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12.00.01 – DAVLAT VA HUQUQ NAZARIYASI VA TARIXI. HUQUQIY TA'LIMOTLAR TARIXI

12.00.02 – KONSTITUTSIYAVIY HUQUQ. MA'MURIY HUQUQ. MOLIYA VA BOJXONA HUQUQI

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12.00.10 – XALQARO HUQUQ

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INSIGHTS FOR CENTRAL ASIA FROM THE PRINCIPLES AND DISPUTES OF INTERNATIONAL WATER LAW

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Abstract. *This article analyzes legal aspects of the Central Asian water dispute with reference to international water law principles. In other words, it examines the existing principles of international water law, and identifies those which dominate in setting international discourses. Moreover, this study provides examples of water disputes around the world, such as the Nile River, the Mekong River, the Indus River cases, in which several non-Central Asian states, facing similar conflicts, such as India and Pakistan, Egypt and Sudan, South-East Asian nations are involved. In particular, it is emphasizes that even countries, which has more problematic relations rather than Central Asian republics, could eventually achieve a mutual legal settlement of water-related tensions. Finally, it offers solutions to the water disputes for Central Asian countries in the light of the principles of international water law laid down by the Permanent Court of Arbitration in the 2012 Kishenganga Case.*

Keywords: *international water law, Central Asia, water dispute, transboundary water resources management.*

ХАЛҚАРО СУВ ҲУҚУҚИ ТАМОЙИЛЛАРИ ВА НИЗОЛАРИДАН МАРКАЗИЙ ОСИЁ УЧУН ОЛИНАДИГАН ХУЛОСАЛАР

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Аннотация. *Мазкур мақолада халқаро сув ҳуқуқи тамойилларига асосланган ҳолда Марказий Осиёдаги сув ресурслари тақсимотига оид низонинг ҳуқуқий жиҳатлари танқидий таҳлил этилган. Хусусан, халқаро сув ҳуқуқидаги мавжуд тамойиллар таҳлил қилинган ва халқаро низоларни ҳал этишда етакчи ролни ўйнаётган тамойиллар кўрсатиб ўтилган. Шунингдек, дунёдаги сув ресурслари тақсимотига оид бошқа низолар – Нил, Меконг, Ҳинд дарёлари тақсимотига оид низолар ва уларнинг ҳуқуқий ечимлари намуна сифатида келтирилган бўлиб, уларда Марказий Осиёдагига ўхшаш низоларда иштирок этган Ҳиндистон ва Покистон, Миср ва Судан, Жанубий-Шарқий Осиё мамлакатларини кўриш мумкин. Айниқса, Марказий Осиё давлатларига нисбатан ўзаро мураккаброқ ва муаммоли муносабатларга эга бўлса-да, айрим мамлакатларнинг сув ресурслари тақсимотига оид низолар бўйича якунда ҳуқуқий ечимга эриша олганликларига урғу берилган. Мақола якунида, Халқаро арбитраж суди томонидан 2012 йили Кишенганга низосини кўриб чиқишда илгари сурилган халқаро сув ҳуқуқи тамойилларидан келиб чиқиб, Марказий Осиёдаги сув ресурслари тақсимотига оид низонинг ҳуқуқий ечимларини назарда тутувчи чора-тадбирлар таклиф этилган.*

Калит сўзлар: *халқаро сув ҳуқуқи тамойиллари, Марказий Осиё, сув тақсимоти низоси, трансчегаравий сув ресурслари.*

ВЫВОДЫ ДЛЯ ЦЕНТРАЛЬНОЙ АЗИИ, ИСХОДЯ ИЗ ПРИНЦИПОВ МЕЖДУНАРОДНОГО ВОДНОГО ПРАВА И ВОДНЫХ СПОРОВ

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Аннотация. *В данной статье проведен критический анализ правовых аспектов водного спора в Центральной Азии, исходя из принципов Международного водного права. Были проанализированы принципы Международного водного права и указано, какие из них играют доминирующую роль в урегулировании водных споров. Помимо этого, рассмотрены примеры водных споров – реки Нил, Меконг, Инд, а также правовые решения этих споров с участием стран с похожим опытом, таких как Индия, Пакистан, Египет, Судан, страны Юго-Восточной Азии. Подчеркнуто, что страны, имеющие проблематичные дипломатические отношения в отношении водных споров, также, как и центральноазиатские страны, в итоге сумели достичь правового решения. В конце статьи даны рекомендации по урегулированию водных споров в Центральной Азии, основываясь на принципах Международного водного права, которые были установлены Международным арбитражным судом при решении Кишенгангского спора в 2012 году.*

