

# Legal challenges to the management of transboundary watercourses in Central Asia under the conditions of Eurasian Economic Integration

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**Abstract** Worldwide experience has shown that interstate economic integration can help states in strengthening of management of transboundary waters and international water law serves as a reference for developing of relevant interstate cooperation. Transboundary waters in Central Asia play important role in the economic cooperation among riparian states, including those who are members of the Eurasian Economic Union (EAEU). At the current stage of transboundary waters management in Central Asia, the obsolete legal status is evident. The international water law sources developed under the United Nations' auspices have no binding application due to lack of formal membership of the EAEU states in these treaties. Also the regional set of regulations, especially for the Aral Sea Basin, needs further enhancement and more efficient implementation. The bilateral interstate regulatory framework of the management of waters shared by EAEU states in Central Asia requires development of additional rules to enable better accommodation of challenges existing in terms of the current interstate cooperation. Having said that can one further assume that EAEU could serve as a new

legal framework for more effective cooperation on transboundary watercourses in Central Asia? The answer might be yes, but... the current stage of the legal framework for cooperation on transboundary waters within the EAEU requires sufficient enhancements in terms of developing its legal and institutional framework. The first condition for EAEU to serve as framework for cooperation on transboundary waters of Central Asia is to strengthen the regulatory framework for the cooperation of EAEU member states regarding environmental issues in general and transboundary water relations in particular, able to accommodate two main goals: environmental protection on the one hand and economic development on the other hand. The EAEU legal framework shall also lead to improvement of existing institutional cooperation and a dispute settlement mechanism on transboundary waters shared by the member states of the EAEU.

**Keywords** Eurasian Economic Union (EAEU) · Transboundary water management · International water law · Central Asia's water management

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## Introduction

Both hydrology and economics point out that a river basin should be treated as a single unit to maintain the physical integrity of the system and to internalize externalities (Qaddumi 2008). The potential benefits coming out of interstate cooperation may include reduced effects of hydrological variability, flood and drought mitigation, increased system-wide yields of water, improved environmental management, and hydropower generation. All of these have economy-wide impacts, directly affecting productive output, employment levels, poverty, and human

health, without diminishing the importance of potential benefits from other spheres. Despite some authors on hydropolitics claiming that the shared character of watercourses leads to conflicts rather than to cooperation among the riparian states (Starr 1991; Gleick 1998; Soffer 1999), the existing state practice in transboundary waters has proven the prevalence of cooperation over conflict (Wolf et al. 2003: 45; DeStefano et al. 2010: 6).

The legal regime of protection and the use of transboundary waters are more complicated than that of water resources located entirely in the territory of one state, as it requires coordination of activity within several states. “For instance, upstream marshland reclamations lead to imminent poverty of rivers, groundwater overdevelopment may cause catastrophic consequences even for large-sized rivers” (Danilov-Danilian 2014: 33). Even so, states sharing water resources still rather prefer to cooperate on a bilateral level instead of a multilateral one or even to follow the doctrine of absolute territorial sovereignty, proclaiming unlimited freedom of a state to use shared water resources within its territory (Amanzholov 2007). Additionally, despite the existing number of treaties regulating state behavior on transboundary water courses, they have rather limited impact on the state practice on shared watercourses (Wolf and Hamner 2000) with the exception of treaties establishing institutionalized forms of interstate cooperation, like river basin organizations, which can most effectively contribute to the basin governance.

Having said that, one shall remember that water law, underpinned by good governance and policy strategy, facilitates an effective water management for transboundary watercourses. Maintaining the basic legal standards for transboundary water management is the right way for securing regional stability, development and mutual international cooperation. Both legal and economical benefits coming out of interstate cooperation on transboundary waters may become a factor a stimulating development of the existing legal frameworks. Such an assumption has been made for the case study of the Eurasian Economic Union (EAEU) and will be analyzed in the following text.

The EAEU is an international organization of regional economic integration created in 2014 by the Treaty on EAEU (further referred to as the EAEU Treaty). Meanwhile, the EAEU member states’ income is generated based on their natural resources, which in turn provides for a significant dependence of the economy of this integration association upon use of natural resources, including water. Since the use of shared natural resources, including transboundary watercourses, by one state could cause damage to another state sharing this resource, the purposes of further economic integration within the EAEU require a strengthening of the legal governance of activities which may have an impact on the natural resources of EAEU members and therefore on the

development of their national and regional economy. The assessment of the current legal framework for management of transboundary water resources among EAEU states in Central Asia can reveal the existing potential and possible gaps for interstate cooperation and economic integration.

### **Relationship between economic integration and transboundary cooperation in water management**

One of the factors influencing the riparian states’ readiness to cooperate on transboundary waters is existence of the interstates regional integration beyond water matters (LeMarquand 1977; Durth 1996; Conca et al. 2006). An economic assessment of interstate cooperation yields results that are quantifiable and therefore less subject to contestation. Regional economic cooperation can, in certain ways, promote regional integration in non-trade related aspects (Qaddumi 2008). First, the existing institutional framework can be used, instead of causing additional costs of setting up new structures for each agreement to be reached among the involved states. Secondly, intensification of the number of activities within an existing framework of cooperation fosters mutual trust among states allowing for closer cooperation in new areas as well. Third, expanding the range of potential issues at stake within existing structures of regional cooperation embeds the cooperation over water within a wider framework of interstate relations. Including more aspects of cooperation into the existing structure of cooperation increases the possibility of finding a configuration of benefits that is acceptable to all parties. The ability to trade-off gains against losses in multi-subject agreements, importantly, reduces the size of compensatory transfers required to agree on particular issues.

The economic integration of the riparian states—in the case of Europe or Southern Africa—significantly increases the likelihood of interstate cooperation on shared waters (Neumayer 2002; Tir and Ackermann 2009). These two examples of wide political and/or economic cooperation show that potential conflict over water-related interests of riparian states could have been overcome more easily in comparison with regions without previously existing structures of interstate cooperation like the Middle East. Therefore, an internally generated counterbalancing of gains and losses among different fields of cooperation might make enforcement of existing interstate agreements less difficult and also help to enhance cooperation over water issues.

