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Professor Slavko Bogdanovic, LL. D.  
EU-LINK, Novi Sad, Serbia

**THE LAW APPLIABLE ON HARNESSING OF THE HYDROPOWER  
OF WESTERN BALKANS TRANSBOUNDARY RIVERS**

An impetus for development or for the new quarrels

# CONTENST OF PRESENTATION

A BRIEF LOOK INTO HISTORY

LAYERS OF LAW

COMMENTS

CONCLUSIONS

# BRIEF LOOK INTO THE HYSTORY

## EUROPE after WWII

Large increase in electric energy consumption.

Necessity for harnessing of hydropower potential of international rivers.

Complexity of legal problems and legal difficulties treating to impact development policy.

International law applicable on the use of shared waters was underdeveloped.

There was no consensus among international lawyers concerning the theories and rules of customary int'l law applicable on the use such waters.

## UN Panel of Experts

The lack of accepted international law on the uses of these [shared; international] streams present a major obstacle in the settlement of differences, with the result that progress in development is often held for years to the detriment not only of the countries concerned but of the economy of the world in general.

*Integrated River Basin Development*, Reprt (1957).

## UNECE action

The study, *Sevette: Legal Aspects of Hydro-Electric Development of Rivers and Lakes of Common Interest* (1952).

## UN Secretary General

*Co-operation on Water Control and Utilization*, Report (1952). *Legal Problems Relating to the Utilization and Use of International Rivers*, Report (1963).

**ILA** started its work in 1954, that yealded as the set of the famous ***Helsinki Rules on the Uses of the Waters of International Rivers*** (1966) and subsequently adopted new, complementary and supplementary rules.

## UNGA

1970. work started on the ***Convention of the Law of the Non/Navigational Uses of International Watercourses***, (1997.).

# LAYERS OF LAW

## ESTABLISHED PRINCIPLES

**Reasonable and equitable share** of beneficial uses of international water resources (in a river basin) (primary rule).

Factors for determination: geography and hydrology; climate; past & existing utilization; economic and social needs & comparative costs of alternative means; availability of other resources; avoiding unnecessary waste in water utilization; practicability of compensation as a means of adjusting conflicts among uses; a degree to which the needs of the basin state must be satisfied without causing substantial injury; **other relevant factors (the list is open; could comprise e. g. the requirements resulted from an EIA study).**

**Duty of not causing significant harm.**

**Duty to notify, etc.**

# LAYERS OF THE LAW - WESTERN BALKANS<sub>1</sub>

## NATIONAL LEVELS

Rich hydropower potential of the transboundary rivers in WB region (Albania, BiH, Kosovo, Montenegro, North Macedonia, Serbia).

In the times of SFR Yugoslavia, all development project involving neighbouring states were subject to previous conclusion of binding bilateral treaties.

In the early 1990s, after the wars and dissolution of Yugoslavia, seven new states emerged, with new national legal systems, and need to establish new international relations between them.

Some 30 years later, their relations are still weak. Some of the largest transboundary rivers in the region are still not covered by binding treaties.

However, their necessity for energy from renewable sources is emerging and has been the main focus of their national energy strategies, alongside with the efforts of SEE Energy Community to create a stable regulatory and market network for energy investments, *inter alia* in harnessing the hydropower of SEE rivers.

# LAYERS OF THE LAW – WESTERN BALKANS<sub>2</sub>

## MULTILATERAL CONVENTIONS

### UNECE

**Espoo Convention, 1991**

**Water Convention, 1992**

**Aarhus Convention, 1998**

### UN

**Watercourses Convention, 1997**

Those conventions identified and set out:

Core principles of customary international water law.

Principles and concepts of international environmental law.

They are applicable on the use and protection of transboundary WB waters.

# LAYERS OF THE LAW - WESTERN BALKANS<sub>3</sub>

## EU ENLARGEMENT PROCESS

In 2000s process of EU enlargement spread to include all WB countries.

Stabilisation and association agreements (assume approximation of WB countries legal systems to that of EU).

EU *acquis* relate to national and transboundary waters in terms of achieving environmental quality objectives (for inland and coastal surface waters, groundwater and protected areas), flood risk assessment and management, and does not cover use of internationally shared waters and sharing benefits as a result of such use.

## RIVER BASIN AND OTHER REGIONAL TREATIES

Additionally to various bilateral arrangements and mentioned relevant international and EU legally binding instruments, the legal patchwork applicable to harnessing WB hydropotential is completed with:

Danube River Protection Convention, 1994.

Framework Agreement for the Sava River Basin, 2002.

Bucharest Agreement, 2008 (“Small Espoo”) concerning the concept of EIA implementation in SEE.



# LAYERS OF THE LAW - WESTERN BALKANS<sub>4</sub> - A TABLE REVIEW

No	STATUS REVIEW									
	International legal instruments applicable on the transboundary watercourses in the Western Balkans [31.12.2019]									
	INTERNATIONAL TREATY		PARTIES							
Water	Environment (horizontal)	Albania	Bosnia and Herzegovina	Croatia	Kosovo <sup>i</sup>	Montenegro	North Macedonia	Serbia	EU	
<b>I UNECE</b>										
1	Water Convention (1992)	05.01.1994	03.12.2009	08.07.1996		23.06.2014	28.07.2015	27.08.2010	14.09.1995	
2		Esposo Convention (1991)	04.10.1991	14.12.2009	08.07.1996	09.07.2009	31.08.1999	18.12.1997	24.06.1997	
3		Aarhus Convention (1998)	27.06.2001	01.10.2008	27.03.2007	02.11.2009	22.07.1999	31.07.1999	17.02.2005	
<b>II UN</b>						24.09.2012			n/a	
4	Watercourses Convention (1997)									
<b>III European Union<sup>ii</sup></b>										
5	Water Framework Directive (2000) & other water related directives <sup>iii</sup>	-	01.04.2009 [SAA][CC][nns][	01.06.2015 [SAA] [PCC]	01.07.2013 [TA]	01.04.2016 [SAA][PCC]	05.01.2010 [SAA] [CC][ns]	01.04.2004 [SAA][CC][nns][	[SAA][CC][ns]	n/a
6		EIA Directive (2011)								n/a
<b>IV River Basin</b>										
7	DRPC (1994) <sup>iv</sup>		n/a	11.07.2005	22.10.1998		28.10.2008	n/a	19.08.2003	22.10.1998
8	FASRB (2002) <sup>v</sup>		n/a	04.08.2004	04.08.2004			n/a	04.08.2004	n/a
<b>V Regional</b>										
9		Bucharest Agreement <sup>vi</sup>	26.03.2015				29.12.2009	26.01.2011	02.11.2018	n/a

