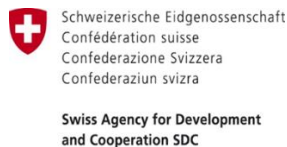


Training workshop “From practitioner to practitioner:  
how to use the two global Water Conventions to promote cooperation on the ground”  
(3<sup>rd</sup> to 4<sup>th</sup> July, 2023)

# Main obligations for the Management of Transboundary Watercourses

Dr. Bernadette A. Adjei  
Director, Legal and Monitoring, WRC- Ghana



# Introduction

- Conventions have certain features that capture the essence of the agreement between parties.
- These are the definition of who the parties are, principles, obligations, scope of the agreement, terms, implementation structures, entry into force, amendment, dispute resolution etc.
- The main obligations under conventions for the management of transboundary water courses are based on customary international law and evolving principles.
- The 1992 Convention on The Protection And Use of Transboundary Watercourses And International Lakes (Helsinki Convention) and the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (New York Convention) provide a basis for international water cooperation and transboundary water management.

# Main Obligations

Key Elements	Details
1. Scope	<ul style="list-style-type: none"><li>• Geographical scope (what waters? What uses? surface water, groundwater, basin)</li></ul>
2. Substantive Norms	<ul style="list-style-type: none"><li>• Legal duties &amp; entitlements (no harm, equitable and reasonable utilisation, ecosystem protection)</li><li>• Rules of substance (general or precise)</li></ul>
3. Procedural Rules	<ul style="list-style-type: none"><li>• Duty to cooperate as bridge</li><li>• Notification and consultation</li><li>• Data exchange</li></ul>
4. Institutional Mechanisms	<ul style="list-style-type: none"><li>• Joint bodies (RBOs)</li><li>• Conference of the Parties (MoP; CoP)</li><li>• Organisations / organs (Ministerial level; other)</li></ul>
5. Dispute Settlement	<ul style="list-style-type: none"><li>• Dispute avoidance (consultation)</li><li>• Dispute settlement (Art. 33 UN Watercourses Convention, Art. 22 UNECE Water Convention ; other)</li><li>• Implementation and compliance (reporting; facilitation, Implementation Committee)</li></ul>

# General obligation to cooperate

## Watercourses Convention, Art 8 (1)

Watercourse States shall cooperate on the basis of *sovereign equality*, *territorial integrity*, *mutual benefit* and **good faith** in order to attain optimal utilization and adequate protection of an international watercourse.

- Encouraged to
  - establishment of watercourse agreements (Art. 3)
  - establishment of joint bodies (Art. 8(2) and 24)
  - harmonisation of existing watercourse/water related agreements (Art. 3)

## Water Convention (Art.2(6))

The Riparian Parties shall cooperate on the basis of equality and reciprocity

- Obligated to
  - enter into 'agreements or other arrangements' (Art. 9)
  - **establish** 'joint bodies' to **support the implementation** of the agreements or arrangements

# Lake Lanoux Case (France v Spain), 1957

- French proposal to carry out certain works for utilisation of waters of Lake Lanoux; Spain concerned that works would affect Spanish rights.
  - Lake entirely in French territory (Pyrenees)
  - Flows to River Carol, which after 24 km reaches the Spanish border before joining the River Segre (tributary of the Ebro)
  - French plan to divert waters towards Atlantic
- Spain claimed can't be done without their permission
- Tribunal held that
  - Must *negotiate terms of agreement* but no obligation to conclude an agreement
  - Negotiation must be on the basis of **good faith**
    - *No unjustified break off of the discussions, abnormal delay, disregard of the agreed procedures, systematic refusals to take into consideration adverse proposals or interests.*




# Notification and consultation of planned measures

## Watercourses Convention - Part III Notification

- Watercourse States notify of any planned measures, e.g. hydropower project, that may have a significant adverse effect upon other watercourse States
- Potentially affected States have **6 months to reply**, which can be extended to an additional 6 months
- Must share available data and information, including results of any environmental impact assessment. Obligated to conduct an EIA (Pulp Mills Case, Argentina v Uruguay)
- If disagree over whether equitable and reasonable, then States enter into consultations for six months
- If no agreement after six months, follow dispute settlement procedures

