolution, however, appears to elevate the Draft Articles to the status of ‘guidance’ in the negotiation of future bilateral and regional transboundary aquifer agreements. This is not simply a change in language or use of synonymous wording. Rather, use of the term ‘guidance’ suggests both a stronger recognition of the Draft Articles by the international community and a more assertive admonition to States to abide by the norms contained therein.

Notwithstanding the ‘guidance’ language, what started out as a relatively quick process in terms of the development of international law, has now slowed down to a crawl. While the Draft Articles were drafted in only six years, since 2009 there have been no amendments to the proposed norms and there has been little progress toward a consensus on next steps. This is particularly evident with respect to the legal form that the Draft Articles should take. The international community in 2014 has before it exactly what it had at the beginning of 2009: a set of ILC Draft Articles annexed to an UNGA Resolution, all of which remain in limbo.

Does this lack of progress on the final form of the Draft Articles suggest that their content is premature or ill-conceived? Might it portend the demise of the effort to formulate legal norms for the management of transboundary aquifers? Or, does the continued postponement intimate an alternative route toward international recognition? The next section of this article considers the various options contemplated and deferred by the UNGA in its successive debates as to the possible forms that the Draft Articles might take. It also assesses those options in the context of transboundary aquifer management.

THE FUTURE FORM OF THE LAW OF TRANSBOUNDARY AQUIFERS

Despite the apparent lack of progress on the Draft Articles, the debate on their future form is far from over and will continue, at least, into the 2016 session of the UNGA Sixth Committee. This is because the form that an international legal instrument may take is not just a theoretical issue where advocates of soft law versus hard law spend time and effort to justify their position.29 Rather, the form can have significant practical relevance and often can dictate or direct the extent to which the general principles (both substantive and procedural) present therein can be used, applied and even enforced.

Against this background, the debates before the UNGA have generated a panoply of options for the possible future form of the Draft Articles. Some nations have advocated developing the Articles into an independent framework treaty, while others prefer to present the principals in the form of guidelines or non-binding recommendations.30 Finally, there are some countries that prefer maintaining the status quo, which is effectively what has happened until now. Each of these options will now be discussed in turn based, in particular, on the most recent discussions that took place before the UNGA Sixth Committee in October and November 2013.31

INDEPENDENT INTERNATIONAL TREATY

The Draft Articles could serve as a basis to negotiate an independent international convention on the topic of the law of transboundary aquifers. Similarly to what happened with the UNWC, an intergovernmental process could be launched where countries would use the text of the Draft Articles as a starting point to negotiate a final agreement. The resulting convention would then be signed at an international conference and enter into force once the relevant number of ratifications is accrued.

While this option enjoyed several followers in the initial debates on the form of the Draft Articles – even during the drafting of the Articles themselves – more and more States appear to have abandoned this position, albeit for different reasons. These reasons can be broadly divided into three categories: legal, political and socio-economic.

Legal Reasons


31 A total of 17 countries presented written submissions, which can be found at: <https://papersmart.unmeetings.org/ga/sixth/68th-session/statements/?cv=1&agenda=7581>.
international legal instruments; and disagreement over specific provisions of the Draft Articles.

With regard to the Draft Articles and the state of the law and the practice of States, the positions of Portugal and the United States are instructive. While the former argued that ‘the Draft Articles are in line with already existing legal regimes governing water and natural resources in general’,32 the latter considered that ‘many aspects of the draft articles clearly go beyond current law and practice’.33 In its most recent submission, the United States also cautioned against moving toward an independent convention because of the possible overlap of authority and proposed norms between the Draft Articles and UNWC. According to the United States, some of the provisions of the Draft Articles would be incompatible with those of the UNWC, thereby creating conflicting obligations and fragmenting international water law.34

