



# National Seminar on International Water Law (Issyk-Kul, September 2013)

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**UN Watercourses Convention  
Part III (and beyond)**

**Dr. Owen McIntyre  
University College Cork  
National University of Ireland**



# Integration of IWL Obligations

- **Substantive Obligations**
  - **Equitable and Reasonable Utilisation**
  - **Prevention of Significant harm**
  - **[Environmental / Ecosystems Protection]**
- ↓ **[Meaningful]**
  - **Discrete Procedural Obligations [Duty to Cooperate]**
  - **Notification / Exchange of Information**
  - **Consultation / Negotiation**
  - **Duty to Warn / Dispute Settlement**
  - **Institutional Machinery**
- ↓ **[Meaningful]**
  - **Integrated Procedural Obligations**
    - **External Integration**
    - **Internal Integration**



# Substantive Obligations

- Equitable and Reasonable Utilisation
  - Relevant Factors - UN Conv. Art. 6(1)
  - Normative framework for achieving substantive objectives (optimal utilisation; environ protection, *etc*) through structured procedural exchange
  - Due diligence
    - Consider interests of co-riparians (largely procedural)
  - Community of Interests (Common Mgt. Institutions)
    - Limited Territorial Sovereignty
  - Equitable Participation – UN Conv. Art 5(2)
  - Duty to Cooperate (procedural elements)



# Substantive Obligations [2]

- Prevention of Significant Harm
  - *De minimus* exception
  - Due diligence
    - Introduce / enforce appropriate (joint) regulatory measures
    - Consider / mitigate risks to co-riparians / ecosystems
  - Duty to Cooperate (procedural elements)
- [Environmental / Ecosystems Protection]



# Discrete Procedural Obligations

- Duty to Cooperate ('indispensible minima')
  - Notification
  - Exchange of Information
  - Consultation / Negotiation (good faith)
  - Duty to Warn
  - Dispute Settlement
- Institutional Mechanisms (RBOs, *etc.*)
  - Environmental / social / development mandate and capacity
- Transboundary EIA (ESIA)
  - Facilitates effective procedural engagement
  - Environmental (increasingly social) protection inherent



# Cooperation: Procedural Elements

- Notification
  - Rio Principle 19; Stockholm Rec 51(b)(i); ECE Conv. Art. 9(2)(h), UN Conv Arts. 11-19; *Lac Lanoux*, *Gabcikovo-Nagymaros*, *Pulp Mills* ; Art. 4.1 2000 SADC Revised Protocol
  - Which States / activities? RBOs, precautionary principle, ecosystems approach, EIA thresholds
  - Form of notification? Good faith, info. re nature of activity, risks, potential injury to State & watercourse (threshold lower than Art.7 – prevention); prompt / early (prior to permitting / implementation); reasonable time for response; duty to refrain
- Exchange of Information
  - Rio Principle 9; ECE Conv Art. 13; UN Conv. Art 9(1)
  - Conditions, emissions, permits / regulations, measures
  - Readily available, useful and comprehensible



# Cooperation: Procedural Elements [2]

- Consult / Negotiate
  - *Lac Lanoux*; ECE Conv. Art 10; UN Conv. Arts 6(2), 7(2), 8, 11, 17, 18 and 19
  - Not consent, good faith / meaningful negotiations, reasonable efforts to accommodate; no requirement to reach agreement; duty to refrain; 3rd WC States – UN Conv Art 4(2); consultation → negotiation - UN Conv Arts 3(5) & 17(1)
- Duty to Warn
  - *Corfu Channel*; *Nicaragua*; [*Chernobyl*]; ILA Berlin Rules Ch. VII; ECE Conv Art.14; UN Conv Art 28 – Art. 4.5 SADC Revised Protocol
- Dispute Settlement (UN Conv Arts 32 & 33)



# Integrated Procedural Obligations

- External Integration
  - UN Conv Art 15 (inconsistent with Arts 5 & 7)
  - *Pulp Mills* case
    - Procedural and substantive obligations ‘intrinsically linked’;
    - ‘functional link’ to ensure equitable and sustainable management;
    - But ‘not indivisible ... may be required to answer for those obligations separately’ (decoupled);
- Internal Integration
  - *Pulp Mills* case
    - Procedural obligations ‘an integrated and indivisible whole’
    - RBO ‘plays an essential role’





# Integrated Procedural Obligations [2]

- Transboundary EIA
  - Rio Principle 17; ECE Conv. Art 3(1)(h); ILC Berlin Rules, Ch. VI; UN Conv. Art 12 (notification)
  - 2008 ILC Draft Arts on Transboundary Aquifers – Art. 15: EIA linked to notification, consult/negotiate
  - Art 4.1 SADC Revised Protocol – ‘any EIA’; Art 7.9 ORASECOM – ‘shall include findings of E(S)IA’
  - Pulp Mills case
    - TB EIA essential for effective notification
    - Legal basis of customary obligation re TB EIA:
      - Effective notification (also consultation / negotiation)
      - Due diligence requirements of prevention & ERU
    - Contents of EIA:
      - No obligation re consideration of alternatives;
      - No obligation re public consultation;
      - Continuous / ongoing EIA
      - MDBs / IFIs: Global Administrative Law (IFC OP 7.50. 1998)