

# The UN Convention on the non-navigational uses of transboundary watercourses

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## What is Public International Law?

A system of binding principles, rules and norms, that **govern interstate relations** in various areas of human activities, including the use and development of transboundary water resources.

Provides parameters for State actions

- What are States entitled to do?
- What are States obliged to do?
- What must States not do?

Creates certainty, predictability, transparency and accountability for States' interactions

## What is “soft” law?

- Non-binding statements and agreements that still hold authority and often intended to have normative significance
- Allows States to negotiate more quickly and efficiently when issues are politically intransigent
- Allows increased participation of non-State actors
- Can influence progressive development of international legal principles

*e.g. Sustainable Development Goals, Dublin Statement, and chapter 18 of Agenda 21 from the 1992 Rio Conference on Environment and Development are soft law that impacts IWL*

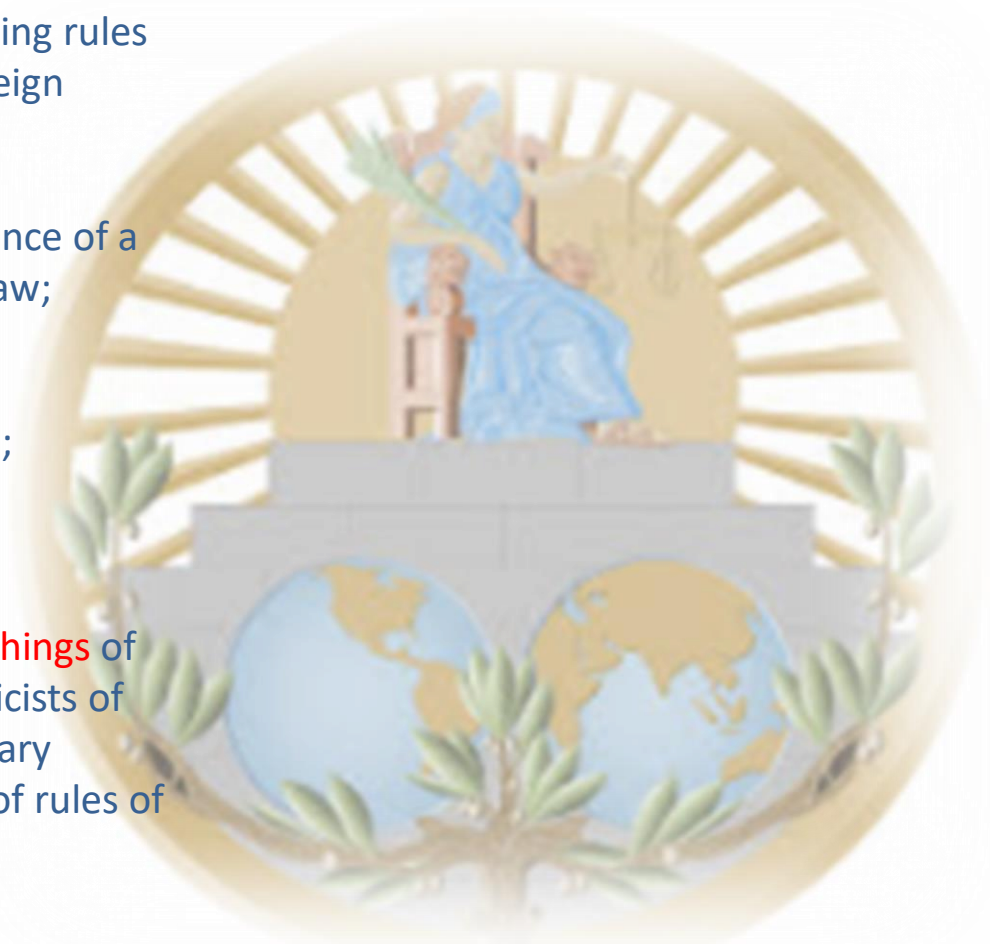
## Sources of Public International Law applicable to transboundary waters

### *Primary sources:*

- International **conventions**, whether general or particular, establishing rules expressly recognized by sovereign states;
- International **custom**, as evidence of a general practice accepted as law;
- The **general principles of law** recognized by civilized nations;

### *Secondary sources:*

- **Judicial decisions** and the **teachings** of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.



