

# Substantive Norms in International Water Law

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# Introduction

- The law of international watercourses provides a framework for managing the sustainability of transboundary waters that cross national borders
- The 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses is the only treaty governing shared freshwater resources that is of universal applicability.
- There are more than 400 agreements that govern international cooperation on transboundary watercourses.

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- In addition to these treaties, rules of customary international law confer specific legal entitlements and impose obligations on watercourse states.
- The overarching rule of treaty and customary law is the principle of equitable and reasonable use, which is a right and duty on all watercourse states governing transboundary watercourses and requires states to take all appropriate measures not to cause significant harm.

## Substantive Norms in International Water Law

- Substantive rules comprise legal norms that establish the rights and obligations of watercourse states.
- Under both customary international law and treaty law, states are entitled to equitable and reasonable use of shared water resources but states must also take all appropriate measures to prevent causing significant harm to other watercourse states.



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- Substantive norms under consideration in this presentation include:
  - ✓ Equitable & reasonable utilisation
  - ✓ No Significant harm
  - ✓ Protection of Ecosystems
- These substantive rules are operationalised through rules of procedure, such as the exchange of information, prior notification, and consultations.

# The Principle of the Equitable and reasonable Utilisation

- This principle provides that each State in an international drainage basin has a right under general international law to utilize the basin and an equal right to use the waters of that basin.
- Specifically, each State is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin concerned.
- The principle of equitable utilisation requires consideration of the legitimate rights and interests of all users of such waters reflecting the emerging view that international water bodies should be managed by 'shared regulation' rather than by a single State.

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- The principle was first considered in the case of *Kansas v. Colorado* [206 US 46 (1907)]
- The court found that Kansas, the lower riparian and prior user, was not entitled to relief against Colorado for the latter's diversion of water from the Arkansas River in Kansas.
- In reaching its decision, the court compared the detriments and the great benefits which obviously resulted to Colorado and found that, 'equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.'

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- In 1929, the Permanent Court of Justice in a case concerning the International Commission on the River Oder concluded that riparian States shared a “natural community of interest” and, therefore, a “common legal right” in the equal use of both contiguous and successive rivers.
- The Helsinki Rules on the Use of Waters of International Rivers of 1966 drafted by the International Law Association embodied this concept and adopted the notion of equitable utilisation.



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- According to **Article IV** of the Rules, each State is entitled within its territory to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.
- The Helsinki Rules have been superseded by the 1997 UN Convention on Non-navigational Uses of International Watercourses.
- **Article 5** of the UN Convention provides for Watercourse States in their respective territories to utilise an international watercourse in an equitable and reasonable manner.

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The UN Convention (Article 6) provide factors for determining equity :

- Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- The social and economic needs of the watercourse States concerned;
- The population dependent on the watercourse in each watercourse State;
- The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
- Existing and potential uses of the watercourse;
- Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
- The availability of alternatives, of comparable value, to a particular planned or existing use.

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- Berlin Rules which arose from a Berlin Conference that was held for the revision of the Helsinki and other International Law Association Rules on International Water Re-sources.
- **Art 12 (1)** of the Berlin Rules on Water Resources (2004), Basin States shall in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States.

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- **Art 3(7a) of the Revised SADC Protocol 2000, also provides for the same upon member States.**

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- **In Article 5** of the 1995 Mekong Agreement, State parties agreed on a term to utilize the waters of the Mekong River system in a reasonable and equitable manner in their respective territories, pursuant to all relevant factors and circumstances.

# Cont...

- The Agreement on the Nile River Basin Cooperative Framework 2009 which provides for principles of development and protection the Nile River System establishes the principle of equitable and reasonable utilization of the waters of the Nile River System under **Article 4**.

# Principle of no significant Harm

- The no-harm rule derives its normative foundation from *sic utere tuo ut alienum non laedas*, or the good neighbourliness principle.
- Countries must avoid causing significant harm to others in utilisation of shared water resources
- The type of harm is qualified by the term significant which is defined as the real impairment of a use, established by objective evidence.
- The “significant” threshold excludes mere inconveniences or minor disturbances that States are expected to tolerate, in conformity with the Legal rule of good neighbourliness”

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- The obligation “not to cause significant harm” also derives from the theory of limited territorial sovereignty
- The theory of limited territorial sovereignty stipulates that all watercourse States have an equal right to the utilisation of a shared watercourse and but they must also respect the sovereignty of other States to equal rights of use.
- The duty “not to cause significant harm” is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm.



