



# B1 - The Principle of Equitable and Reasonable Use

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**Scope:** This class seeks to outline the theoretical origins, normative nature and practical legal implications of the principle of equitable and reasonable utilisation. The class takes a particular focus on the environmental protection requirements which are increasingly understood to be inherent to the principle's meaningful implementation. It also seeks to illustrate the requirements of environmentally sound implementation of the principle at the national and basin levels.

**Purpose:** This class aims to provide an overview of the conceptual and normative origins and nature of the principle of equitable and reasonable utilisation. It includes an account of the central role of the principle in the overall framework of international water law, regardless of the form of its inclusion in global and regional framework conventions and myriad basin agreements. It also aims to explore the means by which considerations of environmental protection have come to be included, and to enjoy significant priority, among the factors to be considered as relevant in the determination of equitable and reasonable use of shared international water resources.

The target audience includes policymakers (and their staff) from transboundary basin organizations, regional and national legislatures and water authorities, technocrats and water managers, and graduate students in various disciplines. This class will therefore aim to be accessible to people from mixed backgrounds. It will, through practical examples and experiential learning exercises, strengthen participants' capacity to better engage in international transboundary waters governance.

**Methodology:** This class is structured to run for three hours. It begins with a 45-minute introductory presentation on the conceptual basis and normative character of the principle of equitable and reasonable use, and on its central role in the practice of international water law. The presentation will also highlight the environmental protection values which pervade the factors relevant to determination of equitable and reasonable use. It will cover the practical means by which such environmental requirements are made effective, including, among others, environmental impact assessment, the ecosystems approach and the related imperatives and methodologies for key multilateral environmental agreements (MEAs). The presentation will be followed by a 15-minute question and answer period.

Participants will then take part in a two-hour experiential learning exercise concerning the Brown River. Participants will be asked to work in three separate groups to provide legal advice and to develop a negotiating position for three riparian States.

Site: UNITED NATIONS INFORMATION PORTAL ON MULTILATERAL ENVIRONMENTAL AGREEMENTS

Course: The "Greening" of Water Law: Implementing Environment-Friendly Principles in Contemporary Water Law

Book: B1 - The Principle of Equitable and Reasonable Use

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# 1. Key points

## **Key points:**

- Conceptual origins of the principle of equitable and reasonable use;
- Normative character and legal implications of the principle of equitable and reasonable use;
- Requirements of environmental protection inherent within principle of equitable and reasonable use.

## 2. The new environmental crisis of the 21st century

The global freshwater crisis has come to be recognized as ‘the new environmental crisis of the 21<sup>st</sup> century’.[1] One might reasonably expect that competition between co-basin States for the right to use shared transboundary water resources will intensify significantly. Thus, the role of international water law in promoting effective hydro-diplomacy and equitable transboundary water resources management will become ever more critical.

Though international water law is a relative newcomer as a discrete body of rules and principles, States have long engaged in formal cooperative arrangements over the use of shared international rivers and lakes. An agreement on the apportionment of the waters of the Euphrates between the ancient Mesopotamian city-states of Umma and Lagash provides us with the oldest known example of an international treaty.[2] The Rhine Commission provides the first example of a permanently constituted international (inter-governmental) organization.[3] However, in the modern practice of international law relating to shared water resources, States had until relatively recently been principally concerned with rights of navigation upon international rivers and lakes.[4]

[1] Brown Weiss 2013, p. 1

[2] Teclaff 1967, p. 21-25

[3] Teclaff 1991, p. 48-51

[4] Rieu-Clarke 2007, p. 392; PCIJ 1929, p. 5-46

### 3. Helsinki Rules to the UNECE Water Convention

The seminal Helsinki Rules, the first codification of international rules applying to the use and protection of shared water resources, were only adopted by the International Law Association in 1966.[1] The first global conventional instrument on the use of shared international water resources, the UN Watercourses Convention (UNWC), was not adopted by the UN General Assembly until 1997. The Convention only obtained the 35 ratifications required to enter into force in August 2014 (UN 1997). Similarly, measures to amend the 1992 United Nations Economic Commission for Europe (UNECE) Water Convention (UNECE 1992), so as to open it up to all UN members, only entered into effect in 2013.[2]

Despite the immense importance of groundwater resources for meeting human needs around the world, international law relating to the use and protection of transboundary aquifers is an even more recent and less developed field. It was only in 2008 that the International Law Commission (ILC) adopted its non-binding Draft Articles on Transboundary Aquifers.[3] Only in 2014 did the parties to the 1992 UNECE Water Convention adopt their Model Provisions on Transboundary Groundwaters, which are intended to support improved cooperation over shared groundwater resources.

Though relatively recently elaborated, international water law is already quite well settled around three key rules:

1. the principle of equitable and reasonable use, as enshrined in Articles 5 and 6 of the UNWC and widely regarded as the cardinal rule in the field;[4]
2. the duty to prevent significant transboundary harm, as enshrined in Article 7 of the UNWC; and
3. the duty to cooperate in the management of shared waters, as enshrined in Article 8 of the UNWC.

