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Disputes on sharing transboundary water resources in Central Asia

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Аннотация. Maqolada sobiq SSSR parchalanganidan so‘ng Markaziy Osiyoda transchegaraviy suv resurslarini taqsimlash bilan bog‘liq muammolar tahlil etilgan. Suv resurslaridan foydalanish hamda gidroenergetika sohasida mintaqa davlatlari o‘rtasida yuzaga kelayotgan ziddiyatlar atroflicha ko‘rib chiqiladi. Mavjud huquqiy mexanizmlar va kelishuvlarning samaradorligi kompleks ravishda baholanadi. Shuningdek, xalqaro-huquqiy tartibga solishni takomillashtirish va mintaqaviy hamkorlikni mustahkamlash zarurligi asoslantiriladi.

Калит сўзлар. transchegaraviy suv resurslari, Markaziy Osiyo, Amudaryo, Sirdaryo, xalqaro suv huquqi, suv taqsimoti, gidroenergetika, mintaqaviy hamkorlik.

Аннотация. Статья анализирует проблемы распределения трансграничных водных ресурсов в Центральной Азии после распада СССР. Рассматриваются противоречия между государствами региона по вопросам водопользования и гидроэнергетики. Оценивается эффективность существующих правовых механизмов и соглашений. Делается вывод о необходимости совершенствования международно-правового регулирования и укрепления регионального сотрудничества.

Ключевые слова. трансграничные водные ресурсы, Центральная Азия, Амударья, Сырдарья, международное водное право, распределение вод, гидроэнергетика, региональное сотрудничество.

Annotation. The article analyzes the problems of distributing transboundary water resources in Central Asia after the collapse of the USSR. Contradictions among Central Asian states regarding water use and hydropower are examined. The effectiveness of existing legal mechanisms and agreements is evaluated. It is concluded that it is necessary to improve international legal regulation and strengthen regional cooperation.

Keywords. transboundary water resources, Central Asia, Amu Darya, Syr Darya, international water law, water distribution, hydropower, regional cooperation.

Prior to the collapse of the Soviet Union in 1991, water sharing among Central Asian countries was a domestic matter, centrally managed by Moscow. After the five Central Asian states declared their independence across the second half of 1991, water sharing rapidly became a key regional issue. Although a range of bilateral and multilateral negotiations and agreements have taken place in the ensuing 25 years, it is fair to say that this issue has never been resolved satisfactorily, and remains a primary bone of contention between the republics of Central Asia. This chapter traces the various attempts to develop legal frameworks to resolve regional water sharing disputes to date.

1. Regulation of Transboundary Water Resources in Central Asia

The Amu Darya and the Syr Darya Rivers and their tributaries form what is called the Aral Sea Basin, which encompasses six nations. Figure 1 shows the map of the Aral Sea Basin, highlighting the two main rivers in dispute, and the six countries making claims on these water resources.

Water resources are of significant importance for the Central Asian republics because the region is very dry and since most of the various populations live along the few main rivers, the dominant economic activity rest in developing irrigated agriculture. Under the Soviet system, the crop fields of Uzbekistan, Kazakhstan and Turkmenistan were Moscow's primary focus for irrigation while the Kyrgyz Republic and Tajikistan managed the rivers for hydropower. Afghanistan, meanwhile, was not part of the Soviet scheme and has struggled to assert its rights as a riparian nation.

During the Soviet period, rivers in Central Asia were under the unified control and management of the Soviet Union. For example, the USSR was often involved in disputes that emerged over demands of the usage of the important Amu Darya and the Syr Darya Rivers. The Soviet Ministry of Reclamation and Water Management had the final word in any dispute among the various autonomous republics when issues over water allocation occurred in any water basin within its boundaries. In 1991 the USSR collapsed and the situation changed dramatically. The Aral Sea basin was no longer controlled by one major-power and instead, the water resources came under heavy demand by the following seven states (Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, Uzbekistan and Afghanistan – Central Asian states and also to a lesser extent, Iran).