Raising the possibility that discord over the Draft Articles may spread from its final form to its substance, many nations have raised concerns over specific provisions of the Draft Articles, questioning their merits, appropriateness and interpretation. Palestine, for example, suggested that it would be unwise to push toward an independent convention when the starting point (the Draft Articles) contain a provision on national sovereignty that, in its opinion, would take the international community back more than a hundred years to the Harmon Doctrine approach to transboundary water management.35 In a different vein, Ukraine raised serious concerns with the obligation to not cause significant harm. It questioned the interpretation of the descriptor ‘significant’ and urged further work and clarification before taking any steps toward an independent convention. More specifically, it questioned the absence of a compensation mechanism for financial losses related to aquifer depletion.36

The challenges raised over substantive provisions of the Draft Articles raise a further issue that apparently has not been addressed in the discussions before the UNGA and its Sixth Committee. If an intergovernmental process were launched toward an independent convention, it is by no means certain that the current content of the Draft Articles would be retained. On the contrary, considering the questions and concerns presented in the most recent discussions over certain core areas (i.e., national sovereignty and significant harm) an intergovernmental process could open a Pandora’s box of substantive dissent that might lead either to a watering down of the existing Draft Articles or an impasse in achieving consensus, rather than enhancing or adding greater precision to the proposed norms.

Political Reasons
Two other reasons against moving towards an independent convention can loosely fall under the category of political constraints and can be framed as a question of political support and scale. According to the American delegation, a future convention on the law of transboundary aquifers ‘would [not] garner sufficient support’.37 The point raised here goes beyond the question of support needed in the negotiation process of a possible convention, and moves toward the necessary number of ratifications for the possible treaty to enter into force. Given that 16 years since its passage by the UNGA the UNWC is only now barely on the verge of garnering the requisite number of ratifications,38 the question of international political support for a convention on transboundary aquifers may be particularly valid.39 Certainly, if a country strongly believes in the value of an international legal instrument and in an independent convention as its form, the lack of support

35 Statement by the State of Palestine, 68th Session of the UN General Assembly Sixth Committee: Agenda Item 87: The Law of Transboundary Aquifers (22 October 2013), found at: <https://papersmart.unmeetings.org/media2/703060/palestine-87.pdf>, at 1. Interestingly, many countries actually refer to the principle of national sovereignty as one of the cornerstones of the Draft Articles. See, e.g., Statement by Uruguay, 68th Session of the UN General Assembly Sixth Committee: Agenda Item 87: The Law of Transboundary Aquifers (22 October 2013), found at: <https://papersmart.unmeetings.org/media2/703071/uruguay-87.pdf>, at 3; and Statement by Peru, 68th Session of the UN General Assembly Sixth Committee: Agenda Item 87: The Law of Transboundary Aquifers (22 October 2013), found at: <https://papersmart.unmeetings.org/media2/703119/uruguay-87.pdf>, at 1. National sovereignty in the context of the law of transboundary aquifers has led to very different positions, with S. McCaffrey, n. 17 above, making the same point raised by Palestine, and L. Del Castillo Labrador, ‘The Law of Transboundary Aquifers and the Berlin Rules on Water Resources (ILA): Interpretive Complementarity’ in: UNESCO-IAH-UNEP, Pre-proceedings: ISARM 2010 Inter-
36 Statement by Ukraine, 68th Session of the UN General Assembly Sixth Committee: Agenda Item 87: The Law of Transboundary Aquifers (22 October 2013), found at: <https://papersmart.unmeetings.org/media2/703119/ukraine-87.pdf>.
37 See Statement by the United States of America, n. 33 above, 1.

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should not prevent that country from considering this form altogether. Nevertheless, the lack of support definitely stands out as a political challenge that needs to be carefully considered when deciding what strategies are pursued.

A second political challenge to an independent convention pertains to a question of scale. There is some disagreement as to whether rules on transboundary aquifer management should be developed at the global level, or if they would be more effective if developed at the level of specific aquifers. Israel advocates this position and argues that local context must be taken into account to the greatest extent, with particular regard to local hydrogeological and political relationships between the countries overlying a transboundary aquifer. Similarly, Guatemala supports a ‘local solutions’ approach.