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[1] ILA 1966, p. 484

[2] UNECE 2004; Fitzmaurice and Merkouris 2015, p. 101-115

[3] ILC 2008; Eckstein and Sindico 2014, p. 32-42; McIntyre 2011, p. 1-18

[4] ILC 1994, p. 222

## 4. Effective implementation

The effective implementation of these rules infers a range of related, ancillary normative requirements. Significantly for their effective implementation, these include quite highly developed procedural rules which facilitate inter-State communication. These procedural rules include the duty to notify co-riparian States of planned projects potentially impacting a shared watercourse and, where necessary, duties to consult and negotiate with such States in a good faith effort to address their concerns.[1] However, there are also related substantive rules, principles and standards which further inform the applicable due diligence standards inherent in the three core rules. These notably include duties relating to the prevention, reduction and control of pollution of transboundary waters and concerning the maintenance and conservation of riverine ecosystems, as set out in Articles 20 to 23 of the UNWC.

Since the initial identification and codification of prevailing State practice in the 1966 Helsinki Rules, almost all water resources agreements have established legal regimes based more or less on this model. These include global and regional framework conventions as well as river basin and boundary waters agreements. Most notably, the 1997 UNWC, the 1992 UNECE Water Convention and the ILC's 2008 Draft Articles on Transboundary Aquifers all adopt similar approaches based on these three basic rules along with a number of related, ancillary substantive and procedural requirements.

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[1] McIntyre 2010, p. 475-497; McIntyre 2013, p. 239-265

## 5. International environmental law and transboundary water management

The trend towards the convergence of international water law around three basic, yet broad and flexible principles, is evident. However, it is clear that this body of rules is continuously interacting with, and is increasingly being shaped by, other prolific, dynamic and highly pervasive fields of normativity, notably including international environmental law.[1] The central relevance of international environmental law to transboundary water management has long been self-evident.[2]

Still, tensions exist with the economic development and social protection values inherent to equitable and reasonable use. These tensions include the priority accorded under Article 10(2) of the UNWC to safeguarding “vital human needs” related to shared water resources. These have become very closely intertwined with the discourse on the human right to water on-going in international human rights law.[3]

Developments in international water law commonly arise in connection with major investment projects, often involving foreign private or public sector investors. The projects usually have the potential to impact the environment of an international watercourse, and influence another State’s right to use the shared waters in question, or encroach upon local people’s access to adequate water resources or services. Thus, tensions may arise with normative frameworks established in the field of international economic law concerning the legal protection of foreign investors[4] or compliance with the environmental and social safeguard policies of multilateral development banks (MDBs) or other international financial institutions (IFIs).[5]

The principle of equitable and reasonable use represents a compromise between two extreme and uncompromising positions regarding the right conferred upon States, by virtue of their territorial sovereignty, to use shared transboundary water resources found within or passing through their territory.

[1] Boisson de Chazournes 2011, p. 10 and 14; Maljean-Dubois 2011, p. 25-54

[2] McIntyre 2007; Brels, Coates and Loures 2008

[3] McCaffrey 2005, p. 100-101

[4] Rieu-Clarke 2015, p. 27-48

[5] Salman 2009)

## 6. Absolute territorial sovereignty

The first position was based on the theory of 'absolute territorial sovereignty' and was traditionally favoured by upstream States. It supports the argument that a co-basin State may freely use waters within its territory without having any regard to the rights of downstream or contiguous States. This position holds that a State has absolute sovereignty over water resources while they are within its territory. The State may use or alter the quality of these waters to an unlimited extent, but accordingly has no right to demand continued flow or quality from another co-basin State.

This approach is closely associated with the so-called 'Harmon Doctrine', named after the US Attorney-General who first elaborated the principle in the context of a dispute with Mexico over the waters of the Rio Grande.[1] Harmon did not recognize any general legal requirement for the US to safeguard the supply of water to Mexico. He stated that the question of whether the US should 'take any action from considerations of comity' was one which 'should be decided as one of policy only, because, in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States'.[2]

[1] Birnie and Boyle 1992, p. 218; Fitzmaurice and Elias 2004, p. 12

[2] Bruhacs 1993, p. 43

## 7. Absolute territorial integrity

The second position is based on the theory of 'absolute territorial integrity' and was traditionally invoked by downstream States. This position would confer a right on a co-basin State to demand the continuation of the full flow of waters of natural quality from another (upper) co-basin State. But, it confers no right to restrict or impair the natural flow of waters from its territory into that of any other (still lower) co-basin State. This approach is the antithesis of the Harmon Doctrine. This position would effectively grant a right of veto upon a downstream or contiguous State, as its prior consent would be required for any change in the regime of the international watercourse.[1]

