



**Report on external conditions limiting the negotiation power of the parties in a future intergovernmental bilateral agreement on shared river basins to be negotiated between Portugal and Spain. The case of existing international and supranational environmental law and principles.**

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## Introduction

The Albufeira Agreement has two purposes (article 2. n.1)<sup>1</sup>:

1. “the protection surface and groundwater and ecosystems aquatic and terrestrial directly dependent on them”
2. “the sustainable use of water resources in the hydrographic basins”.

For the attainment of these purposes, the Albufeira Agreement defines the framework of cooperation between the Parties.

The revision or the replacement of a bilateral conventional legal instrument in force — such as the Albufeira Agreement — depends, first of all, on the converging political will of the States. This political will can correspond to a political programme or be the result of internal political pressure<sup>2</sup> or of international commitments<sup>3</sup>.

It is important to acknowledge that if and when two sovereign States decide to engage in negotiations for the revision or replacement of an international agreement regulating mutual relations, they are neither totally free to depart from previous agreements, nor to ignore existing supranational normative frameworks, nor even to disregard constitutional principles. When they engage in negotiations, they are not free to negotiate from scratch.

The negotiations will be developed in the context of broader normative *aquis*, which frame the negotiations and circumscribe the liberty of the parties in shaping the contents and drafting the mutual obligations that will be written down in any future international agreement.

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<sup>1</sup> [http://www.cadc-albufeira.eu/pt/convenios/PT1\\_14\\_tcm62-424782.pdf](http://www.cadc-albufeira.eu/pt/convenios/PT1_14_tcm62-424782.pdf) .

<sup>2</sup> The political parties represented in the Portuguese Parliament consider the revision of the Albufeira Agreement an urgent issue of national relevance.  
[http://app.parlamento.pt/WebUtils/docs/doc.pdf?Path=6148523063446f764c324679626d56304c334e706447567a4c31684a566b784652793944543030764d5446445155565056433942636e463161585a765132397461584e7a5957387654334a6b5a57357a4947526c4946527959574a68624768764c304e4252553955587a46664d5463756347526d&Fich=CAEOT\\_1\\_17.pdf&Inline=true](http://app.parlamento.pt/WebUtils/docs/doc.pdf?Path=6148523063446f764c324679626d56304c334e706447567a4c31684a566b784652793944543030764d5446445155565056433942636e463161585a765132397461584e7a5957387654334a6b5a57357a4947526c4946527959574a68624768764c304e4252553955587a46664d5463756347526d&Fich=CAEOT_1_17.pdf&Inline=true)

Also, from the Spanish side, a decision from 11 March 2019 of the Supreme Court, could be of relevance. It annulled partially the Spanish hydrologic plan for the Tagus river, one of the reasons being the inadequate treatment of ecological down streams (STS 856/2019,  
<http://www.poderjudicial.es/search/AN/openCDocument/47c54a4d73e1a196f05b951244f113f6d1057617ced3c47d>

<sup>3</sup> The Implementation Review Report presented by the European Commission underlines some cases of non-compliance by the Member States which could be addressed and tackled in a revision of the existing agreements [https://ec.europa.eu/environment/eir/pdf/eir\\_2019.pdf](https://ec.europa.eu/environment/eir/pdf/eir_2019.pdf).



This is in accordance with the present version of the Albufeira Convention which clearly recognizes that “in pursuing this cooperation, the Parties comply with the rules of this Convention and the principles and rules of international and Community law applicable” (article 2 n.2).

This limited freedom is particularly evident in the case of *environmental norms* and *sustainability norms* insofar as environmental protection and sustainability guarantee seem to be the ultimate goal of the Albufeira Agreement.

The following “technical sheets” will reveal eight of the most important environmental limits and constraints to the negotiation of an intergovernmental bilateral agreement on shared river basins between Portugal and Spain. These limits and constraints will be presented in the form of well-known legal principles<sup>4</sup>, all of them existing in international or internal normative instruments legally binding for Portugal and Spain.

Some of these principles establish mainly procedural conditions, while others shape substantial rights and obligations of the parties to safeguard the public interest of the ecological equilibrium of the river ecosystems and sustainable use of riverine resources.

Some of these principles apply both to the negotiation procedure and to the contents of the future Convention. As a consequence, some shape the mutual obligations of the parties during negotiation while others only condition them afterwards, in the daily management of shared river basins.

