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Thank you.



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# THE UTILIZATION OF BOUNDARY RIVERS AND INTERNATIONAL RIVERS

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IBRU: Defining and Managing River Boundaries and International Rivers, Professional Training  
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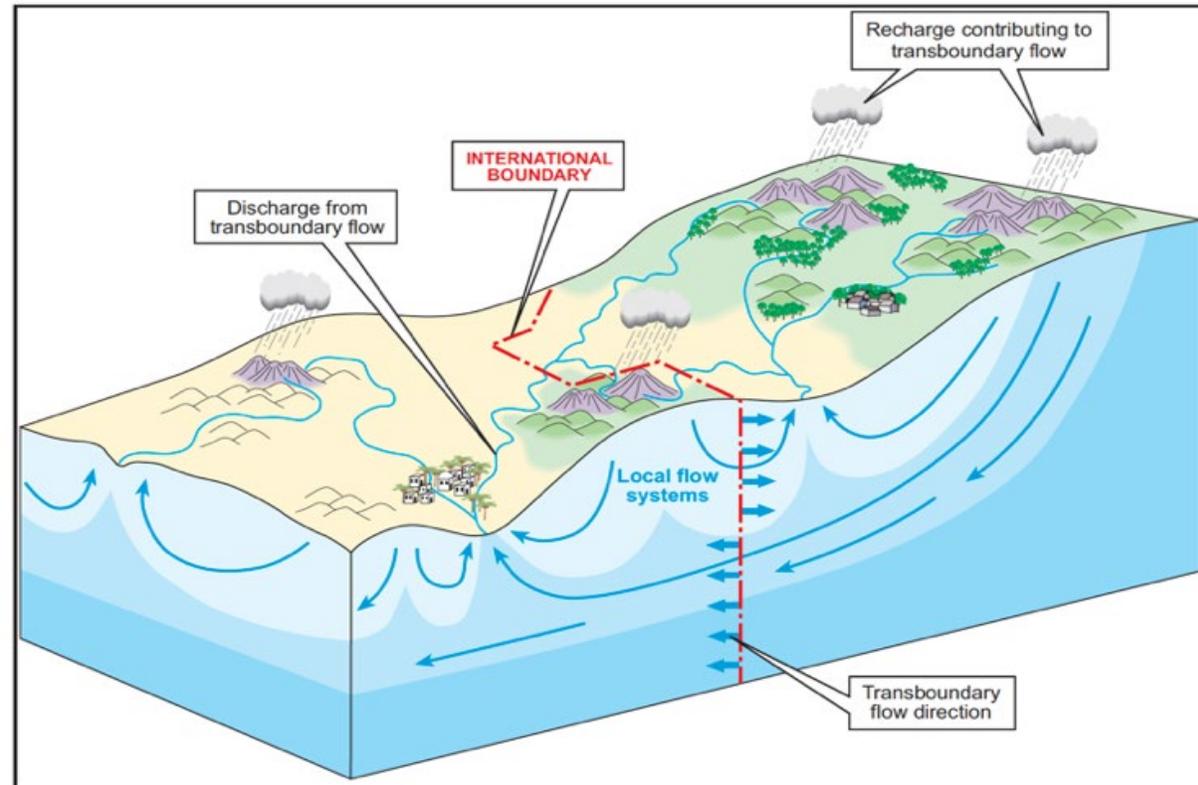
# PRESENTATION

- 'Transboundary Watercourses' their importance and why they should be viewed as an interconnected system that are being placed under increasing pressures.
- Sources of International Law
- Law of Navigation on international navigable waterways
- The Law of the Non-Navigational uses of international watercourses
  - Key multilateral agreements
  - Structure of the law of the non-navigational uses of international watercourses
  - Key concepts
    - Equitable and reasonable utilisation
    - No Harm
    - Duty to notify of planned measures

# WHAT IS AN INTERNATIONAL WATERCOURSE?

- “Watercourse”:
  - “A system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.” (art. 2.a., 1997 UN Watercourses Convention)
- “International watercourse”:
  - “means a watercourse, parts of which are situated in different States” (art. 2.a., 1997 UN Watercourses Convention)

# INTERNATIONAL WATERCOURSES



Shammy Puri et al., Schematic illustration of a transboundary aquifer, in *Internationally Shared (Transboundary) Aquifer Resources Management, Their significance and sustainable management: A framework document*, IHP-VI International Hydrological Programme Non-Serial Publications in Hydrology, SC-2001/WS/40, 13 (UNESCO, 2001), reproduced for educational purposes only, via UNECE <https://unece.org/DAM/env/water/documents/isarm.pdf> (last accessed June 22, 2021).

