

## **Legal Implications of the “Bystroe” Danube-Black Sea Canal Project**

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On May 11<sup>th</sup>, 2004 (after several hesitations and based on a Governmental Decision issued in 2000), the Ukrainian authorities initiated construction work on the deep Danube-Black Sea Canal by developing the Bystroe arm (estuary) of the Danube<sup>1</sup>. For the implementation of this investment, the titleholder of which is the Ukrainian Ministry of Transport, the selected contractor was selected as the German “Josef Mobius” Company in Hamburg, specialising in this type of works. The Ukrainian project, officially justified on economic grounds, has been contested, ever since its proposal, by national and international environmental organisations, by the two Danube (Delta) Biosphere Reserves in the Ukraine and Romania, respectively, by various international environmental institutions (notably the International Commission for the Protection of the Danube River – ICPDR), the Secretariats of the Espoo (1991), Ramsar (1971), UNESCO (1972) and other Conventions, and by the Romanian authorities<sup>2</sup>.

The behaviour of the Ukrainian Government, the response of international structures, as well as Romanian ones (as a directly affected and interested party from a geographical-environmental perspective) to the

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<sup>1</sup> The Danube Delta covers an area of 550,000 hectares (out of which more than 400,000 hectares are located in Romania and the rest in the Ukraine), representing an important biodiversity zone. Its waters are host to 75 species of fish (including sturgeon). It also displays unique oak stands, growing on ancient beaches, which, together with the surrounding steppes, are shelters for numerous rare species of plants and animals. Some endangered bird species are still found in the Delta, including: the pigmy cormorant, the red-breasted goose, Dalmatian pelicans, etc. The Danube Delta is the largest and least affected wetland in Europe, representing a region of international significance.

The “Danube” Biosphere Reserve – Ukraine shelters 257 bird species, 9 of which included on the European Red List, and 42 on the Ukrainian Red List; it is nesting ground for 1000 pairs of pigmy cormorants (*Phalacrocorax pygmaeus*) and 3 pairs of white-tail eagles (*Haliaeetus albicilla*). Construction and navigation works along the canal will affect the habitat and food source of fish species, including 7 species included on the European Red List and 16 on the Ukrainian Red List.

<sup>2</sup> The area has been in litigation since 1997, when the basic bilateral treaty was signed by Romania and the Ukraine, the debate including elements of a political-strategic, economic, technical and ecological order. Along with the settlement of the Snake Island territorial dispute, the building of this canal complicates the negotiations regarding the definition of the maritime limit between the two states. Thus, this being an evolving land mass area, any change of water flow will generate changes of the shoreline and therefore of the basic lines, as a technical landmark in the frontier definition operations. In the case that negotiations of the maritime space definition agreement has already settled a number of elements, the building of the canal would determine reconsideration of certain mechanisms and even reopening of some closed issues, which would result in procrastination and persistent ambiguity in this area.

Bystroe Project are still significant for the understanding, acceptance and compliance with (international and national) legal regulations in this matter, and at this time<sup>3</sup>.

The experience of the Bystroe case is also a measure of how the applicable international environmental law can be effective and, moreover, how it may concretely display weaknesses and strengths, including from the point of view of stakeholder behaviour and their ability to influence compliance with universally agreed rules<sup>4</sup>. From this point of view, this case analysis aims to identify and highlight the way in which legal regulations in the field are perceived, complied with and implemented in order to derive the relevant conclusions, including from the point of view of lessons learned and required developments.

## **I. Background. Environmental Implications of Project Implementation**

The development of the Bystroe branch of the Danube as a deep canal, in order to remove the “Romanian monopoly” over the Black Sea access of Danube river craft, is an older concern of the Ukraine and is based on multiple reasons: economic, geo-strategic and military, etc. The Danube Mouths have always held international strategic significance, and the surrounding delta has acquired an important Continental and global environmental significance in recent decades, in the context of nature conservation and environmental protection gaining major international concern status.

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<sup>3</sup> The Ministry of Foreign Affairs in Bucharest sent to the Ukrainian party more than ten verbal notifications requesting information on the project and its potential impact on the Danube Delta ecosystem, as well as the organisation of bilateral consultation under the Agreement of the two Governments regarding cooperation in the field of frontier waters (Galați, 30 September 1997), but has received no answer until late June 2004. Also, on May 14<sup>th</sup>, 2004 representatives of public opinion (men of culture, ecologists, journalists, etc.) demonstrated in front of the Ukrainian Embassy in Bucharest against the initiation of canal development works and their ecological consequences.

<sup>4</sup> The important role of international response in regard to compliance with the legal regulations in the field is again reflected here. Thus, after the Belgrade reunion held in early June 2004, at the MAB-UNESCO Committee regarding collaboration of the biosphere network in South-eastern Europe and following the action of the representative of the German Government, the developer for the Bystroe project, the “Josef Mobius” Company in Hamburg, was warned about its contract with the Ukrainian Transport Ministry. In this respect, the response of the secretariats of pertinent international conventions, demanding strict compliance with the procedure of preliminary environmental impact assessment of the project for establishing conditions for its approval or rejection was also significant. Ukrainian environmental organisations also sued in national courts in order to stop works until the relevant legal provision are complied with.