It is worth mentioning the fact that the inclusion of the tree principles of environmental democracy (public participation, transparency and pacific conflict resolution) in any future Agreement to be negotiated is mandatory according to the Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums<sup>5</sup>.

These principles are fundamental for the achievement of sustainable development goals 16 “Guarantee Peace, Justice, and Strong Institutions” and 17 “Build Partnerships for the Goals”.

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<sup>4</sup> This brief description of environmental principles will refer to the volume VI of The Elgar Encyclopaedia of Environmental Law (Edward Elgar, 2118), the most overarching and updated piece of legal literature on “Principles of Environmental Law”. One of the chapters particularly important for the subject: the chapter on “environmental principles in maritime and freshwater agreements”.

<sup>5</sup> Available at

<https://www.unece.org/fileadmin/DAM/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.5.e.pdf>.



## 1. Cooperative sovereignty, joint management and common but differentiated responsibility

### 1.1. Meaning

Considering that the object of the international agreement is an international river basin, the States must exercise their sovereignty over the resource in a cooperative way. Each State does not have an absolute sovereign right over its share of the resource. They must cooperate to achieve the desired ecological equilibrium.

Yet the States have different powers regarding the river as a whole. In the case of successive rivers, the upstream State has more practical power than the downstream State to condition the ecological status of the river, considering the direction of the river flow. In the proximity to the river mouth the river has more biodiversity and therefore the downstream State is more conditioned in the activities it authorises in his side of the river basin. In the case of contiguous rivers, the powers differ according to the % of the river basin area situated in the territory of each State.

Besides the geomorphologic differences there can be also demographic differences (population density) and socio-economic differences (more industrialised or more agricultural regions for instance) which must be taken into account in the definition of the concrete responsibilities and obligations of the States.

### 1.2. Plain language formulation

Both States must contribute to river protection and management in the proportion of their capacity

### 1.3. Legal grounds

1997 Convention on non-navigational uses of international watercourses (UN watercourses Convention), Article 8 – cooperation – prior information, prior consultation.

1992 UN Convention on the protection and use of transboundary watercourses and international lakes (water Convention). Article 9 – cooperation, joint bodies



#### 1.4. Practical implementation

When negotiating the obligations of the States with regard to the river, and the ecosystems along the river basin, the States must cooperate in good faith taking into account the fact that no decision shall be taken by none of the States (including the downstream State) without consulting the authorities and the public in the other State. Even environmental impacts that are felt exclusively on the territory of one States jeopardize the ecological equilibrium of the river ecosystems.



## 2. Sustainable development principle, equity, benefit sharing and integration



### 2.1. Meaning

Two dimensions of sustainable development must be present in the future agreements: the time dimension and the space dimension. The first translates into intergenerational equity and the second into regional or local equity.

Intergenerational equity: the States have sovereignty over their natural resources, but the governments must not forget that they are only temporary holders of natural resources and this natural heritage must be passed on to the future generations. Each generation must leave the territory that it inhabits in no worse condition than it received it. This means that each generation can use the natural resources provided that it leaves them to the succeeding generations in similar conditions, providing the future generations equitable access to benefits.

Intra generational equity: in the relations between the different generations coexisting in the same territory equity shall as well be respected, both in the relations between countries and in the relations between national governments and local communities.

In the case of relations between bordering States, equity is translated into benefit sharing. States are not allowed to use shared resources disproportionately, jeopardizing the rights of other States regions or communities to have proportional access to the resources. The fact that the water appears in the springs in the Spanish mountains does not mean that this State can freely collect water for their urban, tourism, agriculture, farming, energy or industrial uses without entering into a dialogue with Portugal. The fact that in Portugal the water flows directly to the ocean does not mean that Portuguese water authorities can freely authorize the abstraction of water for swimming pools, water parks, irrigation, or industrial cooling without taking into account the needs and the interests of local populations and of the environment.

In some cases, the lack of supervision of unauthorized or abusive abstraction of water uses can amount to a violation of human rights — the right to safe food, the right to health or to a healthy environment.



## 2.2. Plain language formulation

Fair treatment of downstream and riverine communities, frugal use of water for non-environmental uses, sharing benefits among all users.

