# Theme 1 – Modern Day Dilemmas

## Presentation: International Rivers: Responsibility and Common Concern

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An international river is not an easy concept to define. Nowadays, its original interpretation is regarded as too narrow a concept for purposes of ensuring environmental protection. More recent treaties thus refer, not just to the flow of water between banks bordered by two or more states and crossing the boundaries between them, but to all or part of the watercourse system - its watershed, basin, associated lakes, tributaries, groundwater systems and inter-connecting waterways - whether local, distant, within the same territory or crossing international boundaries.

The earlier treaties focused on international rivers which divided or crossed territories and related to ensuring that such rivers were kept open for navigation, as evidenced by the Final Act of the Congress of Vienna, concluded following the defeat of Napoleon in 1815. The "Concert" of Europe was the forerunner of our contemporary approaches since it brought concerned states together regularly to consult on questions of common concern, and to concert their actions in dealing with relevant problems. The first Danube Convention arose from this concertation. Adopted at the 1856 Congress of Paris, it built upon the Rhine Convention, adopted in 1815 at the Vienna Congress. Together these introduced such ideas, advanced at the time, as regulatory commissions, river police, the flying of special commission flags, riverine courts for the settling of disputes, the levying of fines for breaches of regulations, which then provided a source of income. The objective of these early conventions, however, was solely to ensure freedom of navigation. Other early treaties followed this limited approach, which is ill-fitted to modern views of the needs and means of environmental protection.

**Environmental goals, concepts and principles**

Even in the 20th century, however, international rivers have never been regarded, unlike the high seas, as open to unlimited freedom of access and use by all states. Nor have recent treaties on rivers reflected the doctrines instituted by the advent of space exploration - namely that its use, along with the moon and other celestial bodies, must recognise the "common interest of mankind" who were entitled to free access for all for activities which benefit mankind as a whole - though such activities must be carried out in accordance with international law, "in the interests of promoting international co-operation and understanding". Nor have any international rivers been designated a "common heritage of mankind", as was the deep seabed and its resources in the United Nations 1982 Convention on the Law of the Sea (UNCLOS). International rivers have never been subjected to global administration, even when flowing, as does the Danube, through many countries into a shared sea, although the United Nations (UN) has recently adopted a relevant convention which is more adapted to new approaches and principles.

This is not to say, however, that international law has not begun to reflect growing international concern about the degradation of the water environment, whether riverine, marine or terrestrial, as demonstrated by the numerous new concepts and principles that are emerging from relevant international environmental agreements and conferences, declarations and other instruments. These include the United Nations Conference on the Human Environment (UNCHE), held in Stockholm in 1972, and its Declaration of Principles and Action Plan; the United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro in 1992, and its Declaration of Principles and programme Agenda 21; and the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

1. The UNCLOS 1982

This states categorically (Part XII, Article 192) that: "States have the obligation to protect and preserve the

marine environment"; that they cannot fulfil this requirement if rivers flowing through their territories discharge vast quantities of pollutants into the adjacent estuaries and seas. UNCLOS further specifically recognises this in requiring that states "shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources, including rivers, estuaries, pipelines and outfall structures, taking into account internationally agreed rules and standards and recommended practices and procedures" (Article 207).

2. The UNCHE 1972

The Stockholm Declaration includes principles that direct attention to certain rights and obligations of "man and state and the international community" in regard to interrelated environmental problems. The principles are not generally expressed in obligatory terms, however; rather they are aspirations, setting goals and providing guidelines, but nonetheless many have now been included in recent water law treaties. Perhaps the most significant principle for our purposes is Principle 21 which, whilst recognising states' rights to exploit their own resources pursuant to their own environmental policies, couples this with "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction".

3. The UNCED 1992

The Rio Declaration reaffirmed the UNCHE Declaration but set its principles within the concept of "sustainable development", which it did not define. It called on states and people "to co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development" (Principle 27). New principles required "the right to development to be fulfilled so as to equitably meet developmental and environmental needs of present and future generations" (Principle 8), but noted that to achieve sustainable development, environmental protection must constitute an integral part of the developmental process and cannot be considered in isolation from it (Principle 4).

Principle 7 is of particular interest in present circumstances; whilst requiring states to co-operate in a spirit of global partnership to conserve the health and integrity of the earth's ecosystem, it notes that: "in view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledged the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on global development and of the technological and financial resources they command". To date, this principle has been made specifically operational, subject to various qualifications, only in the UNCED Framework Convention on Climate Change and the related Convention on Biological Diversity, both of which, however, are highly relevant to Danube protection and conservation and recognise the special position of "economies in transition".