In this general context, Kiev's attitude regarding the project has vacillated depending on various conjectural and long-term elements and interests. Thus, the canal was abandoned in 1997 as an impracticable option, and the project was reactivated in 2000, when the Ukrainian Government approved the development for navigation of the Bystroe arm of the Danube as a canal, branching off the Chilia arm, and flowing only on Ukrainian territory. Although the officials in Kiev justify it based on economic need and benefits, these are disproportionate in relation to its effective benefits and especially to its negative environmental impact.<sup>5</sup>

The development of the deep Bystroe canal will mainly affect, from an ecological point of view, the integrity and quality of the ecosystem in the Danube Delta biosphere reserve, a protected natural resource shared by Romania and the Ukraine, but subject to a relatively common protection and conservation regime.

Thus, its development, involving widening from 2.5 m to 5.85 m, dredging of the river bed and deepening works will lead to the dislocation and removal of huge quantities of sand and mud conduce, and the entire construction will cause a reduction of the Ukrainian area of the Delta by at least 5600 ha. Moreover, the canal crossing of an area of integral protection of the "Danube"-Ukraine biosphere reserve, with a ban on any economic activity and even on public access, will generate incommensurate and irreparable ecological damage.

The main negative environmental impacts caused by the project, that have been identified by the specialists and claimed by the national and international environmental groups, include<sup>6</sup>:

- triggering a more active river flow process, with consequences for the secondary Delta – Chilia;
- affecting the ecological balance of the area, including of the biosphere reserve as a whole; the project involves damaging the

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<sup>5</sup> The cost of developing the canal, with a total length of 160 km and crossing the biosphere reserve on a distance of 10 km, is of about US\$ 30M, and the annual revenue from avoiding relevant fees on crossing Romanian territorial waters are about US\$ 1M a year. At the same time, ecological damage is actually inestimable. Moreover, note that there is already another canal – the Ust-Dunajsk – in the area open for navigation on the northern side of the Ukrainian Delta and connected to the town of Vylkovo. As regards the duration of the works, the first stage was estimated to be finalised in August 2004, while the next will last at least one year.

<sup>6</sup> Analyses of the negative environmental impact of the project were also undertaken and published by, for example, the specialists of the Kiev National University or of the World Wild Fund (WWF) in the report "Water transport on Europe's life line – the Danube. Impact. Threats and Opportunities". The Romanian point of view is expressed in the **Notă privind impactul asupra mediului produs de construcția canalului Bâstroe în Rezervația Biosferei Dunărea din Ucraina [Note concerning the environmental impact caused by the Bystroe Canal on the Danube Biosphere Reserve in Ukraine]**, developed by the National Research and Development Institute–Delta Dunării in Tulcea (June 2004).

habitat of 4000 species of plants and animals and also endangering the fish population, given that Bystroe is a migration site for 95% of the Danube sardine population;

- triggering a process of pollution with petrol and other toxic substances of the canal waters and banks (including a speedy degradation process thereof).
- important trans-boundary effects on the Romanian side of the Danube Delta Reserve (much more extensive than the Ukrainian side, i.e. of 450.000 ha).
- serious impact on the economic-social condition of the local population, whose main subsistence is from traditional fishing.

Therefore, this involves a major change of the water flow regime along the Bystroe arm, with associated consequences and impacts on the quality conditions of a natural area of bilateral (as a shared border natural resource) and global environmental significance (as a biosphere reserve, an asset of the world natural heritage and a wetland of international importance).

From a legal point of view, this situation assumes observance of some universally accepted principles, of general rules and specific regulations aiming to prevent and reduce, and, if possible, completely eliminate environmental damage, as well as the use of procedural instruments that should ensure adequate cooperation in assessing and limiting the trans-boundary effects of such a project.

## **1. Response of the Ukrainian Party**

The authorities in Kiev steadfastly embraced and supported the thesis of absolute territorial sovereignty, stating that “in relating to Romania and with other states, the Ukraine shall rely on its own legislation, national interests and international obligations”<sup>7</sup>, refusing an international dialogue as requested by Romania and the environmental bodies on the topic of the transboundary environmental impact of the project.

It was at best accepted that the respective works might be of interest to the bilateral framework, in the light of the requirements of operations undertaken on a border watercourse and, with total disregard to the environmental implications, information and request for the agreement of international environmental organisations was denied.

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<sup>7</sup> Answer offered by the Ukrainian Embassy in Bucharest to the questions of *România liberă* [Free Romania, a leading newspaper] **The Ukrainians want to “cut” the Delta in two**, *România liberă*, 1 October 2003.

