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## **International legal regulation of transboundary environmental pollution**

This article deals with the problems of transboundary pollution of environment which currently acquired global significance. These environmental problems pose a real threat to the external environmental security of the country, consideration of which requires an immediate solution. The Provisions of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, norms of the Water Code of the Republic of Kazakhstan dated July 9, 2003, providing for the concept of «transboundary waters».

*Key words:* transboundary pollution, hazardous waste, transboundary waters, international rivers.

The concept of ecological safety of the Republic of Kazakhstan, 2004–2015 [1;4], notes: «Transboundary environmental problems include issues of water allocation, pollution of transboundary waters, air and soil, movement of hazardous technologies, materials and waste, the development of cross-border mineral deposits, preservation of unique natural complexes.» The solution of transboundary environmental problems, which pose a real threat to the external environmental security is ensured by joint actions of neighboring countries in the framework of international agreements. National legislation plays important role in the regulation of cross-border pollution. However, as a rule, this role will be derived from the adoption and consolidation of relevant international legal rules.

The regulation of transboundary pollution by the norms of international law, in our opinion, requires setting up and solving a number of problems. First, the legal qualifications of this phenomenon as lawful or unlawful is necessary. As a defining characteristic of the illegality of transboundary pollution should be considered as the presence of damage. Theory and practice of international law qualify as wrongful any significant damage to one state by the acts in the territory or under the control of another state. This is evidenced by customary international law, the current understanding of state sovereignty, the implementation of which must not infringe the legal rights of other states.

In relation to the environment it is most clearly expressed in the Stockholm Declaration (1972), where, in accordance with the Principle 21 is noticed: «The state has, in accordance with the UN Charter and the principles of international law, the sovereign right to use its own resources in accordance with its own policies on the environment and the duty to ensure that activity within its jurisdiction does not cause damage to other states or areas under its national jurisdiction.» Some of the decisions of international tribunals show the wrongfulness of such activity.

Second, another important issue is to find the source of transboundary pollution — the causer of transboundary damage. International law provides the methodology and means of identifying one or more sources of pollution, which caused the damage. Violation of such fundamental principle of international law as the principle of not causing damage entails the international responsibility of the causer of the damage.

However, the finding the fact of damage as the result of transboundary pollution and identification of the source of pollution is not always indicative of direct intent to damage of the causer. It is known that environmental damage can occur as a result of legal actions of one or more states. In this case, we can talk about the absolute liability, especially if the transboundary harm is the result of legitimate use of so-called high-risk sources.

As professor V.A.Vasilenko notes, «...in international law, there is no universally accepted legal norms providing the obligation to compensate the damage, which was caused without guilt. This problem is solved by means of special agreements, providing the duty to compensate damage caused by a certain sources of increased danger» [2; 175]. From this it follows that the best way of development of international law, which will provide liability and compensation for transboundary pollution is the development of the Convention's norms. Conventional regulation is characteristically for the international legal regulation of transboundary pollution. In November 1979, at the European high-level meeting on the environment in Geneva, the Convention on transboundary air pollution on long distances was adopted. It was the first agreement in the international practice, which provided comprehensive regulation of interstate cooperation in transboundary air

pollution and united most of the industrialized countries of Europe and North America. This Convention is difficult to assess unambiguously. The one of disadvantages of this international act is the absence of specific agreements regarding the scope and terms of the reduction of transboundary agreed pollutants.

The problem of transboundary movements of hazardous waste is the one of the problems of rapid industrial development. The amount of hazardous waste, generated in developed countries, each year varies, but continues to grow. Transboundary movement of hazardous waste means any movement of hazardous wastes or other wastes from an area under the national jurisdiction of one state to or through an area under the jurisdiction of another state or to or through an area not under the national jurisdiction of any state, if such transportation affects at least two states.

Due to the large amount of hazardous waste disposal in industrialized countries, the legislation on hazardous waste management was adopted; it regulates the entire process (from the production of hazardous waste prior to final disposal) to ensure the environmentally based using of hazardous and other wastes. New processes are aimed at the reduction of waste amount. However, the problem of safe using and disposal of hazardous waste is currently still relevant. Currently significantly increased costs for the using and safe disposal of hazardous waste. These costs, coupled with restrictions on the using of facilities for the disposal of hazardous waste force many private producers to save material resources needed for the cost of the safe use and disposal of waste by exporting hazardous wastes to countries with unstable economies and less stringent laws in the field of environmental protection. Therefore the majority of transboundary movements of hazardous waste take place between industrialized countries in accordance with domestic law. In connection with the advent of the present challenges of the export of hazardous waste and the illegal trade in hazardous waste, developing countries have become «a dumping of waste.»