# THE IMPORTANCE OF TRANSBOUNDARY RIVER, LAKE BASINS AND AQUIFER SYSTEMS

- Home to more than 40% of the world's population
- Cover more than half of the Earth's land surface
- Account for an estimated 60% of global freshwater flow
- 153 countries share rivers, lakes, and aquifers

*Progress on Transboundary Water Cooperation, Global Baseline for SDG Indicator 6.5.2, available at UN-Water, Progress on Transboundary Water Cooperation, Global Baseline for SDG Indicator 6.5.2, SDG 6 MONITORING, <http://www.unwater.org/publications/progress-on-transboundary-water-cooperation-652/>*

# GROWING PRESSURE ON INTERNATIONAL WATERCOURSES

- Water on Earth is finite
- Unevenly distributed resource
- Increased demand and water stress
  - Climate change
- Often creates unique dynamics between upstream and downstream riparians

# SOURCES OF INTERNATIONAL LAW

## Statute of the International Court of Justice (ICJ), art. 38(1):

*1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*

*a. **international conventions**, whether general or particular, establishing rules expressly recognized by the contesting states;*

*b. **international custom**, as evidence of a general practice accepted as law;*

*c. the **general principles of law** recognized by civilized nations;*

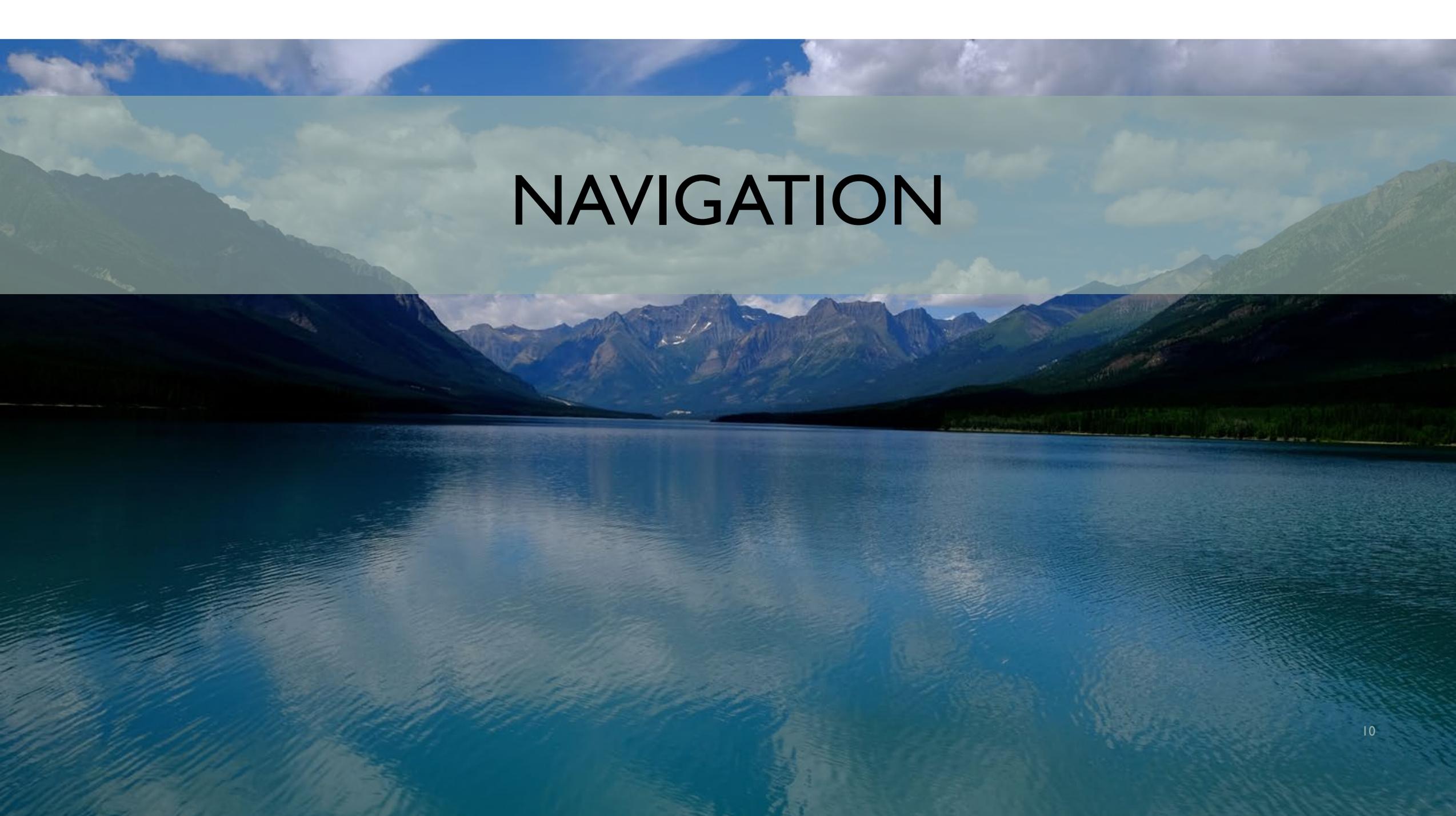
*d. subject to the provisions of Article 59, **judicial decisions** and the **teachings of the most highly qualified publicists** of the various nations, **as subsidiary means** for the determination of rules of law ( = as evidence of international custom. No stare decisis of judicial decisions)*