This paper chooses to focus on a research question, whether the EAEU could offer a suitable international legal basis for interstate cooperation on transboundary water resources shared by EAEU member states located in Central Asia, and therefore could serve as an instrument of

strengthening already existing legal regimes on the management of transboundary water courses. For this purpose, this paper has three specific objectives: first, to summarize the principles and mechanisms of transboundary waters management included in the existing sources of international water law; second, to elaborate on the applicability of these standards in the management of transboundary waters in Central Asia nowadays; third, to present the EAEU and to analyze—based on the analysis of the strengths and shortcomings of the legal status of EAEU in comparison with international legal standards—whether the EAEU could serve as a framework for transboundary water cooperation in Central Asia.

## Basic principles and mechanisms of transboundary water cooperation

### Sources of international law on transboundary waters

The principles of international law, especially of water law, have been serving as an important factor in paving the way for concluding the agreements on the management of transboundary waters, even in the case of potential conflict (Kliot 1994; Lautze et al. 2005). This hypothesis might be applicable to the case of interstate relations on transboundary watercourses shared by EAEU states in the region of Central Asia. At least three criteria are commonly used to define the status of a shared water resource<sup>1</sup>: (1) it is located on the territory of two or more states; (2) it includes surface and underground waters, (3) it is a unitary whole and normally flowing into a common terminus. Among the basic international legal framework establishing the common rules of protection and use of shared water resources are: the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 (*further as UNECE Water Convention 1992*); The Convention on the Law of the Non-Navigational Uses of International Watercourses 1997 (*further as UN Water Convention 1997*) as well as some important documents of not legally binding character (like Helsinki Rules on the Uses of the Waters of International Rivers (1966)<sup>2</sup>; The Law of Transboundary Aquifers (2008)<sup>3</sup>; UN Conference

on Environment and Development ‘Agenda 21’<sup>4</sup>). The two international legal sources—UNECE Water Convention 1992 and UN Water Convention 1997—pose an indisputable legally binding force and may be applicable globally. Obligations coming out of these instruments for the Central Asian states and Russia, in the case of their membership to them, would presuppose the need of their implementation and compliance with their provisions within the framework of interstate cooperation on transboundary watercourses in the Central Asia region. The status of the membership of the EAEU states in these treaties will be discussed below.

### Main principles of the international water law

The existing international sources reflecting legal regimes of transboundary waters refer to the following three basic water law principles (Caponera 1985: 565; Jaihar and Popattanachai 2013: 352–359): (1) the principle of reasonable and equitable use, (2) the principle of the prevention of transboundary harm, and (3) the principle of cooperation, which are discussed below.

First, the principle of reasonable and equitable use is considered to be the main one in the area of the use and protection of shared water resources (Paisley 2002: 283). Among the factors relevant from the point of view of equitable and reasonable utilization of water resources, the following can be named: geography, hydrography, climate, ecology as well as other factors of natural, social, and economic character.<sup>5</sup> The principle of reasonable and equitable use reflects the principle of state sovereignty over its natural resources, including transboundary water resources, which provides for a states’ right to freely develop their economy and use their natural resources. This freedom is, however, limited by a state’s obligation not to cause harm to the environment of other states.<sup>6</sup> This basic duty of a state, arising out of the respect against the environment, can be understood as not to cause unnecessary pressure on the environment and shows how economic right to use water resources should be limited by the aim of environmental protection. The applicability of the principle of state sovereignty to shared water resources, not without some critics (Mechlem 2009: 811), was clearly spelled out in the main international law instruments.<sup>7</sup>

<sup>1</sup> See: The Helsinki Rules 1966 (art. III); UNECE Water Convention 1992 (Art. 1); UN Water Convention 1997. Art. 2 (b).

<sup>2</sup> Concerning their legal force we may admit that some authors consider provisions of the Helsinki Rules of 1966 as a reflection of the international customary law (Valeev 2012: 378), but some others consider them merely as unbinding recommendations (Vinogradov 2000).

<sup>3</sup> The Law of Transboundary Aquifers’ of December 11, 2008, UN Doc A/RES/63/124.

<sup>4</sup> ‘Agenda 21’ of the UN Conference on Environment and Development of June 14, 1992, UN Doc A/CONF.151/26/Rev 1 vol I, 9.

<sup>5</sup> UN Water Convention 1997 Art. 6.

<sup>6</sup> See: Charter of Economic Rights and Duties of States of 1974, Art. 1. A/RES/29/3281; Rio Declaration on Environment and Development of 1992 in Principle 2. A/CONF.151/26 (Vol. I).

<sup>7</sup> Helsinki Rules 1966, Art. 4; UNECE Water Convention 1992, Art. 2, par. (c), UN Water Convention 1997 Art. 5, par. 1.

The second principle spelling out the prevention of transboundary harm imposes on states a responsibility to prevent transboundary harm that may be caused to the shared natural water resource. The states are therefore obliged to take legislative and administrative measures aimed at the prevention of transboundary harm. This principle mainly refers to the antecedent actions which are obligatory to be taken by states to prevent harm, and secondly that harm shall be compensated to allow an environment to recover (Karkkainen 2006; Yu 2011; Keessen et al. 2008). Such interpretation is to be found in the international water law instruments<sup>8</sup> and has been presented by the International Court of Justice in The Case Concerning Pulp Mills on the River Uruguay as customary law.<sup>9</sup>

Thirdly, the principle of cooperation anticipates that transboundary problems related to the protection of the environment should be resolved by means of cooperation of states based on equality and mutual benefit with a purpose to prevent, reduce, and eliminate negative environmental impact and to restore natural resources (Crabb 2003; Pittock et al. 2010).<sup>10</sup> In fact, states, while performing their obligation to cooperate, are free to adjust their actions, undertaken for the purpose of fulfilling of principles included into the international legal instruments, like UN Water Convention 1997, and UNECE Water Convention 1992 for their own particular relevant needs by means of creating special regional mechanisms allowing for proper implementation of the principle of cooperation.