In February 1992, the five former Soviet Central Asian states signed an agreement [1] proclaiming that the water allocation scheme under the Soviet regime should remain in place in order to maintain the status quo. The Kyrgyz Republic, an upstream nation on the Syr Darya River, and Tajikistan, an upstream country for both

the Syr Darya and Amu Darya rivers, complained about the allocation scheme. Under the Soviet system, the Kyrgyz Republic was allocated 13% from the Syr Darya River and Tajikistan 15.4% from the Amu Darya River. In fact, these two nations want considerably more of the flow allocated to them (to expand irrigation) and more freedom to generate winter hydropower [2]. In the Soviet period huge dams were built throughout these five countries in order to provide the lower regions with sufficient water in the summer rather than for hydropower purposes. Since the independence of the Kyrgyz Republic and Tajikistan, these two nations have endeavored to change the purpose of the dams from a reservoir that provided summer irrigation water to hydro-dams that produced more energy for winter usage in their countries.

Namely, in the case of the Syr Darya River basin, in 1997 the Kyrgyz Republic demanded payment from Uzbekistan and Kazakhstan for water that flowed from the rivers originating within its territory claiming that water was a state property. Uzbekistan found such demands unreasonable and refused, while Kazakhstan agreed to pay for water flowing only from the Chu and Talas rivers. In 1998, the opportunity arose to establish the first international consortium to deal with the water resources in the Syr Darya Basin, which included four out of the five Central Asian countries. Kazakhstan, the Kyrgyz Republic, Tajikistan, and Uzbekistan were invited to build a consortium. The Kazakh, Kyrgyz and Uzbek governments agreed to establish the Syr Darya Energy Consortium, later, Tajikistan joined in 1999. Yet this consortium collapsed in 2002. On the meantime, the nations in this basin began to build reservoirs to meet water needs of their own respective interests. For example, the Kyrgyz Republic and Uzbekistan began to build reservoirs in 2007 [3] on the Syr Darya River to the concern of the other nations.

Meanwhile, similar sort of issues and problems emerged over water resources in the Amu Darya Basin. In 1996, Uzbekistan and Turkmenistan concluded an agreement [4] to divide water from the Amu Darya equally. Turkmenistan sought to lengthen the Karakum canal from this river, which would have increased the diversion of water resources. Uzbekistan strongly opposed such diversions. In addition, Tajikistan is intent on overbuilding the Rogun hydropower station – a 335 meter high dam – that would give it complete control over the Amu Darya and maximize hydropower production. Meanwhile, it causes possible conflicts with the downstream, especially with Uzbekistan, since this project reduces the water allocated to the lower riparian states.

Finally, Afghanistan seeks to increase its water diversion from the Amu Darya for its irrigation (*"Qushtepa" canal project*), which most likely will be vehemently be opposed by the other three riparian states. Overall, the Syr Darya and Amu Darya Rivers have become the major source of water conflicts between the region nations.

2. Literature Review of Relevant Academic Sources

There are a number of academic papers written in the field of Central Asian water disputes. Water law issues of Central Asia is also researched by Gregory E. Heltzer, Eelke P. Kraak, Eric Sievers, and Dinara Kemelova; but, their respective approaches are different than legal one, such as political, environmental, ethnic, etc.

Leading academic papers are written by Vinogradov[5] and Ziganshina[6] since they extensively analyzed the water law issues and policies in Central Asia. In particular, Vinogradov notes that though "the use of trans-boundary water resources is still influenced by the practices established in the former Soviet Union, there is a tendency towards greater reliance upon international law in addressing water-related issues of common concern."[7] On the other hand, Ziganshina criticizes that "the textually indeterminate standards such as equity, reasonableness, and appropriateness that dominate the law of international watercourses generally make it more difficult to define certain obligations and to verify their fulfillment."[8] Similarly, Dinar argues that "the international legal principles that have evolved over the years have provided states with only contradictory and vague directions for resolving conflicting uses for, and interests in, a shared international river."[9] Meanwhile, discussing the regional legal framework in terms of cooperation and compliance, Vinogradov underlines that *the 1992 Agreement*[10] "does not contain any specific rules regarding the management or exploitation of shared natural resources"[11] though it was signed by five Central Asian states – that is, Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan.

3. Compliance and Performance of Current Regional Legal Framework in Central Asia

In this section, the article analyzes how the current water allocation agreements are working in practice [12] and to what extent, they are capable of preventing disputes effectively in terms of sharing trans-boundary rivers. In this regard, substantive and procedural norms in those treaties will be elaborated.

To begin with, the paper notes two main groups of the water disputes in Central Asia:

1) Equitable sharing of water resources among the five states;

2) The appropriate allowable usage for upstream hydropower plants.