In response to this latter political challenge, the idiom that all politics are local is apropos. Moreover, the fact that the politics and law of transboundary aquifers are very much intertwined can be readily acknowledged. Nevertheless, there is evidence that international legal frameworks can accommodate local decision making and provide for tailored solutions to local problems. Multilateral environmental agreements are often referred to as ‘framework treaties’, precisely because they provide a common platform upon which to build at the bi-national or regional level. Portugal acknowledges this option and argues that a future convention should be flexible enough to allow States to establish specific regimes suitable to their contexts.

Socio-economic Reasons

The final type of reasons against moving toward a convention can be categorized as ‘socio-economic’. Japan hints at this when explaining that despite its past approach favouring a Convention, it now sees this option losing momentum due to the ‘sensitivity’ of certain countries to ‘particular issues’. Guatemala uses clearer language when it asserts that it finds itself against moving toward an independent convention because of the panoply of economic, political and environmental interests related to the management of transboundary aquifers. Fundamentally, Guatemala argues that, because of socio-economic problems related to the use of groundwater resources in a transboundary aquifer context, their management does not warrant a global treaty.

To paraphrase the idiom related to politics, all socio-economic problems also are local problems. But just as in the political context, an international approach does not necessarily negate recognition of unique local challenges and opportunities for local solutions. Nevertheless, these socio-economic concerns further suggest that there is little appetite for the Draft Articles to be translated into a global independent convention. When taken one at a time, there may be ways to discuss and overcome the various legal, political and socio-economic challenges raised. Taken together, though, these challenges have created a formidable obstacle that is driving countries away from this form. It is therefore necessary and advisable to move on and consider the other available options regarding the future form of the Draft Articles: their adoption as a declaration of principles or retaining them in their current form.

DECLARATION OF PRINCIPLES

In his final report, Ambassador Yamada noted: ‘While the positions of Governments remain divided, the Special Rapporteur has noticed that some Governments have shifted from supporting a legally binding convention to a non-binding document.’ A second option regarding the future form of the Draft Articles therefore is for them to be presented as a declaration of principles. The one immediate difference that such a form would have from their adoption as an independent convention would be their legal nature. While a declaration endorsed by an UNGA Resolution would not be legally binding on the member States, a convention would be obligatory under international law. In addition, as a declaration of principles, it would be far easier for an instrument to reflect the current content of the Draft Articles. As noted earlier, if countries were to open an intergovernmental process to negotiate an international convention based on the Draft Articles, it is possible that the content of the Draft Article could be watered down. This risk would likely be lessened if a...
declaration were adopted. To some extent, there is a political reason for this. Many countries who have objected to the Draft Articles becoming an independent convention have done so because they oppose certain provisions becoming hardened or obligatory by being incorporated in a global convention. It may well be that these countries would soften their objections if the final form is aspirational and imposes no direct liability or obligation. Finally, in contrast to those who frame the declaration approach as a defensive strategy intended to prevent the Draft Articles from becoming binding under a global convention, many advocates for a declaration see it as a constructive first step in the process toward a future convention.\(^{48}\) This latter group appears to recognize the challenge of achieving consensus while maintaining their objective of an independent, global convention.

Recognizing the need for compromise, Uruguay, on behalf of the Guarani Aquifer Agreement countries, considered a declaration of principles as the best option for the future form of the draft articles.\(^{49}\) Similarly recognizing that some member states showed unwillingness to negotiate for a future convention based on the text of the draft articles with their own legitimate interests, Japan shares this position.\(^{50}\) However, what is not entirely clear is whether using the Draft Articles as principles and guidelines even requires a new declaration. This takes us to the last of the three options regarding the form of the future draft articles: maintaining the status quo.