*2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.*



## SOURCES OF INTERNATIONAL LAW

- In some cases, the use of international watercourses will be controlled by treaties; these agreements take precedence, to the extent they are inconsistent with otherwise applicable international norms, when interpreting legal rights regarding the use of such watercourses under the *lex specialis* principle (*lex specialis derogate legi generali*).
  - Although usually these agreements will be interpreted and function in conjunction with customary international law.
  - It is, however, also important to note that courts and tribunals have drawn on custom to interpret and even update treaties.



# NAVIGATION

# EVOLUTION OF NAVIGATION: MAJOR AGREEMENTS

- The two agreements constituting the Peace of Westphalia in 1648, the Treaties of Munster and Osnabruck, contained significant provisions concerning navigation on shared waterways.
- The Congress of Vienna of 1815 established freedom of navigation on international waterways.
- The 1919 Treaty of Versailles and its associated agreements ending World War I declared certain important rivers in Western and Eastern Europe to be international, opened them to trade, and established international commissions to administer them.
- Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern: global in scope but found limited success outside of Europe, restricted freedom of navigation to reciprocal agreement between contracting States.

# GENERAL INTERNATIONAL LAW

- State practice supports the idea that the prevailing standard under general international law is the concept of freedom of navigation for riparian States to an international waterway (Subject to any contrary State practice, treaties, or regional practices).
- The resulting legal framework provides generally for freedom of navigation for commercial vessels, subject to the policing regulations of riparian States. It entails freedom of movement on the entire navigable course of a waterway, including from ports in one riparian State to those in another or to the sea\*
- Look to watercourse specific agreements or regional practices.

## COMMUNITY OF INTEREST

- In its 1929 decision in the *River Oder* case, the Permanent Court of International Justice relied on the concept of a "community of interest of riparian States," which formed "the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."
- The PCIJ finding in the *Oder* case regarding a "community of interest" could also be seen to support freedom of navigation on international waterways as a general principle of international law.
- While the *Oder* case involved navigation, the International Court of Justice in the *Gabcikovo-Nagymaros Project* case found that the community of interest doctrine, as articulated by the Permanent Court, applies to non-navigational uses, as well.

# NAVIGATION HAS LOST ITS PREEMINENCE OVER OTHER USES

- As early as 1920, the League of Nations Commission of Enquiry was able to conclude: “A hundred years ago waterways were principally used for purposes of navigation; today this is no longer invariably the case. . . . [F]rom this point of view the absolute priority of navigation is no longer invariably admissible . . . .”
- The lack of automatic priority of navigational uses today is illustrated clearly by Article 10 of the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses.
  - That article provides that “no use . . . enjoys inherent priority over other uses.”

# THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES



## KEY MULTILATERAL AGREEMENTS

- **The 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (the UN Watercourses Convention)**
  - The most authoritative instrument in the field of the non-navigational uses of international watercourses.
  - Framework Convention.
  - The major principles of the convention have been largely accepted as a codification of existing customary international.
- **The Convention on the Protection and Use of Transboundary Watercourses and International Lakes (ECE Water Convention, Water Convention, or UNECE Water Convention)**
  - Designed originally for the ECE region, has since expanded into a global framework agreement.
  - Implementation guide provides guidance on implementation and tries to harmonize with the UN Watercourses Convention.

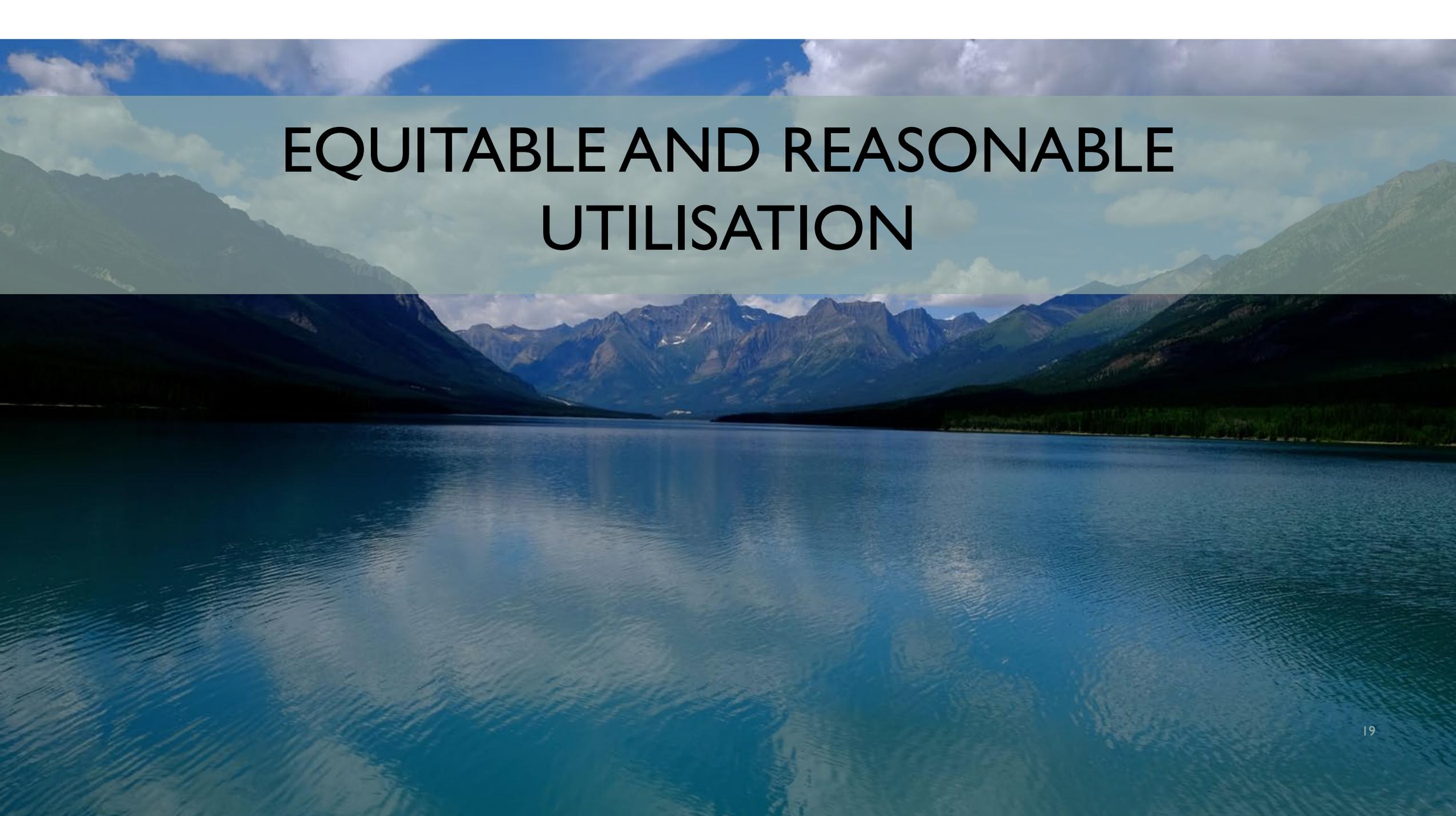


# STRUCTURE OF THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

- UN Watercourses Convention meant to be supplemented by more basin specific treaties.
- Co-equal Sovereign States with Territorial Integrity.
- Transboundary effects on international watercourses. The *Trail Smelter* case “no State has the right to use or permit the use of its territory in such a manner as to cause injury [ ] in or to the territory of another or the property of persons therein.”
  - The *Corfu Channel*, The *Gabčíkovo-Nagymaros Project* and *Pulp Mills* cases.
- Limited Territorial Sovereignty.

# KEY OBLIGATIONS OF THE UN WATERCOURSES CONVENTION

- Art. 2 Definition of “Watercourse”
- Procedural:
  - Notification of planned measure Art. 12
- Substantive:
  - Equitable and reasonable utilization Art. 5-6
  - No significant harm Art. 7
- \*All have been recognized as reflecting customary international law
  - *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgement, 1997 ICJ Rep., p.78.
  - *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgement, 2022 ICJ Rep., p. 614.



# EQUITABLE AND REASONABLE UTILISATION

# UN WATERCOURSES CONVENTION: ARTICLE 5 EQUITABLE AND REASONABLE UTILISATION AND PARTICIPATION

- 1. Watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse.*