Ключевые слова: *принципы Международного водного права, Центральная Азия, водный спор, трансграничные водные ресурсы.*

Introduction

Five nations – Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan emerged in the Central Asian region soon after the fall of the USSR in 1991, and their relations became increasingly dependent on international law. As these countries developed, there have emerged numerous disputes on sharing transboundary natural resources such as water. This study focuses on the issues surrounding water disputes among the six nations – the above-mentioned five nations and Afghanistan. The two main river sources involved in the Central Asian Basin are the Syr Darya and the Amu Darya Rivers. Both of them flow into the Aral Sea but have different origins. The Syr Darya River originates in the Kyrgyz Republic, flows through Uzbekistan and Tajikistan, re-enters Uzbekistan, crosses Kazakhstan, and finally flows into the Aral Sea. The Amu Darya River begins in Tajikistan and forms the borders between Afghanistan and Uzbekistan, meanders between Turkmenistan and Uzbekistan, and then dumps its waters into the Aral Sea.

Materials and methodology

This paper provides a study of legal aspects of the Central Asian water dispute with reference to international water law principles. In other words, it examines the existing principles of international water law, and identifies those which dominate international discourse. In addition, this study provides examples of water disputes around the world, in which some non-Central Asian states, facing similar conflicts, such as India and Pakistan [1], Egypt and Sudan [2], are involved.

Finally, it predicts outcome of the water disputes for Central Asian countries in the light of the principles of international water law laid down by the Permanent Court of Arbitration (PCA) in the 2012 Kishenganga Case.

Research findings

International Regulation of Sharing Transboundary Water Resources

"While there is considerable literature on international water law, scholars do not agree fully on the categories of principles and on the status of various principles, or the obligations

that follow" [3]. According to Weiss, there are five theoretical bases of international water law: absolute territorial sovereignty, absolute territorial integrity, limited territorial sovereignty, community of interest, prior appropriation.

Absolute territorial sovereignty meant that upper riparian states could use the water as they pleased, including by diverting the water flow away from the watercourse without the need to accommodate downstream users [4]. The Indus River case and the Tigris-Euphrates case (*the upstream Turkey invoked this principle against the downstream Syria and Iraq claiming that it has no obligation to provide water flow for them*) can provide examples of those states which invoked this principle. However, scholars agree that absolute territorial sovereignty is no longer the prevailing principle, if it ever was" [3].

On the other hand, "the theory of absolute territorial integrity gives upstream states a right to use the water insofar as their actions do not affect the natural flow of the water of downstream states" [3]. Its emergence is connected with the "natural flow" theory, which in the 1820s English courts basing on this theory determined that an upstream user had "a duty not to diminish the quantity or quality of water" to downstream users. The theory of absolute territorial integrity appeared in different cases such as the Columbia River case (*the US stated this principle against Canada for the unlimited use of river flow. – Columbia River Treaty, 17th January, 1961 and 23th January, 1964, 542 UNTS 244.*), and the Nile River Basin case (t*he downstream Egypt claimed that "it holds natural and historical rights" to the Nile waters against Ethiopia, Sudan and Burundi. – Nile Waters Agreement, 8th November, 1959, 453 UNTS 51.*) In practice, this theory could provide unlimited use for downstream states. On the contrary, most of its elements are incorporated into the doctrine of reasonable use.

The next principle is prior appropriation. This principle gives assurance to the appropriator that he/she could continue to receive water even if subsequent users diverted water from the stream. In other words, it means "first come – first served." "Many of the early cases of prior appropriation occurred in California, during the gold rush in the 1840s and 1850s, when miners needed a secure supply of water for use off riparian land" [5]. Moreover, the 1997 UN International Watercourse Convention lists the principle among determining factors unless alternative sources of water allocation can be found [6].

Meanwhile, "under restricted sovereignty (limited territorial sovereignty), a state's exercise of sovereignty over its territory is limited by the obligation to ensure that it does not cause significant harm to other states" [3].

"The community of interests" theory rests on the notion that riparian states inherently share international watercourses because of "their natural, physical unity" [7]. Therefore, states form a community of interests in watercourse as well. That is, it is based on the notion that water is commonly held. This principle was recognized by international courts. In 1929 the Permanent Court of International Justice in the Territorial Jurisdiction of the International Commission of the River Oder decision referred explicitly to a "community of interests of riparian states." Further, "the International Court of Justice has subsequently referenced the River Oder case and referred to a community of interests in states in an international river in its decision in the 1997 Gabcikovo-Nagymaros Project case" [8]. Meanwhile, scholars such as Weiss categorized the principles of limited territorial sovereignty and community of interests among the contemporary dominant principles.

