

# Procedural norms under IWL

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# Overview

- Why procedure?
- Duty to cooperate
- Notification and consultation
- Environmental impact assessment

# WHY PROCEDURE?

# Legal Analytical Framework

Key Elements	Details
1. Scope	<ul style="list-style-type: none"><li>• Legal reach (what waters?)</li><li>• Definitions (watercourse; uses)</li><li>• Parties (States; RIEOs)</li></ul>
2. Substantive Norms	<ul style="list-style-type: none"><li>• Legal duties &amp; entitlements (equitable and reasonable utilisation; due diligence; protection)</li><li>• Rules of substance (general or precise)</li></ul>
3. Procedural Rules	<ul style="list-style-type: none"><li>• Rules of procedure (duty to cooperate as bridge)</li><li>• Notification / exchange of information</li></ul>
4. Institutional Mechanisms	<ul style="list-style-type: none"><li>• Joint bodies (RBOs)</li><li>• Conference of the Parties (MoP; CoP)</li><li>• Organisations / organs (Ministerial level; other)</li></ul>
5. Dispute Settlement	<ul style="list-style-type: none"><li>• Dispute avoidance (consultation)</li><li>• Dispute settlement (Art. 33 UN WC; other)</li><li>• Compliance verification (reporting; facilitation)</li></ul>

# The importance of procedural and institutional mechanisms

“It is reasonable ... that procedural requirements should be regarded as essential to the equitable sharing of water resources. .... In the absence of hard and precise rules of allocation, there is a relatively greater need for specifying requirements for advance notice, consultation, and decision procedures.”

Schachter, *Sharing the World's Resources* (Columbia Uni Press New York 1977)

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General Obligation to Cooperate

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Substantive norms and procedure

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Notification and Consultation

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Environmental Impact Assessment

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Regular Exchange of Data and Information

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Joint monitoring

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# DUTY TO COOPERATE

# UN Watercourses Convention, Art. 8(1)

Watercourse states *shall* cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and *good faith* in order to attain optimal utilisation and adequate protection of an international watercourse



# Good faith obligation

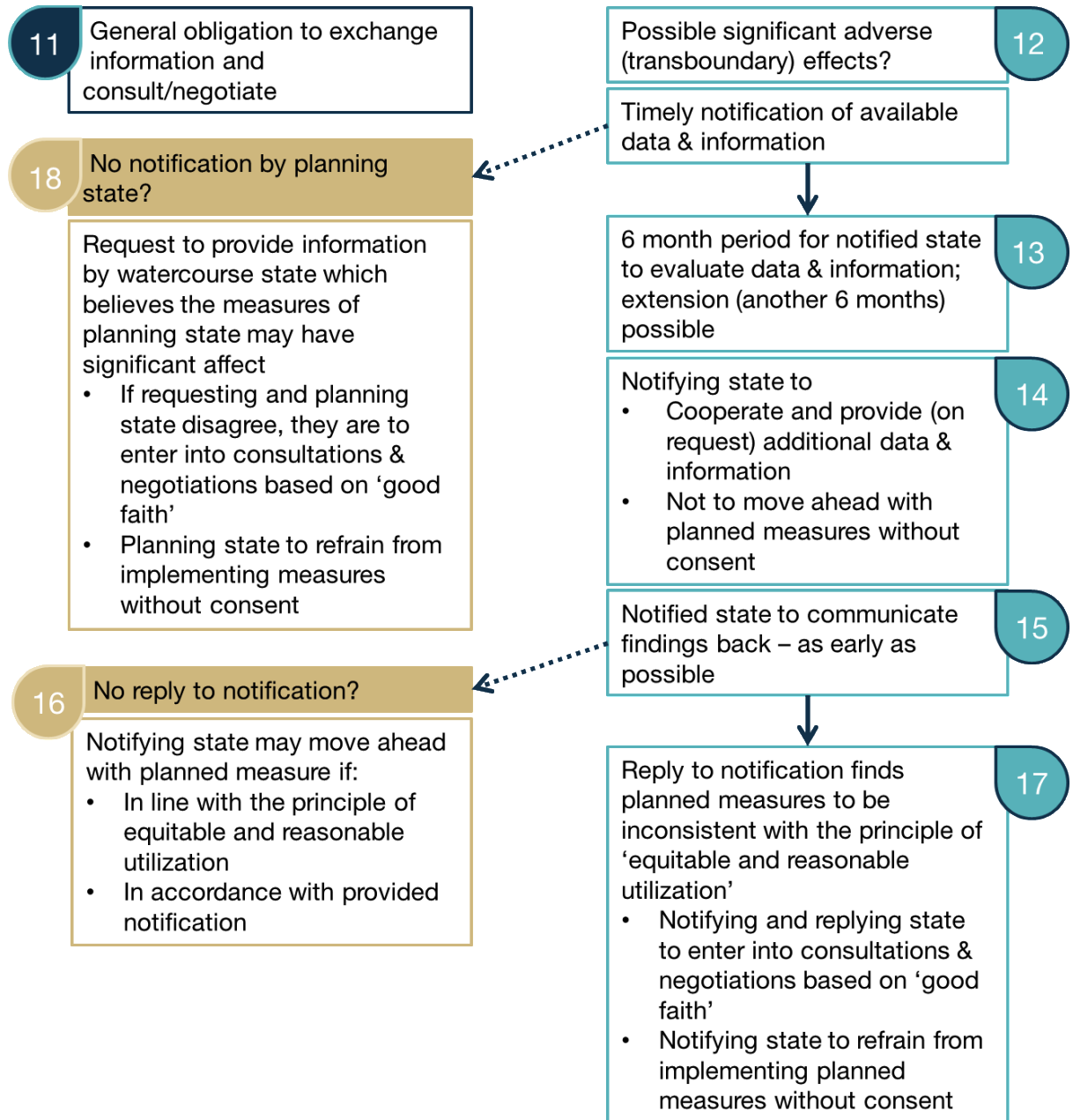
- Reflected in UN Charter, Art. 2(2)
- ‘Good faith’?
  - Act with honest intent, fairness and sincerity
    - *Meaningful* negotiations and consultations
      - Can’t simply insist on own position without contemplating any modification (Gabcikovo-Nagymaros Case, North Sea Continental Shelf Case)
      - Lack Lanoux Case
        - » ‘accept all communications and contracts which could, by a broader comparison of interests and by reciprocal good will, provide States with the best conditions for concluding agreements’
        - » ‘upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own’.
  - No intention to deceit