## Water Convention - Art.10 Consultations

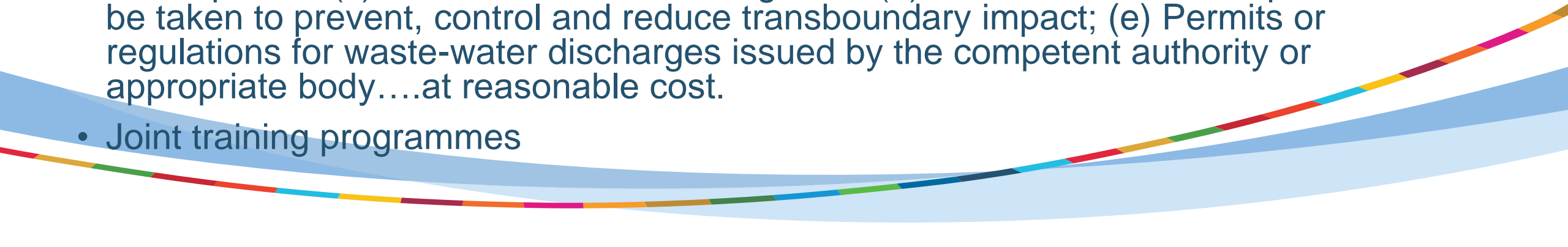
- Consultations shall be held between the Riparian Parties on the basis of **reciprocity, good faith and good-neighbourliness**, at the request of any such Party.
  - Such consultations shall aim at cooperation regarding the issues covered by the provisions of this Convention.
  - Any such consultations shall be conducted through a joint body established under Article 9 of this Convention, where one exists.
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# Duty to exchange data and information

## Watercourses Convention - Article 8(1)

- Watercourse States shall on a *regular* basis exchange readily available data and information on the condition of the watercourse, in particular that of a *hydrological, meteorological, hydrogeological* and *ecological* nature and related to the water quality as well as related forecasts.

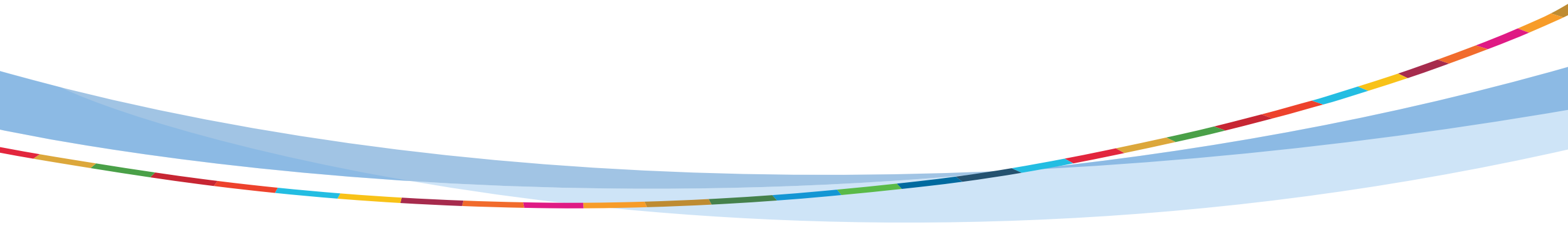
## Water Convention - Article 13 Riparian Parties shall, exchange reasonably available data,

- (a) Environmental conditions of transboundary waters; (b) Experience gained in the application and operation of best available technology and results of research and development; (c) Emission and monitoring data; (d) Measures taken and planned to be taken to prevent, control and reduce transboundary impact; (e) Permits or regulations for waste-water discharges issued by the competent authority or appropriate body....at reasonable cost.
  - Joint training programmes
- 



# Substantive norms

## Equitable and Reasonable Principle





# Applying equity to transboundary waters

- “...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”
- “...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”

ILC Commentary to the 1994 Draft Articles on the Law of the Non-navigational uses of International Watercourses