### Institutional mechanisms of interstate cooperation

Out of a great number of international agreements adopted for regulating transboundary waters, merely less than a half of them provide for institutionalized forms of interstate cooperation (Wolf et al. 2003: 45). To draw some general analysis on the diverse forms facilitating institutional cooperation of states on transboundary waters one can refer to the notion of “Joint Management Arrangements” (JMA), which is expressing a more expansive approach to the object of the research (Janusz-Pawletta 2015). The JMA can be defined as “a basin wide or joint agency or

commission with authority to undertake the integrated management of waters of an international drainage basin” to be established by basin states when necessary to ensure the equitable and sustainable use of waters and the prevention of harm.<sup>11</sup> The undertaking of JMA is in fact not compulsory; however, it is a wide spread state practice to establish such arrangements, often viewed as a precondition of the effective implementation of the basic water management principles.<sup>12</sup> Existing international water law refers to the establishment of JMA in the form of joint bodies/joint cooperation mechanisms or commissions and determine their scope of activities.<sup>13</sup>

The overall role of international law in governing transboundary waters is crucial (Wouters 2013). International law facilitates transboundary interstate cooperation, offering norms and principles reflected in existing agreements and within the customary law, guiding states toward a sustainable way of mutual interactions. Law serves as a foundation for continuing and developing multilateral cooperation on transboundary water management also in Central Asia. The question which shall be asked is whether the existing regional cooperation might be further strengthened thanks to deepening of the regional integration within the EAEU. The answer on this question requires first of all an analysis of the existing legal framework facilitating cooperation among the EAEU states on the transboundary waters.

### Legal framework regulating interstate cooperation within EAEU on transboundary waters in Central Asia

Currently there are five member states in the EAEU, namely the Republic of Armenia, Republic of Belarus, Republic of Kazakhstan, Republic of Kyrgyzstan, and the Russian Federation. The EAEU Treaty is based on more than 200 treaties, which have been signed by the member states of the EAEU before its creation. Actually, the EAEU Treaty is a codification of the norms of the treaties to which today’s EAEU member states used to be state-parties. The Customs Union, which is a part of the EAEU, assures free movement of goods between member states and the elimination of all tariff barriers. Also a special legal framework

<sup>8</sup> Helsinki Rules 1966, Art. 10; UNECE Water Convention 1992, Art 2 par. 1, UN Water Convention 1997. Art 7.

<sup>9</sup> Pulp Mills on the River Uruguay (Argentina vs. Uruguay), para 205 (Judgment of International Court of Justice from April 20, 2010). Available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=88&case=135&code=au&p3=4>. Last visited 20.03.2016.

<sup>10</sup> According to Article 2 (para 2) of the International Covenant on Civil and Political Rights of 1966 “All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law”.

<sup>11</sup> ILA Berlin Rules, Art. 64.

<sup>12</sup> Art. 64 of Berlin Rules on Water Resources, International Law Association ‘Resolution No 2/2004: Water Resources’ in International Law Association (ed) Report of the Seventy-First Conference: Berlin: 16–21 August 2004 (ILA London 2004) 15. <https://www.google.pl/#q=ilahq+Berlin+Rules+on+Water+Resources%2C+International+Law+Association+%282004%29+>.

<sup>13</sup> UN Water Convention 1997, Art. 8, and 24; UNECE Water Convention 1992, Art. 9.

has been created for the free movement of services, persons and capital within the EAEU. There is a fairly developed EAEU institutional structure—including the Supreme Eurasian Economic Council (Supreme Council), Eurasian Intergovernmental Council (Intergovernmental Council) and the Eurasian Economic Commission (EEC).

The use of natural resources, including transboundary waters, plays a significant role in the economy of the EAEU states. It creates a need for closer interstate cooperation on the use and protection of transboundary waters based on an effective legal setting. The later analysis will therefore try to assess how far the existing framework facilitates the interstate cooperation on transboundary waters.

### **Overview of the transboundary waters shared by EAEU member states**

There are several large watercourses shared by the EAEU states of Central Asia, namely Syr Darya, Chu and Talas rivers (shared by Kazakhstan and Kyrgyzstan), Ural, Ishim, Irtysh and Tobol rivers (shared by Russia and Kazakhstan). The relations between Kazakhstan and Kyrgyzstan are shaped by the fact that in case of all shared waters Kyrgyzstan is the upstream country. Important are also the diverging type and contradicting regime of uses of the water resources. In Kyrgyzstan, water is an important resource to produce energy, which requires constant release of water. The most important purpose of usage of water in Kazakhstan is for the irrigation needs, which in the local climatic conditions presupposes, in opposite to the regime preferred by Kyrgyzstan, a seasonal water's storage (increased in the winter period to avoid flooding and accumulate for water for summer season) and its release (increased in the summer period). Interstate cooperation in Chu and Talas river basins are often referred to as exemplary in the regional context (opposite view: Wegerich 2008), with only sporadic tensions on water issues like in the case of plans opposed by Kazakhstan to build two hydroelectric power stations near Kambar Ata (Janusz-Pawletta and Gubaidullina 2015). The transboundary water relations between Kazakhstan and Kyrgyzstan on the shared Syr Daria River Basin are much more complex since engage also Uzbekistan and Tajikistan (UNECE 2015), which are, however, not members to EAEU.

Cooperation between Kazakhstan and Russia in the field of use and protection of transboundary waters is conducted on 20 transboundary watercourses, including the main ones like Ural and Irtysh. In case of the Ural river, Russia is an upstream state and Kazakhstan a downstream state. The Ural's outflow has been intensively shrinking for recent years threatening both economic benefits (navigation, fishery, etc.) and ecologic status (pollution, decrease in

natural sturgeon spawning areas). In case of the Irtysh Basin, the geographical position of both states is the opposite: Russia is a downstream country, and Kazakhstan is the upstream one. The Irtysh Basin is shared by Kazakhstan and Russia with China and Mongolia. The often referred to shortages of water volume in Irtysh require additional affords of multilateral character to facilitate mutual cooperation.

Due to the high importance of transboundary waters to the EAEU, it is of high importance to analyze the existing framework regulating interstate cooperation within the EAEU on transboundary waters in Central Asia and elaborate on the potential for its future developments member states. The existing legal framework is to be analyzed taking into account whether, and if yes, how far it reflects the international water law standards.