# Duty to Cooperate

- A logical extension of substantive norms
  - Equitable and reasonable utilisation
    - Identification and weighing of factors
    - Equitable *participation*
      - Duty to cooperate in the protection and development of an international watercourse (Art. 5(2), UNWC)
  - No significant harm
    - Due diligence obligation to take all *appropriate* measures
      - Consider and mitigate risk (strong procedural element)
        - » EIAs, Stakeholder Consultation, Data and Information Exchange, Regulatory framework, Licensing and Permits, etc.

# NOTIFICATION AND CONSULTATION

# Notification n procedures under the UNWC



# UN Watercourses Convention

- What type of activity?
  - ‘Planned Measures’ (Art. 12, UNWC)
    - New projects or programmes of a major or minor nature, as well as changes in existing uses of an international watercourse (ILC)
- Who to notify?
  - Watercourse State where such measures may have a ‘significant adverse affect’ (Art. 12, UNWC)



<http://legal.un.org/avl/ha/clnuiw/clnuiw.html>

# UN Watercourses Convention

- When to notify?
  - ‘*Before* a watercourse state implements or permits the implementation of planned measures... it shall provide ... *timely* notification’ (Art. 12, UNWC)
  - Timely?
- What to share?
  - ‘Available technical data and information, including the results of any environmental impact assessment’ (Art. 12, UNWC)
  - Additional information upon request, where ‘available’ and ‘necessary’