- 2. Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.*

# THE MOST FUNDAMENTAL RULE OF THE LAW OF INTERNATIONAL WATERCOURSES

- The obligation of Equitable and Reasonable Utilization constitutes the foundation for much of the law in the field.
  - Recognized as customary international law.
- It teaches that a state's use of a watercourse shared with other states must be both equitable and reasonable vis-à-vis those other states.

## “EQUITABLE”

- “Equitable” connotes a fair balance between the use by one state and that of another, co-riparian, state.
- Thus, in order to fulfil this obligation, the first state must have knowledge about the conditions and uses of shared water resources in the other state(s).
- This highlights the importance of regular communication between the co-riparian states concerning hydrological conditions and their present and prospective uses.

## “REASONABLE”

- The meaning of the term “reasonable” is very much context-dependent.
- It works with the term “equitable” to ensure an overall fair balance of uses among states sharing freshwater resources.
- Theoretically, an allocation of water as between to co-riparian states could be “equitable” without being “reasonable,” as when one state’s quantitative share of the water was fair under the circumstances vis-à-vis a co-riparian, but was used in a wasteful, unreasonable, manner in the prevailing circumstances.

# UN WATERCOURSES CONVENTION: ARTICLE 6 FACTORS RELEVANT TO EQUITABLE AND REASONABLE UTILISATION

- I. *Utilisation of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including:*
  - a) *Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;*
  - b) *The social and economic needs of the watercourse states concerned;*
  - c) *The population dependent on the watercourse in each watercourse state;*
  - d) *The effects of the use or uses of the watercourses in one watercourse State on other watercourse states;*
  - e) *Existing and potential uses of the watercourse;*
  - f) *Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;*
  - g) *The availability of alternatives, of comparable value, to a particular planned or existing use.*