## Preliminary thoughts on International Water Law

- International water law has historically focused on **navigation** issues
- When it came to non-navigational issues, law was **limited** in substance and was usually focused on **bi-lateral** arrangements
- First bi-lateral documents related to shared waters date back to the **Mesopotamian** civilization
- Only lately legal tools on non-navigational issues started to develop based on **States' practice**
- PIL is focused on **States' sovereignty**  
*States exert sovereignty over territory and natural resources within that space, subject to rules of international law*

## Sovereignty v/s Absolute territorial sovereignty and Absolute territorial integrity

*“Both theories are in essence factually myopic and legally “anarchic”: they ignore other states’ need for and reliance on the waters of an international watercourse, and they deny that **sovereignty entails duties as well as rights**”.*

Mc Caffrey, 2001

### Theory of limited territorial sovereignty

- Compromise of two previous theories
- Community of interest means obligations of equitable and reasonable use
- Pre-eminent legal rule in the field
- It has its limitations:
  - It is generic
  - It should adapt to the specificities of every basin’s geographic, demographic, ecologic, socio-economic character
  - It should use factors and is difficult to apply
- It can be complemented by the establishment of common/joint mechanisms or commissions for management and dispute settlement.

Not all water resources, can be “fenced”  
in.

“Sovereignty” is a state’s exclusive authority over  
its territory.

“Sovereignty applies to a state’s internal political  
order, not to its relations with other states.

“Sovereignty” is sometimes used as a fig leaf for  
actions that violate international law.

Shared water resources may be temporarily “in”  
a state’s territory, but are not part of it.

Therefore, share water resources are not  
subject to a state’s “sovereignty”.



My apple trees will never get across  
And eat the cones under his pines, I tell him.  
He only says,  
'Good fences make good neighbors.'

(Robert Frost)





## 1997 Convention – A few facts

- Request by Bolivia in 1959
- 15 reports from the ILC
- 27 years of negotiations
- Adopted in 1997 with 104 votes “for”, 26 abstentions and 3 against



- Open to ratification by 35 states in order to enter into force
- Entered into force only on 17 August 2014
- Reflects general principles of law as well as customary law on the subject
- Referred to in the few cases of the ICJ even before its entry into force

*How did your country vote?*



## 1997 Convention – Main subject

The Convention applies to watercourses parts of which are **situated** in different states

A water course is international either because it **crosses** the territory of two or more states

- > It is a successive international watercourse
- > States are up-stream and downstream states

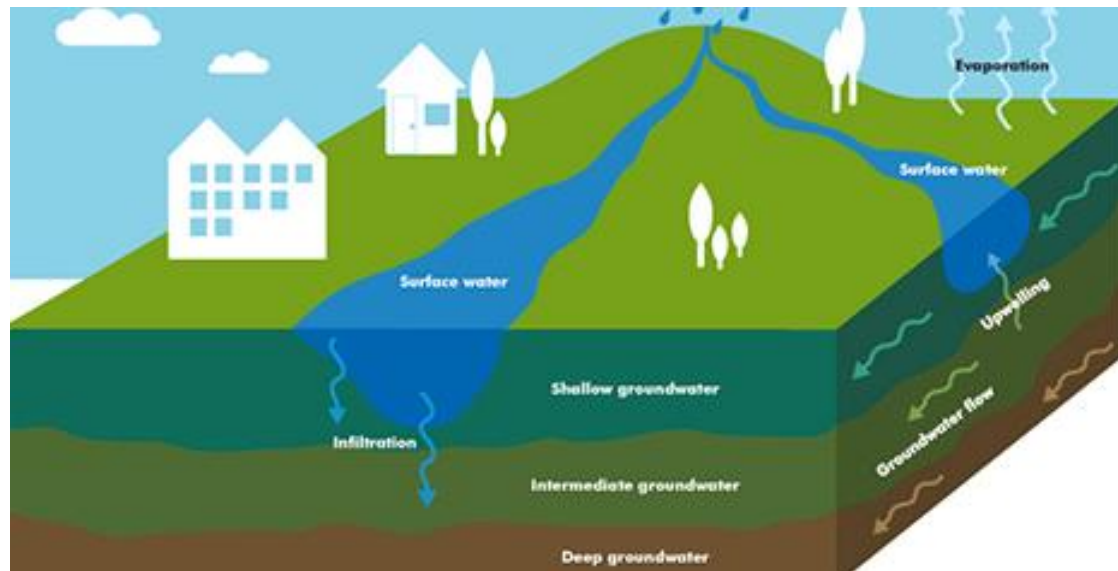
Or because it **separates** two or more states and serves as a boundary

