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UNECE Convention on Protection and Use of Transboundary Watercourses and International Lakes

INTERNATIONAL WATER LAWS AND NEGOTIATION OF MUTUALLY BENEFICIAL MULTILATERAL WATER AGREEMENTS IN CENTRAL ASIA

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THE UNECE CONVENTION ON THE PROTECTION AND USE OF TRANSBOUNDARY WATERCOURSES AND INTERNATIONAL LAKES - COMMENTARY TO SELECTED PROVISIONS -

This document is an excerpt from the draft Guide to implementing the Convention on Protection and Use of Transboundary Watercourses and International Lakes (Water Convention)[1], developed by the Convention's Legal Board and the Working Group on Integrated Water Resource Management. The Guide is a commentary to the selected number of provisions of the Convention that may involve special difficulties for the Parties, as well as for acceding countries. This excerpt focuses on the provisions that address the most discussed issues related to transboundary water cooperation in Central Asia.

ADVANTAGES OF BECOMING A PARTY TO TH WATER CONVENTION[2]

1. In becoming a Party to the Convention a State does not simply become the addressee of new rights and obligations. Most importantly, it would join in an institutional regime based on the Meeting of the Parties (MOP), its Bureau, its subsidiary bodies and the Secretariat. Such an institutional framework provides a collective forum conducive to bilateral and multilateral cooperation sharing experience and good practices. Parties may take part in working groups and other subsidiary bodies, such as task forces and expert groups, established by the MOP to develop soft-law guidelines and recommendations[3] and specific Protocols. The Advisory Service under the Convention handles requests for clarification on technical, legal, institutional, economic and financial issues related to the implementation of the Convention.

2. **Co-operation** is a precondition for sustainable use of a transboundary watercourse, while non-sustainable utilization leads to the worse off situation for all parties involved. **Uncertainty** about the willingness by other riparians to effectively co-operate is a major disincentive for self-

[1] LB/2009/1 - 31 March 2009
[2] Chapter IV of the draft Guide (LB/2009/1 - 31 March 2009)
[3] See guidelines, recommendations, background reports and studies at http://www.unece.org/env/water/publications/pub74.htm

interested States against taking the first steps towards co-operation. Such uncertainty may occur under two scenarios: The first one concerning the uncertainty of State A as to whether riparian B, and/or possibly C, D ... will enter into a bilateral or multilateral watercourse co-operation agreement; the second one, concerning the uncertainty of State A as to whether riparian B, and/or possibly C, D..., once entered into such an agreement, will effectively comply with it, or let State A embark alone e.g. on the short term costs of the co-operation originally provided for in the agreement, on the basis of the expectation that the other riparians will implement the agreement.

3. The above appears most evident in a short vis-à-vis long term perspective framework, the latter being inherent in the concept of **sustainability**. Riparians are faced with quantity and quality problems pertaining to the watercourse. Addressing such problems through collective action requires a number of initially unilateral decisions towards co-operation and sustainability which imply costs - e.g. a lower rate of consumption to be agreed, in cases of shortage of water, and the costs for improving infrastructure as well as prevention and/or depuration technological capacity. This may make co-operation appear as disadvantageous in a short term perspective, particularly if riparian A has doubts about riparian B, or possibly C, D... sharing the costs and co-operate. If, in such a situation of uncertainty, luck of trust and of communication, the dominant policy of the riparians becomes one of unilateralism, hence, pulling out of the short term costs of co-operation, in the long term, each riparian, even though possibly in different measure, will find itself in the most disadvantageous situation vis-à-vis the shared watercourse: its depletion and/or its pollution beyond repair. Even before reaching the point of no return, in a scenario of lack of co-operation, repletion and restoration of the shared watercourse would be reached through costs for all riparians which would be incommensurably higher than the savings initially made by averting co-operation.

4. Becoming a party to the Convention may precisely remove this kind of uncertainty paving the way for collective and assisted action. This is precisely so thanks to the confidence building framework set up by Convention through its collective institutional regime providing for collective assessment, as well as technical, legal and administrative assistance. Indeed, if all riaparians to a transboundary watercourse join in the Convention, thanks to the latter's institutional framework, each riparian State is not left alone in its dealings vis-à-vis the other riparians, while its expectations become the concern of all other Parties sitting in the MOP, which would also provide for its assistance, and that of its subsidiary bodies, towards compliance and cooperation by all Parties.

5. Cooperation under the Convention may become an important contribution to the **prevention of conflicts** between riparians, thereby enhancing peace and security. Permanent cooperation through the mechanisms of the Convention, such as establishment of joint bodies, exchange of information and consultations allows early identification of potential sources of disagreement and provides means to prevent their escalation.

6. International practice shows a wide range of existing **joint bodies** in terms of their mandates, powers, compositions, and structures. They may be bilateral or multilateral; they may be in charge of a particular watercourse or of all transboundary waters shared by the state parties; they may address the entire range of water-related activities and uses, or focus on specific sectors of the water management and utilization; they may involve the highest level of representation in interstate relations, up to Heads of States, or only technical experts; they may simply serve as a channel of communication or be entrusted with much broader responsibilities, including dispute settlement. There is no single model of cooperation that would be appropriate for all situations. This diversity is a major strength and is a consequence of the large variety of political and physical settings, various

origins and mandates of the institutions, and the current and emerging problems they are required to address.[4]

7. The establishment of such institutional mechanisms provides concrete means for the practical implementation of the standards of cooperation envisaged by the Convention while representing at the same time a powerful incentive for further and more advanced cooperation.

8. Cooperation involves different sectors of the central administrations of States Parties, their relevant local authorities, other public and private stakeholders and NGOs. This improves collaboration, awareness, knowledge and capacity at cross-sectoral and multilayered levels in State and regional contexts. Such forms of cooperation and collaboration encompass exchange of information, consultations, common research and development, particularly on the achievement of water-quality objectives, joint monitoring and assessment, early warning systems and mutual assistance concerning critical situations.

9. Although non-Parties are not prevented from adopting on a voluntary basis the same standards of cooperation through the mechanisms laid down in the Convention, becoming a Party provides a guarantee that the institutional mechanisms of the Convention will be followed in relations with other riparian Parties paving the way towards permanent and effective cooperation.

10. It may be that not all riparians to the same transboundary watercourse become Parties to the Convention. In such a case, the Riparian Parties would not be legally bound by the provisions of the Convention in their relations with the riparians that have not joined in the Convention.