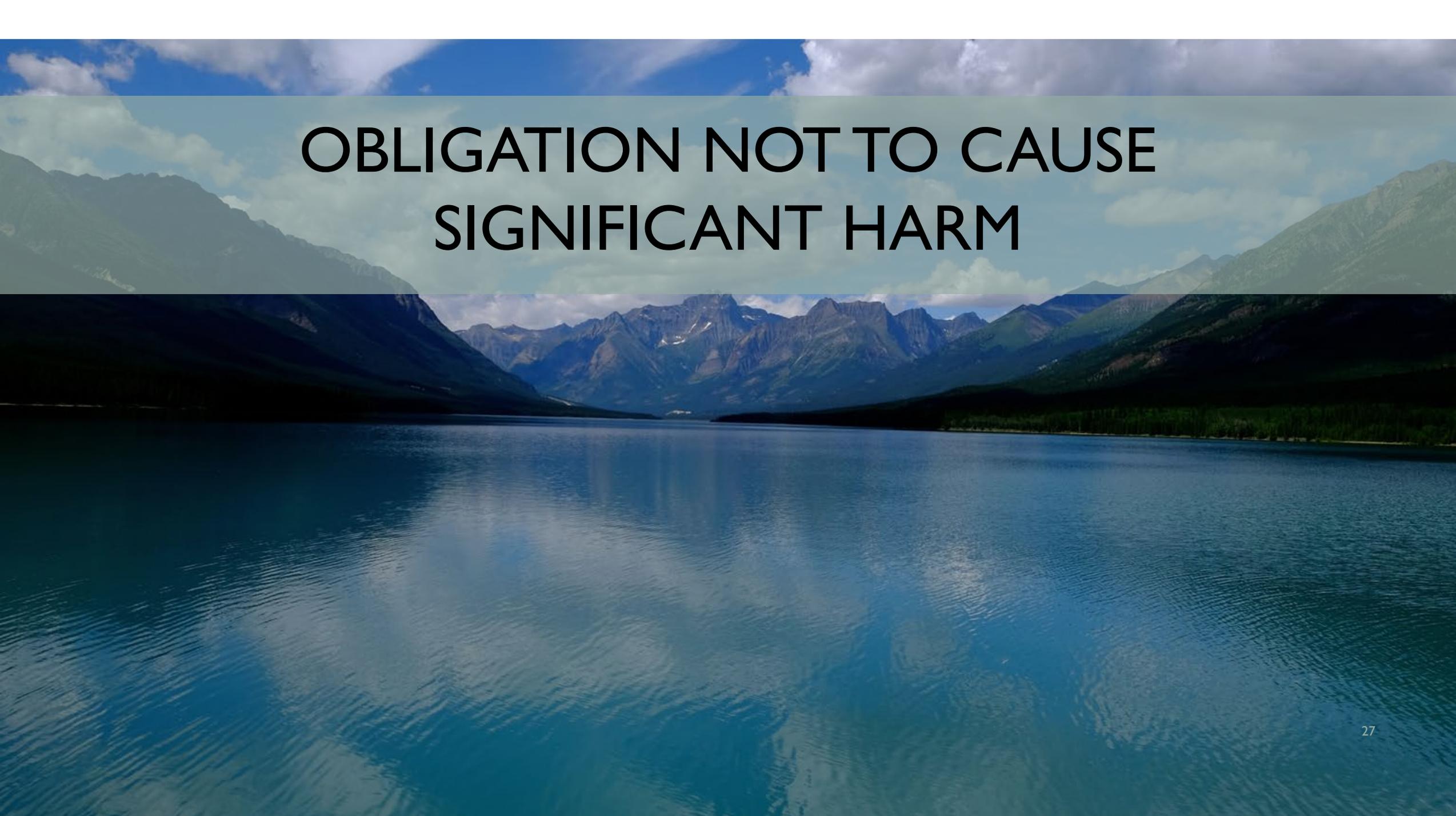


## UN WATERCOURSES CONVENTION: ARTICLE 6 FACTORS RELEVANT TO EQUITABLE AND REASONABLE UTILISATION CONT.

- 2. In the application of Article 5 or paragraph 1 of this article, watercourse states concerned shall, when the need arises, enter into consultations in a spirit of cooperation.*
- 3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.*

## CASE-BY-CASE BASIS

- Look at all factors overall.
- Factors as well as their weight will vary from case to case.
  - (UN Watercourses Convention, Art 6, 3).



# OBLIGATION NOT TO CAUSE SIGNIFICANT HARM

# UN WATERCOURSES CONVENTION: ARTICLE 7 OBLIGATION NOT TO CAUSE SIGNIFICANT HARM

- 1. Watercourse states shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states.*
- 2. Where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Article 5 and Article 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.*

## INTERPRETATION OF “HARM”

- Harm that is transmitted by means of an international watercourse.
- In light of State practice, Article 7 of the UN Watercourses Convention should be construed broadly so as to embrace harm resulting from activities indirectly related to an international watercourse.
  - (e.g., deforestation causing increased runoff and flooding)
- Two-way operation of the No-Harm obligation: “Harm” may be legal rather than factual.
  - (e.g., foreclosing future development possibilities and uses upstream by unilateral new uses downstream) harm can travel downstream and upstream.