The first group of legal issues relates to disputes over the fair usage of water resources between the Kyrgyz Republic, Tajikistan and Afghanistan as the set of upstream states, and Kazakhstan, Uzbekistan and Turkmenistan as the downstream nations. For the second group of the issues, the contention revolves around the use and development of hydropower. Under the previous Soviet system, hydropower was developed in the Kyrgyz Republic and Tajikistan as part of a plan to manage and allocate water to the downstream agricultural states. Yet this set of legal issues does not include Afghanistan. At present, the Kyrgyz Republic and Tajikistan

desire to develop and increase hydroelectricity for winter use which would affect the summer allocation of water to downstream states. In terms of these legal issues, the upstream nations invoke the theory of absolute territorial sovereignty while the downstream countries invoke the theories of limited territorial sovereignty and community of interests.

The next problem is the absence of a long-term water sharing agreement, which in turn intensifies tensions between these states. For instance, the omission of a clear written and binding water sharing formula in the form of treaty between the watercourse countries of Central Asia further contributes to the escalation of water tensions. Therefore, depoliticizing the water sharing process through a normative treaty is indispensable for all Central Asian riparian nations.

Moreover, the most serious problem, breach of the agreements, arises, particularly when the river flow drops or the downstream countries (for example, Kazakhstan and Uzbekistan) fail to deliver fossil fuel energy regularly to the upstream states (Kyrgyz Republic and Tajikistan). For example, in *Article 3 of the 1992 Almaty Agreement*, the parties agreed “to refrain from actions on their territories that might have affect interests of other parties and cause harm to them, lead to deviations from the agreed volumes of water flow and pollution of water sources.” However, this agreement does not state whether harm must be significant or not. As noted by Ziganshina, “the question may arise whether this provision indeed prohibits any transboundary harm, whether it in fact asks for the impossible.”[13] On the other hand, the technical data of basin rivers flow is not comprehensive, that is, the actual amount of following year’s river flow (in particular, the Amu Darya and the Syr Darya) is unpredictable. Therefore, water sharing agreements do not take into account the fluctuation of the flow, causing the lack of flexible clauses in the agreements relating to this issue. Finally, “making matters even worse is the basin states’ tendency to overestimate their rightful share of water resources.” [14]

Also, there is no significant cooperation under the international water law rules below between Central Asian states. In fact, among Central Asian states only Uzbekistan has ratified *the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses* [15] (hereinafter, *the 1997 UN Convention*). The reason for such ratification lies in the fact that Article 6 of this convention determined “geographic, hydrological character; existing and potential uses of the watercourse; the population dependent on the watercourse” in the list of related factors in terms of water sharing. Thus, this provision is to a large extent, consistent with Uzbekistan’s interests in transboundary water apportionment in the region. Even though other Central Asian countries are not yet members of the *1997 UN Convention*, the entry into force of this convention in August 2014 strengthens the argument of member countries. In addition, *the 1997 UN Convention* “has already had a

positive impact on the international legal environment through the process of codification and crystallization of the customary rules of international water law." [16] To be specific, *the 1997 UN Convention* sets out the obligations of "timely notification", "consultations over planned measures" in its Articles 12 and 17, respectively. At last, article 8 of this Convention provides that watercourse states "shall co-operate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection" of the watercourse.

On the other hand, if a water market approach were to be applied to a transboundary river like the Syr Darya as argued by the Kyrgyz Republic, this approach would surely raise a new set of confusing legal issues between the regional watercourse states. For example, "if a State introduced water-efficient technology and then marketed the water it saved, would it be considered a reasonable and equitable use?" [17] If not, then why should the State bear the burden of such technology? Also, there will be a question as to whether the watercourse states have to guarantee that no eventual significant harm reaches the downstream users. Overall, "will the marketing of water essentially create a parallel system of agreements on the watercourse, which could upset the balance sought under the principles of equitable and reasonable use and no significant harm?" [18]

4. Summary

Overall, while a range of bilateral and multilateral agreements have been implemented over the past 34 years, these agreements have often been short-lived, valid for as little as a year. And even when a longer-term treaty has been put in place, it has sometimes been ignored in practice by both sides. Further, some issues such as the question of whether water is an economic good, and how equitable and reasonable use should be determined, remain completely unaddressed. The result of this piecemeal approach has been constant regional political tension, uncertainty for the agricultural sector, and dissatisfaction for the hydro-energy sector in upstream states, which have suffered consistent disadvantage under the agreements that have been entered into.

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