### **International legal framework on transboundary waters and its applicability to EAEU**

The first criterion of a legal assessment of the EAEU framework for transboundary water cooperation in Central Asia is its compatibility with international water law standards included into the UNECE Water Convention 1992 and UN Water Convention 1997. Article 1 of the EAEU Treaty states that the EAEU “is an international organization of regional economic integration,” which would allow the EAEU to account for a “regional economic integration organization” as foreseen in the UN Water Convention 1997. Article 2 (d) of the UN Water Convention 1997 defines such an entity as an organization constituted by states of a given region, to which its member states have transferred competence with respect to matters governed by this convention. The fact that the UN Water Convention 1997 offers a firm international legal basis for the development of a transboundary legal framework for interstate cooperation on transboundary waters could support the argument for recognizing the EAEU as a regional economic integration organization. In turn, it could help to further strengthen cooperation of EAEU member states also regarding the transboundary water issues. However, it must be mentioned that as for now, none of the member states of the EAEU are party to the UN Water Convention 1997. Therefore, its provisions are not directly applicable to the EAEU member states and do not regulate their transboundary water relations. Nevertheless, the EAEU states remain free to accept the UN Water Convention 1997 provisions as a basis for closer cooperation on their transboundary water issues. It would be advisable since the UN Water Convention 1997 was a result of long-term work of the UN International Law Commission. However, the legal value of this treaty has been challenged in international legal doctrine (Dellapenna and Gupta 2008: 304); at the same

time, it was admitted that its most basic provisions reflect international customary norms (Iskandarhonova 2007: 7). The later assumption offers additional legal argument to EAEU states to apply UN Water Convention 1997 to their transboundary affairs already at this stage.

As for the UNECE Water Convention 1992, only two out of five member states of the EAEU—Kazakhstan and Russia—are parties to it. Also two protocols to the UNECE Water Convention 1992 were adopted, first on Water and Health of 1999, where only Russia, but none of the Central Asian EAEU states, is a member since 1999, and secondly, the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters of 2003, which is not in force yet and has not been signed by Central Asian EAEU states nor Russia. Altogether, the application of the UNECE Water Convention 1992 nowadays does not seem to be possible when it comes to the regulation of transboundary waters within EAEU in Central Asia; however, on praxis its relevance is recognized by all Central Asian countries (Libert 2008). There is also a strong argument that number of provisions of the UNECE Water Convention reflects the customary norms of international water law (Wouters and Vinogradov 2003).

Due to the limited formal participation of the EAEU states in the UN Water Convention 1997 and UNECE Water Convention 1992, there is no binding application in managing transboundary water resources in EAEU in Central Asia. Therefore, the formal membership in one or both would be advisable. Never the less both conventions provide in the interstate practice a strong framework for cooperation between the EAEU Central Asian countries to manage their shared waters according to the current standards of international water law.

### **Regional multilateral legal framework among EAEU states on transboundary watercourses in Central Asia**

There are two regional frameworks containing interstate legal agreements regulating the status of transboundary waters in Central Asia. The first group are commitments adopted by Central Asian states upon their membership in the Commonwealth of Independent States (CIS), and the second are regional agreements among riparian states sharing the basin of the Aral Sea. The main difference between both frameworks is the membership of Russia in each of them. When, in the case of cooperation within the CIS, Russia is its member state, then in the framework of cooperation in the Aral Sea Basin, Russia is not a member of existing regional agreements, what weakens the effectiveness of this framework to serve as a point of reference for water cooperation among the EAEU states.

The CIS Agreement on the Basic Principles of Interaction in the Sphere of Sustainable Use and Protection of Transboundary Waters of 1998 (*further as CIS Agreement*) is a regional treaty to which EAEU members are parties. The CIS Agreement directly establishes a legal regime of water resources. The preamble to the CIS Agreement contains reference to the Helsinki Rules 1966 and UNECE Water Convention 1992 and points out that “this Agreement takes into account provisions of both mentioned instruments”.<sup>14</sup> As an agreement of a framework character, the CIS Agreement requires further specification “by concluding bilateral and multilateral treaties and also by other mutually agreed means” (Article 11). The principle of prevention of transboundary harm was spelled out in Article 2 of the CIS Agreement. But neither principle of reasonable and equitable use of water resources nor the obligation to cooperate (apart from the obligation to establish the principles of cooperation) is existent. Moreover, the creation of any institutionalized form of interstate cooperation is not foreseen in the CIS Agreement. As for today, the interstate cooperation between the EAEU with reference to the CIS legal water-related framework is rather limited and does not serve as a platform for their effective cooperation on transboundary waters.

The second type of regional legal framework on cooperation among EAEU states on transboundary waters is limited to the legal commitments regarding the basin of the Aral Sea and includes several multilateral states’ agreements. The Agreement of 1992 between EAEU members Kazakhstan and Kyrgyzstan, also together with participation of the remaining riparian states of the Aral Sea Basin which are Uzbekistan, Tajikistan and Turkmenistan, devoted to the Cooperation in the Sphere of Joint Management of Use and Protection of Water Interstate Recourses is a multilateral regional treaty stipulating more specific mechanisms of protection and use of the shared water resources in the region. The principle of the prevention of transboundary harm is enshrined in Article 3, but the principle of reasonable and equitable use is not set there. It foresees the creation of the Interstate Coordinating Water Commission (Art. 7 and 10) authorized to provide for compliance with a water passage regime and water consumption limits...”. Another document, the Framework Agreement on the Use of Hydro energy Resources in the Syr Darya River Basin of 1998 to which EAEU members Kazakhstan and Kyrgyzstan (as well as Uzbekistan) but not Russia are parties, establishes a common water passage regime in Toktogulskoe hydroplant. This Agreement eliminates custom duties on imports and exports of energy resources and other goods and services related to its

<sup>14</sup> CIS Agreement on basic principles of interaction in the sphere of sustainable use and protection of transboundary waters of 1998.

implementation. It underlined a coordinated order of water and energy resources use in the Syr Darya River Basin, which is a prerequisite for further socioeconomic development of the countries and peoples' welfare.<sup>15</sup> However, it is of a rather technical but not general legal nature and does not reflect common principles of water law, such as the principles of reasonable and equitable use and the prevention of transboundary harm (Janusz-Pawletta 2015).