# Overarching objective of equity

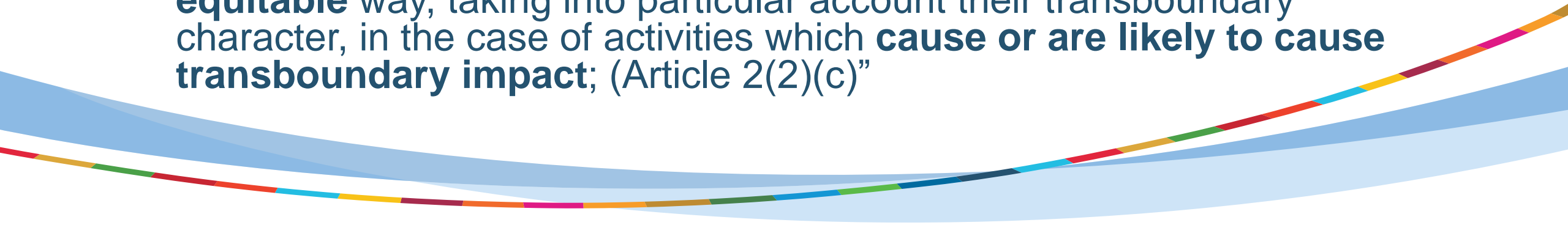
Watercourses Convention - Art. 5(1),

“... an international watercourse shall be used and developed by watercourse States *with a view to* attaining **optimal and sustainable utilisation thereof and benefits therefrom**, taking into account the **interests** of the watercourse States concerned, **consistent with adequate protection of the watercourse**”

Water Convention - Article 2(2)

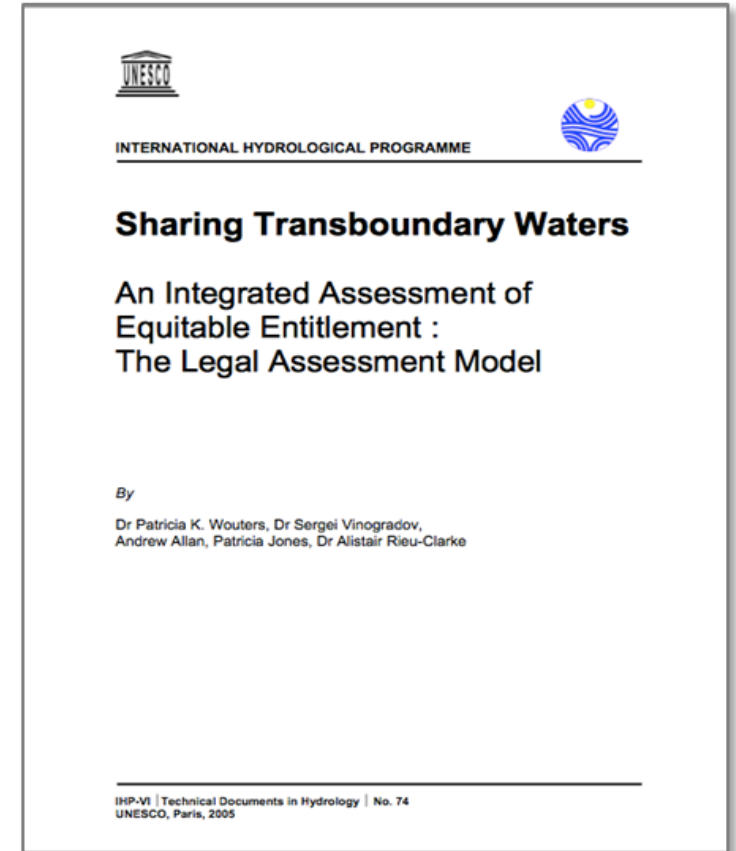
Riparian states have general obligations to control pollution and

“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**; (Article 2(2)(c)”



# How to apply equity in practice (Watercourses Convention – Art 6)

- What?
  - Physical characteristics
    - Geographic, hydrographic, hydrological, climatic
- Who?
  - Population dependency
    - Present and projected
- What uses?
  - Existing and potential social and economic uses
- What impacts?
  - Effects of a water use on other watercourse States
- What options?
  - Efficiency of and alternatives to uses of a watercourse

