

UN Watercourses Convention

User's Guide Fact Sheet Series: Number 5

No Significant Harm Rule

The duty not to cause significant harm

Article 7 of the UN Watercourses Convention codifies and clarifies the scope of the duty “*not to cause significant harm*”. This obligation, otherwise known as the “*no significant harm*” rule **requires that States, “in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.”**

The obligation “*not to cause significant harm*” 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. This principle is widely accepted as the foundation for the law of international watercourses and the Convention.

Elements of the duty not to cause significant harm

According to this principle, no State along an international watercourse is allowed to use the watercourse in its territory in such a way as to cause significant harm to other watercourse States or to their environment. This 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. This principle is widely recognised and incorporated not only in modern transboundary water agreements, but also into international environmental law more generally.

UN WATERCOURSES CONVENTION TEXT

ART. 7 - Obligation not to cause significant harm

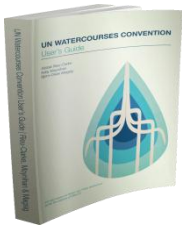
- 1) Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
- 2) Where significant harm nevertheless is caused to another watercourse State, the States whose use causes 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.

Importantly, **the duty “not to cause significant harm” is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm.** Hence, 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.** This was confirmed by the International Court of Justice decision in the *Pulp Mills on the River Uruguay* case, which included the need to conduct an EIA (see Fact Sheet 6) as part of this duty.

Furthermore, countries are required to take only those measures of prevention deemed *appropriate* according, for example, to a State’s resource capabilities. The type of harm countries must avoid causing is qualified by the term *significant* - **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. The “significant” threshold excludes mere inconveniences or minor disturbances that States are expected to tolerate, in conformity with the legal rule of “good neighbourliness”.

Relationship with Equitable and Reasonable Utilisation

When developing the text of the UN Watercourses Convention there was lengthy discussion and debate on which substantive principle should take priority - that of equitable and reasonable utilisation or the no significant harm. **Upstream States generally did not support the prioritisation of no significant harm rule,** because they feared it might potentially lead to a curtailment of future upstream developments. Conversely, **most downstream States did not favour the primacy of the principle of equitable and reasonable utilisation** due to a perception that it allowed scope for harm to occur from such developments with impacts downstream. Although the text that was eventually agreed upon by States appears to strike a balance between these two principles, it is still a contentious issue.



Visit our on-line resource at www.unwatercoursesconvention.org

This fact sheet is based on the *UN Watercourses Convention User's Guide*:

- Electronic version available on-line at: www.dundee.ac.uk/water
- Hardcopy available to order by emailing: water@dundee.ac.uk



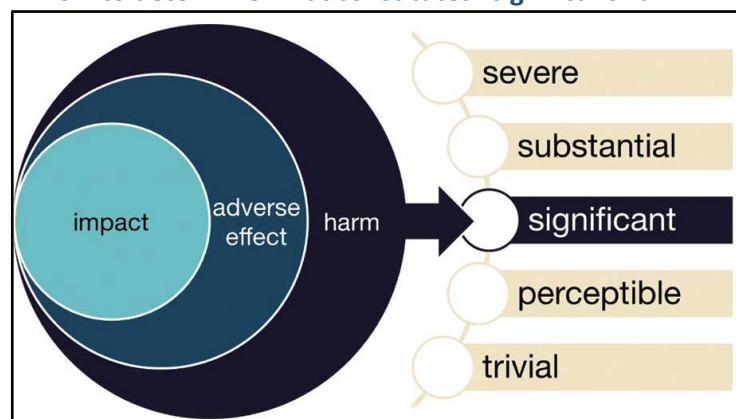
The relationship between these two principles within the text of the Convention is dictated by **Article 7(2)** which stipulates that any State causing harm to another must, **“take all appropriate measures, having due regard to the provisions of Article 5 and 6 to eliminate or mitigate such harm (...)”**. Article 5 provides that States must utilise their waters in an equitable and reasonable manner, and Article 6 sets out a non-exhaustive list of factors that should be taken into account in determining what this constitutes (see Fact Sheet #4).

Based on these provisions of the UN Watercourses Convention, a State must always give *“due regard”* to the principle of equitable and reasonable utilisation whenever significant harm occurs. **However, there is no reciprocal obligation of “due regard” to the principle of no significant harm when States are determining if a use or uses are equitable and reasonable.** This crucial distinction is what has led many legal scholars to conclude that the duty not to cause significant harm is thus a secondary obligation to the primary principle of equitable and reasonable utilisation.

While priority is therefore given to the equity principle, there are also a number of important conditions to this:

- **Article 5(1)** States must take into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse;
- Under **Article 5(2)** States have both the right and duty participate in the use, development and protection of an international watercourse in an equitable and reasonable manner, including cases where significant harm occurs;
- **Article 20 and Part IV of the Convention** further emphasises the obligations placed on States to protect international watercourses and their ecosystems (implying protection from significant harm);
- Pursuant to **Article 7**, States must still generally seek to eliminate or mitigate such harm, and where appropriate discuss compensation.

How to determine what constitutes “significant harm”



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

Thus, only limited scenarios exist whereby causing significant harm may be permitted under the Convention.

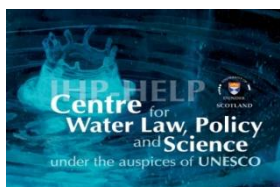
ADDITIONAL RESOURCES

FURTHER READING

Rieu-Clarke, A., Moynihan, R. and Magsig, B., *UN Watercourses Convention – User's Guide* (CWLPS 2012), at 117-122

McIntyre, O. *Environmental Protection of International Watercourses under International Law* (Ashgate 2007) at 87- 112

Wegerich, K., and Olsson, O. *Late Developers and the Inequity of 'Equitable Utilisation' and the Harm of "Do No Harm"* (2010) 35 *Water International* 707



This fact sheet series, online resource and User's Guide have been produced through generous financial support from the **Norwegian Ministry of Foreign Affairs**, and in partnership with **WWF**. Since 2006, WWF has promoted the UN Watercourses Convention through a global initiative that encompasses a wide range of partners and activities. For further details visit: http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_watercourses_convention/