The existing institutional arrangements applicable to the entire basin of the Aral Sea were established in the Agreement on joint action to address the problem of the Aral Sea and surrounding areas, environmental improvement and socioeconomic development of the Aral Sea region of 1993, which sets up an institutional body the International Fund for Saving the Aral Sea (IFAS). In this most significant regional mechanism for cooperation in the Aral Sea Basin as a whole, Russia holds merely an observer status. The Agreement on IFAS's legal status of 1999 did not lead to the improvement of the institutional cooperation as initially intended. It led rather to an institutional confusion due to inclusion of the already existing international intergovernmental organizations into the IFAS: the Interstate Commission for Water Coordination (ICWC) and the Interstate Commission on Sustainable Development (ICSD) and their subsidiary organs. The unclear legal nature of IFAS still requires a change of the legal status of all existing bodies to avoid the subordination of legally independent international law subjects (ICSD, ICWC) under the structure of another international law subject (IFAS).

Unfortunately, nowadays the whole current legal system in the Aral Sea Basin—having just a declarative character (no adoption of foreseen additional protocols), being outdated or just not properly implemented—does not reflect current interstate water relations on the regional level (Janusz-Pawletta 2015). The problem lies in the fact that the normative quality of these treaties, most of which have been adopted with no links to each other, fall short of incorporating the contemporary principles of international water law and best water management practices and neglect the significance of establishing a sound procedural system of transboundary water cooperation (Ziganshina 2015). Also, the fact that Russia is not a party to it limits its applicability within the EAEU cooperation framework.

### **Bilateral legal framework among EAEU states on transboundary watercourses in Central Asia**

A prerequisite of carrying into effect equitable, reasonable, and harmless transboundary water management is that the states' obligations to cooperate include a bilateral level of

interstate relations. The legal regime for such cooperation in the governance of transboundary waters shared by EAEU states on a bilateral level has been developing already for the last 25 years. The following analysis reflects current legal status of bilateral relations on transboundary waters of Central Asia

#### *Russian–Kazakh cooperation on the transboundary watercourses*

The framework of cooperation between Russia and Kazakhstan is based on the Water Agreement,<sup>16</sup> which was concluded in 2010 and replaced the treaty of 1992.<sup>17</sup> The 2010 Water Agreement is based on the principles of the UNECE 1992 Convention on the protection and use of transboundary watercourses and international lakes since both state-parties are members to the UNECE Water Convention. The 2010 Water Agreement applies to all transboundary waters, surface and ground. Its parties agreed to prevent transboundary impact by refraining from activities which may cause deterioration of the hydrological and hydrochemical regime of transboundary waters and related ecosystems; taking measures to control and eliminate pollution, and mitigating negative effects of natural phenomena, such as floods and erosion; taking measures which ensure proper maintenance of hydrotechnical installations and waste treatment facilities (Art. 3). Parties obliged themselves to the rational utilization and protection of transboundary water bodies and the responsibility to ensure that their activities do not cause damage to transboundary water bodies of another party and to respect their earlier agreements and past decisions on the allocation of transboundary water resources. The procedural obligations include prior notification of planned measures which may cause transboundary impact; consultations on such measures, exchange of information; monitoring of transboundary water bodies, compensation of transboundary harm caused by activities on transboundary water bodies, etc. In terms of institutional cooperation, the 2010 Water Agreement establishes a Joint Commission with a wider mandate than the previous body, for instance: to determine the parameters of water flow and to modify the water allocation limits in transboundary watercourses on the

<sup>16</sup> Agreement between the Government of the Russian Federation and the Government of the Republic of Kazakhstan on Joint Utilisation and Protection of Transboundary Water Bodies from 2010 (further referred to as 2010 Water Agreement).

<sup>17</sup> Agreement between the Government of the Russian Federation and the Government of the Republic of Kazakhstan on Joint Utilisation and Protection of Transboundary Water Bodies from 1992. It created a Kazakhstan–Russia committee meeting twice a year to approve the work schedule for reservoirs designated for joint use, set limits for water extraction and develop measures for the repair and operation of water facilities designated for joint use.

<sup>15</sup> See Ref. EU-UNDP Project (2008–2012), p. 10.

basis of joint assessment of water requirements; to study planned measures and determine the amount of harm-caused compensation.

In the case of transboundary waters shared not only by Kazakhstan and Russia but also by other states, the existing legal framework is not sufficient. It is the case for the Irtysh River Basin where merely bilateral arrangements between Russia and Kazakhstan, on the one hand, and China and Kazakhstan, on the other (Vinogradov and Wouters 2013), exist and apply simultaneously but separately to its management. Since these treaties do not affect the manner in which the upper or lower reaches are used, it creates obvious difficulties for Kazakhstan and Russia in effective governance of the Irtysh Basin. There is a need for a stronger political push of the riparian states toward constant efforts for setting up a mutual legal framework for the whole Irtysh Basin. One of the important goals would be to create a basin-wide joint body. It is, however, not an easy task. It shall accommodate responsibility for management, use and protection of the whole Irtysh Basin in a mutually beneficial multilateral way, but there seem to be not enough relevant political will to pursue this approach.