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[1] McIntyre 2007, p. 17-18

## 8. Two extreme contrasting positions

On the basis of a detailed analysis of State practice regarding these two extreme contrasting positions, McCaffrey concludes that they were principally invoked as ‘tools of advocacy’ rather than as legal principles considered likely to assist in the resolution of concrete disputes.[1] For example, he notes that shortly after Attorney-General Harmon made his (in)famous statement of opinion in 1895, the US concluded bilateral treaties with Mexico (in 1906) and Canada (in 1909) which are somewhat consistent with the principle of equitable and reasonable use.[2]

Over time, practically all States sharing transboundary basins have come to adopt a third approach. This approach is based on the theory of ‘limited territorial sovereignty’ and represents a compromise between the absolute positions outlined above. It recognizes that both the sovereign use rights of one (upstream) basin State and the right to territorial integrity of another (downstream) basin State are each restricted by a recognition of the equal and correlative rights of the other State.[3] This approach is usually articulated in normative terms as the principle of ‘equitable and reasonable use’. It entitles each co-basin State to an equitable and reasonable use of transboundary waters flowing through its territory.

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[1] McCaffrey 2001, p. 130

[2] McCaffrey 2001, p. 93-94 and 111

[3] McIntyre 2007, p. 23

## 9. The pre-eminent substantive rule of international water law

The principle of 'equitable and reasonable use' is based on the notion that there exists a 'community of interest' among all co-basin States, requiring a fair balancing of State interests, which accommodates the needs and uses of each State. To permit flexibility, the concept of 'equitable and reasonable' use is consciously understood as normatively vague.[1] It is to be determined in each individual case in the light of all relevant factors[2] including, notably, the human, economic and social dependence of each State upon the water resources in question, as well as considerations of environmental protection. In essence, the principle of equitable and reasonable utilisation requires that, in using shared water resources, each co-basin State must have equitable and reasonable regard for the legitimate needs and interests of other co-basin States.

As noted by one early commentator, '[i]t is only by an objective appreciation of the facts that it will be possible to discover the fair extent to which the various riparian states must take their reciprocal interests into consideration'.[3] This principle unquestionably provides the prevailing normative framework for identifying international watercourse rights and obligations today.[4] It has its doctrinal origins in the sovereign equality of States, whereby all States sharing international watercourse have equivalent rights to the use of its waters.

Equitable and reasonable use is regarded as the pre-eminent substantive rule of international water law. However, a normative framework requiring the equitable balancing of the legitimate interests of basin States must inevitably involve intense procedural inter-State engagement.[5] This often can only be facilitated by the establishment of technically competent inter-State institutional machinery. Such institutions can ensure effective inter-State communication which might involve, among other issues, prior notification of planned projects potentially impacting upon the watercourse, routine exchange of information regarding the use or condition of the shared waters, or expression of concerns on the part of any basin State.

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[1] Barrett 2003, p. 126

[2] Lipper 1967, p. 41-42

[3] Sauser-Hall 1953, p. 557-558; McCaffrey 2001, p. 138

[4] McIntyre 2007, p. 24-28

[5] Bruhacs 1993, p. 159

## 10. Giving effect to the principle of equitable and reasonable use

The pivotal role of institutional mechanisms in giving effect to the principle of equitable use has long been recognized by the international community. Recommendation 51 of the *Action Plan for the Human Environment* adopted at the 1972 Stockholm Conference called for the ‘creation of river basin commissions or other appropriate machinery for cooperation between interested States for water resources common to more than one jurisdiction’, and set down a number of basic principles by which the establishment of such bodies should be guided.[1] Such institutional structures can take numerous different forms and have diverse remits. Yet, there are today at least 119 river basin organizations (RBOs) performing a very extensive range of coordination and joint management functions.[2] Reliance on such institutional mechanisms to facilitate the inter-State cooperation necessary to achieve equitable and reasonable use is often referred to as the ‘common management’ approach, which further underlines the existence of a community of interest among co-basin States.[3]

The principle of equitable and reasonable use enjoys considerable support in the judicial deliberations of international and federal courts and tribunals. It is present as well in analogous approaches to the allocation of shared water resources adopted by municipal courts.[4] For example, in the *Gabčíkovo-Nagymaros* case before the International Court of Justice, Judge *ad hoc* Skubiszewski, in his dissenting opinion referred to the ‘canon on an equitable and reasonable use’ as an expression of ‘general law’.[5] The principle receives almost universal support in treaty law, international codifications, declaratory soft law instruments and the general practice of States, as well as in the writings of leading publicists.[6] Indeed, on the basis of an extensive expert examination of the position having regard to all indicators of the existence of customary rules, the UN ILC concluded unequivocally ‘that there is overwhelming support for the doctrine of equitable use as a general rule of law for the determination of the rights and obligations of States in this field’.[7]

[1] UNCHE 1972

[2] Schmeier 2013, p. 65

[3] Birnie and Boyle 1992, p. 223-224; McIntyre 2007, p. 28-40

[4] McIntyre 2007, p. 54-62

[5] ICJ 1997, p. 235

[6] McIntyre 2007, p. 62-76

[7] ILC 1994, p. 222

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