11. Parties largely benefit from the Convention and its institutional framework also with regard to the **domestic dimension** of water management. Advantages may as well be derived by Parties from those provisions that bear also on the exercise of their internal sovereignty: i.e. on the relation between a Government and its local administrations, on the one hand, and its citizens and resident individuals and companies, on the other. The collective and expert assistance provided for under the Convention enhances the national water management capacity. Such enhanced national capacity, once acquired in relation to freshwaters having transboundary character, not only applies automatically to the domestic parts of an international watercourse, but can just as well be applied to watercourses having a purely domestic dimension.

12. Article 2 (5), setting out the precautionary principle, the polluter-pays principle and the inter-generational sustainability principle, provides a useful example. Once such principles are adopted in the internal legal order of a riparian State – usually, through the parliamentary law authorizing ratification –they will normally apply to the whole range of activities likely to have environmental impact, be it domestic and/or transboundary. By taking individual and co-operative measures to prevent, control and reduce any transboundary impact, as one of the main objectives of the Convention, the Parties inevitably find themselves reaching out for higher standards of protection of **human health and safety** both on domestic and international level.

13. Becoming a Party to the Convention may also involve, directly, or indirectly, advantages in relation to **international funding** for projects connected with use and management of transboundary waters. Financial assistance may be facilitated or sought by MOP, when appropriate, in order to enhance the capacity of a Party to achieve the purposes of the Convention (see art. 17 (2 (c)).

[4] S.Vinogradov, P.Wouters, P.Jones “Transforming potential conflict into cooperation potential: the role of international water law” (University of Dundee, UK, 2003), p. 62.

14. Efforts to enter into bilateral or multilateral agreements and establish joint bodies are strongly encouraged by international organizations (e.g. UNECE, ESCAP[5], UNDP[6], OSCE[7], and EU), multilateral financial institutions and bilateral donors. Financial support to river commissions and other joint bodies worldwide is provided, inter alia, by the World Bank, the Global Environmental Facility (GEF), the European Investment Bank, the African Development Bank, the Asian Development Bank, the Islamic Development Bank, the European Commission, and by a number of governments.

15. Parties to the Convention may benefit from the use of the Convention's **trust fund,** which supports the effective implementation of the Convention. The trust fund is managed by the UNECE secretariat. The Parties contribute to the fund on a voluntary basis.

GENERAL EXPLANATIONS OF MAIN FEATURES OF THE CONVENTION[8]

16. The Water Convention is a typical 'framework' instrument. Most of the UNECE conventions as well as significant global environmental treaties (e.g. on climate change, ozone layer etc.) and UNEP regional seas conventions belong to this category of international instruments. The primary objective and function of this type of international agreements, which are sometimes also called 'umbrella' treaties, is to create an institutional framework around the MOP within which the Parties may cooperate, benefit from collective technical and legal assistance, as well as further develop the provisions of the framework agreement.

17. The objectives of the Water Convention are to be achieved through a two-tiered approach, which envisages two main categories of obligations. The first set of duties, contained in Part I, are more general and apply to all Parties to the Convention. The second, contained in Part II, are more specific and must be implemented through the conclusion of further agreements by Riparian Parties sharing the same transboundary waters. The legal framework of the Convention is more detailed, therefore it offers more legal guidance, than average umbrella agreements; this is especially true with respect to provisions contained in Part II.

18. Consistent with the nature of a 'framework' instrument, the Water Convention lays down certain general principles and requirements for its Parties to be further developed and made operational through the adoption of subsequent protocols and certain non-binding ('soft-law') instruments in the form of guidelines and recommendations on specific subjects within the scope of the Convention, and supplementary protocols to respond to new problems. Since the Convention entered into force, two additional binding instruments have been adopted - the Protocol on Water and Health and the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

19. Finally, the legal interface between the Water Convention and other environmental conventions adopted under the auspices of the UNECE must also be mentioned. The linkages between the Water Convention and other UNECE instruments exist in different forms—from direct co-operation in creating new legally binding instrument and formulating policies to the provision of operational and technical support at the country level.

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[5] United Nations Economic and Social Commission for Asia and the Pacific.
[6] United Nations Development Programme.
[7] Organisation for Security and Cooperation in Europe.
[8] Chapter VI of the draft Guide (LB/2009/1 - 31 March 2009)

The "due diligence" nature of the general obligations under the Convention

20. It appears that the general obligation of prevention with its specifications set out in articles 2 and 3, is one of "due diligence", as opposed to absolute obligations, or obligations of result. The due diligence nature of an obligation of prevention is precisely determined by the duty to take "**all appropriate measures**" aimed at the prevention in point. According to the European Court of Justice "appropriate" means "required".

21. Explanation of the due diligence concept is best made in functional terms. That is to say that, in order to distinguish in practical terms a "due diligence" obligation of prevention from an "absolute obligation" of prevention, one is to consider that, in the latter case, a State Party would be held responsible for breach of the obligation of prevention whenever tranboundary impact occurs in relation to activity carried out on its territory. On the other hand, for an obligation of due diligence to be considered as having been breached, the mere occurrence of transboundary impact would not in itself be sufficient. In order for a State to be internationally responsibility for breach of a "due diligence" obligation of prevention, next to the occurrence of transboundary impact, it would be necessary that the State on whose territory the activity was carried out which caused such an impact could not prove to have adopted "all the appropriate measures" of prevention. If transboundary impact occurs despite all appropriate measures having being taken, the origin State, rather than becoming internationally responsible for breach of an international obligation, will have to comply with the ancillary obligation to take all appropriate measures - individually and jointly with the victim State – to control and reduce such impact. The legal concepts explained coincide with the normative structure of the general obligation of prevention, control and reduction of transboundary impact under article 2 of the Convention.

22. The due diligence nature of the obligation of prevention, control and reduction of transboundary impact and the concept of "appropriateness" of the measures required involve a significant measure of relativity as to both contents and time frame of the conduct which is to be taken by Parties.

23. Such relativity would be proportionate to the capacity of the Party concerned, as well as to the nature and degree of the risk of occurrence of transboundary impact in light of the specific circumstances, including the individual features of the relevant water basin. That is to say that, on the one hand, the higher the risk of a major impact - such as that of a flooding from failure of a dam, or of serious toxic pollution from failure in an industrial plant – the greater the care due (i.e. the appropriate measures). On the other hand, the higher the degree of scientific, technological, economic and administrative development and capacity of the State Party, the higher the standards of care expected and required by it.

