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**The Law of Transboundary Aquifers in the Draft Articles  
of the International Law Commission and in the UN  
Convention on the Law of the Non-Navigational Uses of  
International Watercourses**

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# ***Background***

- 1. The 1997 UN Watercourse Convention had left a gap in regard to groundwaters**
- 2. The UNILC was tasked by the UNGA to fill that gap in 2003**
- 3. The Draft Articles on the law of transboundary aquifers, are the result of intense collaboration between legal experts and scientists over a period of five years (from 2003 to 2008) inspired and driven by Unesco- IHP**

# ***UNGA Resolution 63/124***

- **By Resolution 63/124 adopted on 11 December 2008 the UNGA**
- **Took note of the Draft Articles on the Law of transboundary aquifers presented by UNILC**
- **Encouraged concerned States to make appropriate bilateral or regional arrangements for the proper management of their aquifers, taking the Draft Articles into account issue of legal instrument of draft articles has been differed twice (2011-2013)**

# ***Scope of Draft Articles***

- **Uses of aquifers: extraction of groundwater, of heat for thermal energy, mining, storage and waste disposal (Art. 1)**
- **All activities which are carried out on an aquifer and that cause or may cause an adverse effect on it**
- **Measures for the protection, preservation and management of such aquifers (sustainability concerns)**

# ***Sovereignty of aquifer States (Art.3)***

- ***Each State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory; it shall exercise its sovereignty in accordance with international law and the present articles***
- **Limited sovereignty hotly contested issue by some scholars**

# ***Comparison between the New York Convention and the Draft Articles***

## **New York Convention**

*Art. 2: **Watercourse** means a system of surface water and groundwater constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus ...*

It covers **all groundwaters** that are hydrologically **connected with surface water** (non fossil water), **except fossil water**

## **Draft Articles**

*Art. 2: **Aquifer** means a permeable water-bearing geological formation underlain by a less permeable layer and the water contained in the saturated zones of the formation ...*

It covers the “**non fossil waters**” and “**fossil water**”

### ***Overlap***

In respect to all forms of groundwater (non fossil water), except “*confined groundwater*”

# ***Comparison between the New York Convention and the Draft Articles***

## **New York Convention**

Art. 5: Equitable and reasonable utilization and participation

**BUT**  
*Watercourse States shall in their respective territories utilize ... in an equitable and reasonable manner ... an international watercourse shall be used .. in view to attaining optimal and sustainable utilization ... and benefits taking into account the interests ... consistent with adequate protection ...*

## **Draft Articles**

Art. 4: Equitable and reasonable utilization

**Sustainability concerns,**  
the obligation *to maximize the long-term benefits* of groundwater exploitation  
the obligation of States to engage in individual or joint planning of the *comprehensive utilization* of groundwater  
the obligation of State not to jeopardize the effective functioning of aquifers when utilizing them

# ***Comparison between the New York Convention and the Draft Articles***

## **New York Convention**

Art. 6: Factors relevant to equitable and reasonable utilization

Geographic, hydrographic, hydrological, climatic, ecological, the population dependent on the watercourse, the effects of the uses of watercourses, conservation, protection, development and economy of use of the water resources of watercourse and the costs of measures taken to that effect ...

**BUT →**

## **Draft Articles**

Art. 5: Factors relevant to equitable and reasonable utilization

*(d) The contribution to the formation and recharge of the aquifer or aquifer system*

*(i) The role of the aquifer or aquifer system in the related ecosystem*

# ***Comparison between the New York Convention and the Draft Articles***

## **New York Convention**

Art.10, par. 2

*In the event of a conflict ... special regard being given to vital human needs*

## **Draft Articles**

Art 5, par. 2

*In weighing different kinds of utilization ... special regards shall be given to vital human needs*

***AND***

# ***Comparison between the New York Convention and the Draft Articles***

## **New York Convention**

Art. 7: Obligation not to cause significant harm

*Watercourse States shall ... take all appropriate measures to prevent the causing of significant harm*

**IS BROADER in →**

**AND**

*where significant harm is caused ... the States whose use causes harm ... shall take all measures in consultation ... and **to discuss** the question of **compensation***

## **Draft Articles**

Art. 6: Obligation not to cause significant harm

*Aquifer States shall ... take all appropriate measures ...*

being expanded to cover the **discharge zone of aquifers** located in the territory of other States

***there is not** the question of **compensation**, the obligation is more absolute*

# ***Comparison between the New York Convention and the Draft Articles***

## **New York Convention**

***Art.20: Watercourse States shall ... protect and preserve the ecosystems of international watercourses.***

***Art.21: Watercourse States shall where appropriate, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States (environment, health, safety) ... shall agreeable measures and methods to prevent ... Water quality objectives and criteria ... techniques and practices to address pollution ... establishing lists of substances the introduction of which into waters ... is to be prohibited, limited, investigated or monitored.***

## **Draft Articles**

### ***Ecosystem support function***

***Art.10: The obligation of States to protect and preserve the groundwater - dependent ecosystem within and outside an aquifer, by ensuring adequate quantities of recharge and discharge water of adequate quality ...***

***Art.11: The obligation of States to take measures to prevent and minimize detrimental impact on the aquifer recharge and discharge processes ...***

***Art.12: Pollution control: the obligation of States to prevent new pollution and to reduce and control existing pollution that may cause significant harm to other States. The obligation to take a precautionary approach, given the uncertainty about the nature and extent of a transboundary aquifer.***

# Conclusion

- *The principle of sovereignty in the Draft Articles is not absolute as argued by Prof. McCaffrey, but relative and attenuated; absolute sovereignty and absolute territorial integrity have nowadays been superseded by the development of customary international water law as reflected in the NY Convention which has served as a model for the draft articles, particularly, in the doctrine and principle of equitable utilization which permeates both instruments,*
- *however, due to groundwater's vulnerability to pollution and depletion, in the Draft Articles the protection and conservation of aquifers attract greater attention relative to the utilitarian functions of aquifers, compared to the UN Convention,*
- *some overlap between the two instruments is detectable regarding renewable groundwater resources, as these come within the purview of both instruments. This issue has been raised but not tackled by the ILC Special Rapporteur Yamada, and it remains pending notwithstanding consideration by UNGA at the 66/104 (2011) and 68/118 (2013)*



***Thank you for your attention !***

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