## 2.3. Legal grounds

Intergenerational equity was mentioned for the first time in the Stockholm declaration on human development (1972) and from then on in each and every international treaty, including the 1997 UN watercourses Convention and the 1992 UN water Convention. Benefit sharing is mentioned mostly in international biodiversity conventions but also in the United Nations Convention on the law of the sea (1992).

Article 1 n.1 e), article 2 n.º1 and Part III of the Albufeira Agreement (art 13-16).

Article 66 2 b) d) and f) of the Portuguese Constitution

Article 45 1 and 2 of the Spanish Constitution

## 2.4. Practical implementation

When drafting the legal regime of water uses, the interests of future generations must be taken into account by considering the long-term effects of present decisions on activities that cause soil sealing (urban or road construction) or biodiversity loss (deforestation). Each of these activities means less water in the future. On the other hand, the interests of local communities must be taken into account as well by considering the telecoupling effects of decisions on activities likely to cause water contamination (intensive agriculture or livestock farming, pollutants can stay in the soil for centuries, damaging the water every time it rains) or excessive water abstraction.

Taking into account the interests both of future generations and of local communities can be done by carrying out thorough scientific studies and producing special reports on long term and long-range impacts. Ideally, it can be done by creating an institutional representation of the interests at stake, or at least ensuring effective and enlarged public participation (in the case of intra generational equity).



### 3. High level of protection, no regression and progression principle

#### 3.1. Meaning

The main purposes of the Albufeira agreement are environmental: “the protection surface and groundwater and ecosystems aquatic and terrestrial directly dependent on them” and “the sustainable use of water resources in the hydrographic basins” article 2 n.1.

Although not mentioned expressly but the objective of the agreement is to go beyond minimal environmental protection ensuring a high level of environmental protection.

As a consequence, any revision, update or amendment of the agreement shall not downgrade, reduce or abolish the level of environmental protection established. The purpose of the agreement is not to satisfy human needs. It is rather to protect the ecosystems and ecosystem services. Yet we know that the environmental conditions are changing. Less biodiversity and climate change are the visible manifestations of this change and have consequences on the water quantity and quality.

The most obvious case of no regression is the difficult maintenance of the ecological flows in view of the draught years to come. It is hard to defend that human activities that depend on water shall be stopped or suspended. Many of these activities are fundamental for the development of the country, for quality of life or to create jobs.

But the member States of the European Union are obliged to maintain “a high level of environmental protection and the improvement of the quality of the environment” (article 37 of the Charter of Fundamental Rights of the European Union). How can this be done? The non-regression principle requires that the States have to make an effort to make sure that the environmental conditions of the river are restored. Restoration of ecosystem services requires time, knowledge and investment but is the only solution when the minimal ecological conditions required by the River cannot be met maintaining the same level of human activities causing impacts in the River and in the River basin. Alternatively, in the meantime the states can consider other possibilities, such as changing the activities that generate negative impacts on the River and replacing them with lower impact activities. For instance, instead of intensive irrigation, change the agricultural practises and the agricultural products to less water demanding ones,



moving to more sustainable productions. Instead of filling the swimming pools with freshwater, use water from the sea whenever possible.

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### 3.2. Plain language formulation

Can't downgrade the level of environmental protection already reached.

### 3.3. Legal grounds

Article 3 c) of the 2018 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean

2015 Paris Agreement on Climate Change

Article 37 of the Charter of fundamental Rights of the European Union.

Article 11 of the Treaty on the Functioning of the European Union

Article 6 n.6 of the Albufeira agreement

Article 13 n.2 a) and b) of the Albufeira agreement.

Article 9 e) and 66 n.2 of the Portuguese constitution

### 3.4. Practical implementation

The States must map and assess every human water use that is causing too much impact in the ecological state of the rivers. Whenever possible they must suspend or replace these activities with others having less impact. They must also map and assess the ecosystem services that are being lost and which require ecological restoration. After assessing the restoration needs, the States will have to invest in reforestation, protecting riverbank vegetation, reintroducing lost species, replacing soil sealed areas with permeable soil, cleaning up contaminated sites, creating more efficient wastewater treatment facilities, sometimes dredging and cleaning the riverbeds. This is not an expenditure. It is an investment, as hopefully it will have a return in the medium or long term.



## 4. Prevention principle, correction at the source, informed consent

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### 4.1. Meaning

The states must proactively avoid every predictable environmental impacts of human activities.