- > It is a contiguous watercourse
- > States are on opposite sides of the border



## 1997 Convention and groundwater

UNWC applies to groundwater but only to the extent that an aquifer is connected hydrologically to a system of surface waters, parts of which are situated in different states, which excludes confined aquifers.





## 1997 Convention: main principles

1. The equitable and reasonable use
2. The avoidance of non-significant harm
3. The general duty to cooperate
4. Procedural obligations
5. Conflict resolution mechanisms

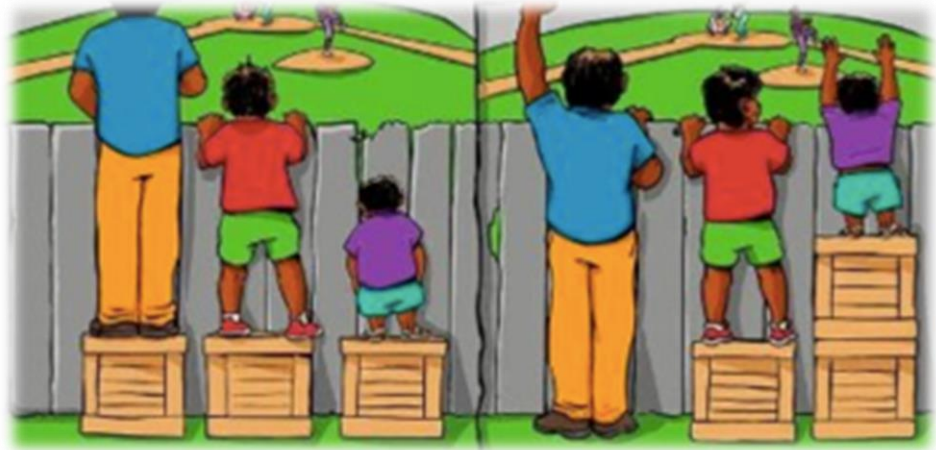
## 1. The principle of equitable and reasonable use and participation

Cornerstone principle of international water law: entitles watercourse states to a reasonable share of the uses and benefits of the watercourse and creates a reciprocal obligation not to deprive co-riparians of this right.

In the 1997 Convention it is articulated to provide maximum benefits and minimal harm to each watercourse State

*“...an international watercourse shall be used and developed...with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.” - Article 5(1)*

During the long negotiations this principle was perceived as protecting upstream countries rights.



## 1.1. Factors Relevant to Equitable and Reasonable Utilization

Art. 6 lists factors that help determine what would be an equitable and reasonable use

- Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- Social and economic needs of the watercourse States;
- 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 and costs of measures taken to that effect;
- Availability of alternatives, of comparable value, to a particular planned or existing use.

Article 10: special regard given when resolving a conflict to requirements of vital human needs



## 2. The avoidance of significant harm

*“No State is allowed to use watercourse in such a way as to cause significant harm to other States or their environment” - Art. 7*

- Due diligence obligation of prevention; **not absolute prohibition of any harm**
- Determined by country’s reasonable conduct, often including the need to conduct EIA (Pulp Mills on the River Uruguay case)
- Where harm occurs, States are required to consult with impacted State to eliminate or mitigate harm
- Significance defined as a real impairment of use, established by objective evidence – **not trivial but does not need to be substantial**

**During the long negotiations this principle was perceived as protecting upstream countries rights.**

The 1997 Convention balances both *principles* “Any State causing harm must take all appropriate measures, having due regard to Articles 5 and 6 to eliminate or mitigate such harm” - Art. 7(2)