24. The Water Convention precisely requires each Party to start with due care the process of adoption of "all the appropriate measures" for achieving the result eventually required of by its relevant provisions, right from completion of the ratification or accession.[9]

[9] "Many agreements contain a special clause, in which the States pledge themselves to take 'all appropriate measures' or to make 'appropriate efforts to control and reduce sources of pollution in the area or in the space concerned. This is to be done both by establishing technical and administrative procedures for informing other States in the event of pollution. It is clear that such agreements do not establish the strict obligation not to pollute (obligation of result), but only the obligation to 'endeavour' under the due diligence rule to prevent, control and reduce pollution. For this reason the breach of such obligation involves responsibility for fault (rectius: for lack of due diligence)" (R. Pisillo Mazzeschi, Forms of International Responsibility for Environmental Harm, in International Responsibility for Environmental Harm 15, 19 (F. Francioni & T. Scovazzi eds., 1991).

25. Three specifications are called for concerning the operation of the duty of care under the due diligence obligations set out in the Water Convention:

(a) The relativity and flexibility of the obligation to take "appropriate measures" is complemented under the Convention by clear general **parameters**, such as the precautionary, polluter-pays and sustainability principles (art. 2 (5)), and **standards**, such as those set out in article 3 on the introduction, amongst others, of a permit regime based on the best available technology, on environmental impact assessment, as well as on the setting of emission limits and of water-quality criteria. Those standards and parameters contribute to the concrete determination of the normative content of the due diligence obligations of prevention and of the corresponding duty of care.

(b) It is practically and legally difficult, if not impossible, for the victim of a transboundary impact to prove that not all the appropriate measures of prevention have been adopted by the national authorities of the origin State. While it is possible for a subject to prove that it has taken action, tracking record of it, it is virtually impossible to provide documentary evidence that a third party has not taken action. Consequently, there is general agreement that in this area of law an **inversion of the burden of proof** applies from claimant on to the origin State of transboundary impact. It will be for this State, rather than for any subject invoking responsibility, to demonstrate that appropriate preventive action has been adopted within its jurisdiction.

(c) As already anticipated, the due diligence obligation to take "all appropriate measures" applies, not only to the obligation of prevention, but also to that of control and reduction of transboundary impact. That is to say that, under the Convention, the occurrence of transboundary impact is the trigger for the obligation to take all appropriate measures to control and reduce such an impact.

26. The above being said about the basic feature of the general principle of prevention, control and reduction of transboundary impact, one should not lose sight of those provisions in the Convention that provide for **immediately applicable obligations**. This is the case with the following obligations:

a) to set emission limits for discharges into surface waters based on the best available technology, specifically applicable to individual industrial sectors (art. 3, para. 2);
b) to define water quality objectives and adopt water quality criteria in conformity with annex III;
c) to establish programmes for monitoring the conditions of transboundary waters (art. 4);
d) to make information on the conditions of transboundary waters available to the public, according to the indications set out in art. 16
e) of co-operation according to the articulations and specifications provided for under article 2 (6), and articles 5, 6, 9, 10, 11, 12, 13, 14, 15, 17. Obviously, the full realization of this obligation is subject to the co-operative attitude by the other riparians; however, for a Party not to be found in non-compliance with the obligation of co-operation it is to demonstrate that co-operation could not be possible due to the attitude of riparians, while it has adopted all measures to make co-operation possible.

EXPLANATIONS AND CLARIFICATIONS OF SELECTED PROVISIONS[10]

Part I. Provisions related to all Parties

Article 1, paragraph 1,2,3,4 and Article 9 paragraph 3 – Scope of the Convention

Article 1 (1,2,3,4) provides that:

For the purposes of this Convention,

1. "Transboundary waters" means any surface or ground waters which mark, cross or are located on boundaries between two or more States; wherever transboundary waters flow directly into the sea, these transboundary waters end at a straight line across their respective mouths between points on the low-water line of their banks;
2. "Transboundary impact" means any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within an area under the jurisdiction of a Party, within an area under the jurisdiction of another Party. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors;
3. "Party" means, unless the text otherwise indicates, a Contracting Party to this Convention;
4. "Riparian Parties" means the Parties bordering the same transboundary waters;

Article 9 (3) provides that:
…
3. In cases where a coastal State, being Party to this Convention, is directly and significantly affected by transboundary impact, the Riparian Parties can, if they all so agree, invite that coastal State to be involved in an appropriate manner in the activities of multilateral joint bodies established by Parties riparian to such transboundary waters.

A. Background explanations – legal analysis and clarification

27. The ‘scope’ of a treaty determines its “sphere of application”, i..e. the subject-matters addressed by its provisions. The scope of ‘territorial treaties’ determines also the geographical (in our case, also the hydrological or hydrographical) sphere of application of the treaty, including the water resources, as well as the water-related components of the environment, governed by its provisions. It can also define the types of uses, or activities, regulated by the treaty. Finally, it determines the issue of eligibility, i.e. which states are entitled to participate in such a treaty. Thus, there are different aspects to be considered and established in order to assess the scope of the Convention: its geographical application, the kinds of situations and activities, as well as who is involved in or affected by it, including the question of which States have a right to become a Party to it. These issues are closely inter-related, and the rights and obligations related to each of them have an influence on the rights and obligations related to the others.

[10] Chapter VII of the draft Guide (LB/2009/1 - 31 March 2009)

Geographic scope

28. The geographic scope of the Convention is defined in article 1 (1), with regard to the types of waters, and in article 2 (6)[11], with regard to the relevant catchment areas and to the marine environment.

29. As to the types of waters falling within the scope of the Convention, the key words are **transboundary waters, surface waters and groundwaters.**

30. According to article 1 (1), the expression *transboundary waters* means any surface waters or groundwaters which mark, cross or are located on boundaries between two or more States. Wherever transboundary rivers flow directly into the sea, such rivers fall within the reach of the rules of the Convention until a straight line across their respective mouths between points on the low-water line of their banks.

31. *Surface waters* include waters collecting on the ground in a stream, river, channel, lake, reservoir or wetland. *Groundwaters* include all the water which is below the surface of the ground in the saturation zone and in direct contact with the ground or subsoil. As to groundwaters, the Convention includes both confined and unconfined aquifers.

32. Article 2 (6) provides that *transboundary waters* should not to be limited to a *water body* (e.g. a river, a lake, a groundwater aquifer), but should cover the *catchment area* of the said water body (or in case of a groundwater aquifer, whether confined or unconfined, its entire recharge area). For the purposes of the Convention, the catchment area of a surface water body, or the recharge area of a groundwater aquifer, is the area receiving the waters from rain or snow melt, which drain downhill (on the surface or below the surface of the ground in the unsaturated or saturated zones) into a surface water body or which infiltrates through the subsoil (i.e. the unsaturated zone) into the aquifer.[12]

33. It is important to note that under the Convention the term “catchment area” equally applies to areas collecting the waters from a part of the river (for example, the area upstream of the point of the confluence of a river with its tributary or the area upstream of the outflow of a lake) or collecting the waters from the totality of a river (i.e. the area upstream of the point where the rivers flows into the sea, an enclosed lake or desert sink).