The objectives of UNCED's programmatic Agenda 21 are principally to satisfy the freshwater needs of all countries for their sustainable development. Complex actions are required to satisfy the requirement that "a dynamic, interactive multisectoral approach to water resources management" be pursued, "that integrates technological, socio-economic, environmental and human health considerations" (para. 18.9 (a)). These aims are highly challenging in normal circumstances; in those now prevailing in certain lower Danubian states they are acutely so. Special assistance will clearly be required in providing the scientific and other data that are indispensable for executing the required environmental impact assessment, identifying the range of biodiversity in the river and assessing the impact of climate change.

**Recent treaties relating to the Danube**

Nineteenth and 20th century conventions approached regulation of rivers from narrow sectoral and sovereignty based perceptions and perspectives; the only limitations required were that a state's actions must not cause significant environmental harm to other states and that the riparian states must equitably share the beneficial uses of shared freshwater resources. No definition of such "shared" resources has been

provided, even in the Principles issued by the UNEP in 1978 on Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilisation of Natural Resources Shared by Two or More States; these were expressed in very general terms.

Most river commissions have had a singularly narrow focus and lack the significant independent authority necessary for the effective management of shared water resources; rather they have provided a negotiating forum and administrative back-up, the narrow focus of which does not encourage co-operation across the wider field required by an ecosystem approach. Such treaties and commissions are ill-equipped to deal with new issues relating to environmental protection, especially complex ones, which then become subordinated to member states' national interests. The common interests of member states in environmental protection cannot be sufficiently emphasised, yet only in the Climate Change and Biological Diversity Conventions have these been recognised, and then not substantively. Older conventions were generally weak also in providing for alternative means of implementation and dispute resolution; more orthodox methods were relied upon, as appropriate, for regimes focused on navigational issues.

1. The UN Convention on the Law of Non-Navigational Uses of International Watercourses

This applies exclusively to uses other than navigation and covers measures of protection, preservation and management related to these other uses. The definition of "watercourse" that it provides is wider than in most earlier conventions, but it does not, to the disappointment of environmentalists, include the whole drainage basin as advocated in Agenda 21.

The regime established by the convention aims to establish a model on which new watercourse agreements can be based, or old ones adapted, to meet its generalised standards. However, as the International Law Commission had to find principles and procedures which would be acceptable to most states, in accordance with their existing legal systems and practices, the result is necessarily constrained. There is no reference to the existence of any "common concern" in watercourse agreements' protection of environments; no reference to observance of inter-generational equity or the polluter pays principle and the drainage basin approach is disregarded.

States working to establish effective freshwater protection agreements will need to look more closely at the UNCED/UNCLOS requirements and at the precedent provided by numerous regional conventions and measures concerning protection of the marine environment, fisheries and their habitat - such as the revised Paris Convention for Protection of the Marine Environment of the North Sea; the Helsinki Convention for the Baltic Sea; the Barcelona Convention for the Mediterranean (and its Protocols); the European Community's numerous measures on fisheries and habitat protection; and the 1992 Helsinki Convention and its 1999 Protocol.

2. The UNECE Convention on the Protection and Uses of Transboundary Watercourses and International Lakes (Helsinki Convention) 1992

Unlike the UN Convention and more akin to the approach of the UNCED Agenda 21, Ch. 18, this regional convention adopts a stronger approach to protection of waters and lakes found within the member states of the UN Economic Commission for Europe (ECE). It defines transboundary impacts (a central concern) broadly and recognises the interaction between water and other components of the ecosystem (Article 1 (2)). It reflects concern over both the existence and threats of adverse effects of changes in the condition of these waters on the environment, economics and well-being of ECE member countries and takes account of relevant provisions of the UNCHE Declaration, the conclusions of the Final Act of the Conference on Security and Co-operation in Europe (CSCE) and the ECE's Regional Strategy for Environmental Protection and Rational Use of Natural Resources in ECE Member Countries Covering the Period up to the Year 2000 and Beyond.

3. The Protocol on Water and Health in the 1992 ECE Helsinki Convention

At the Third WHO/ECE Ministerial Conference on Environmental Health, a Declaration was made and a Protocol, prepared by the UNECE and WHO/Euro, was signed which aims to reduce cross-border water

pollution and improve the quality of drinking water in Europe to diminish diseases. The Protocol emphasises that surface waters and groundwater are renewable resources with a limited capacity to recover from adverse impacts of human activity and that, therefore, sustainable management of the hydrological cycle is essential for both meeting human needs and protecting the environment. The Protocol marked a new commitment to acting in partnership for improving the environment and health in the 21st century.

4. The Sofia Convention on Co-operation for the Protection and Sustainable Use of the Danube 1994

This Convention entered into force on 22 October 1998. It recognises the measures already taken domestically by the Danubian countries, as well as the efforts undertaken within the CSCE process by the UNECE, and by the European Community (EC), to promote co-operation at these levels for the prevention and control of transboundary pollution, sustainable water management and rational use and conservation of water resources. It refers in particular to the Helsinki Convention and the 1992 Convention for Protection of the Black Sea against pollution. It also emphasises the need for sustainable water management. The Convention established an International Commission to implement its objectives and provisions (Part III, Articles 18 and 19).