MAINTAINING THE STATUS QUO

A status quo approach suggests no action whatsoever. As seen earlier, the language found in the most recent UNGA Resolution on the law of transboundary aquifers has experienced a mild but potentially significant change as compared to the two prior Resolutions. States are encouraged not merely to take into account the Draft Articles when negotiating a bilateral or regional agreement for the management of a transboundary aquifer, they are now commended to use them as guidance in their negotiation. Accordingly, it is arguable that the status quo has already changed. Nevertheless, while most of the countries engaged in the recent debates at the UNGA seem favorable to this language modification\(^{51}\), a considerable number of States appeared to oppose any further action, including the adoption of a non-legally binding declaration of principles.

A few of the arguments repeated by some of the countries justifying the status quo include concerns about the ‘maturity’ of the Draft Articles. Guatemala and Malaysia, for example, both argue that States should be given more time to familiarize themselves with the Draft Articles before having to decide whether the provisions therein are worthy to be taken into account in possible future negotiations.\(^{52}\) This argument raises the question of awareness and understanding of the Draft Articles. As important as groundwater governance and transboundary aquifer management may be, it is still a rather complex and often invisible matter for many governments. The two prior UNGA Resolutions referenced the capacity building work of UNESCO-IHP in the field of transboundary aquifer management. That effort has not been limited to increasing the scientific knowledge of transboundary aquifers, which is still referred to by some countries as insufficient\(^{53}\), but also has focused on the legal and institutional options available to countries. The role of UNESCO-IHP is, therefore, crucial for the UNGA process since the organization is called upon to clarify the Draft Articles and make them more visible. Accordingly, a discussion about the relevance of the future form of the Draft Articles is strongly allied with the work of UNESCO-IHP.

A second reason put forward by States to advocate for the status quo is that the current form of the Draft Articles, as annexed to a UNGA Resolution, provides the necessary flexibility for the Draft Articles to accommodate the local needs and characteristics of different transboundary aquifers.\(^{54}\) For example, the United States argued that locally unique hydrological, climatic, economic, social, cultural and other factors will require a tailored approach to transboundary aquifer management.\(^{55}\) Since this argument is akin to the one considered in the political objection context above, it suffices to say that such concerns do not fully rationalize maintaining the status quo.

THE PROTOCOL OPTION

Before concluding the discussion of options for the final form of the Draft Articles, it is noteworthy to at least mention a fourth possibility that, while promoted by

\(^{48}\) See, e.g., Statement by Portugal, n. 32 above, at 3.

\(^{49}\) See Statement by Uruguay, n. 35 above, at 5.

\(^{50}\) See Statement by Japan, n. 45 above, at 3.

\(^{51}\) Statement by Malaysia, 68th Session of the UN General Assembly Sixth Committee: Agenda Item 87: The Law of Transboundary Aquifers (22 October 2013), found at: <https://papersmart.unmeetings.org/media2/703081/malaysia-87.pdf>; Statement from India, 68th Session of the UN General Assembly Sixth Committee: Agenda Item 87: The Law of Transboundary Aquifers (22 October 2013), found at: <https://papersmart.unmeetings.org/media2/703192/india-87.pdf>; Statement by Guatemala, n. 41 above; Statement by Peru, n. 35 above; Statement by Israel, n. 40 above; Statement by Palestine, n. 35 above; and Statement from the United States of America, n. 33 above.

\(^{52}\) See Statement by Guatemala, n. 41 above, at 2; Statement by Malaysia, n. 51 above, at 1.

\(^{53}\) See, e.g., Statement by the United States of America, n. 33 above, at 1; Statement by India, n. 51 above, at 2.

\(^{54}\) See Statement by the United States of America, n. 33 above, 1.