34. Thus, the Convention adopts an integrated approach to water protection, which today is referred to as “river basin management”. This approach is based on the concept of catchment area, which comprises the transboundary river or lake basin, including tributaries, groundwaters, as well as “other elements” of the environment, such as air, land, fauna and flora to the extent that theses “other elements” interact with the relevant transboundary watercourse or international lake (see article 1 (2)). Therefore, the catchment area is the only physical unit where harmonized policies, programmes and strategies the Riparian Parties are to develop under article 2 (6).

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[11] See commentary to article 2(6).

[12] Note should be taken of the definitions in the WFD. This Directive uses the term “river basin” whereby the river basin means the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes *into the sea* at a single river mouth, estuary or delta (recent publications under the Convention use the term “basin” if the entire area of a first order river (ending in the sea, an enclosed lake or desert sink) is meant, and sub-basin if part of this area is referred to (e.g. the sub-basin of a tributary to the first order river)). In the Convention’s terminology the catchment area may either be the basin area, as defined by the Water Framework Directive, or the area of any sub-basin.

35. Article 1 (1), excludes sea waters from the scope of the Convention. However, article 2 (6) requires Parties to take requirements of the marine environment into account as the aim is "to protect the environment of transboundary waters or the environment influenced by such waters, including the marine environment". This obligation has had a far-reaching influence on a number of agreements, developed on the basis of the Convention, which have included provisions to protect the recipient sea and coastal areas. This is the case, for example, of the agreements on the protection of rivers Elbe, Oder and Danube and their basins.

36. It is important to note that the Convention does not exclude water which ends in a desert sink or in an enclosed lake.

Substantive scope

37. The key substantive scope of the Convention focuses on the prevention, control and reduction of **transboundary impact**, defined in article 1 (2).

38. Accordingly, the Convention follows a holistic approach to the concept of environment in addressing the adverse effects on its multifarious components listed in article 1 (2).
The expression "significant adverse effect" provides an abstract standard of guidance for the assessment of the acceptable threshold of harm, like in similar provisions contained in other multilateral environmental agreements (MEA) in which we find the terms "appreciable", "substantial", "important", or "serious". In the preparatory work which led to the New York Convention, the International Law Commission (ILC) indicated that the replacement of the word "appreciable" with "significant" did not purport to raise the applicable standard of acceptable adverse effect, as it would have been the case with the words "substantial" or "serious".[13] Accordingly, the expression "significant adverse effect" reflects the international general principle of "good neighbourliness" which provides the duty to overlook minor, insignificant, inconveniences deriving from activities in neighbouring countries. There can be said to be "significant adverse effect" when there is a real impairment of a significant use of the watercourse by a riparian, or of its environment. To put it with the words of the ILC, "significant harm" is intended as "a detrimental impact of some consequence upon, for example, public health, industry, property or the environment in the affected State".[14] This is fully in line with the principle of equitable utilization codified in the Water Convention under article 2 (2 (c))**.**

39. The concrete assessment of the "significance threshold" of the adverse effect depends on the basin specific situation, including the specific circumstances pertaining to the riparian Parties involved, on a case-by-case basis. The same adverse effect may be considered "significant" in one basin, but not in another, according to the different depuration capacity available, or to the kind of uses affected and to the alternative uses available in each relevant basin. The purpose of the determination of the "significance threshold" is that of providing guidance to the Parties in the adoption of the concrete legislative and administrative measures, precisely aimed to prevent overcoming that threshold, to be considered as "appropriate" by the interested riparians. Therefore, exchange of data and information, as well as consultations - i.e. cooperation - between them is crucial for the assessment of the acceptable, or non-permissible, "adverse effect" of an existing, or planned, activity. This accounts for the three-tiered cornerstone of the Convention, based on (a) the

[13] Report of the International Law Commission on the Work of its Forty-Sixth Session, U.N. GAOR 49th Sess., Suppl. No. 10, U.N. Doc. A/49/10, pp. 11 f. (1994)
[14] Report of the International Law Commission on the Work of Its Fortieth Session, U.N. Doc. A/43/10 (1988), reprinted in [1988] 2(2) Y.I.L.C.1, p. 36.

no-harm rule; (b) the equitable utilization principle; and (c) the cooperation principle, as the catalyst for the realization the former two.

40. The elaboration of water-quality objectives and criteria is the key to the concrete assessment of the "significance threshold" on a case-by-case basis, particularly if they are elaborated jointly by riparians. On that score, the Convention provides a most advanced regulatory setting facilitating such an assessment. It is to be recalled that the Convention, next to the obligation for riparians to enter into "agreements or arrangements" for the establishment of joint bodies, whose various tasks include that "to elaborate joint water-quality objectives and criteria", provides in annex III a number of guidelines to that end.

41. The Water Convention applies to any activity that may cause transboundary impact without defining the nature and location of such activity. That means that an activity causing, or likely to cause, transboundary impact can be located anywhere in the territory of a State, without regard to its proximity to the border, or to the watercourse. States should therefore consider the entire catchment area and even, in some cases (for confined aquifers, for example, their entire recharge areas) beyond it, to ensure that no transboundary impact is caused.

42. In line with the principle of legal equality of States, the normative scope of the provisions of the Convention is primarily that of addressing the reciprocal relations between Riparian Parties. However, the Convention contains provisions that also aim to protect the common interest of the community of its Parties in the preservation of the environment. These are called *integral obligations* (or obligations *erga omnes partes*), in the sense that, in order to protect community interests, they create a set of indivisible corresponding rights for the community of the Parties. Conduct seriously in contrast with those obligations is not admissible, even if it results from mutual agreement by two, or more, Riparian Parties, or from a reciprocal action in response to a previous violation of the Convention. Accordingly, conduct that causes serious and irreversible harm to the environment of another State Party, or a use of a watercourse that proves unsustainable would not be permissible under the Convention.

Eligibility to participate

43. The issue of scope, or territorial application, of an international agreement is also linked to the question of which states are entitled to participate in a given treaty. The Water Convention was initially conceived as a pan-European or, in other words, a typical 'regional' instrument. According to its article 23 the Convention is open for the States members of the UNECE, States having consultative status with the UNECE, and regional economic integration organizations constituted by sovereign States members of the ECE to which their members have transferred competence over matters governed by the Convention. Currently, ECE comprises of 56 countries located in the European Union, non-EU Western and Eastern Europe, South-East Europe and Commonwealth of Independent States (CIS) and North America. All of them have a right to become a Party to the Convention.