This means that:

- activities carried out in the territory of a State shall not cause harm in the territory of another
- furthermore, pollution and environmental degradation must be corrected at the source
- institutionalised procedures (such as environmental impact assessment and strategic environmental assessment) shall be carried out in order to foresee beforehand possible transboundary environmental impact of human activities
- even when these institutionalised procedures don't apply, States and economic operators shall act with due diligence
- significant environmental damage shall be avoided and not compensated
- minimal environmental impacts can be tolerated provided that there are no cumulative impacts
- whenever environmental damage cannot be prevented, potential victims shall be informed and prior informed consent shall be required
- whenever human rights are at stake no consent can be given
- whenever the ecological equilibrium is at stake no transgression is tolerable

### 4.2. Plain language formulation

environmental harm - transboundary or in the national territory – shall be prevented

### 4.3. Legal grounds

Principle 21 of the 1972 Stockholm declaration on human environment.

Article 191 n°2 of the Treaty on the Functioning of the European Union

2014 Environmental impact assessments directive



2001 Strategic assessment directive

Article 8 and 10 of the Albufeira Agreement

Article 9 e) and 66 n.2 of the Portuguese constitution

#### 4.4. Practical implementation

Careful compliance with the EU Law on Impact assessment and allowing for the systematic participation of public authorities and the public in the licencing procedures activities not submitted to EIA or SEA but likely to have some impact in the River or in the River basin.

Careful monitoring of existing authorised activities attentive supervision of ongoing activities, smart detection of illegal activities (namely using spice and remote sensing data technologies)



## 5. Precautionary principle

### 5.1. Meaning

States shall not carry out hazardous activities which entail serious risk of severe damage. Provisional measures shall be adopted even without clear evidence of the probability or nature of the risk. The measure shall be proportionate to the magnitude and reversibility or irreversibility of the risk. Activities likely to cause catastrophic impacts shall be forbidden. Activities likely to cause serious impact must be carefully balanced and potentially affected populations must be informed and allowed to participate and their participation be taken into account.

States shall make sure that scientific knowledge on cumulative long term or long range effects is produced. Whenever there are doubts on the risks or effects associated with human activities (be them economic activities or environmental activities), precautionary measures shall be taken.

### 5.2. Plain language formulation

Effective risk management shall be applied even without full evidence.

### 5.3. Legal grounds

Article 15 of the 1992 Rio declaration on environment and development.

1992 UN Convention on Biodiversity

1992 UN Convention on Climate change

Article 191 n.2 of the Treaty on the Functioning of the European Union

Article 12 of the Albufeira Agreement

The 2015 Sendai framework for disaster risk reduction

### 5.4. Practical implementation

Scientific commissions or observatories can provide the necessary expertise to allow the States to take informed decisions and to support proportional precautionary measures.



Activities such as building and operating large dams, authorising and operating risky industrial activities involving hazardous substances or radiation, located in the riverbanks, introducing a new fish species, allowing mining activities that use dangerous chemical substances, are some examples of activities covered by the precautionary principle.

These activities require specific procedures for assessing and balancing the known and unknown risks and proposing the adequate measures to prevent disasters from occurring.



## 6. Public participation principle

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### 6.1. Meaning

Environmental issues are best handled with the participation of all concerned citizens and groups of citizens, at the relevant level.

At the national level, individuals shall have appropriate access to information concerning the environment that is held by public authorities and the opportunity to participate in decision-making processes.

Participation should be encouraged by measures of environmental education and by establishing procedures that ensure effective participation in environmental decisions. These participations should be analyzed and evaluated in the decision processes.

This principle also includes the effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

### 6.2. Plain language formulation

Citizens and communities must speak and be heard regarding decisions that have environmental impacts

### 6.3. Legal grounds

Article 10 of the 1992 Rio declaration on environment and development.

Article 6 of the 1992n UN Convention on Climate change

Article 15 of the Treaty on the Functioning of the European Union

Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Articles 48, 65 n.2, 66 n.2 of the Portuguese Constitution

Article 9 n.2 and 23 n.1 of the Spanish Constitution

Article 6 of the Albufeira Agreement



#### 6.4. Practical implementation

Article 6 of the Albufeira Agreement only ensures supply of information to all that present a reasonable request. This information can be withheld when it affects national security and the security of citizens, confidentiality issues, international relations between States and even the protection of environment in case of undue use of the information.