\(^{55}\) Ibid.
some organizations, never seemed to gain any traction at the UN. In some circles, the final form of the Draft Articles has been proposed as a protocol to the UNWC. The chief justifications proffered for this option include the need for a holistic approach to the codification and development of international water law, as well as a coordinated effort for the management of interrelated related surface and ground water resources. It is unclear why this option did not garner much attention at the UN. Nevertheless, given the current antipathy of the UN member State representatives in the UNGA Sixth Committee to a formal treaty, it is unlikely that this approach could gain any support.

**SUMMARY OF THE FUTURE FORM**

In the grand scheme of the development of international law, the first three options all can be regarded as reasonable possibilities. They are not, however, equally realistic or likely to result from the UNGA’s deliberations. Legal, political and socio-economic hurdles make the success of the first option highly improbable with most countries favouring either the declaration or the status quo approach. This reality brings into question whether the form that the Draft Articles may finally take could have an impact on their future relevance. This is the focus of the following section.

**THE RELATIONSHIP BETWEEN THE FUTURE FORM AND THE FUTURE RELEVANCE OF THE DRAFT ARTICLES**

**METHODICAL DEVELOPMENT**

While the UNGA’s approach in assessing the Draft Articles on the Law of Transboundary Aquifers may be frustratingly sluggish, it is possible that, to some extent, the pace of development is intentional. Although the Draft Articles were composed with relative speed – in contrast to the 25 years it took to craft the draft articles leading to the UNWC, the Draft Articles were prepared in less than six years – they were not achieved without controversy.

Accordingly, in order to prevent the wholesale rejection of the Draft Articles, some, like Ambassador Yamada, counselled that the UNGA should take a slow but methodical approach to the development of global standards and norms for managing transboundary ground-water resources. To generate eventual acceptance and support for the principles incorporated in the Draft Articles, Ambassador Yamada suggested that they be tabled by the UNGA so as to minimize the pressure that binding norms would engender and allow countries to test run the norms proposed in the Draft Articles. It was Ambassador Yamada’s hope that the norms articulated in the Draft Articles might eventually rise to the level of custom, regardless of whether they would ever be codified in a binding legal instrument. This is the tactic that, while not intentionally, has been successfully pursued by proponents of the UN Draft Articles on the Responsibility of States for Internationally Wrongful Acts. This is also the option that most countries in the recent 2013 debate on the law of transboundary aquifers at the UN Sixth Committee appeared to favour.

Given the dearth of experience with managing transboundary aquifers, such an organic and measured approach may be justified. On the one hand, it would provide nations the opportunity to experiment with the norms and adapt them to locally specific or unique circumstances. More importantly, as aquifer riparians begin to utilize, abide by and modify these principles, it would create the space in which their actions could evolve into demonstrable State practice and thereby help create customary international legal norms.

While it is still too early to assess the outcome definitively, the Draft Articles have already begun to influence State practice and the development of international law. For example, the Guarani Aquifer Agreement explicitly references Resolution 63/124 in its preamble. It also adopts a number of the concepts and norms contained in the Draft Articles, including the principles of sovereignty, cooperation, no significant harm, exchange of data and information, and prior notification of planned works with transboundary implications.

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18 Some of the more contentious issues before the UN Sixth Committee included the scope of the Draft Articles and their applicability to activities unrelated to the exploitation of an aquifer but which can have a direct impact on the aquifer, the question of sovereignty over portions of a transboundary aquifer found within a State’s territory, and prioritization of the rules of no significant harm and equitable and reasonable utilization. See generally G. Eckstein, n. 17 above.

19 See C. Yamada, n. 30 above, at paragraph 9; and G. Eckstein, ‘Notes from the Meeting of Ground Water Experts Group with His Excellency Ambassador Chusei Yamada’ (28–31 January 2008, Tokyo), at paragraph 74 (on file with author).


22 Guarani Aquifer Agreement, n. 6 above.
Likewise, the 2009 Bamako Declaration for the Iullemeden Aquifer System directly acknowledges Resolution 63/124, while the related Memorandum of Understanding implementing the Declaration adopts the principles of equitable and reasonable use, exchange of data and information and prior notification of planned works with transboundary implications, as well as other more progressive norms focusing on human welfare and environmental protection.