44. On 28 November 2003, the Parties to the Water Convention amended its articles 25 and 26 unlocking the door for any other States that are Members of the United Nations to accede to the Convention upon approval by the MOP. With this amendment, once in force, the Water Convention will acquire an entirely different character of a 'global' treaty potentially open for universal participation. The amendments will enter into force with 23 ratifications. Nevertheless, the MOP will not consider any request for accession by States outside the UNECE until the amendments have

entered into force for all the States and organizations that were Parties to the Convention when they were adopted.

45. As was mentioned earlier and related to the question of participation is the introduction in the Convention of two categories of States: 'Parties' and 'Riparian Parties'. Under article 1 (3) 'Party' means a Contracting Party to the Convention itself. Thus, any State that has ratified or acceded to the Convention is considered a 'Party' within the meaning of this provision. On the other hand, the term 'Riparian Parties', as defined in article 1 (4), applies to those Parties to the Convention that border the same transboundary waters. They are required to enter into bilateral and multilateral agreements concerning their 'common' waters as provided for in article 9[15].

46. Finally, although the primary focus of the Convention is on fresh waters, it does not ignore potential negative consequences of their utilization for the marine environment. In international practice, marine pollution through transboundary rivers is dealt with by a different 'family' of international instruments -- regional seas conventions and additional protocols on land-based sources and activities. The latter often provides for the possibility of non-coastal States located within the catchment areas of transboundary rivers flowing into a regional sea to become a party to such agreements.

47. Likewise, the Water Convention mirrors this situation in its article 9 (3). It envisages that in cases where a coastal State, being Party to the Convention, is directly and significantly affected by transboundary impact, the Riparian Parties can, if they all so agree, invite that coastal State to be involved in an appropriate manner in the activities of multilateral joint bodies established by Parties riparian to such transboundary waters. Thus, the Convention opens the door for the affected coastal States to at least participate in the activities of the Riparian Parties, if not to become a party to specific watercourse agreements.

Article 2 paragraph 1- Obligation to prevent, control and reduce transboundary impact

Article 2 (1) provides that: 1. The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact.

A. Background explanations – legal analysis and clarification

48. Aim of the article is to avoid significant harm being caused to neighbouring States – in our case, riparian States - by imposing the duty to take **all appropriate measures** to that effect[16]. It codifies a customary international rule known, as the **"no-harm rule"**. It is linked to the principle

[15] See commentary to article 9.

[16] According to the International Court of Justice, "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment" (Legality of the threat or use of nuclear weapons, par. 29, ICJ Reports 1996, p. 241-242). See also principle 21 of the 1972 Stockholm Declaration : "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" The same rule is also embodied in Principle 2 of the 1992 Rio Declaration.

of equitable and reasonable utilization, under article 2 (2 c)[17], and to that of cooperation, under article 2 (6), hence, making up the three-pillar normative cornerstone of the Convention

49. As already indicated, the obligation for Parties to take all appropriate measures is a **due diligence obligation**. It means that the conduct of each Party "is that which is generally considered to be appropriate and proportional to the degree of risk of transboundary harm in the particular instance"[18]. The higher the risk or degree of transboundary impact, the greater will be the duty of the State to take "all appropriate measures".

50. The obligation under review, like all due diligence obligations involves a reasonable amount of flexibility. Since the level of economic development and the relevant technological, infrastructural or institutional capacity may vary from one State to another, such differences are to be taken into account in determining whether a particular Party has taken "all the appropriate measures", i.e. whether it has exercised the required due diligence. However, this does not mean that this Country specific approach may dispense it from its obligations under the Convention, thus neutralizing their normative impact[19]. To that end, one is precisely to identify and refer the minimum requirements of the general provision under consideration.

B. Minimum requirements to comply with the provision

51. In case of a problem about compliance by a Party with the obligation of prevention under review, that Party is to show, *inter alia*, that:

a) it has taken "measures for the prevention, control and reduction of water pollution […] at source" (art. 2 (3));
b) such measures do not "result in a transfer of pollution to other parts of the environment" (art. 2, para. 4);
c) it has taken legal, administrative, economic, financial and technical measures to apply low and non-waste technology in order to prevent emission of pollutants at source (art.3, para. 1 (a));
d) it has introduced a licensing regime of waste-water discharges also providing for monitoring and control of the authorized discharges based on the best available relevant technology (ibidem, (b, c));
e) it applies biological treatment (or equivalent processes) to municipal waste water, or, at least, concrete steps to that effect have been undertaken (ibidem, (e));
f) it applies measures for the reduction of nutrient inputs from industrial and municipal sources (ibidem, (f));
g) it applies appropriate measures and best environmental practices (in conformity with annex II) for the reduction of inputs of nutrients and hazardous substances from diffuse sources, especially agriculture (ibidem, (g));
h) it has developed contingency planning (ibidem, (j));
i) it has taken measures to prevent the pollution of groundwaters (ibidem, (k)).

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[17] This linkage is clearly demonstrated in article 1 of the Rules on water pollution in an international drainage basin adopted by the International Law Association at its Montreal Session (1982), which provides, inter alia, that "consistent with the Helsinki Rules on the equitable utilization of the waters on an international drainage basin, States shall ensure that activities conducted within their territory or under their control conform with the principles set forth in these Articles concerning water pollution in an international drainage basin".

[18] International Law Commission, Report of the fifty-third session (2001), doc. A/56/10, Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, commentary under article 3 (11).

[19] See also International Law Commission, op. cit, commentary under article 3 (13).

52. The obligation expressed in article 2 (1), applies to various forms of adverse effects to the environment in conformity with the definition of **transboundary impact** under article 1 (2), of the Convention. Such a definition is inevitably abstract, and situation specific, since it assumes that an impact that is significant in one case may not be so in another. The threshold of "significant adverse effect on the environment" to be prevented is to be also assessed on a case-by-case basis. To this end, consultation and cooperation between the Countries involved may be held upon request by the complaining State. The Convention provides a most advanced institutional framework for such a joint process to take place.

53. No Party may be held responsible for breach of the obligation of prevention due to transboundary impact that may derive from another country. This may happen *inter alia* where upstream Country A pollutes its own section of a transboundary watercourse or withholds water in its territory to such an extent that – due to the already high concentration of pollutants received or to the reduced dilution capacity of the receiving water – downstream Country B is rendered unable to meet its own obligations vis-à-vis downstream Country C. This case has been particularly addressed during recent developments concerning the EU's water regime[20].

54. In similar circumstances, Country B would still be under the obligation of reduction of transboundary impact *vis-à-vis* Country C. However, the appropriate measures to that end and related costs should be undertaken jointly with the origin Country A according to an equitable share.