<http://legal.un.org/avl/ha/clnuiw/clnuiw.html>



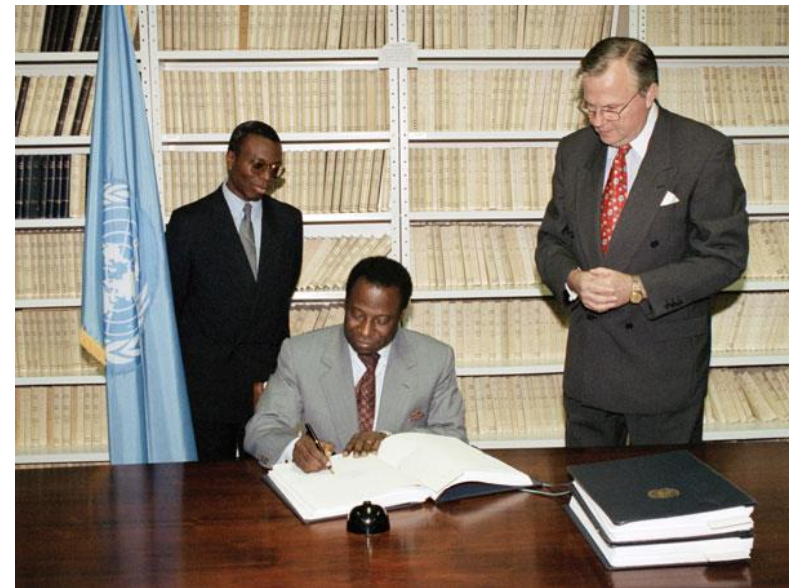
# UN Watercourses Convention

- How long to reply?
  - Need to reconcile diverging interests (planned v affected)
  - 6 months (Art. 13, UNWC)
  - Further 6 months where ‘special difficulty’ (Art. 13, UNWC)
- Obligations on notifying State during notification period
  - No implementation of planned measure without consent of notified State (Art. 14)
  - What constitutes the ‘planned measure’?
    - Ground clearing?
    - Road upgrades?



# UN Watercourses Convention

- Duty to consult
  - Enter into consultation (Art. 17, UNWC)
  - If requested by notified State, notifying State to refrain from implementation for a period of six month (Art. 17, UNWC)
  - Can then proceed having due regard to Arts 5 – 7 (ERU and No significant harm)
- Where no agreement?
  - Settle disputes in peaceful manner (Art. 33)
  - 3<sup>rd</sup> party fact-finding (after 6 months consultation)
  - Arbitration or adjudication?



<http://legal.un.org/avl/ha/clnuiw/clnuiw.html>



# UN Watercourses Convention

- Significant (especially for a global framework convention!)
  - Detailed procedures for notification and consultation
  - Still a number of interpretative questions
    - When to notify – ‘timely’?
      - ‘As early as possible, and no later than when informing their own public’ (Finland)
    - What to share?
      - EIA
        - » Only if available?
    - Obligations on planning State during notification, consultation and arbitration/adjudication?
      - Refrain from implementing ‘the project’
        - » What constitute ‘the project’?
        - » What happens during arbitration/ adjudication?

# ENVIRONMENTAL IMPACT ASSESSMENT

# Environmental Impact Assessment

- Share available data and information,
  - ‘including the results of any environmental impact assessment’ (Art 12, UNWC)
- Transboundary EIA a requirement?
  - Obligation to take all appropriate measures to prevent significant harm
  - Pulp Mills case ICJ suggested transboundary EIA part of customary international law

# EIA and Transboundary Agreements

- 2003 Lake Tanganyika Convention
  - Art 15, Environmental Impact Assessment
    - Each contracting State adopt
      - adopt EIA and SEAs national legislation and procedures
      - Monitor compliance with and enforce authorisations
    - EIA for proposed activities listed in Annex I must follow procedure set out in convention
      - Activities: hydrocarbons; oil refineries; oil pipelines; mining; major constructions; dams; large-scale abstraction; forested areas; conversion or destruction of wetlands; large scale aquaculture or fish farming; any activities likely to cause significant risk or serious adverse impact.

# EIA and Transboundary Agreements

- 2003 Lake Tanganyika Convention
  - Art 15, Environmental Impact Assessment (ctd)
    - Content of EIA stipulated (Annex I)
      - Description of proposed activity
      - Evaluation of alternatives
      - Description of environmental impacts of proposed activity and their significance
      - Description of prevention and mitigation measures and a comprehensive mitigation plan
      - Result of any public consultation with public, interested and affected persons, communities, organizations, and government agencies.
      - Indication of predictive measures employed and underlying assumptions made
      - Identification of gaps in knowledge and uncertainties encountered
      - Non-technical summary with visual aids

# EIA and Transboundary Agreements

- 1991 UNECE Convention on Environmental Impact Assessment in a Transboundary Context
- 2003 Protocol for Sustainable Development of the Lake Victoria Basin
  - Art 12, Environmental Impact Assessment
    - Develop national EIA laws and regulations
    - Solicit comment from other states if transboundary impacts

Thanks for listening!