Over-stressing the economic interest for the canal development, the Ukraine only stated that they are in compliance with the environmental protection norms, but did not agree to start the procedures triggered by a significant transboundary environmental impact. In this regard, an internal impact study was conducted in 2003, but this was challenged by both the Administration of the “Danube” Biosphere Reserve in Ukraine, and by the Science Academy in Kiev.

The Ukrainian Ambassador in Bucharest claims that he notified the Romanian authorities on the canal development in October 2003<sup>8</sup>, and on March 4<sup>th</sup>, 2004, at the request of the Romanian Minister of Foreign Affairs, the Ukrainian Ministry of Foreign Affairs communicated to the Romanian Party that the Ukraine “timely informs the national and international organisations” on the Deep Danube-Black Sea Canal Project on the Ukrainian part of the Danube Delta, as prepared by the Ministry of Transport in Kiev.

On June 28<sup>th</sup>, 2004 the Ukrainian President, Mr. Leonid Kutchma, was stating in Mamaia (Romania) that he had accepted the proposal of the Romanian President, Mr. Ion Iliescu, regarding information of the Romanian Party on the works conducted on the Bystroe canal, but that the Ukraine does not need the agreement of international environmental organisations as well<sup>9</sup>.

## **2. Response of the Romanian Party**

Information provided by the Romanian Ministry of Foreign Affairs shows that the Ukrainian party was sent more than ten verbal notifications, requesting information on the project and its potential consequences for the Danube Delta ecosystem, as well as the organisation of bilateral consultation under the Agreement of the Romanian and Ukrainian Governments regarding cooperation in management of frontier waters, signed at Galați on September 30<sup>th</sup>, 1997, but that the Ukrainian party had not sent any answer by May 11<sup>th</sup>, 2004.<sup>10</sup> Also on May 14<sup>th</sup>, a notification was sent to the Secretariat of the Convention on the conservation of European wildlife and natural habitats (Bern, September 19<sup>th</sup>, 1979).

On May 12<sup>th</sup>, 2004, the Ministry of the Environment and Water Management addressed the Secretariat of the Espoo Convention, informing

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<sup>8</sup> **The Ukraine takes a step backwards in the matter of the Bystroe Canal**, *România liberă*, June 19<sup>th</sup>, 2004.

<sup>9</sup> *Adevărul*, [leading newspaper] May 29<sup>th</sup>, 2004.

<sup>10</sup> MFA. – Spokesperson Office, **Clarification regarding information on the Ukrainian authorities starting construction work on the Danube-Black Sea canal on the Bystroe arm of the Danube**, May 11<sup>th</sup>, 2004.

on the request sent to the Ukrainian Ministry of the Environment and Natural Resources to forward the notification and documentation related to the environmental impact of the implementation of the Bystroe Canal. Also, after the start up of the development work on the canal, the Governor of the Romanian Administration of the “Danube Delta” Biosphere Reserve asked the Secretariat of the Ramsar Convention, the Secretariat of the “Man and the Biosphere” Programme – MAB UNESCO and the UNESCO Centre for the World Heritage to lobby the Ukrainian authorities for the undertaking of an impact study and compliance with the three applicable international conventions above.

In a meeting of May 28<sup>th</sup>, 2004, at Mamaia (Romania) between the Romanian president, Ion Iliescu and the Ukrainian President Leonid Kutchma, the head of the Romanian state requested the necessary information from his Ukrainian counterpart, stating that any changes or works undertaken on a frontier waters should be agreed by the neighbouring countries, a condition the Ukraine had not observed in starting work on the Bystroe Canal.<sup>11</sup>

In late May, 2004, the Romanian Premier, Adrian Năstase, sent a letter to his counterpart, Viktor Yanukovich, criticising the building of this canal in the shared resource biosphere reserve, “in the absence of bilateral consultations”.

On the 15<sup>th</sup> of June, 2004, the Romanian Ministry of Foreign Affairs sent a letter to the Secretariat of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus, 1998), providing information on the negative environmental consequences of the project and notifying the fact that the Ukrainian actions ignore the provisions of the bilateral agreements on the regime of frontier waters and of some important multilateral conventions protecting the quality of waters and of the environment in the Danube Delta.<sup>12</sup>

On June 22<sup>nd</sup>, 2004 in a meeting of State Secretary Bogdan Aurescu of the MFA and the Ukrainian Ambassador in Bucharest, Teophyl Bauer, the Romanian diplomatic representative reiterated the request to the Ukrainian party to forward detailed technical information on the Bystroe project, according to the provisions of international conventions on environmental protection to which the Ukraine is a Party. It was again requested that the work should be stalled until the impact study provided by the international

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<sup>11</sup> *Adevărul*, of 29 May 2004.

<sup>12</sup> Ministry of Foreign Affairs, Spokesperson office, **Press Release**, 16 June 2004.

conventions should be finalised and its conclusions should be reviewed, and that bilateral consultations should be held to review the issues deriving from the Ukrainian project<sup>13</sup>.