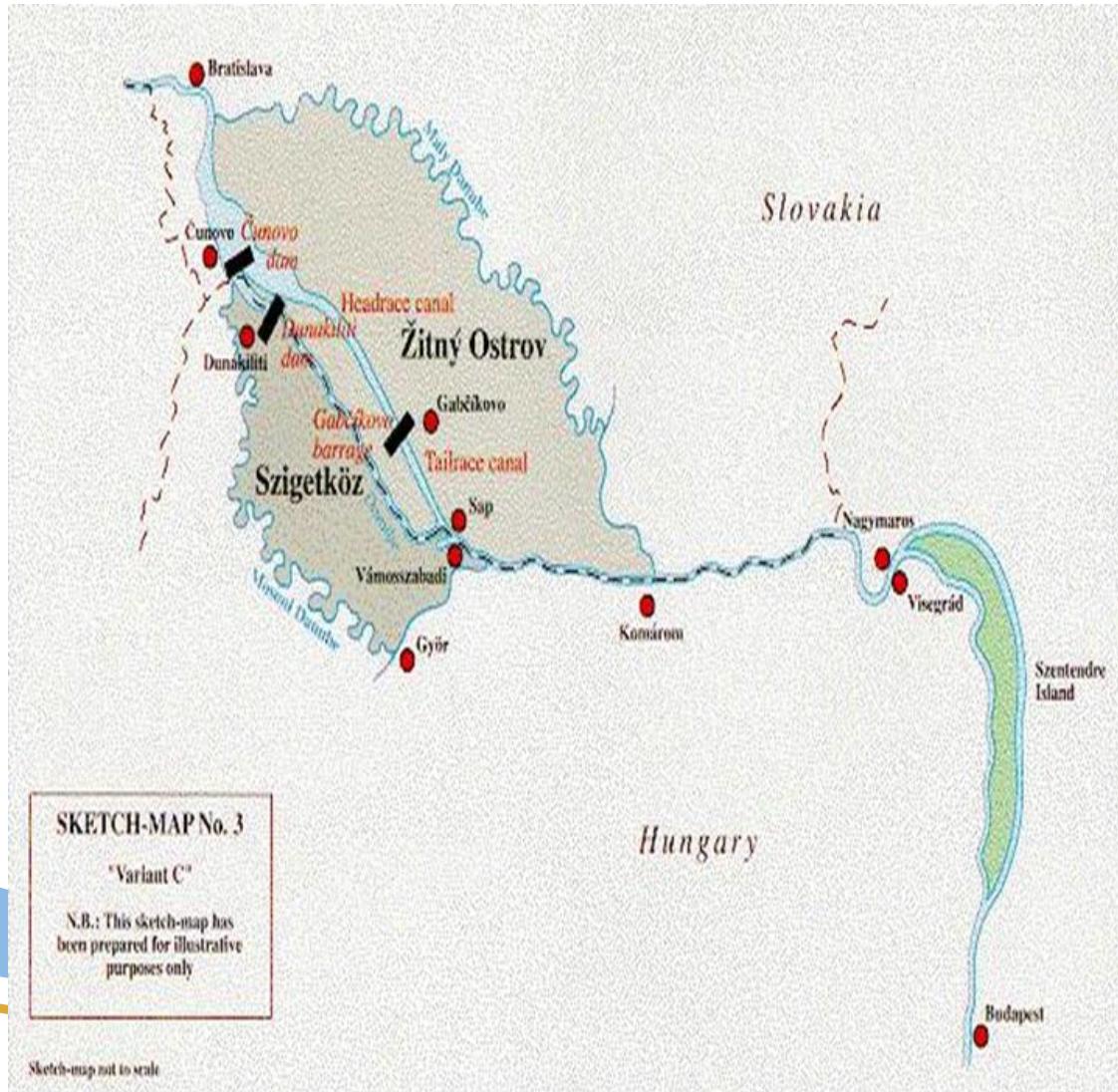


# Weighing of factors and circumstances

- Watercourses Convention - Art 6
  - All relevant factors considered together and conclusion reached on the basis of the whole
  - Weight to be given to each determined by its relation with that of other factors
- Watercourses Convention - Art 10
  - No use of an international watercourse enjoys inherent priority over other uses
  - 'Special regard' given to the requirements of vital human needs