**Governing principles and concepts**

It is clear that old approaches to regulation of international rivers have gradually changed in order to meet modern needs and perceptions. The concepts and principles that have emerged from and influenced this process of change are both old - equity, co-operation, regulation, good faith, good neighbourliness - and new - sustainable development, a precautionary approach, protection of the interests of present and future generations, sustainable development, environmental impact assessment, prior informed consent.

Such concepts have been increasingly referred to in both non-binding declarations, guidelines, recommendations and so on, popularly referred to as “soft” law, as well as in formal treaties. The question is often asked, therefore, whether they have become binding principles of customary international law. It can also be asked whether they are general principles of law common to all legal systems. However, these may well be questions that neither need to be asked nor answered. The reference to the concept of sustainable development in the recent judgement of the International Court of Justice in the case brought by Hungary and Slovakia, concerning the Gabcikovo-Nagymaros Dam Project, is enlightening. The Court, in its only collective reference to “sustainable development”, noted that: “though mankind had interfered with nature through the ages, growing awareness of the needs for mankind now provided by scientific insights has led to development of new norms and standards in many recent instruments. These have to be taken into consideration and given proper weight both when states contemplate new activities and continue past ones”. The Court concluded that: “this need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development”.

Judge Weeramantry, in a separate opinion, adopted a different approach. He considered “sustainable development to be more than a mere concept”; rather he regarded it as “a principle with normative value” since the right to development and the need to protect the environment may conflict. “The law necessarily contains within itself the principle of reconciliation... the principle of sustainable development” whose normative value derives from its wide and general acceptance by the global community, endorsed by its inclusion in international and regional treaties and declarations, the declarations of international bodies, the practice of international financial institutions, planning programmes and state practice. He concluded: “the principle of sustainable development is thus part of modern international law by reason, not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the international community”.

One commentator, Professor Vaughan Lowe, disputes this conclusion but finds that the concept exemplifies a species of normativity which is of great potential value in the handling of such concepts of international environmental law. “Sustainable development”, in his view, is an imprecise label for a general policy goal adopted by states but nevertheless does not lack all normative status; it can still be used by judges within the process of judicial reasoning, as well as by governments and other bodies in decision-making, and

affect the outcome. Sustainable development and related concepts thus retain within them a degree of flexibility and interpretation which will ensure their relevance and application in countering the environmental problems that will undoubtedly face the managers of the Danubian environment in the 21st century, and any judges called upon to pronounce on their success in restoring and maintaining its quality.

There is, however, as Lowe notes, "a pressing need to integrate legal, economic and technological considerations into the processes of international law-making", and, one could add, scientific considerations. The concept of sustainable development could be one of the means for doing this. Achieving the balance between the development of a water-course and conservation of the environment is no longer, in the light of all recent developments, solely a question of achieving an equitable balance of the interests of the parties to the relevant conventions but must also take account of the international community's interest in sustainable development. Riparian states must now fulfil that obligation in good faith on a co-operative basis.

**Conclusions**

Humankind's need to develop responsible means of preserving the environment and sustainably using rivers has now been recognised. The United Nations Convention on the Law of the Sea (UNCLOS 1982), the United Nations Conference on the Human Environment (UNCHE 1972) and on Environment and Development (UNCED 1992) have articulated a new balance of interests which takes into account the interests not only of riparian states but of states using or constituting the whole water catchment area. They include equitable and reasonable utilisation, co-operation, a precautionary and anticipatory approach to pollution prevention, environmental impact assessment, good faith, good neighbourliness, the duty to notify, consult and negotiate on risk creating activities, inter- and intra-generational equity and common concern. Moreover, the 1977 decision of the International Court of Justice in the Dam Case Concerning the Gabcikovo-Nagymaros Project evidences firm support for good faith, co-operation and negotiation, and strong concern for environmental protection.

The 1997 United Nations Convention on Non-Navigational Uses of International Watercourses provides, at the international level, new goals, definitions and standards and integrates many of the new principles - though, as it reflects compromises, it has disappointed environmentalists, who advocated new management systems, not just for whole rivers but for whole regions. The new Danube Commission, established by the Sofia Convention, and subsequent revising and supplementary agreements, provide examples of new approaches but are open to further development of new views of state responsibility and integration of new principles. Under general international law, states remain responsible for pollution that breaches the rights of other states, represents a non-equitable use of the river or causes significant harm to it. Moreover, they are not stopped from enacting and applying standards nationally that are higher than those set in the UN Watercourse Convention.

Responsibility of watercourse states for preserving their water quality does not end with the conclusion of the new instruments; they are no more than a beginning. In present circumstances, our common concern must be manifested in the provision of our own support for, and co-operation in the efforts of, Danubian states to work towards revitalising their lifeline and its supporting waters.