Finally, the Ukraine makes the proposal, in a verbal notification received by the Romanian Ministry of Foreign Affairs on 28 June 2004, „to organize consultations during which the environmental issues and the use of danube eco-systems should be approached, in a general manner, including the situation raised by the construction activities on the Bystroe branch”<sup>14</sup>.

The Romanian Ministry of Foreign Affairs pointed out that the proposal has been transmitted in the context that the Ukraine „has failed to communicate yet any of the information required by Romanian party concerning the Bystroe project, especially a complete study on the impact of the project on the environment” and states that „including the Bystroe issue in a more general framework could lead to dilution of discussions and impossibility to attain the objective for which the consultations are organised”.

On 29 June 2004, the Romanian Ministry of Foreign Affairs communicated to Ukrainian authorities the acceptance for the organization of the consultations on 6 July 2004 in Bucharest, (Ukraine has originally proposed Kiev), reiterating the request that all relevant technical documentation is made available in advance, the agenda of the meeting having to be entirely dedicated to the Bystroe situation.

### **3. The attitude of the International Environmental Bodies**

By virtue of their specific functions and prerogatives conferred by the constitutive international treaties, the international environmental bodies normally play a subsidiary role in the sense that they may only act at the request and under the conditions set by the Parties.

The need to develop an impact study in a transboundary context was revealed and its development requested at the international level: during the European Conference of the environmental ministers in Kiev of May-June 2003 (by the General Director of the WWF and the Governor of the “Danube Delta” Biosphere Reserve - Romania); by the Report of the joint mission of the Secretariats of the Ramsar Convention on wetlands of international significance and of the “Man and Biosphere Programme – MAB UNESCO (October 2003), presented to the Standing Committee of the Ramsar Convention (January 2004); by the Resolution of the 6<sup>th</sup> ordinary

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<sup>13</sup> Ministry of Foreign Affairs, Spokesperson Office, **Press Release**, 23 June 2004.

<sup>14</sup> Ministry of Foreign Affairs, Spokesperson Office, **Press Release**, 30 June 2004.

annual reunion of the International Commission for the protection of the Danube River (2 December 2003); by the MAB-UNESCO Reunion in Belgrade, on South-East European cooperation on biosphere reserves, in June 2004, highlighting the negative ecological implications of the Bystroe Project and the attitude of Ukraine as non-conforming to the international legal regulations in the field. Also, a team of the Secretariat of the Bern Convention (1979) and of the European Council will inspect the area during July 22-25, 2004. June 25<sup>th</sup> the Parliamentary Assembly of the Council of Europe (PACE) adopted a recommendation concerning the European transboundary basins where member States are required to intensify their cooperation aiming at an integrated management of the water resources. On this occasion several motions on the Bystroe Canal have been introduced. Note that in the absence of an express request under the various applicable international conventions, the above mentions rather had the value of mere points of view, and not of official requests, with the associated legal repercussions.

## **II. Review of Compliance with the Applicable Legal Regulations.**

The state of the matter as expressed above is subject to a number of national and international legal regulations that interact and generate specific requirements in this case. An analysis reveals major violations of international environmental law that calls for the triggering of the necessary compliance mechanisms. These violations equally regard substantive and procedural issues, unitarily determined by the essential interest of preserving representative assets of the Earth's natural heritage.

### **1. Non-compliance with the Principles of Sustainable Use and Protection of International Watercourses**

In their relationships regarding the Danube River, a protected international watercourse, Romania and the Ukraine are bound to comply primarily with the principles of sustainable, equitable use and protection of the waters. These have been recognised in international practice, by various documents to which the two states are Parties and in some respects by the case law of the International Court of Justice.

### **1.1. The Principle of equitable and reasonable use of transboundary waters.**

Initially derived (late 19<sup>th</sup> century) from the “natural flow” doctrine, the principle was long in being incorporated into international documents, and only asserted itself after being expressly provided by the Helsinki Rules, of 1966.

Thus, all the international treaties on transboundary watercourses consecrate it in almost identical phrasing<sup>15</sup>.

At a caselaw level, the Decision of 25 September 1997, made on the case of the Gabčíkovo-Nagymaros project, regarding a dispute between Slovakia and Hungary, the International Court of Justice explicitly consecrated this principle.

### **1.2. The obligation not to damage the environment of other states.**

By recognising the sovereign right of every state to use its own water resources according to its environmental and development policies, the correlative obligation of ensuring that activities under its jurisdiction or control do not affect the environment of other states or territories beyond its national jurisdiction is also stipulated<sup>16</sup>, as well as the older rule of preventing transboundary impact<sup>17</sup>. The relation between the principle of equitable and reasonable use (obligation to do) and the obligation not to damage (obligation not to do) the environment (including the aquatic environment) outside national jurisdiction is still generating interpretations. Giving priority to the latter would lead to a status quo situation to the advantage of the “first” users of a transboundary watershed (and general, the downstream states). Conversely, supporting the principle of equitable and reasonable use involves cooperation and consideration of all the stakeholder interests, coexistence of the former uses with the satisfaction of new needs.