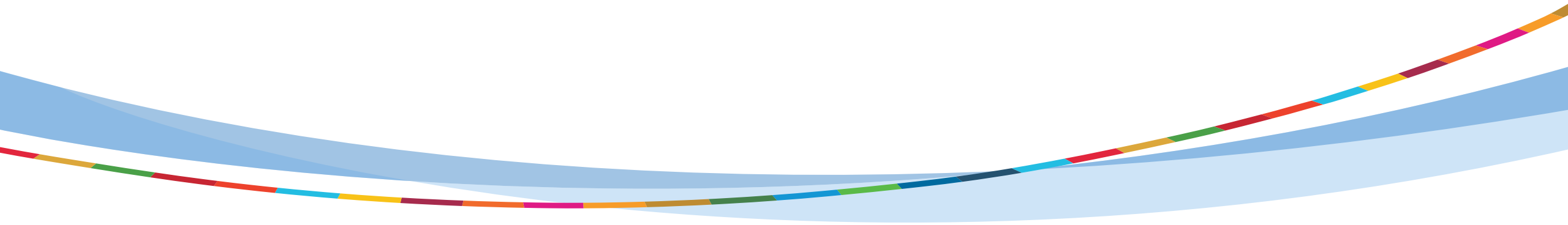


# Gabcikovo-Nagymaros Case (Hungary/Slovakia), ICJ, 1997



Slovakia's plan to utilise 80-90 percent of waters of the Danube for its exclusive benefit breached Hungary's 'basic right to an equitable and reasonable sharing of the resources of an international watercourse'


Substantive norms  
Duty to take all appropriate  
measures to prevent significant  
harm





# No significant harm

Watercourses Convention Art 7(1), Water Convention (Art 2 (1))

- Watercourse States prohibited from activities that cause significant harm to other watercourse States – activities with transboundary impact
  - What constitutes ‘harm’?
    - Detrimental impact of some consequence upon the environment or the socio-economic development of another State
    - Public health, industry, property or agriculture
  - What is ‘significant’
    - More than merely perceptible or trivial
    - Determined on a case-by-case basis
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# A due diligence standard, ie., depends on nature of harm and capacity of country

## Watercourses Convention - Art 7(1)

- “Watercourse States shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm”
- A diligence proportioned to
  - the magnitude of the subject
  - the capacity of State
  - Has a very strong procedural component

## Water Convention - Art 2(1), Art.1(2) Art.3 and Annexes I, II, III,

General Obligation - ...to take all appropriate measures to prevent, control and reduce any transboundary impact (Art 2 (1))

Defines broadly transboundary impact

Any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity,... 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...(Art 1 (2))

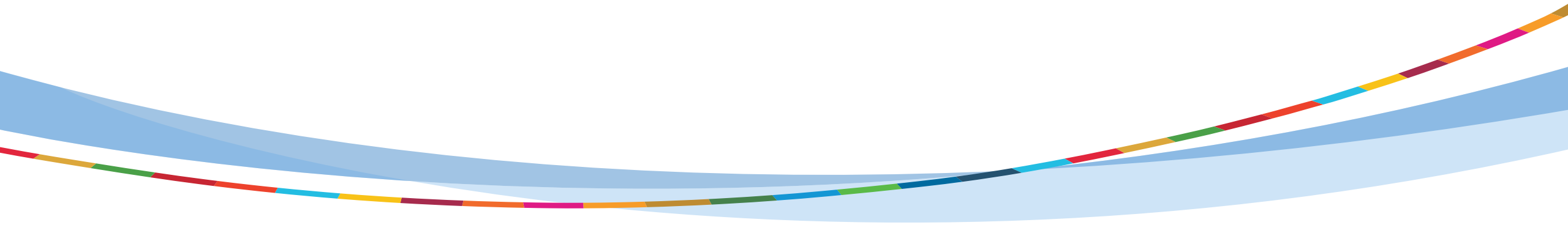
Annex I - Definition Of The Term "Best Available Technology"