#### *Kazakh–Kyrgyz cooperation on the transboundary watercourses*

A progressive example of bilateral cooperation in the EAEU presents legal relations between Kazakhstan and Kyrgyzstan in the transboundary basin of Chu and Talas rivers. Its waters are mainly used for irrigation purposes in both countries as well as for the generation of hydropower. Interstate cooperation in this basin is being often perceived as best developed within the whole Aral Sea Basin,<sup>18</sup> despite some sufficient weaknesses related mainly to the operation of Kirov reservoir (Wegerich 2008). The current legal basis for cooperation offers *the Agreement on the Use of Water Management Facilities of Intergovernmental Status on the Rivers Chu and Talas* of 2000, which was developed referring to the legal standards of the UNECE Water Convention of 1992.<sup>19</sup> It is limited in scope, covering the use of water facilities of interstate use, which shall be targeted at mutual benefits for both states on a fair and reasonable basis. The agreement provides for shared participation of both states in the costs of operation and maintenance of facilities like dams, reservoirs and canals specified in the Agreement in accordance with the water volume received by each party. This infrastructure located

on the territory of Kyrgyzstan and remaining under its ownership is however of great importance for Kazakhstan's water usage. Additionally, states agreed to undertake joint measures to protect the water facilities of interstate use from adverse effects of floods, mudflows and other natural phenomena (Art 7) and in case of emergency shall notify each other and undertake joint actions to prevent, mitigate and remove consequences of emergencies (art 8) as well as to acknowledge the necessity to use the construction, repair, operation and industrial capacities of each other (art 9). In 2006, the states established a permanent bilateral Commission<sup>20</sup> which is responsible for determining the infrastructure operation mode as well as the states' share in costs. The commission has a well-developed structure and consists of two national parts, each having a chairperson. The commission meets twice a year but has a permanent executive body, a secretariat, with regular meetings of members of the Kazakh and Kyrgyz national secretariats. The commission has also four working groups on (1) legal issues, (2) water allocation, (3) facilities and (4) economics, environmental monitoring and data exchange.

The present success of the bilateral relations between Kazakhstan and Kyrgyzstan in the Chu–Talas basin is partly due to the prehistory of existing regulation established back in the Soviet period. A Statute issued by the Ministry of Water Economy of the USSR of February 24, 1983, on the joint use of water resources in the Chu River Basin and its additional Protocol as of February 18, 1985, settled the division of all water resources of the Chu River Basin in quotas of 42% for Kazakhstan and 58% for Kyrgyzstan. A similar statute concerning the Talas River Basin of January 31, 1983, and its additional Protocol as of July 18, 1983, fixed 50% for Kazakhstan and 50% for Kyrgyzstan of Talas water resources. These documents include no reference to the operation and maintenance costs of the Kirov reservoir since costs were covered from the federal budget of USSR (Kemerova and Zhalkubaev 2003: 480). The previously existing framework of cooperation helped both states to facilitate current bilateral relations in water management.

#### *Kyrgyz–Russian cooperation on the transboundary watercourses*

Kyrgyzstan and Russia do not share any transboundary watercourses, nevertheless there used to be some interaction of legal nature between them on this matter. Kyrgyzstan, being one of the riparian states of the Syr Darya River Basin, established bilateral cooperation with Russia, which is merely neighboring this basin, allowing for some indirect impact on its management. There were two

<sup>18</sup> [https://www.unece.org/fileadmin/DAM/env/water/Chu-Talas/Chu\\_Talas\\_II\\_Project\\_Report\\_Short\\_ENG.pdf](https://www.unece.org/fileadmin/DAM/env/water/Chu-Talas/Chu_Talas_II_Project_Report_Short_ENG.pdf). Last visited 20.03.2016.

<sup>19</sup> The global opening of the 1992 Water Convention, P. 2, see: [http://www.unece.org/fileadmin/DAM/env/water/publications/brochure/Opening\\_brochure.pdf](http://www.unece.org/fileadmin/DAM/env/water/publications/brochure/Opening_brochure.pdf). Last visited 20.03.2016.

<sup>20</sup> See: [www.chutalas-commission.org](http://www.chutalas-commission.org). Last visited 20.03.2016.

agreements concluded between Russia and Kyrgyzstan in 2012. The first, on Building and Operating the Kambaratinskaya-1 Hydropower Plant stipulates construction and operation of the HPP, as well as building up power lines for the export of electrical energy generated there to adjacent states. The second, on Building and Operating the Upper Naryn Cascade of Hydropower Plants provides for building and operating four Upper Naryn cascade hydropower plants in Kyrgyzstan—the Akbulunskaya, Narynskaya-1, Narynskaya-2 and Narynskaya-3 power plants. Due to the worsening of the overall economic situation, these cooperation plans were put on hold (Blagov 2016). In January 2016, the president of Kyrgyzstan signed a law on annulment of both agreements.

The currently existing bilateral management of transboundary waters shared by EAEU states in Central Asia requires a new clear and comprehensive set of rules, which are flexible enough to accommodate current and future challenges of interstate cooperation.

### **Weaknesses of the EAEU framework in regard to cooperation on transboundary waters in Central Asia and possible solutions**

The provisions currently applicable to the existing legal framework of the EAEU concerning the environment, and particularly to water resources, envisage a number of shortcomings regarding (1) regulatory basis, (2) institutional cooperation, and (3) dispute settlement mechanisms.

#### **Regulatory basis of the transboundary waters**

As it has been presented earlier on, there are several sets of agreements aiming at the protection and establishing of multilateral and bilateral legal regimes on the use of transboundary waters to which EAEU member states are parties to. These agreements need further specification and unification since some of them are “not organized, badly agreed upon and even contradict each other” (Amanzholov 2007; EU-UNDP Project 2008–2012). Furthermore, due to a limited number of EAEU states who became members of the UNECE Water Convention 1992, and the non-participation of EAEU states in the UN Water Convention 1997, these widely recognized agreements do not strengthen the existing legal framework on transboundary water regulation in the EAEU. The EAEU Treaty itself offers not much more legal clarity. There is neither any special environmental regulation—neither a chapter nor even a single paragraph—on environmental standards, nor on international water standards in the EAEU Treaty. Nor is there any additional agreement concluded among the member states of the EAEU regulating environmental issues,

including water resources. Therefore, it can be stated that in fact nowadays there is no special set of provisions regulating environmental protection within the EAEU, and consequently, no common regulation of the EAEU on shared water resources currently exists.