The issue of the relation between the two rules is significant for the current approach to pollution prevention and control, where, in the face of transboundary dimensions, adequate and constructive cooperation is preferable to the implementation of classic solutions (abstention, liability).

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<sup>15</sup> The Amazon Pact (of 3 July 1978, art. V); Convention on the protection and use of transboundary watercourses and international lakes (Helsinki, 17 March, 1992, art. 2 b and c); Convention on cooperation for the protection and sustainable use of the Danube River (Sofia, 26 June 1994, art. 2(1)6); UN Convention on the use of watercourses for purposes other than navigation (New York, 21 May 1997, art. 5 and 6).

<sup>16</sup> Water and Health Protocol to the Convention on transboundary watercourses (London, 17 June 1999, art. 5 c).

<sup>17</sup> The Convention on transboundary watercourses (art. 3), the Danube Convention (art. 2.2, 3.2.5), the UN Convention (art. 20, 21), the Convention for the Protection of the Rhine (12 April 1999, art. 3.1., 4.b.).

**1.3. The precautionary principle.** Although recently included in international environmental law, the precautionary principle takes into consideration the risk concept and assumes the undertaking of an impact study, which made it readily incorporated into the water pollution prevention and control policy. It has been defined in both general<sup>18</sup>, and sector specific terms<sup>19</sup>.

**1.4. The “polluter pays” principle** is universally consecrated in the field, on the restricted assumption of its meanings, in the sense that the costs of pollution prevention, control and abatement will be borne by the polluter<sup>20</sup>.

**1.5. Sustainable, integrated management, according to the relevant best environmental practices.** It is the dominant principle for the use of transboundary watercourses. The sustainable nature derives from the definition included in the Brudtland Report (1997) and expresses the requirement that water resources should be managed in such a way as to meet the needs of present generations, without compromising the capacity of future generations to meet their own needs<sup>21</sup>.

In concrete terms, this will imply: maintaining the overall quality of life, maintaining continuous access to the natural resources, avoiding long-term ecological damage, ensuring ecosystem protection, and using preventive approaches<sup>22</sup>.

Integrated management is undertaken at the river basin level (whether transboundary or not) and with consideration to the relation between economic-social development and the protection of natural ecosystems<sup>23</sup>. Best environmental practice refers to the use of the best combination of measures and strategies in the sectoral control of the environment<sup>24</sup>.

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<sup>18</sup> For example, the Convention on transboundary watercourses (1992) provides “The precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand” (art. 2.5.a); The Danube Convention only lists it (art. 2.4).

<sup>19</sup> Water and Health Protocol to the Convention on transboundary watercourses (art. 5 a).

<sup>20</sup> The Convention on transboundary watercourses (art. 2.5.a); Water and Health Protocol (art. 5 b); the Danube Convention (art. 2.4); Convention on the Protection of the Rhine (art. 4 d).

<sup>21</sup> The Convention on transboundary watercourses (art. 2.5.c); Water and Health Protocol (art. 5.d).

<sup>22</sup> The Danube Convention (art. 2.5).

<sup>23</sup> Water and Health Protocol (art. 5j).

<sup>24</sup> The Danube Convention (art. 7.2 and annex no. I, part 2); Convention for the Protection of the Rhine (art. 4.h).

**1.6. The general obligation of states to cooperate on fundamental water management issues.** Cooperation in this matter extends to public and non-governmental organisation levels. This general principles are expressed by concrete rules such as: exchange of data and information, notification on proposed measures, monitoring and preliminary consultation, peaceful settlement, by legally acceptable means<sup>25</sup>.

Ukraine's attitude of starting implementation of the Bystroe Danube canal project, on a shared, border river, without notifying its intention, without providing the minimum required information on the potential impact on the shared watercourse and without consulting with Romania on this matter, is a defiance and a violation of the principles of sustainable and equitable management of shared waters, that are generally recognised and consistently applied at the European and international levels. It mainly reflects non-compliance with the obligation not to damage the environment of other states, with the principle of sustainable and reasonable use of trans-boundary waters, with the precaution and polluter pays principles.

## **2. Non-compliance with the international legal protection and conservation regime of the “Danube Delta” biosphere reserve**

From the point of view of international law, the Danube Delta is under a triple protection and conservation regime, established by relevant international conventions and arrangements, including: the biosphere reserve status, that of an asset of the world natural heritage, and the quality of wetland of international importance. Every one of these standings and all of them together establish, not only direct and concrete obligations for the states involved to protect, conserve and make sustainable use of this area and of its resources, but also obligations for the states sharing such interests, especially in the case of a shared natural area, including: the obligation not to affect the area subject to the sovereignty of another state, to consult, inform, and cooperate. Through its exclusivist approach and by ignoring any interest – i.e. ecological, deriving from the international standing of the area – other than its own economic ones, the Ukraine has infringed important international obligations.