Article 2, paragraphs 2 (c) and 5 (c)) - The equitable and reasonable utilization principle

Article 2 (2 (c) and 5 (c)) provides that:
…
2. The Parties shall, in particular, take all appropriate measures:
(c) To ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact;
…
5. In taking the measures referred to in paragraphs 1 and 2 of this article, the Parties shall be guided by the following principles:
(c) Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.

A. Background explanations – legal analysis and clarification

55. In the past, alternative claims of State entitlement over transboundary waters were advocated - the most extreme being based upon the doctrines of absolute territorial sovereignty and absolute territorial integrity. Claims based on absolute territorial sovereignty, a favourite of upstream States, would allow a State unlimited use of transboundary waters falling within that

1. [20] Directive 2008/105/EC of the European Parliament and of the Council of 16 December 2008 on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/491/EEC, 86/280/EEC and amending Directive 2000/60/EC of the European Parliament and of the Council. Article 6 of the Priority Substances Directive provides that no Member State may be held liable for breach of its obligations to meet applicable environmental quality standards if it can demonstrate that the exceeding of such parameters was due to pollution outside its national jurisdiction and that, despite recourse to the required coordination mechanisms, it was unable to take effective measures to comply with those standards.

State's territory regardless of the needs and concerns of other watercourse States.[21] Conversely, the principle of absolute territorial integrity, which tends to favour downstream States, prohibits an upstream State from interfering with the natural flow and conditions of an international watercourse. Neither of the two approaches ever prevailed in international practice. As a compromise result, the doctrine of limited territorial sovereignty is now widely accepted by States as being the foundation upon which the principle of equitable and reasonable utilization has evolved.

56. The principle of equitable and reasonable use is well recognised as part of customary international law, as evidenced by international agreements, non-binding instruments, decisions of courts and tribunals, and in the writings of publicists.[22] This principle reflects the concept of 'community of interest of riparian states' in an international watercourse together with the perfect equality of the right each of them in its use, recognized by the Permanent Court of International Justice.

57. Article 2 (2 c), should be read in conjunction with article 2 (5 c), according to which "water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs". This is fully in line with the contemporary developments of international customary water law according to which the principle of equitable use incorporates that of sustainable development. That is to say that a use of an international watercourse may not be considered as equitable, therefore legal, if it is not sustainable. Therefore an utilisation of the watercourse providing maximum benefit to the riparian States in a manner incompatible with its preservation as a natural resource could not be qualified as 'equitable and reasonable'.

58. For better understanding how the principle of equitable and reasonable use operates in the context of international watercourses the ILC's commentary to its 1994 Draft Articles may be of use. It reads as follows: "In many cases, the quality and quantity of water in an international watercourse will be sufficient to satisfy the needs of all watercourses States. But where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourses States cannot be fully realised, a "conflict of uses" results. In such a case, international practice recognises that some adjustments or accommodations are required in order to preserve each watercourse State's equality of right. These adjustments or accommodations are to be arrived at on the basis of equity, and can best be achieved on the basis of specific watercourses agreements." [23]

59. As emphasized by the same ILC in its commentary to article 5 of the Draft Articles on the Law of the Non-Navigational Uses of International Watercourse, the principle of the sovereign equality of States results in every watercourse State having rights to the use of the watercourse that are qualitatively equal to, and correlative with, those of other watercourse States. However, this fundamental principle of "equality of rights" does not mean that each watercourse State is entitled

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21 See generally, McCaffrey, S.C., Second Report on the Law of the Non-navigational Uses of International Watercourses, [1991] 2(2) Y.B. Int'l L. Comm'n, at 105-109, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

22 Commentary to Draft Articles on the Law of the Non-navigational Uses of International Watercourses, in Report of the International Law Commission on the work of its forty-sixth session, UN GAOR, 49th Sess., Supp. (No. 10), U.N. Doc. A/49/10 (1994), reprinted in [1994] 2(2) Y.B. Int'l L. Comm'n, at 222, para. 24. The commentary concluded that: "A survey of all available evidence of general practice of States, accepted as law, in respect of the non-navigational uses of international watercourses - including treaty provisions, positions taken by States in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases - reveals that there is overwhelming support for the doctrine of equitable utilisation as a general rule of law for the determination of the rights and obligations of States in this field."

23 Commentary to ILC 1994 Draft Articles, supra note?

to an equal share of the uses and benefits of the watercourse. Nor does it mean that the quantity of water itself is to be divided into identical portions. Rather, each watercourse State is entitled to use and benefit from the watercourse in an equitable manner. The scope of a State's rights to equitable utilization depends on the specific circumstances of each individual case[24].

60. The rule of equitable and reasonable use is particularly relevant in cases where there is a "conflict of uses" between watercourse States. A situation must therefore arise whereby one or more watercourse States is unable to satisfy its needs as a result of another States use of an international watercourse.

B. Minimum requirements to comply with the provision

61. Where it can be established that there is a conflict of uses between States, and all the conflicting uses are considered reasonable, resolving the conflict will be determined by weighing up all relevant factors and circumstances. Such an approach was supported by the German Staatsgerichtshof (high court) in the Donauversinkung case, in which the German states of Württemberg and Prussia sued the state of Baden seeking relief from the phenomenon of the 'sinking of the Danube' as a result of certain works. The court stated that "One must consider not only the absolute injury caused to the neighbouring State, but also the relation of the advantage gained by one to the injury caused to the other." The principle therefore recognises both the right to an equitable and reasonable share in the uses of an international watercourse, and a correlative obligation not to deprive other States of their right to an equitable and reasonable utilisation.[25]

62. Those considerations account for the fact that the principle in point reflects the community of interest and the equality of rights of all riparians in the use of a shared watercourse. Against this fairly abstract background, assessment of the equitable nature of an existing, or planned, use depends on the specific circumstances pertaining to the given basin, as well as to the social, economic and political features of the States involved, which may differ from one another. Accordingly, practical implementation of the principle under consideration requires a case-by-case assessment to be made in conformity with the Convention, mutual exchange of data and information on such basin and Country specific factors, as well as consultations, hence cooperation, are a precondition.

63. In order to identify such relevant factors on which to exchange data and information and on which to hold consultations, article 6 (1) of the New York Convention[26] provides useful guidance. It identifies a non-exhaustive list of factors and circumstances that should be taken into account when balancing the interests of riparians.[27] Such factors relate to the physical characteristics of the

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[24] See Yearbook of the International Law Commission, 1994, vol. II, Part Two, p.98.

[25] Helsinki Rules *supra* note?. Article IV of the ILA Helsinki Rules on the Uses of the Waters of International Rivers, provide that: "Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."

[26] 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses.

[27] "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.

resource, the population dependent on the waters, existing and potential uses, the impact of such uses, and the availability of alternative uses or the adoption of more efficient practices.