### 3- The general duty to cooperate

- Good faith is a general principle of international law and is the foundation of cooperation, providing the basis for reciprocity and trust
- States are duty bound to negotiate in good faith to arrive at a reasonable and equitable solution to conflicting exercise of rights
- Once they sign, an agreement, State must act in good faith to implement it/adhere to it
- Framework principle requiring more specific obligations to put into practice
- Embraces and gives rise to duties to consult and negotiate and obligation to notify co-riparian of planned measures and during emergencies
- Can also form basis of further cooperation through establishment of institutional platforms

*“States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to obtain optimal utilization and adequate protection of an international watercourse.” - Article 8(1)*





## 4. Procedural Obligations

Functional link between procedural obligations and substantive elements of IWL

### Duty to exchange information on a regular basis

- Acts as basis for cooperation and determining equitable and reasonable uses
- Enables due diligence to avoid significant harm

### Duty to notify planned measures

- Projects or programmes that may cause significant adverse impacts on a watercourse
- Take appropriate measures to avoid significant harm under 1997 Convention arguably includes EIA

### Duty to enter into consultations

- Once notification takes place, triggers process of consultation and potentially of negotiation
- 6 months period for reply, possibility of renewal

Pulp Mills – ICJ affirmed EIA is an element of due diligence requirements not to cause significant harm in shared watercourses



“Planned measures” not defined in Convention, but generally taken to mean any intended project or programme which may cause some form of adverse effect(s) on a watercourse, either directly or indirectly, and in turn within the territory of another watercourse State.

○ *Art. 11 on “Information concerning planned measures”*

*Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.*

○ *Art. 12 - Notification concerning planned measures with possible adverse effects*

*Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures*



**4. Procedural Obligations**

Functional link between procedural obligations and substantive elements of IWL

**Duty to exchange information on a regular basis**

- Acts as basis for cooperation and determining equitable and reasonable uses
- Enables due diligence to avoid significant harm

**Duty to notify of planned measures** (projects or programmes that may cause significant adverse impacts on a watercourse)

**Duty to enter into consultations**

- Once notification takes place, triggers process of consultation and potentially of negotiation

**Duty to undertake prior notification** and take appropriate measures to avoid significant harm under 1997 Convention arguably includes EIA

Pulp Mills – ICJ affirmed EIA is an element of due diligence requirements not to cause significant harm in shared watercourses



## 5. Dispute Resolution

Broadly a principle of international law to seek peaceful resolution of disputes between States and carries into IWL

*"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."* - UN Charter Article 33, paragraph 1

Article 33 – 1997 Convention: General obligation that States must settle their disputes by peaceful means, and providing various options for doing so:

- Where there is an existing arrangement between the parties, such as a joint institution, such a mechanism should be used.
- If no joint institution exists or the dispute remains unresolved despite negotiations in good faith, States may use one or a combination of various methods such as good offices, mediation and conciliation.
- These methods are non-binding as States control the process and the outcome.

If States are unable to resolve the dispute within six months using the methods described, one or both parties must submit the dispute to a fact finding commission that will produce an impartial finding of disputed facts by engaging a third-party.

Commission with 3 members, one from each disputing country and one from a third country who will act as chair and who must be agreed upon by both parties.

Additionally or alternatively, States can seek a solution via Arbitration or Adjudication (ICJ through consent, binding and no appeal).

## Do we have to choose between 1997 and 1992?

**NO!**

- Complementary
- 1997 Convention can learn from the 1992 Convention (i.e. Secretariat, Procedures, Implementation, Champion)
- One is generic – framework convention and the other is more specific
- Geographic and substantial scopes
- Both are coherent with GPL
- Both provide the common language and shared understanding which are necessary for any inter-States interactions on water (e.g. development of specific agreements)



## Why was it so difficult for it to enter into force?

- The perceived loss of national sovereignty
- The treaty congestion of the 90s
- The lack of awareness by non-lawyer communities
- The lack of Champion



## Do we still need it? **YES!**

- There is not supra-power to rule the international society. States have to voluntarily take up such legal tools to establish international order
- It provides the frame for any specific local treaty
- It upholds the legal system
- It reflects customary law and if you are not in it, it will develop around you anyway
- Any State who think that rules do not apply to them are either oblivious of the rules of the international society or genuinely elusive