# A DUE DILIGENCE REQUIREMENT

- Obligation of due diligence, not an obligation of result.
- Not an absolute obligation/requirement.
- “Significant” may change depending on the circumstances.
- Harm must be unreasonable depending on the circumstances.
- Some degree of flexibility in the due diligence requirement.
  - Cf. article 7, UN Watercourses Convention: “*all appropriate measures.*”

## A DUE DILIGENCE REQUIREMENT

- *Pulp Mills on the River Uruguay*, 2010 ICJ Rep., p. 55-56, para. 101:
  - “[T]he principle of prevention, as a customary rule, has its origins in the **due diligence** that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ (*Corfu Channel (United Kingdom v. Albania)*, ... I.C.J. Reports 1949, p. 22). A State is thus **obliged to use all the means at its disposal** in order to avoid activities which take place in its territory, or in any area under its jurisdiction, **causing significant damage to the environment of another State**. This Court has established that this obligation ‘is **now part of the corpus of international law relating to the environment**’ (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996 (I), p. 242, para. 29).”

## BREACH OF THE “NO-HARM” OBLIGATION

Three conditions:

1. Significant harm in one state, resulting from activities in another state;
2. The state where the activity originated **must have been capable of preventing the harm (standard of due diligence) but failed to prevent it;** and
3. The conduct resulting in the harm must have been **unreasonable under the circumstances at stake.**



## THE RELATIONSHIP BETWEEN “EQUITABLE UTILIZATION” AND “NO-HARM”

- The basic obligations of equitable and reasonable utilization, on the one hand, and the prevention of significant harm, on the other, are sometimes seen as potentially being in conflict with each other.
- An earlier-developing downstream state may assert the “no-harm” obligation against a later-developing upstream State, while the later might contend that it has a right to equitable and reasonable utilization, even if that results in some harm downstream.

# THE WAY OUT: ARTICLE 7(2) OF THE UN WATERCOURSES CONVENTION

- After providing in paragraph 1 for states sharing international watercourses to “take all appropriate measures” to “prevent the causing of significant harm” to other states sharing the watercourse, paragraph 2 provides as follows:
  - 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall . . . Take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.



# NOTIFICATION CONCERNING PLANNED MEASURES

# UN WATERCOURSES CONVENTION: ARTICLE 12 NOTIFICATION CONCERNING PLANNED MEASURES WITH POSSIBLE ADVERSE EFFECTS

- 1. 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.*

# OBLIGATION OF PRIOR NOTIFICATION AND RELATED OBLIGATIONS

- Obligation of prior notification is a fundamental obligation. Required under Customary International Law.
- New uses or modifications of existing uses.
- Lower threshold than significant harm in article 12: “significant adverse effect.”

# OBLIGATION OF PRIOR NOTIFICATION AND RELATED OBLIGATIONS

## CONT

- Implies other obligations: e.g., to conduct impact assessments of planned activities.
  - *Pulp Mills on the River Uruguay*, 2010 ICJ Rep., p. 14, at para. 204: “it may now be considered a requirement under general international law to **undertake an environmental impact assessment** where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.”
  - *Certain Activities Carried out by Nicaragua in the Border Area and Construction of a Road in Costa Rica along the San Juan River*, 2015 ICJ Rep., p.665, at para. 104:
    - A state must “ascertain if there is a risk of significant transboundary harm;”
    - If so, it triggers “the **requirement to carry out an environmental impact assessment;**”
      - The EIA should be carried out “in light of the specific circumstances of each case;”
    - If the EIA confirms the risk, the state is required, “in conformity with its due diligence obligation, to **notify and consult in good faith** with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk.”

## OTHER RELEVANT PROVISIONS OF THE UN WATERCOURSES CONVENTION

- Article 3: Watercourse agreements
- Article 8: General obligation to cooperate
- Article 9: Regular exchange of data and information
- Article 11: Information concerning planned measures (works with Article 12)
- Article 20: Protection and Preservation of Ecosystems
- Article 33: Dispute Settlement



# THANK YOU

ANY QUESTIONS CAN BE DIRECTED TO DR. RILEY DENOON

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