64. According to the principle in point, no use or category of uses enjoys inherent priority. However, article 10 (2) of the New York Convention provides that, "special regard" be given to vital human needs. While there is no clear articulation of what is meant by "special regard", it would tend to imply that in determining what is equitable and reasonable, vital human needs should be protected through the supply of water from either within or out with a particular watercourse. Ultimately, in weighing up all relevant factors every effort should be made to maximise the resultant benefits to watercourse States equitably, whilst at the same time protecting the long-term viability of the resource.

65. The fact that a use of a watercourse causes transboundary impact may not necessarily involve that it is inequitable, therefore, illegal. According to the specific circumstances of each given case, such a use may be assessed as equitable. This would require that all appropriate measures, not only to prevent, but also to control and reduce the transboubdary impact had been taken, including exchange of data and information, as well as consultations and other forms of cooperation with the affected States. The equitable and legal nature of the use might also depend on whether, through such forms of cooperation, all parties involved have negotiated mutually agreeable adjustments, including compensation. However, not every transboundary impact would be negotiable. Agreement would not preclude the inequitable, therefore illegal, nature of a use that would be unsustainable, such as a use that would irreversibly affect the environment to the extent of impairing present or future vital human needs of the people living along the basin, or beyond.

66. The fact that a use of a watercourse may be assessed as equitable at a given point in time does not mean that such an assessment may not be reversed at a later stage according to the change the circumstances pertaining to the factors relevant for the assessment.[28]

Article 2, paragraph 5 (b) - Polluter-pays principle

Article 2 (5 b) provides that:
…
5. In taking the measures referred to in paragraphs 1 and 2 of this article, the Parties shall be guided by the following principles:
…
(b) The polluter-pays principle, by virtue of which costs of pollution prevention, control and reduction measures shall be borne by the polluter;

A. Background explanations - Legal analysis and clarification

67. The "polluter pays principle" (PPP) can well be said to encompass the whole scope of application of the primary obligation of the Convention, namely, that of taking "all the appropriate

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[28] The Kansas v. Colorado case decided by the US Supreme Court in 1907, still referred to as an authoritative precedent is most illustrative of this point. The Court rejected the claim for relief put forward by Kansas – upstream and prior user of the Arkansas River – against Colorado for significant harm deriving from the latter's diversion of water from the river which the Court found to be an equitable use. However, the Court added that "it is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas my justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against the action of Colorado" (206 US, 1907, p. 117).

measures to prevent, control, reduce any transboundary impact". In fact, the amount of such costs is to be planned by the private operator in the environmental impact assessment which it is to submit within the licensing regime provided for under article 3 (1 (b, c and h)).

68. Indeed, the costs of pollution prevention, control and reduction envisaged by the PPP are primarily aimed at avoiding damage being caused, thus stressing the preventing aspect of the principle. Once a transboundary impact occurs, the PPP comes into play as a tool for the mitigation and recovery of damage, as well as for the financing of measures of reinstatement of the environment.

69. From a micro-economic standpoint, the PPP provides a concrete incentive for operators to reduce pollution, insofar as they are made to realise that the costs related to pollution they must bear are greater that the benefits they derive from the polluting activity.

70. The main legally relevant points of the PPP can be summarized as follows:

(a) *Costs for internalisation of polluting routine activities:* the PPP is primarily a regulatory tool for domestic public administrations to internalise the cost of pollution prevention, control and reduction with regard routinely conducted polluting activities. The trigger of the application of the principle is the presence of a potential or actual pollution activity, irrespective of the fact whether such pollution is lawful or not (i.e. water is discharged in accordance with the conditions of a permit or applicable regulations). Accordingly, the PPP can*not* be seen as *a license to pollute*. The more one pollutes, the more it is liable to bear the costs. On that score, not only the PPP saves public funds, but also provides a strong economic incentive for polluters – usually private operators – to invest in prevention and treatment technologies and to carry out their activities with a high degree of care;

(b) *Costs of internalisation of non-routine polluting activities:* in addition to the above preventive focus of the principle, PPP also covers the *control* and *reduction* of water *pollution* from a non-routine discharge, usually an accident. In this context the PPP aims at ensuring that the final costs of pollution control and reduction - arguably. the complete removal of pollution, are borne by the polluter. This aim can also be achieved through cost recovery by the public authorities when control and remediation measures are undertaken by the authorities, e.g. in the case of emergency response measures;

(c) *Non-compensatory nature:* the PPP is applicable in the relationship between public authorities and polluters. It does not give rise to compensation claims for damage caused between private parties for the loss of property, health, life, economic opportunity, etc. Such claims fall entirely outside the scope of the PPP. It is for national legal systems to afford the victims of pollution access to appropriate remedies, irrespective of the PPP. On the other hand, there is no exemption from the duty to control and reduce of the harmful effects on a watercourse for an operator because it has already paid damages for loss a private property);

(d) *Domestic nature:* the PPP has a primarily a domestic nature, i.e. it regulates relationships within the territory of a Party rather than between Parties. Accordingly, the PPP therefore does not provide legal grounds to claims for compensation for water pollution between Parties.

(e) *Contextual application*: The PPP is closely linked to other important requirements of the Convention, especially those, *inter alia*, to carry out EIA, to establish licensing regime, to develop contingency regimes, under article 3.

B. Minimum requirements to comply with the provision

71. The following minimum requirements may be listed:

(a) *Procedural measures:* with regard to individual discharges (including routine and non-routine), EIA and connected permitting regimes should be implemented, as appropriate. These can ensure that, on the one hand, the operator and the authorities become fully aware of the potential environmental impact of the polluting activity. On the other hand, through permitting procedures authorities can lay down conditions on pollution prevention, control and remediation as well as sanctions. Reporting and monitoring requirements would enable the competent authorities to gain sufficient information on the state of routine and non-routine polluting activities;

(b) *Mandatory remediation and sanctions:* the above should be complemented by remediation requirements and sanctions both at the legislative and administrative levels. Financial, or other, sanctions should be introduced as an incentive for operators to avoid, or minimise, pollution;

(c) *Cost internalisation of routine pollution activities:* eco-taxes, charges, duties, fees, should be introduced through fiscal measures at the central and/or local levels. Such measures should meet at least three criteria: a) they should proportional to the gravity and quantity of the pollution; b) they should be financially significant enough to create a meaningful incentive to invest in pollution prevention and control. Low charges are directly passed on to consumers, while higher charges require operators to optimise their fee structures by reducing their environmental impact; c) they should provide exemption clauses, so that those who undertake to invest significantly in pollution prevention and abatement technologies can be granted a full or partial exemption from the payment of charges. Such a policy may be effective only if charges are high;

(d) *Cost internalisation of non-routine polluting activities:* implementation of the PPP requires funds for the remediation of non-routine pollution incidents. This may be achieved through a series of financial guarantees ranging from mandatory liability insurance, security over property (e.g. automatic mortgage over the assets of the polluter) to a number of banking products (e.g. bank guarantees, bonds, etc.). Mandatory financial guarantees are applied to a very limited, but a growing extent by Parties, while environmental insurance policies are being taken up by private companies on a voluntary basis at a rapidly growing rate.

