

**The duty not to cause significant harm
under the UN Water Convention &
UNECE Water Convention**

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Outline of the presentation

- What is the meaning of the duty not cause significant harm?
- The duty not cause significant harm under the UN Water Convention
- What amounts and how to determine what constitutes significant harm
- Main elements of the obligation not to cause significant harm
- Due diligence nature of the no significant harm principle
- Conclusion

Meaning of the duty not cause significant harm

- The obligation to take all appropriate measures to prevent significant harm is a substantive principle of international law relating to transboundary waters allocation.
- The no-harm rule derives its normative foundation from *sic utere tuo ut alienum non laedas* or the good neighbourliness principle (**Trail Smelter Arbitration (United States v. Canada)** (**Principle 2 Stockholm Declaration & Principle 21 Rio Declaration**))

Meaning Cont'd

- 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.

The No significant harm obligation under the UN Water Convention

- Article 7 of the UN Watercourses Convention codifies and clarifies the scope of the obligation “not to cause significant harm”.

The Article states as below:

- 1) Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States

UN Water convention provisions

Cont'd

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 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.

What amounts to significant harm

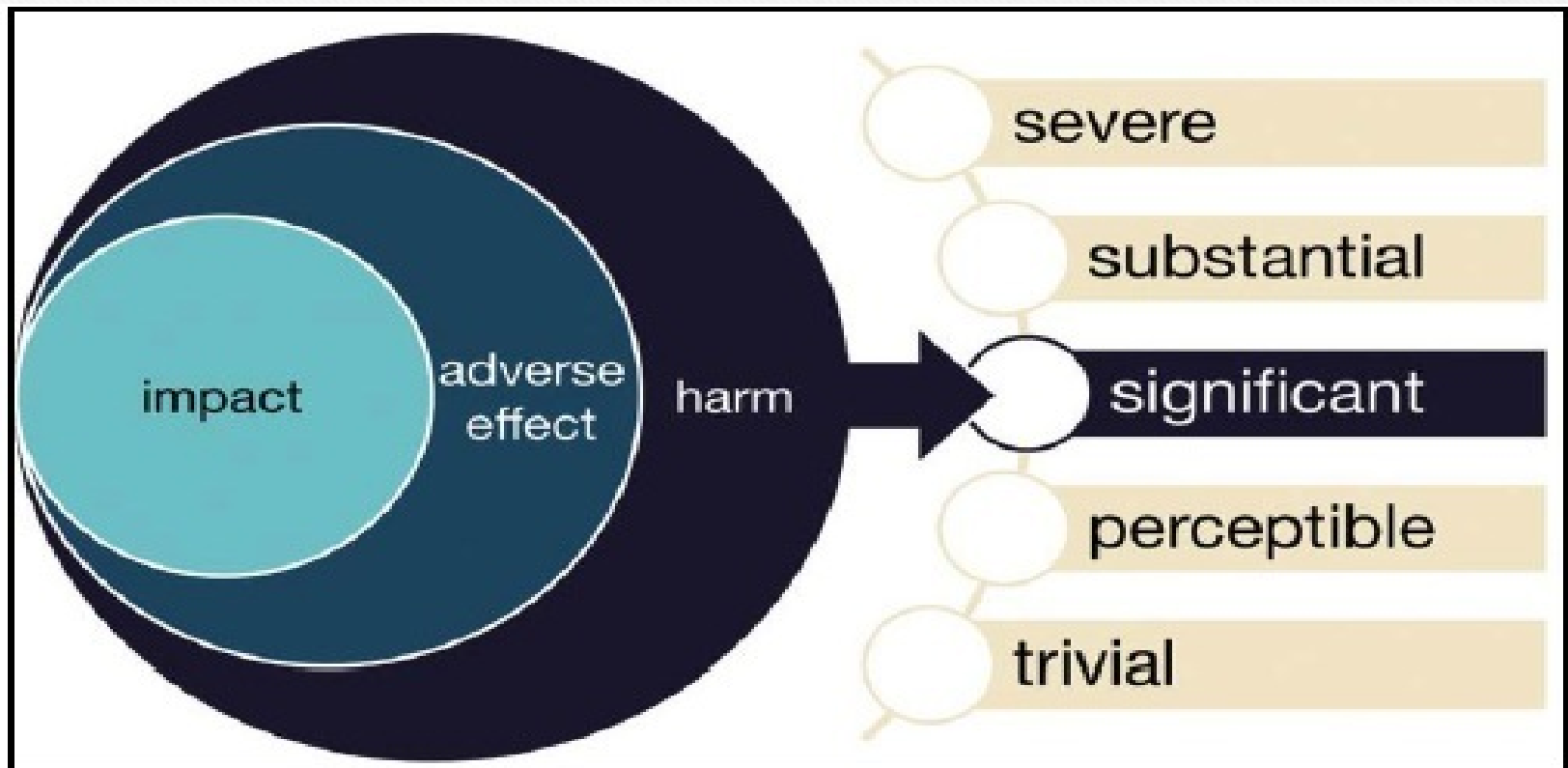
- The type of “**harm**” is qualified by the term “**significant**” which is defined as the real impairment of a use, established by objective evidence.
- For harm to be qualified as significant it must not be trivial in nature but it need not rise to the level of being substantial; this is to be determined on a case by case basis.