**SAA** = Stabilization and Association Agreement [date of entering into force]; **TA** = Treaty of Accession [date of entering into force]; **CC** = Candidate Country; **PCC** = Potential Candidate Country; **ns** = negotiation started; **nns** = negotiation not started; **n/a** = not applicable.

**REFERENCES**

i This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo Declaration of Independence.

ii Legal obligation for transposition, implementation and enforcement of EU water and horizontal *acquis* legal instruments stems from signed Stabilisation and association agreements (SAA) and Accession Agreement concluded between WB countries and EU. For more details see, (EC, 2019).

iii Those are: Directive 2006/118/EC of the European Parliament and of the Council of 12 December 2006 on the protection of groundwater against pollution and deterioration; several directives on emissions of polluting substances into inland and coastal waters; several directives concerning quality of water for certain uses; Directive 2007/60/EC on the assessment and management of flood risks, etc. Aarhus Convention requirements regarding access to information and public participation are incorporated into these legal instruments.

iv Parties to the Danube River Protection Convention are Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Czech Republic, Germany, Hungary, Moldova, Montenegro, Romania, Slovakia, Slovenia, Serbia, Ukraine and European Union.

v According to: Bogdanovic, S (2005, p. 93).

xi The Agreement is aimed at implementation of the Espoo Convention provisions in detail. Signatories are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Montenegro, Romania, Serbia and FRY of Macedonia. As of 12.12.2018, Bosnia and Herzegovina, Croatia, Greece and Serbia have not ratified the Agreement. For more details see, (UNECE, 2018)-

# COMMENTS<sub>1</sub>

Reasons for actual search for harnessing hydropower:

International commitments in terms of complying with the EU energy and environmental *acquis*.

Support to sustainable development of water and energy resources.

Rapid transformation of the energy system to enable response to global climate emergency.

**Importance of bilateral agreements** – the lack of binding treaties (clearly regulating all connected issues) can lead to prolonged differences, disagreements, quarrels and even disputes if an unilateral action in terms of hydropower development is taken.

**Importance of environmental treaties** - specifically in terms of environmental impact assessment in a transboundary context.

**Joint consideration of international water law principles and concepts of international environmental law.**

Omitting, e.g. Aarhus Convention requirements can lead to infringing human rights to environment.

# COMMENTS<sub>2</sub>

## Cases of public concern – harnessing hydropower

HP “**Buk Bijela**”, Tara River (Montenegro, BiH). On-going.

HP “**Ashta**” (Albania, Montenegro). Updated information shows that a mutual understanding among countries has been found.

**Plan to develop 2.700 small hydropower plants** in the region - strong opposition of public due to destruction of environment. In the case of the Cijevna River Albania and Montenegro agreed to accept **the advisory procedure before the Espoo Convention Implementation Committee**, and thereafter established a joint technical working group on “Monitoring and Assessment” of possible transboundary impact in Montenegro of planned small hydroelectric power plants in Albania.

### **Case of potential suspension of existing legal regimes - Multilateral agreement among the countries of SEE for implementation of Espoo Convention (Bucharest, 2008; “Small Espoo”)**

Lays down provisions that could be the legal basis for suspension of all established legal regimes requesting adoption of an EIA study in case of development of projects with transboundary effects. Suspended could be (now binding): duty of notification; EIA scoping; response to notification; duty to establish arrangements for distribution of documentation to the authorities and public.

Reasons: to provide right of all interested parties to “skip relevant procedures and practical arrangements for disclosure of information, public consultation and communication... and conduct EIA public consultation according to the special arrangements”.

These arrangements would be designed by working groups, and consultations would be provided on a case-by-case basis in a legal environment shielding reduced standards for public participation, making it more difficult, inaccessible and nontransparent in the cases of e.g. construction of new nuclear power plants, hydropower plants, cross border pipelines, etc.

The SEE Energy Community recognises this potential for suspension of existing legal regimes on EIA (Espoo Convention, transposed EU *acquis*) but concluded that “Small Espoo” is a treaty independent from Espoo.

# CONCLUSIONS

On-going efforts on programming harnessing the hydropower potential of WB (SEE) transboundary watercourses should take into account:

All requirements set out by current multilayered legal frameworks and apply established principles of international water law and established and still evolving principles and commitments of international environmental law.

Combination of international water law principles in terms of reasonable and equitable utilization and duty not to cause significant harm, and environmental law principles, particularly in terms of duty to assess environmental impacts in case of the projects involving transboundary water resources is necessary while respect for human rights, embedded in Aarhus Convention, is a must.

Such approach would ensure resolving differences and prevent disputes over harnessing hydropower of shared watercourses, and would make a significant contribution to the sustainable development of WB region.

Entering into power and implementation of the “Small Espoo” would substantially lower standards established (in the UN ECE region and in EU) for environmental impact assessments in cases of transboundary projects.