On the other hand, there is another alternative principle which regarded as "a suggested logical corollary to the principle of equitable utilization: a principle of

equitable sharing of downstream benefits" [9]. This principle has seen its application both domestically and internationally. "The principle of equitable utilization is enshrined in both the Helsinki Rules and the UN Watercourses Convention" [10]. Furthermore, international courts often regarded to this principle during the process of analyzing several cases. For instance, "the judgment of the International Court of Justice ... in the Gabčíkovo-Nagymaros Project also supports the proposition that equitable utilization is the basic governing principle of customary international water law" [8].

Selected Transboundary Water Disputes offering Insights for Central Asia

In this section, the paper conducts a comparative analysis between Central Asian water dispute and the Indus River case (Pakistan vs. India) for the following reasons. First, India and Pakistan were one of the British colonies which were governed by one superpower, identical to the fact that Central Asian states were once union republics included in the former USSR. Second, downstream Pakistan and upstream India concluded the 1960 Indus River Treaty to solve the water sharing issue, and the 1960 Indus River Treaty sets "historic and planned use (for Pakistan) plus geographic allocations (western rivers vs. eastern rivers)" [11] as a criterion for water allocations of the Indus River. Likewise, Uzbekistan prefers the same criteria for resolving the water sharing problems in Central Asia. That is, the Uzbek government argues that "existing and potential uses of the watercourse" and "geographic character" [8] there of as well should play decisive role in the region's water apportionment. Shifting the focus back to the Indus River Basin, the paper notes that, similar to Central Asian states, for Pakistan and India "the most important issue was control by each state of its own resource" [11]. Consequently, "structural division of the (Indus River) basin, while crucial for political reasons, effectively precludes the possibility of increased integrated management" [11] as it happened in Central Asian water allocation agreements. At the same time, the 1960 Indus River Treaty offers an effective answer to downstream Pakistan's prime concerns, namely, the delivery schedule and the volume of river flow, which is now on top priority for Central Asian downstream riparian nations. For they need water flow much for their irrigation fields, especially in vegetation period (March – September). Furthermore, the Indus River conflict experience shows that more international engagement in disagreement, more encouragement to cooperate. As a matter of fact, when Pakistan and India could not find a common solution in 1953, the World Bank asked each party to prepare its own plan, which consequently be subject to further analysis by the World Bank for marking similar proposals and provisions.

In fact, Article IX (5) of the 1960 Indus River Treaty sets out that if the parties cannot, through compromise, resolve the dispute arose in applying this treaty; either party has a right to refer to court in order to initiate the arbitration proceedings [12]. Therefore, in 2010 Pakistan brought the issue, so called the Kishenganga Hydroelectric Project which could not find its appropriate solution through bilateral negotiations by the parties, to Permanent Court of Arbitration. Particularly, one of the questions was "the legality of the construction and operation of an Indian Hydroelectric Project located in Indian-administered Jammu and Kashmir" [13] which would obviously influence on the river flow allocated to downstream Pakistan. So, in the process of negotiating, Pakistan argued that India was, by means of this construction, going to gain a total control over the water flow which the 1960 Indus River Treaty apportioned to Pakistan. (Here, the research has to note

that downstream Uzbekistan once had the identical view towards the construction of the Rogun hydropower station in upstream Tajikistan). On the contrary, upstream India claimed that the Kishenganga Hydroelectric Project would bring no adverse impact on the quality of water flow apportioned to Pakistan. Accordingly, PCA determined that "this obligation (*to maintain the natural channels of the rivers and its effect on inter-tributary transfers*) involves maintaining the river channels' physical capacity to carry water, and does not require maintaining the timing or volume of the flow in the river," however, "Pakistan retains the right to receive a minimum flow of water from India in the Kishenganga/Neelum riverbed at all times" [12], despite the fact that India could go ahead with its project. Besides, PCA required the parties to share further information to set the minimum amount of river-flow, apportioned to Pakistan. In the meantime, the research draws attention to the fact that it is also technically problematic to find out the minimum volume of Central Asian transboundary rivers' flow as well, due to the lack of relevant information.