Article. 2 paragraph 6 - Principle of cooperation

Article 2 (6) provides that:

The Riparian Parties shall cooperate on the basis of equality and reciprocity, in particular through bilateral and multilateral agreements, in order to develop harmonized policies, programmes and strategies covering the relevant catchment areas, or parts thereof, aimed at the prevention, control and reduction of transboundary impact and aimed at the protection of the environment of transboundary waters or the environment influenced by such waters, including the marine environment.

A. Background explanations - Legal analysis and clarification

72. The obligation of cooperation stands out as an independent obligation. However, it is an integral part of the three-pillar normative setting of the Convention together with the principle of equitable utilization, under article 2 (2 c), and the obligation of prevention, under article 2 (1). That is to say that cooperation between riparians is instrumental to full compliance with the obligation of equitable utilization, as well as with that of prevention, control and reduction of transboundary impact.

73. This provision enunciates the general international obligation of co-operation with respect to relations between Riparian Parties. Its customary legal force in the field of the protection of the environment is substantiated by a number of authoritative instruments, such as Principle 24 of the Stockholm Declaration, Principle 7 of the Rio Declaration, article 4 of the ILC 2001 Draft articles on international liability for injurious consequences arising out of acts not prohibited by international law, as well as article 8 (1) of the New York Convention. It represents one the **key normative and policy features** of the Convention.

74. The normative contents of the general obligation of co-operation is specified and articulated through an extensive number of subsequent provisions in the Convention, namely, articles 9-15. According to those provisions, co-operation takes the form, inter alia, of consultations, establishment of joint bodies, joint monitoring and assessment, exchange of information, warning and mutual assistance. Such forms of cooperation may be applied to the special circumstances pertaining to each specific transboundary watercourse, through bilateral and multilateral agreements among Riparian Parties.

75. The general obligation of co-operation reflects the interdependence of Riparian Parties also recognizing their community of interest in the shared transboundary watercourses. To that end, this provision prescribes that co-operation be made “on the basis of equality and reciprocity”. This implies that co-operation should not be limited to a purely formal procedure of exchange of views, but that each Riparian Party should conduct itself in good faith

B. Minimum requirements to comply with the provision

76. Co-operation in article 2 (6), is not provided for the sole purpose of occasional contacts to prevent, or control, transboundary impact in individual cases, it is to be established on a permanent basis through bilateral or multilateral agreements. Its vast scope of application extends to the whole series of policies, programmes and strategies required for the achievement of the aims of the Convention.

77. Co-operation is not simply confined to the water channel of the transboundary river, or to the water of the international lake but, according to article 2 (6), it has to be applied to the relevant catchment area, or at least parts thereof. Thus, the Convention adopts an integrated approach of water protection based on the holistic concept of the cathcment area[29], Thus, the concept of catchment area appears as the main unit for the application of harmonized policies, programmes and strategies the Riparian parties are to develop under article 2 (6), of the Convention.

78. According to the provision under review, the outcome of co-operation should be the development of “harmonized policies, programmes and strategies”. Harmonization includes both

[29] See for this concept the commentary to Article 1 (1,2,3,4) and 9 (3) – Scope of the Convention.

common, or at least co-ordinated, policies, programmes and strategies. Therefore, it may range from co-ordination of relevant national actions to the development of a single river basin management plan, an option already provided for in article 13 (2 and 3) of the WFD. In any case, the "development" of such harmonized actions covers their preparation and adoption, as well as their implementation.

79. Cooperation among states in river basins may be a complex issue, particularly at the beginning. It should be seen as an aim in itself. It is therefore crucial to create a reliable structure as a basis for cooperation. This may be a gradual process starting with simple steps, e.g. by a joint committee meeting regularly. At a later stage, working groups or expert groups may be added. The kind of structure depends on the specific needs of the relevant countries and of the relevant water basins. There is no blue print. Effective cooperation is based on mutual trust. Trust building in the international water sector needs time. The psychological aspect of transboundary cooperation should in no way be underestimated. Considering that e.g. the International Commission for the Protection of the Rhine had been established shortly after the end of the Second World War, one could imagine that trust building required many years. Only if the states trust each other useful programmes, plans or projects can be established. Trust building requires much dialogue in order to increase mutual understanding and to enable the States involved to address in a constructive manner more problematic issues. This may be a long process.

80. The general obligation of co-operation reflects the interdependence between Riparian Parties and also recognizes their community of interest in transboundary waters. Against this rationale, the provision under review prescribes that co-operation shall be made "on the basis of **equality and reciprocity**". According to the UN Charter - as further interpreted in the landmark Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States,[30] all States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

81. Still on the element of **equality** among riparians, it seems to safeguard, in the context of article 2 (6), the right of each riparian State to participate, on an equal footing with other riparian States, in the procedural aspects of cooperation. Equality in this context implies the right, as well as the duty of each riparian State, to be involved in the negotiation of watercourse agreements, as well as in the activities of consultation, monitoring, exchange of data etc., in a manner consistent with the concept of the community of interest of riparian States in the uses of a transboundary watercourse[31].

82. As to **reciprocity,** it is a direct consequence of the principle of the legal equality of States. It involves some element of *quid pro quo behavior* and requires that each Riparian Party should conduct itself in good faith taking into account the legitimate interests of the other Riparian Parties. However, in case of a breach of a basic provision of the Convention, reciprocity may not allow for reciprocal conduct by way of countermeasure nor for suspension, or termination, of the obligations breached. Obligations such as that to prevent, control, or reduce transboundary impact are not only beneficial to the other Contracting Parties but also protect the common interest of the community of the Parties to an environmental agreement - of the international community as a whole - in the preservation of the environment. These are called **integral obligations,** in the sense that in protecting community interests, they create a set of indivisible corresponding rights for the

[30] Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States, UNGA Resolution 2625 (XXV), 1970.
[31] See for this concept the commentary to article 1 (1c).

community of the Parties to the agreement, or for the members of the international society. Accordingly, a reciprocal conduct of non-performance of such an obligation by a Contracting State in response to a previous breach of the same obligation would be wrongful for it would violate the same indivisible corresponding right of each and all the other contracting Parties.