Possibly the most significant reference to the Draft Articles can be found in the UNECE Model Provisions on Transboundary Groundwaters, which were adopted by the Meeting of the Parties to the 1992 UN Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes. In the commentary appended to the Model Provisions, the UNECE states that:

The present exercise [the Model Provisions on Transboundary Groundwaters] builds on that instrument [the Draft Articles] with a view to providing concrete guidance for implementing, with regard to groundwater, the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention) in the light of the lessons learnt and the experience gained from the implementation of the Convention.

It is significant that the Model Provisions constitute an instrument intended to provide guidance on the subject of transboundary aquifers. Hence, the preamble to Decision VI/2, in which the UNECE adopted the Model Provisions, explicitly ‘recognizes the need for providing specific non-binding guidance for the implementation of the Convention with regard to groundwaters’.

It is interesting to note that the UNECE Water Convention is now open to all UN member States. This effectively means that a legal instrument stemming from such a Convention, albeit in the form of a decision of the Meeting of the Parties, could be relevant for a wider group of countries than those that currently enjoy UNECE membership. The close relationship between the Draft Articles and the Model Provisions implies that, were the latter to be followed by more countries, the Draft Articles themselves could be deemed to have a broader impact. However, the real point is once again whether the current (and any future) form of the Draft Articles requires such sophisticated linkages to enhance its legal effects.

**NORMATIVE PROPOSITIONS, LEGAL EFFECTS, LEGALLY BINDING INSTRUMENTS AND CUSTOMARY INTERNATIONAL LAW**

As noted above, the Draft Articles in their current form have already had some influence on the development of a number of international instruments. In addition, they have also been referred to by a number of national courts, including the Supreme Court of Justice in Costa Rica. As such, the Draft Articles already have had

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some impact on State practice. Uruguay, speaking at the 2013 UN deliberations on behalf of the signatories to the Guarani Aquifer Agreement, made a compelling point that the Draft Articles in their current form constitute ‘normative propositions’.71 This contention would not contradict the position of those countries that, quite rightly, assert that in their current form, the Draft Articles are not legally binding.72 Regardless, given how international law can emerge and evolve, it is reasonable to ask whether a non-legally binding international instrument can, nonetheless, have legal effects. Practice in the field of international environmental law, especially the decisions taken by conferences of the parties (COPs) to multilateral environmental agreements, suggests that this question can be answered in the affirmative.73

The logical questions resulting from this assessment would then be: What is meant by legal effects, and what does Uruguay mean when it refers to the Draft Articles as being normative propositions? It can be argued that the Draft Articles provide a platform of substantive and procedural rules that States can use as guidance when negotiating an agreement to manage their transboundary aquifers. The effects are legal insofar as what is suggested in the Draft Articles, as well as in the Model Provisions, constitutes a normative framework.

The legal effects are not legally binding because they are not enforceable before any court. If a country does not use the Draft Articles as guidance or does not take them into account when negotiating a transboundary aquifer agreement, it would not be acting contrary to international law. Moreover, its actions would not trigger or impose any State responsibility or liability. In other words, legal effects can arise from an UNGA Resolution that provides for a declaration of principles, in a way similar to COP decisions.