### **2.1. Ignoring the legal regime of the biosphere reserve.**

Instituted by the UNESCO “Man and Biosphere” Programme – MAB in 1970, biosphere reserves form a representative global management

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<sup>25</sup> The Danube Convention (art. 2.4); the UN Convention (art. 8).

network of space and of species and ecosystems conservation. Their legal status is established by special laws and assumes a functional zoning (integral protection zones, transition zones, and buffer zones) and special administration.<sup>26</sup> The Bystroe Canal crosses through an integral protection zone of the “Danube” Biosphere Reserve–Ukraine, thus seriously impacting the deltaic environment and violating all the legal regulations for the reservation regime, and especially the ban on economic activities and on public access.

## **2.2. Violation of the regime of wetland of international importance**

Both Romania (Law No. 5 of 25 January 1991), and the Ukraine have ratified the **Convention on Wetlands of International Importance Especially as Waterfowl Habitat** (signed at Ramsar, in Iran, on February 2<sup>nd</sup>, 1971), and the Danube Delta was included on the special list attached to this convention. The Parties committed to enable conservation of the wetlands included on this list and, to the extent possible, to make reasonable use thereof on their territory, by creating nature reserves and adopting legislative, administrative, and other measures. A first serious violation of the convention derives from the fact that, by the development of the Bystroe canal, the area of the Ukrainian delta will be reduced by at least 5,600 ha. According to art. 4 item 3 of the document, such a unilateral national measure is only acceptable if both of the following conditions are met: a) to be based on urgent matters of national interest and b) to provide compensation, to the extent possible, for any resource loss in the area, by creating new natural reserves for the water birds and for the protection in the same region or elsewhere, a convenient portion of the former habitat. The Ukrainian Party has not stated or proved in any way the existence of such exceptional situation that might justify the reduction, by the development of the respective canal, in the area of the wetland of international importance.

Also, the changes in the hydrological regime of the Chilia Delta, including the stalling of the water flow will lead to the change of current wetlands into meadows. Apart from commitments to define and designate, develop and implement development plans and conservation measures, the Parties also committed to consult on the fulfilment of obligations under the Convention, especially for zones where a river basin is shared by several contracting Parties, and to endeavour “to coordinate and support their wetland, flora and fauna conservation policy in current and future

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<sup>26</sup> Law no. 82 of 20 November 1993 on the establishment of “Danube Delta” Biosphere Reserve, as amended.

regulations” (art. 5). Furthermore, each contracting Party must inform the Standing Bureau of the Ramsar Convention (this function being fulfilled by the International Union for Nature and Resource Conservation) on changes of ecological characteristics of the wetlands on its own territory, or included on the list, that have occurred, are occurring or might occur as a result of technological development, pollution, or other human intervention (art. 8 item 2 letter c and art. 3 para. 2).

### **2.3. Non-compliance with the requirements regarding world heritage assets**

Both states (Romania by Decree No. 187 of 30 March 1990), ratified the **Convention concerning the protection of the world cultural and natural heritage** (adopted by the UNESCO General Conference on 16 November 1972 and entered into force on 17 December 1975), and the Danube Delta was included on the World Heritage List. Among others, the two Parties have committed “not to adopt deliberately any measure that might cause direct or indirect damage to the cultural and natural heritage on the territory of other Parties to this Convention” (art. 6.3.). Development of the Bystroe Canal will affect the natural heritage irreparably, by a unilateral action outside international legislation.

### **3. Non-compliance with other relevant international conventions**

The two interested states have ratified other relevant international documents such as the **Convention on the conservation of European wildlife and natural habitats** (signed in Bern on September 19<sup>th</sup>, 1979, to which Romania accessed via Law no.13/1993) and the **Convention on the conservation of migratory species of wild animals (CMC)** (signed in Bonn on June 23<sup>rd</sup>, 1979, to which Romania accessed via Law No. 13/1998). The respective documents both provide direct obligations for Ukraine regarding the protection of determined species and of cooperating with other states, including Romania, on issues of shared resources. The implementation of such a project in the absence of an adequate environmental impact study and of suitable measures runs counter to the provisions of the respective conventions.

### **4. Non-compliance with the bilateral commitments of the Parties**

Bilateral cooperation on this matter is mainly regulated by the **Agreement of the Romanian and Ukrainian Governments regarding cooperation in the management of frontier waters** (Galați, 1997). Another two documents: Agreement between the Ministry of the Environment and Land Development of the Republic of Moldova, the Ministry of Waters, Forests, and Environmental Protection of Romania, and the Ministry of the Environment and Natural Resources of the Ukraine on the cooperation in the region formed by the protected natural areas of the Danube Delta and the Lower Prut (Bucharest, 2000) and the Treaty between Romania and the Ukraine on the Romanian-Ukrainian border regime, cooperation, and mutual assistance in border issues, respectively, (Tchernovitz, 2003), although relevant to this issue, have not yet come into force.

**4.1. Violation of the Agreement of the Romanian and Ukrainian Governments regarding cooperation on frontier waters** (signed at Galați, on September 30<sup>th</sup>, 1997 and entered into force on January 28<sup>th</sup>, 1999).