What amounts to significant harm cont'd

- The “significant” threshold excludes mere inconveniences or minor disturbances that States are expected to tolerate, in conformity with the Legal rule of good neighbourliness”
- The harm includes harm to human health or safety to the use of the waters for beneficial purposes, or to the living organisms of the watercourse systems.

How to determine what constitutes “significant harm”

Source: Rieu-Clarke, et al. UN Watercourses Convention –User’s Guide, at 121



Main elements of the no-harm obligation

- a) States along international watercourses should not cause significant harm.
- b) States should take all appropriate measures in utilizing international watercourses to prevent the causing of significant harm to other watercourse States.

Due diligence nature of the no significant harm principle

- The duty “**not to cause significant harm**” is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm.
- Due diligence or ‘due care’ with respect to the environment and natural and resources is among the first basic principles of environmental protection and preservation law.
- The due diligence nature of an obligation of prevention is precisely determined by the duty to take.

Due diligence nature cont'd

- The UN Convention contains a duty of due diligence in the prevention of transboundary harm. (Article 7)
- It incorporates the ecosystem approach, and provides for environmental protection and sustainable use of transboundary water resources.
- This implies that a state's compliance with Article 7 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.

Due diligence nature cont'd

- This was confirmed by the ICJ decision in the *Pulp Mills on the River Uruguay* case, which included the need to conduct an EIA as part of this duty.
- Under UNECE Convention, it appears that the general obligation of prevention, control and reduction of transboundary impact, with its specifications and articulations, set out in articles 2 and 3, is one of “due diligence”, as opposed to absolute obligations.

Due diligence nature cont'd

- In particular, under Article 2(2)(a)-(d), of the UNECE Convention, parties must act diligently to:
 - a) “prevent, control and reduce pollution of waters causing or likely to cause transboundary impact;”
 - b) “ensure that transboundary waters are used with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection;”

Due diligence nature cont'd

- Under Article 3 the UNECE requires each Party to take due care by prevention of the emission of pollutants & control of pollution application of low and non waste technology, application of biological treatment, use of permit procedures, environmental impact assessments, and contingency planning etc...

Conclusion

- The prevention of significant harm is an obligation of conduct. Co-riparian states are under the obligation to take ‘all appropriate measures’ to ensure that activities conducted under their jurisdiction do not cause significant harm to the territory of other riparians.
- States must provide prior notification and exchange information with regard to any planned development and measure that might significantly harm other transboundary watercourse states.