Annex II - Guidelines For Developing Best Environmental Practices

Annex III - Guidelines For Developing Water-quality Objectives And Criteria

# Substantive norms

## Protection of ecosystems



# Protection of ecosystems

## Watercourses Convention - Art 20

- “Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of an international watercourse”

## 2008 Draft Articles on Transboundary Aquifers - Art 10,

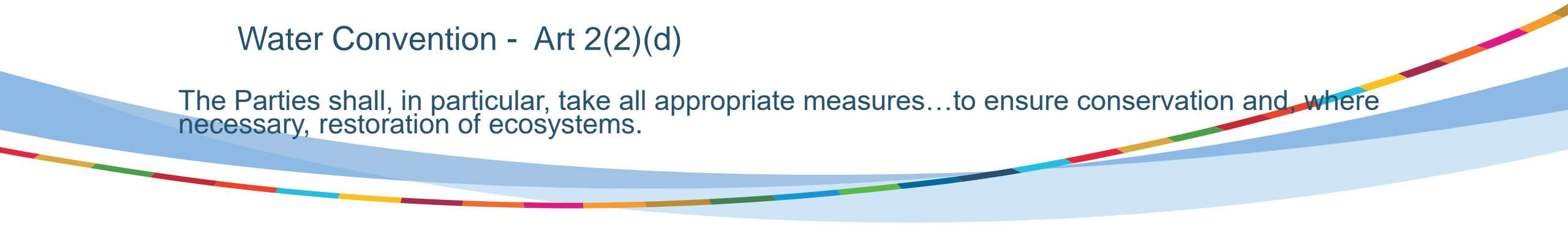
- “...ensure that the quantity and quality of water retained in an aquifer or aquifer system, as well as that discharged through its discharge zones, are sufficient to protect and preserve such ecosystems”

## • Inherent requirement of equitable and reasonable utilisation?

- Watercourses Convention - Art 5(1)
  - “Adequate protection of the watercourse”
- Watercourses Convention Art 5(2)
  - “Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation including both the right to utilise the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.

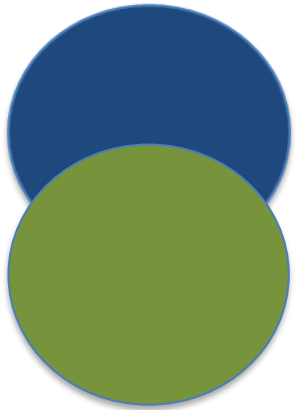
## Water Convention - Art 2(2)(d)

The Parties shall, in particular, take all appropriate measures...to ensure conservation and, where necessary, restoration of ecosystems.



# Protection of ecosystem and equitable and reasonable utilisation

Equitable and reasonable utilisation (incl nsh)

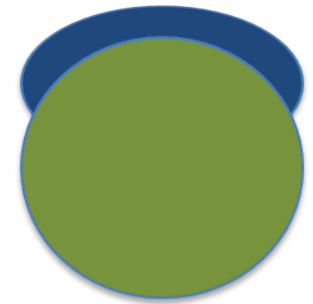


Protection of ecosystems  
(services)

Enhanced scientific understanding of  
the relationship between ecosystems  
and sustainable livelihoods



Equitable and reasonable  
utilisation (incl nsh)



Protection of ecosystems  
(services)

# Take away messages

- Procedural and institutional arrangements critical for implementing substantive principles
- Data and information exchange a basis for cooperation, especially in light of any significant planned activities
- Three key substantive principles in international water law based on the concept of limited territorial sovereignty, ie.,
  - Equitable and reasonable utilization
  - No significant harm
  - Protection of ecosystems
- These three principles must be interpreted and applied in a complementary manner
- Flexible principles the application of which will differ depending on facts and circumstances, ie., no two river basins are the same.
- Institutional structures critical for developing cooperation.



thank  
you