Recognising that the protection and reasonable use of frontier waters may only be ensured by close cooperation, and aiming to solve frontier water management problems in the spirit of good vicinity, cooperation and mutual advantage (Preamble), the Romanian and Ukrainian Governments have committed, in the **Agreement regarding cooperation in the management of frontier waters**, to a number of obligations dealing with the management, protection and use of frontier waters. In a bilateral context, the document specifies, to some extent, the general rules and principles provided by the Convention on the protection and use of trans-boundary watercourses (Helsinki, 17 March 1992) and the Convention on cooperation for the protection and sustainable use of the Danube River (Sofia, 29 June 1994).

In the case of the Bystroe canal, the Ukrainian party has violated at least four main obligations assumed by the Galați Agreement, including:

- the obligation not to develop work on its territory, in the absence of preliminary consultation, and not to take measures regarding frontier waters that might change the flow regime or quality conditions thereof (art. 2 item 3);
- the obligation to share information and mutually consult on the potential influence of water management and protection measures on the regime of frontier waters (art. 4 item 2.3);
- the obligation to assess jointly the influence of measures considered by one party, that might have negative impacts on water management on the

territory of the other party (art. A item 3, thesis I);

- the obligation of the party initiating such measures to notify the other party on its intentions and to forward the data regarding the planned measures, and provide the opportunity to participate in this assessment (art. 4 item 3, thesis II).

Furthermore, the **Protocol** of the first session of the empowered representatives for the completion of the Agreement (19-23 October 1999, Baia Mare, Romania) agreed on establishing working groups for the concrete implementation of the document, including a group to solve problems related to the Danube River along the shared border (item 1.1.2) .

## **5. Non-compliance with the environmental impact assessment procedures in a transboundary context.**

By virtue of its nature and concrete size, the Bystroe Project will have a transboundary impact, as its hydrological and ecological consequences will also occur on the Romanian territory. In this regard, the provisions of the **Convention on environmental impact assessment in a transboundary context**, adopted at Espoo on February 25<sup>th</sup>, 1991 and ratified by both states (Romania by Law No. 22 of 22 February 2000) also become applicable. Moreover, in Kiev, on May 21<sup>st</sup>, 2003 the representatives of the two countries signed the **Protocol to the Convention on environmental impact assessment in a transboundary context, related to strategic environmental assessment (SEA)**.

### **5.1. Classification of the Bystroe Project among cases subject to the Espoo Convention**

The activity involved in developing the Bystroe canal assumes a major change in the state of this estuary of the Danube, and its execution is subject to the decision of a competent authority, i.e. the Government and the Ministry of Transport of the Ukraine. Its ecological impacts occur both on a territory under the jurisdiction of the Ukrainian party, and, more importantly, in a region – the Danube Delta – under Romanian jurisdiction, which meets the requirements of the Espoo Convention (art. 1, items V and VII) in regard to the existence of an activity with transboundary impacts, where the Ukraine is the *party of origin*, and Romania the *affected party*.

The Bystroe Project also classifies among the activities that may cause significant adverse transboundary impacts for which, under art. 2 item 4, the Ukraine had the obligation to notify the affected party, for sufficient and efficient consultations (under art. 3, 4 and 5 of the Espoo Convention). Thus,

item 9 on the **List of proposed activities** (Appendix I), automatically triggering such procedures, mentions: “*Trading ports and also inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1,350 tonnes*”. Moreover, under art. 2 item 5, the interested parties must engage discussion, at the initiative of either party, to find whether the proposed activities, not listed in annex no. 1 might also cause significant adverse transboundary impact and so, consequently, these should be dealt with as if listed (the general applicable criteria in determining significant environmental impact for activities not listed in Appendix I are included in Appendix III). Note that impact assessment should be conducted during the proposal stage of the proposed activity, but this did not happen in the current case.

## **5.2. Non-compliance with the environmental impact assessment procedure in a transboundary context**

Under the Espoo Convention, the Ukrainian party, as party of origin, should have assumed the obligation to proceed to an environmental impact assessment prior to making the decision to approve or start the Bystroe project. This would involve a preliminary notification, in view of sufficient and efficient consultation with the affected party and, in the event of the latter’s participation in the procedure, also for consulting the public of the two countries, until the adoption of the final decision. If the procedures managed to reach this stage, the issue would arise of applying the special provisions of the **Convention on public access to information, public participation in decision-making and access to justice in environmental matters**, adopted at Aarhus, Denmark on June 25<sup>th</sup>, 1998 (and ratified in Romania through Law No. 86 of 19 May 2000). The international document also provides for a subsequent review of the project implementation, at the request of any on the interested parties (art. 7).

## **6. Disregard for Case-law conclusions of the International Court of Justice in this matter**

The case-law has played special role for identifying and construing the legal international rules in the field of environmental law. From this viewpoint the ICJ decision of September, 25<sup>th</sup> 1997, in Slovakia vs. Hungary case, concerning the Gabčicovo-Nagymaros hydroelectric project is particularly important.