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- **Article 7 of the UN Watercourses Convention** codifies and clarifies the scope of the duty “not to cause significant harm”
- Under **Art 4 (4a) Revised SADC Protocol**, State Parties shall individually or jointly take all appropriate measures to prevent or mitigate conditions related to a shared watercourse that may be harmful to other Watercourse States.
- The obligation involves taking appropriate measures even where harm was resulting from natural causes such as floods, water-borne diseases, erosion, drought or desertification.

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- **Article 16 of the Berlin Rules on Water Resources 2004** provides for avoidance of transboundary harm by Basin States.
- It states that Basin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the right of each basin State to make equitable and reasonable use of the waters.

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- The substantive obligation of no harm is also embedded in **Art 3 of the 1992 Almaty Agreement** .
- It requires the parties “to refrain from actions on their respective territories that might affect interests of other contracting parties and cause harm to them, lead to deviations from the agreed volumes of water flow and pollution of water sources”.
- **Art 5 of the Agreement on the Nile River Basin Cooperative Framework 2010** similarly provides for the principle of preventing the causing of significant harm to other States of the Nile River Basin.

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- **Article 6 of the 1995 Mekong Agreement** considers the norm of no significant harm by providing for States cooperation for maintenance of Flows on the Mainstream from diversions, storage releases, or other actions of a permanent nature.
- The obligation as in the above provisions known as the “no significant harm” rule requires that States, “in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

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- Hence, a state's compliance with **Article 7 of the UN convention** is not dependent solely on harm being caused, but rather determined by a country's reasonable conduct in terms of preventative behaviour to avoid the harm in question.
- The 'no significant harm' principle is widely recognised and incorporated not only in modern transboundary water agreements, but also into international environmental law.
- This was confirmed by the ICJ decision in the **Pulp Mills on the River Uruguay Case** which included the need to conduct an EIA.

# The Principle of the Protection and Preservation of Ecosystems of International Watercourses

- Watercourse ecosystems provide many valuable services to humans, including the provision of habitat for fish, and other aquatic species of fauna and flora that not only serve as sources of food but also purify water.
- The principle of protection and preservation of ecosystems is recognized by International Water Conventions.
- **Articles 20 and 22 of the 1997 UN Watercourses Convention** recognize the principle of protection and preservation of ecosystems.

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- **Article 20** requires States to ‘individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.’
- **Article 22** restricts the introduction of alien species into an international watercourse which may have effects detrimental to the ecosystems of the watercourse resulting in significant harm to other watercourse States.
- The protection and preservation ecosystem is contained in numerous agreements on international watercourses.

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- **Article 7 of the 1995 Mekong Agreement** considers this principle.
- It is to the effect that States have to make every effort to avoid, minimize and mitigate harmful effects that might occur to the environment, especially the water quantity and quality, the aquatic (eco-system) conditions, and ecological balance of the river system, from the development and use of the Mekong River Basin water resources or discharge of wastes and return flows.
- **Article 4 (2a) Revised SADC Protocol 2000** provides that State Parties shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of a shared watercourse.



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- **Art 7 of the Agreement on the Nile River Basin Cooperative Framework 2010** provides for the principle of protection and conservation of ecosystems.
- The principle is that Nile Basin States take all appropriate measures, individually and, where appropriate, jointly, for the protection and conservation of the Nile River Basin and its ecosystems.

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- **Chapter V of the Berlin Rules on Water resources 2004** provides for protection of the aquatic environments including appropriate measures to protect the ecological integrity necessary to sustain ecosystems dependent on particular waters, prevent the introduction alien species where they might have a significant adverse effect and hazardous substances into the waters.
- **The Convention for the Establishment of the Lake Victoria Fisheries Organisation** of June 30, 1994, (Article 2 (3) (d) and (f)) also stipulate for this principle.

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- The eco systems protection was also recognised by the ICJ in the **Gacikovo-Nagymaros Project Judgment of 25 Sept. 1997 para.53** (*Hungary/Slovakia*), where it was stated that ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn...’

# Conclusion

- ✓ Substantive rules are contained in several agreements. The challenge is how to implement them. This requires developing basin specific rules for their implementation.

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