Considering the above, it is appropriate to question whether the relevance and legal impact of the Draft Articles would be any different if they were translated into a fully-fledged treaty. On the one hand, according to the principle of pacta sunt servanda, the answer would be affirmative where a convention is in force and imposes obligations upon ratifying States.74 It is clear that substantive and procedural obligations present in a treaty are binding upon the States party to that treaty and that breaching them would constitute a violation of international law. On the other hand, the legal nature of an obligation under international law depends also on two other considerations. First, the wording of that obligation can determine whether it is legally binding only in principle, or also in practice. If a treaty obligation is drafted in very general or ambiguous terms, it may make a breach very difficult to prove and State responsibility almost impossible to establish before a court. Second, and more relevant to the management of transboundary aquifers, obligations are legally binding where they reflect customary international law.75 Where an obligation reflects customary international law, it does not matter whether the provision embodying the obligation is found in a legally binding instrument, a non-binding UNGA Resolution, or a non-binding COP Decision. That obligation will have legally significant consequences. Accordingly, the question is whether the norms contained in the Draft Articles reflect customary international law in the field of transboundary aquifer management. This is where the debate is probably most heated and evident, for example, in the diverging opinions of Portugal and the United States discussed above.76

The Draft Articles, however, contain at least one key obligation that is widely acknowledged as a customary norm of international law: the obligation not to cause significant harm to neighbouring countries.77 While it has never been specifically applied in the context of a transboundary aquifer dispute, the principle is widely accepted as part of international water law and appears in some form in every transboundary aquifer agreement to date.78

In addition, the Draft Articles contain a number of principles that appear to be emerging customary international legal norms applicable to the management of transboundary aquifers. In particular, the obligation to regularly exchange data and information,79 and the corollary duty to monitor and, where possible, generate

71 See Statement by Uruguay, n. 35 above, at 3.
72 See Statement by Japan, n. 45 above, at 3; Statement by India, n. 51 above, at 3.
75 ‘Customary international law’ refers to international law that is grounded in States’ conduct rather than codified rules. It emerges from the practice of States that is both broad and consistent, and justified by a sense that such conduct is legally appropriate and mandated, rather than simply morally proper or imposed under threat of reprisal. See M. Shaw, International Law, 6th edn (Cambridge University Press, 2008), at 72; and I. Brownlie, Principles of Public International Law, 7th edn (Oxford University Press, 2008), at 6.
76 See Statement by Portugal, n. 32 above, and Statement by the United States of America, n. 33 above.
79 See UNGA Resolution A/RES/63/124, n. 2 above, Article 8.
additional data\textsuperscript{80} are found in a number of contemporary transboundary aquifer arrangements.\textsuperscript{81} Similarly, the obligation of prior notification of planned activities\textsuperscript{82} is also found in various relevant agreements.\textsuperscript{83}

Another procedural obligation that seems to have acquired customary international law status in the context of minimizing significant transboundary harm is the obligation to undertake an environmental impact assessment. It is unclear, however, the extent to which this customary norm is obligatory in the context of transboundary aquifers. Recent case law by the International Court of Justice can be interpreted as raising the legal bar of such obligation to the level of customary international law, but only in the context of proposed industrial activities.\textsuperscript{84} Furthermore, the fact that the Draft Articles reference environmental impact assessment in Articles 15 and 18,\textsuperscript{85} but without a clear-cut requirement to undertake such an activity, raises doubts as to the customary nature of this obligation in the context of transboundary aquifer management. The same can be argued when analyzing the provisions of the Guarani Aquifer Agreement, where the possibility of an environmental impact assessment is mentioned without any binding requirements.\textsuperscript{86} Despite the difficulties in determining when an obligation acquires customary international law status, the form of the legal instrument in which they are found does not necessarily impact their applicability, or even enforceability.

CONCLUSION

The progression of legal development is a dynamic process that often requires years. Hence, the impact

\textsuperscript{80} Ibid., Article 13.
\textsuperscript{81} See G. Eckstein, n. 77 above, at 578.
\textsuperscript{82} See UNGA Resolution A/RES/63/124, n. 2 above, Article 15.
\textsuperscript{83} See G. Eckstein, n. 77 above, at 578–579.
\textsuperscript{85} See UNGA Resolution A/RES/63/124, n. 2 above, Articles 15 and 18.
\textsuperscript{86} Guarani Aquifer Agreement, n. 6 above, Articles 9 and 10.

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