Public participation is absent from the agreement, although it might be ensured within trans boundary impact assessment evaluations.

Despite the fact that this is a bilateral agreement between States, compliance with the EU Law, international conventions and respective constitutional laws is necessary. Systematic participation of the public in licencing procedures activities, even the ones not submitted to EIA or SEA, but likely to have some impact in the River or in the River basin, should be ensured.

This is a form of ensuring a wider collection of relevant interests in what concerns environmental procedures, allowing for better and more sustainable decision making. It also improves the legitimacy of decisions, helps build stakeholder capacity and improves levels of implementation and execution of environmental policies



## 7. Transparency principle

### 7.1. Meaning

Transparency requires more than access to information or the open disclosure of information. Disclosure should be made in a clear, complete, understandable and accessible way to the public. This allows for better governance and accountability and also promotes informed environmental choices.

Environmental reporting, preferably available online, is essential and should include the most important categories of environmental information: EIA and SEA procedures; air and water quality data; permits and licenses for the development of projects with relevant environmental impacts; legislation, policies, plans and programmes on or relating to the environment; environmental agreements; state of the environment reports; threats to human health and the environment communications, etc.

Besides providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, these should also establish and maintain practical arrangements to make it effective (for instance by establishing publicly accessible lists, registers or files, by requiring officials to support the public in seeking access to information or identifying points of contact).

#### 7.1.1. Plain language formulation

Everyone has the right to have access to relevant environmental information. This information should be complete, timeless, readable and accessible to all.

### 7.2. Legal grounds

Articles 3 n. 1 and 5 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Article 15 of the Treaty on the Functioning of the European Union



### 7.3. Practical implementation

The principle of transparency involves the active provision of open data. The Albufeira Agreement only establishes a wide requirement of information exchange between both (state) parties (Article 5). This exchange includes regular and systematic information on water management and on activities that may produce trans border effects; and the information on legislation, institutional structures and administrative practices in order to promote the effectiveness of the agreement.

Regarding the public, article 11 imposes the institution of communication, alert and emergency systems to prevent and manage hazardous situations. Nothing else is added.

The transparency principle, however, goes further than a mere duty of communication in good-faith between public entities, it should actively involve the public and be directed to it in all relevant environmental situations, even of a clear technical nature.

Therefore, the public should be made aware of all projects and plans that entail environmental impacts, should be informed of the water status and also of the technical measures taken under the Albufeira Agreement to ensure its effectiveness.



## 8. Pacific conflict resolution principle

### 8.1. Meaning

Environmental disputes, either between public entities; public entities and private parties or private parties among themselves must be settled by pacific means, usually by impartial and independent entities such as courts of law. The specificities of these disputes and the public interests involved require that expeditious and free of charge or inexpensive procedures are set in place and that NGOs may enjoy *locus standi*.

However, the technical nature of environmental issues and concerns, the usual multiparty nature of the disputes (the involvement of many stakeholders) and the urgent or pressing nature of the matters, tend to turn environmental disputes into a fruitful realm for extrajudicial procedures of conflict resolution, such as negotiation, conciliation, mediation and arbitration.

Indeed, the economic and social costs of environmental disputes, dissatisfaction with traditional judicial and administrative procedures and the proven success, in some cases, of new methods of conflict, are some of the factors that explain the development and the potential of Environmental Mediation.

### 8.2. Plain language formulation

Different understanding of rights and duties between the parties shall be discussed until an agreement is reached or until a decision from an impartial and independent entity is issued.

### 8.3. Legal grounds

Article 26 of the 1992 Rio declaration on environment and development

Article 14 of the 1992n UN Convention on Climate change

Article 9 of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

Article 26 of the Albufeira Agreement



#### 8.4. Practical implementation

The Albufeira Agreement establishes a multitiered system of conflict resolution between the parties. At a first stance they should try to reach a negotiated solution to the dispute or, if the dispute is predominantly technical, appoint an enquiry commission. At a final level, an Arbitral Court should be formed. No participation of private entities, such as *amicus curiae*, is established.

Regarding disputes on the restriction or elimination of (public and private) rights by the implementation of the Albufeira Agreement, article 24 establishes that an adequate mechanism would be proposed by the Albufeira Commission. It is still lacking. This makes judicial redress hard in these trans border cases, since two judicial systems may be potentially involved.