Thinking of the improvement of today’s regulatory status of the EAEU regarding transboundary water resources management, one shall underline that the EAEU environmental legal framework should be based on the common policy of the EAEU member states. The experience of European Union, which possesses a legal mandate over the development of a common environmental protection policy (Hedemann-Robinson 2015), can serve as a primary example. Such a common policy is odd to be based on international water law standards and the principle of cooperation. Moreover, a new legal and institutional framework should be established within the EAEU to provide it. The success of such integration of policy would depend very much on the quality of the future regulatory framework of protection and use of natural resources, including shared waters of the EAEU member states. To strengthen the regional legal framework of the EAEU on water-related matters, it seems to be necessary to introduce into this framework the existing international legal standards typical for associations of regional economic integration—(1) decisions of common bodies and (2) regional interstate agreements, which are typically to be concluded within an integrated association (Jovanovic 2011). Delays in the implementation of the existing legal institutions mean they could become outdated before they have had any effect (Kemerova and Zhalkubaev 2003). It seems also to be important to implement a mechanism of the environmental impact assessments (EIAs) more effectively and to ensure public participation in decision-making on all hydrologic infrastructures, which could prove advantageous for protecting the interests of the downstream countries on the transboundary rivers and, respectively, strengthen their willingness to cooperate in overall issues relevant to the EAEU.

Additionally, it should be mentioned that the EAEU Treaty lacks of a special chapter dedicated to basic principles of protection and use of transboundary water resources. Additionally, a so-called special annex covering the environmental issues, including a legal regime of transboundary waters, could be added to the EAEU Treaty. Strengthening of the EAEU treaty as well as the adopting of a special annex would reflect the current structure of the EAEU Treaty which consists of (1) the main part, reflecting general norms, and (2) annexes (protocols) where the general norms coming out of the main part are being specified. Such a new set of regulations would create a relevant legal basis for the EAEU Court’s jurisdiction over disputes on transboundary water recourses of the EAEU

member states. The introduction of clear rules on management of transboundary waters would offer a legal basis for the EAEU to relieve the tension between a freedom of a state to use transboundary watercourses within its own territory and an obligation not to cause harm to another state which shares the same watercourse. Such an approach would be beneficial for both development of economic integration and environmental protection of transboundary watercourses in Central Asia.

There is also need for catalyzing a greater commitment among all EAEU states toward an integrated approach addressing basin-wide impacts of the building of dams and other infrastructure in upstream states, as well as guaranteeing the quality of transboundary waters. Here the adoption of regional interstate agreements within the EAEU seems to be most advisable for the sake of settling the environmental and (particularly) water issues. Such agreements would fit into the law sources category listed in the EAEU Treaty (Art. 6). Also it would be advisable that the EAEU would become a party to such treaties as the UNECE Water Convention 1992 and UN Water Convention 1997.

All these above-mentioned improvements of the legal setting on EAEU transboundary water resources would make the dispute settlement mechanism within the EAEU more efficient, and the EAEU Court would get a clear legal standing to resolve disputes connected with the use and protection of transboundary water resources by the EAEU members.

### Mechanisms of dispute settlement on transboundary waters

Currently there is no common specific dispute settlement mechanism for the disputes arising from the treaties setting forth a legal regime of transboundary water resources of the EAEU member states in Central Asia. None of the multilateral nor bilateral agreements concluded among EAEU member states out of Central Asian foresees such a mechanism. The limited participation in the UNECE Water Convention 1992 makes it rather unrealistic that a dispute settlement mechanism fixed there could be used for the case of transboundary waters in Central Asia. Therefore, it would be worth analyzing how far the EAEU Court could serve as such a dispute settlement mechanism.

There are some legal challenges related to the scope of jurisdiction of the Court of the EAEU to be pointed out. The first challenge is related to the fact that according to paragraph 39 of the EAEU Court's Statute, the Court resolves disputes arising from the EAEU Treaty, treaties concluded within the EAEU and (or) decisions of any bodies of the EAEU. That means that EAEU Court does not have jurisdiction over any disputes between the EAEU

states which may arise from other treaties, except those mentioned in Paragraph 39 of the EAEU Court's Statute. Therefore, in cases when treaties establishing a legal regime of transboundary waters could not be considered as above mentioned, as "treaties within the EAEU," the Court would not have jurisdiction over the disputes that could have arisen from such treaties on transboundary waters, even in cases when EAEU member states would have been parties to such a dispute. A legal definition of this category of treaties is provided in the EAEU Treaty (Art. 2). It says that "treaties, concluded within the EAEU" are "treaties, concluded between EAEU member states on issues connected with the functioning of the EAEU." Unfortunately, until now there is no legal case or authoritative legal interpretation of the definition of "treaties, connected with the functioning of the EAEU." Therefore, it is difficult to predict if the treaties on transboundary waters could be regarded as such treaties which are "connected with the functioning of the EAEU." Additionally, it is not clear whether treaties on transboundary waters, which were concluded by EAEU member states before the adoption of the EAEU Treaty establishing this organization, could be recognized as treaties falling under the above-mentioned Art. 39. One shall remember that all existing treaties on transboundary water resources in Central Asia were concluded before the EAEU Treaty entered into force.

As for the second challenge for applicability of jurisdiction of the EAEU Court to disputes over transboundary waters, one shall keep in mind that according to Paragraph 40 of the EAEU Court's Statute, member states may refer to the Court's jurisdiction for the purpose of settling disputes in case the EAEU Court jurisdiction is directly foreseen in a treaty as being subject to the dispute. However, nowadays treaties defining the legal regime of transboundary waters among Central Asian states do not foresee the jurisdiction of the EAEU Court.

Finally, environmentally loaded disputes concerning the use and protection of shared water resources may arise among EAEU states according to existing Articles 29.1 and 65.7 of the EAEU Treaty. Article 29.1 states that "EAEU member states have right to apply trade restrictions for the purposes of ... environmental protection; ... protection of animals and plants".<sup>21</sup> According to Article 65.7, EAEU member states have the right to apply investment and trade in service restrictions "necessary to protect human, animal or plant life or health".<sup>22</sup> However, and that is the final third challenge, application and interpretation of these two EAEU Treaty provisions is unclear due to an absence of any environmental provisions within the EAEU Treaty itself and due to the non-existence of any separate special

<sup>21</sup> EAEU Treaty 2014, Art. 29.1.

<sup>22</sup> EAEU Treaty 2014, Art. 65.7.

agreement within the EAEU covering environmental matters.

### **Institutional cooperation on transboundary waters**

As for now, there is also a lack of an effective interstate framework facilitating institutional cooperation among the EAEU states on environmental matters. This shortage is even more evident in the case of the protection of transboundary waters. Since EAEU institutions have currently no competence in environmental (including water) matters, the existing institutional cooperation among EAEU member states in Central Asia is nowadays based entirely on the obsolete regional institutional framework setup for interstate cooperation in the basin of the Aral Sea which was discussed above.