The next case the paper analyzes is the Mekong River case. Identical to the plans of Central Asian upstream republics, upstream "China would like to fully develop the Upper Mekong Basin and has proposed the building of 15 dams for hydroelectric power" [14]. Obviously, this Chinese ambition puts under risk the water allocation scheme achieved by the Mekong River Commission formed in 1957 by most of the riparian nations. Later, "in 1975, the riparians set out to refine the Committee's objectives and principles for development in support of the Plan in a 'Joint Declaration on Principles,' including the first (and so far only) precise definition of 'reasonable and equitable use' based on the 1966 Helsinki Rules ever used in an international agreement" [15]. However, upstream China and Myanmar did not show their willingness to participate in the 1995 Agreement on the Sustainable Development of the Mekong River Basin under the Mekong River Commission [16]. Thus, they created a kind of barrier to achieve the ultimate goals of this 1995 Agreement. In the meantime, this study argues that the Mekong River case provides good lessons for comparative analysis. For instance, it served to some extent, as an example of the argument "the greater the international involvement in conflict resolution, the greater the political and financial incentives to cooperate" [17] while Central Asian nations takes the standpoint of choosing bilateral negotiations rather than multilateral one. In addition, "by establishing and utilizing the necessary management infrastructure before respective senses of urgency had the chance to hamper political decision-making, the Mekong Commission had already developed a routine of cooperation which proceeded despite later political tensions" [17]. In contrast, this sort of cooperation is largely absent in Central Asian countries since 2000. However, the research has to acknowledge the weak point of comparing the Mekong River case and Central Asian water dispute. That is, the volume of water flow shared between riparian nations was not a key problem in the Mekong River Basin.

Furthermore, this article analyzes the Nile River case between Egypt and Sudan in terms of comparative study with transboundary water sharing problems in Central Asia. Similar to the water issues in Central Asia, the allocation of the Nile's waters came to be interstate tension between the riparian countries after the fall of British colonialism in this region. Therefore, Egypt and Sudan signed Agreement for the Full Utilization of the Nile Waters (the Nile Waters Agreement) in 1959. The approach which sounds "acquired rights plus even division of any additional water resulting from development projects" [18] served as criteria for water apportionment under the 1959 Nile Waters

Agreement. According to this Agreement, "the losses were deducted from the Nile yield of 84 billion cubic meters (BCM) and the remaining water was divided among Egypt and Sudan as 55.5 and 18.5 BCM, respectively. Sudan was to construct projects to contribute to the Nile's flow by preventing evaporation losses in the Sudd swamps of the White Nile, with costs and benefits divided equally between the two countries" [19]. However, this research has to note that new challenges are emerging to this 1959 Nile Waters Agreement. Namely, "other watercourse nations, particularly Ethiopia, are planning development projects that may necessitate renegotiating a more inclusive treaty" [18]. Moreover, as in the Central Asian water dispute, "the core question of historic versus sovereign water rights is complicated by the technical question of where the river ought to be best controlled – upstream or down" [20]. In addition, due to its geopolitical strength, Egypt could maintain its higher position against other upstream nations, the fact that is similar to Central Asian heavyweight – Uzbekistan's standpoint in 1990s.

Meanwhile, this study draws attention to the lessons for Central Asian riparian nations in the light of the Nile River case. In fact, "while Egypt and Sudan were negotiating their Nile Waters Agreement, the government of Ethiopia [*another upstream riparian state*] declared that it was reserving its rights for future use of 84 percent of the flow" [21]. Similar to the Central Asian scenario, downstream "Egypt, who resisted any diminution of the Nile waters," favored the no-harm rule against its upstream neighbors. Later the Egyptian government built a dam in its own territory to secure its own summer water intake from the Nile, identical to what Uzbekistan and the Kyrgyz republic did in Central Asia [20]. However, this attitude of Egypt resulted in "the loss of almost a fifth of the Nile's annual flow from evaporation and seepage from the downstream" reservoir in Egypt; moreover, "this loss also increases the salinity of the water downstream" [21].

Conclusions

Water tension in Central Asia has become one of the regular questions of academic research since the fall of the Soviet Union in 1991. After almost 25 years of interstate negotiations this issue is still a challenge to peace and stability between the riparian states. Central Asian states could not come up with any treaty satisfactory to all of them so far because of their unilateral approach to the problem. This research argues that the riparian nations of Central Asia can achieve a legal solution in the light of the principles of non-significant harm and sustainable development. To date, downstream countries took the position of keeping the former Soviet water management scheme on a status-quo basis. However, upstream states found that Soviet arrangement unreasonable as they need more proportion of water flow, in particular for hydropower usage. Thus, this article underlines that adherence to the principles of non-significant harm and sustainable development is one way to avoid transboundary water dispute in a long-term perspective. The final outcome of this research is stability and avoidance of conflict, prosperity and growth of investment attractiveness [22] in Central Asia.

In addition, the paper sums up that there is no universally accepted set of international water law principles. On the contrary, most principles used to settle international water disputes are contradictory in nature. However, the principles of non-significant harm and sustainable development have recently been taking precedence among the states involved in transboundary water disputes. Finally, the research argues that the Kishenganga Case provides useful lessons for the Central Asian watercourse states. This case has facts almost identical to those in the Central Asian disputes, and is one of the few that has been heard by an international body.

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