The Ukraine disregarded these conclusions in the Bystroe case:

- the obligation to maintain the Danube waters quality and protect

nature (paragraph 140);

- the need to take into consideration the international environmental rules and the principles of law concerning the international watercourses (paragraph 141);

- the right to make use of the watercourse in a reasonable and balanced way and the obligation to cooperate in order to protect and bring it out, in accordance with the 1991 Helsinki Convention (paragraph 147).

## **7. Deficiencies in the Response and Behaviour of the Romanian Party**

In asserting its status as an interested party, the Romanian Party limited itself to sending to the Ukrainian Party more than 10 **Verbal notifications** through the Ministry of Foreign Affairs, which received no answer. The official notification of the Secretariats for the relevant international conventions in this matter – Espoo, Ramsar, Bern, UNESCO – was made after work had started on canal development (11 May 2004), which is too late, if trans-boundary environmental impact assessment is to be conducted at least in the proposal stage of the proposed activity.

Moreover, we consider that the diplomatic procedure used (verbal notification) was not very suitable in situations of this kind and not strong enough for such complex issues. From a different perspective, the authorities in Bucharest did not use all the means provided by the international instruments, to which the two stakeholder countries are Parties, least so the strongest and most effective ones.

Thus, for example, under art. 3 item 7 of the Espoo Convention, Romania could, as an affected party – once no answer was received to its requests and significant adverse transboundary environmental impact was denied – have claimed its right to submit the matter to an investigating commission, who should pronounce on the probability of such consequences to occur.

Also, under the **Bilateral Agreement on cooperation in management of frontier waters** (30 September 1997), it could have been possible to activate the Government representative who should have called an extraordinary meeting on the issues raised by the canal development.

## **III. Conclusions**

The case of the deep canal development along the Bystroe arm of the Danube, of significant adverse transboundary environmental impact is an illustration of how the states understand to implement and comply with international, bilateral, and national legal regulations in the field.

The combination of geographical proximity (shared river) issues, mainly related to management, with transboundary issues (mainly related to environmental protection and nature conservation) generate a special, complex situation, which often surprises the stakeholder states, and makes them react very prudently on matters of inter-state cooperation.

Environmental disputes are often used as a screen for older, “historic” conflicts and essentially political-strategic interests, the difficulty of which is transferred to environmental issues.

By its attitude of treating the canal development as a purely internal matter, mainly related to water management issues, and practically ignoring the serious environmental effects, the Ukraine demonstrates that it sticks to the old thesis of absolute territorial sovereignty, associated to the arrogance of a large regional power, and thus continues the post-soviet tradition.

The Ukrainian party violated many pertinent legal regulations, including:

1. generally accepted principles of sustainable use and protection of international watercourses;
2. the international legal regime of the Danube Delta as a biosphere reserve, a world natural heritage asset and a wetland of international importance;
3. the Conventions provisions aiming to protect and preserve certain species and their natural habitats applicable to this zone and to be respected by both States.
4. the commitments made bilaterally, especially in the Agreement of the Romanian and the Ukrainian Governments on cooperation in management of frontier waters (Galați, 30 September 1997);
5. international regulations on environmental impact assessment in a transboundary context.

In regard to the attitude of the Romanian party, the following major deficiencies need remembering:

1. delayed adequate official response, in the sense that the initial stage only involved **verbal notifications** addressed by the Ministry of Foreign Affairs to the Ukrainian party, requesting information

on the project, and only after the development work was started (11 May 2004) were the Secretariats of the relevant international conventions notified, with the Romanian Ministry of the Environment asking the relevant Ukrainian Ministry to notify the proposed activity, at a time when there was no question of undertaking an impact study in a transboundary context; high level political intervention, also post-factum, mitigated some of the obstructionist position of the Ukrainian party, failing, however, to determine its compliance to international legislation;

2. failure to use all the available legal means and especially the stronger and more effective ones provided by the pertinent international regulations (such as the right to submit the issue of the existence of adverse transboundary environmental impacts to an investigation commission, as provided by the Espoo Convention, or the activation of the Government representatives to an extraordinary session, as established by the Bilateral Agreement on cooperation related to management of frontier waters, of 1997).

On the whole, the Bystroe case shows that, at the inter-state level, environmental interests still come second to economic, strategic-military and political ones, and the traditional sovereignty concept is maintained *de facto* in spite of formal consecration of the thesis of trans-national cooperation. Furthermore, international, including European conventions, are perceived as too general, and thus less applicable, which points to the need to adopt sub-regional and bilateral agreements better adjusted to the ecological specifics and to the politico-strategic context of the region, and therefore more effective. The sad reality is also revealed that some states of the former communist zone, although signing, joining, and ratifying numerous international legal instruments, and thus demonstrating “*an active presence on the international arena*”, do not live up to the principles and basic rules deriving from international law as at the start of the 21<sup>st</sup> century.