Due to this shortcoming in the current legal construction of the EAEU, one could think of introducing environment-related competences into the existing institutional framework of the EAEU, which could include a well-developed set of bodies. The Supreme Council is the main body which consists of the heads of the member states of the EAEU. The Supreme Council's competences are very wide. It considers the main issues of EAEU activities, defines EAEU strategy, directions and prospects of further integration development, and takes decisions aimed at implementing EAEU goals. The Supreme Council has its competence in the administrative sphere, financial sphere, sphere of relations between the EAEU and third parties and others. The basic powers of the Supreme Council are: approving the composition of the Board of the EEC and the appointment of its Chairman; approving the Rules of Procedure of the EEC; appointment of the EAEU Court's judges; approving the Budget of the EAEU and determining the amount of contributions of the EAEU member states; determining the procedure for admission of new members to the EAEU and some others. The list of the Supreme Council's powers is not limited. It can also exercise other powers provided by the EAEU Treaty and treaties concluded within the EAEU (Art. 6 EAEU Treaty). The decisions of the Supreme Council are adopted by consensus (Art. 6 EAEU Treaty). The Intergovernmental Council consists of the heads of governments of the EAEU member states. The competence of the Intergovernmental Council mostly is to approve the draft decisions of the Supreme Council (Art. 18 EAEU Treaty). The EEC is the executive body of the EAEU which consists of a Council and Board. The competence of the EEC is specified in Annex 1 to the EAEU Treaty. The basic objectives of the Commission are to enable the functioning of and development of the EAEU, as well as to develop proposals in the sphere of the economic integration of the EAEU (Para 1 of The Regulation on the Eurasian economic Commission.

Annex 1 to EAEU Treaty). The EEC is based in Moscow. The permanent judicial body of the EAEU is its Court. The Court's jurisdiction is set forth in the Annex 2 to the EAEU Treaty and will be discussed further (Art. 19 EAEU Treaty). The EAEU Court is based in Minsk (Belarus). In the case of a conflict between decisions of the Supreme Council, the Intergovernmental Council or the EEC, the decisions of the Supreme Council shall prevail over decisions of the Intergovernmental Council and the EEC. The decisions of Intergovernmental Council shall prevail over the EEC decisions. Decisions of the Supreme Eurasian Economic Council and Eurasian Intergovernmental Council shall be enforceable by EAEU member states in the procedure provided for in their national legislation. Decisions of the Supreme Eurasian Economic Council cannot contradict the EAEU Treaty and the Treaties, concluded within the EAEU.

Nowadays none of these bodies poses clear competences related to environmental (including water) issues. To overcome this shortage, amendments of the EAEU Treaty would be required.

### **Conclusions**

International best practices prove that economic integration among states may lead to more effective interstate cooperation on transboundary resources, including water resources. While proving the hypothesis of this paper, that the EAEU could serve as a legal framework for more effective cooperation on transboundary waters in Central Asia, the answer given could be positive, but only if taking into account several conditions the EAEU should comply with to reach this goal. The first condition is to introduce main principles and mechanisms of international water law into the existing EAEU legal framework. Second would be to strengthen the legal basis to enable cooperation between EAEU member states on environmental issues in general and transboundary water relations in particular. The current framework for transboundary water cooperation within the EAEU unfortunately is rather limited and out of date. To overcome existing shortages, there is a need for introduction into the EAEU legal framework a set of new comprehensive and clear international legal norms which would comply with two goals: environmental protection on the one hand and economic development on the other hand.

The two required amendments could be complied with by improving the existing regulatory basis of the EAEU on transboundary waters, institutional cooperation and a dispute settlement mechanism. As for the regulatory rules, they should be based on the common policy of the EAEU member states. Unfortunately, there is no special environmental or water agreement within the EAEU as well as no

special part of the EAEU Treaty devoted to environmental or water issues. Neither is there any legal framework for such a policy within the EAEU at the current stage of integration. Such common policy could be efficient merely in case it would be stipulated by the EAEU Treaty. Therefore, it would be beneficial to amend the EAEU Treaty with a special chapter on environment protection, including the protection of transboundary watercourses, be introduced. Also, the adoption of regional interstate agreements on transboundary watercourses which would fall under the legal notion within the EAEU of “treaties, concluded within the EAEU” would be beneficial. In case when the EAEU becomes party to the UN Water Convention 1997, it could be recognized as a regional economic international organization in the context of the UN Water Convention 1997. As for the institutional cooperation in the case of overcoming shortages in regulatory rules, the EAEU bodies would receive necessary powers regarding water issues. In this way, the EAEU Court also would get clear jurisdiction to resolve disputes connected with the use and protection of transboundary waters placed on the territory of the EAEU member states.

The EAEU could work as an institution that can bridge the tension between the sovereignty over water resources on the one hand and the necessity to cooperate aiming at economic development and environmental protection of transboundary water resources on the other hand. However, the level of current cooperation on transboundary watercourses between Central Asian EAEU states as presented above could still be improved for the sake of mutual benefit. Its management can become one of the increasing challenges of the years to come in the relations among EAEU states due to insufficient clarity on how to better protect and allocate the limited water resources in their transboundary rivers. The interstate association of integrative character, as is the case of the EAEU, to be able to effectively facilitate interstate cooperation, including transboundary water resources, shall be set up incorporating widely adopted international legal standards, which shall subsequently effect further implementation of these standards within national legislation systems of its member states. Such an approach strengthens the rule of law within the integrative association itself, helps member states to advance on both supranational and national levels of legislation and finally leads to the unification of member states’ national laws. It clearly comes out of the declaration of the high-level meeting of the United Nations General Assembly on the rule of law that the rule of law and development are strongly interrelated and mutually reinforcing, and that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth and sustainable development. For this reason, the United Nations General

Assembly is convinced that this interrelationship should be considered in the modern international development agenda.<sup>23</sup>

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<sup>23</sup> The Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels A/RES/67/1, para 7 (2012).

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