Held in June 1992 UN Conference on Environment and Development in Rio de Janeiro adopted the Declaration on Environment and Development — the list of principles relating to the global environment and development. Rio Declaration contains the basic principles of ecologically correct behavior of the international community and the states at the present stage. From the point of view of the United Nations and the participants, based on these principles of national internal and external environmental policies should conform to national and international environmental law order. The Declaration sets out the objectives for which these principles were proclaimed. The main of them is the establishment of a new and equitable cooperation on a global scale by establishing new levels of cooperation among nations and peoples, the definition of prospects of development of international environmental law, the development of national legislation in the field of the environment and the establishment of measures, which might be useful to maintain a favorable state of the environment and its restoration. In accordance with the Principle 2 of the Declaration of Rio de Janeiro, it emphasizes that states, in accordance with the UN Charter and the principles of international law, the sovereign right to exploit their natural resources to conduct their own policies on the environment and development, are responsible for that activities and control that this activity does not cause damage to the environment in other countries or areas beyond national jurisdiction. This principle confirms the Principle 21 of the Stockholm Declaration and expresses the further development of the relationship to the environment. Rio de Janeiro Declaration in 1992 can be defined as the basis for cooperation on transboundary movement. The success of the Declaration of Rio de Janeiro in the creation of international law on the protection of the environment will be determined by how the principles contained in it, will be implemented by states and will remain reflected in state practice. Thus, customary law obliges states to cooperate in the field of environmental protection and control over transboundary pollution.

In 2003, Kazakhstan joined the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which made it possible to establish new rules for the declaration of hazardous waste, prevent their subsequent entry into the territory of the republic under the guise of recycled materials and products. The Basel Convention was adopted on March 22, 1989, by 116 countries, entered into force on May 5, 1992, it is composed of 29 articles and 6 applications. The main objective of the Convention is to protect human health and the environment from the adverse effects that may be caused by the production, management and transboundary movements of hazardous and other wastes. In the pursuit of this goal, the Convention establishes a regime which is based on the following principles:

- reduction of hazardous waste to a minimum (the principle of minimization of hazardous wastes);
- if it is inevitable, to remove the hazardous wastes as close as possible to the source of production of the waste (principle of proximity removal);
- the export of hazardous waste is prohibited in Antarctica and in countries that have prohibited the import of hazardous wastes by national legislation;

– hazardous wastes that are exported illegally or legally exported hazardous waste that cannot be removed in a safe way in the country of destination must be re-imported into the state of export.

Analyzing the provisions of this Convention, it should be noted that one of the biggest controversies in the development of the Basel Convention related to the definition of «hazardous waste». Firstly, instead of adopting a definition of hazardous waste, Convention accepts a wide range of them, so there are 45 categories of wastes that are hazardous in the Convention. To qualify them as hazardous, these categories of wastes should express one or more hazardous characteristics such as flammability, oxidation, toxicity. Second, if the waste is considered hazardous in accordance with the national legislation of the country of export, import or transit, waste will be treated as hazardous under this transboundary movement of all states included in the process of transportation [3; 134].

In 2000, Kazakhstan joined the Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992), which allows to form a uniform legal approaches to solving problems of rational use and protection of transboundary rivers. This accession was caused by the fact that Kazakhstan is one of the water-scarce countries of the Eurasian continent. Of the total surface water resources, about half is formed outside the country, one-third goes through Kazakhstan to neighboring states. Currently, due to the increase of cross-border impact on international rivers, the tendency of reduction of natural surface water resources is observed in our country. The very definition of «international river» was first given in Art. 5 of Treaty of Paris of May 30, 1814, that defines an international river as a river flowing through the territory of two or more states. In the legal literature on international law of rivers this definition has a complement — «and having access to the sea» [4; 5, 6].

International rivers are subdivided into the open the border rivers. Open international rivers are those that have the freedom of navigation for commercial vessels of all nations of the world. Border rivers throughout, or in part, are the boundary between two countries and, as a rule, are subject to border regime.

In Barcelona Statute of 1921, in the Art. 1 is given the term «navigable waterway of international importance», which is all natural navigable waterway section, the channel is shared and crossed by different states.

Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992) first introduced the concept of «transboundary waters». Later, the term «transboundary waters» was given in the Article. 15 of the Water Code of the Republic of Kazakhstan dated July 9, 2003. Transboundary waters are any surface or ground waters which mark, cross the border between two or more states or are located on the borders. Under the watercourse system refers to not only the surface, but also underground water, forming a unitary whole and normally flowing to one output. International watercourses have parts, which are located in different states. The regime of watercourses defined by the agreement of the states, to the territory of which they are associated. Each state has the right to participate in the agreement. States are obliged to use the watercourses so as to provide them the necessary protection. They are obliged to participate in the protection of watercourses in an equitable manner, cooperate to achieve this goal [5; 139]. Transboundary water management is complex relationships associated not only with the conditions and procedures for the use of interstate water, but also with the occurrence and termination of the right of the transboundary water objects and subjects use, establishing the rights and obligations. The object of water use in the country is the specific water bodies and water sources, and subject to transboundary water is the river, parts of which are located in different states. Consequently, the subjects of water management of transboundary rivers are the states, on which territory the transit river flows.

The rights and responsibilities of these water consumers in the unity constitute the content of the right of transboundary rivers management. They are defined by the agreements of the states that, in turn, determine the amount and conditions of the right of use of transboundary rivers. The main purpose of transboundary water management is to comply with such a regime of water objects, which would provide a comprehensive rational use of water, their economic use, protection, improvement of qualitative state, as well as to prevent harmful effects on water bodies, i.e., prevent, control and reduce pollution of waters causing or capable of causing transboundary effects. According to the Art. 1 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992, transboundary impact means any significant adverse effects arising from changes in the conditions of transboundary waters caused by human activity, the physical source of which is situated wholly or partly in an area under the jurisdiction of a hand, to the environment — in an area under the jurisdiction of the other side. These effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors; they also include effects on

cultural heritage or social economic conditions resulting from alterations to those factors [5; 141]. Since joining the Convention, the Government of the Republic of Kazakhstan signed a number of bilateral agreements with the Russian Federation, with the Government of the Kyrgyz Republic, with the Government of the Republic of Uzbekistan, with the Government of the People's Republic of China. These agreements of Kazakhstan, regarding transboundary waters, leave no doubt that at the international level, Kazakhstan is ready to cooperate fully with its neighbors to ensure rational use and protection of these waters. Kazakhstan is ready to take responsibility for the unilateral actions of national water and other organizations, if such actions cause damage to a neighbor. Similar commitments are for the contractual partner of Kazakhstan.

These agreements do not take into account the need to regulate international relations in the national use of the spillway area of transboundary rivers. It is known, for example, that if the upper reaches of the rivers are in the mountains, the reckless felling of forests and other vegetation can lead to flooding suffered by the inhabitants of the lower reaches of the river. Another situation — the parties have mountains, if they need water, they can try to speed up the natural melting of glaciers and snowfields, applying blackening of them (such experiments were conducted in the Tien Shan mountains on the Chinese side). But if these measures will lead to flash floods on the border rivers, it cannot be regarded as an internal affair of the party that caused the floods. Apparently, these cases should be negotiated in advance in bilateral agreements of countries related to the use and protection of transboundary rivers. International law knows the problem of water relations in the complex, as the unity of water that forms the entire transboundary river basins, including tributaries, and not only them, but also the catchment areas. This is clearly written in the so-called «Helsinki Rules», adopted by the International Law Association in 1994, the texts of the agreements contain a reference to the «activity» on the one hand, which leads to damage and loss from a neighbor. At the same time, however, the ability of illegal inactivity, which can lead to negative consequences, is ignored. We must assume that this omission is the omission of agreements. But improper activity (or inactivity) of organizations responsible for the operation of facilities is only one aspect of the matter. Harmful effects can occur regardless of the operating structures, primarily as a result of delayed transfer of important water resources information. The agreements provide for the obligation of the parties to exchange such information, but do not say anything about the responsibility of the party because of the slowness (in providing information) which damaged the other side. We must assume that any sanctions would be appropriate in these cases. Moreover, if one side did not systematically provide the other side for the necessary information, even if it did not lead to damages and losses, such carelessness should entail certain sanctions against the faulty part. If to support this point of view, we must recognize the need to conclude special agreements (or preparation of special protocols), which would determine the objectivity, the amount, time and procedure for the exchange of information between water treaty partners.

Thus, in accordance with the Art. 143 of the Water Code of the Republic of Kazakhstan mechanism of international cooperation in the use and protection of transboundary waters provides for the restoration of ecological systems disturbed by transboundary impact, the joint financial and technical participation in the management, regulation and protection of transboundary water cooperation with neighboring countries in the field of unification of the legal framework, creating uniform monitoring systems, the development and implementation of joint programs for the protection and restoration of transboundary water and related environmental systems, attraction of funds of international organizations for these purposes, creating, if necessary, international bodies for the management of transboundary waters for the joint implementation of interstate and intergovernmental agreements on the use and protection of transboundary waters, ratified by Kazakhstan, joint scientific and technological research to solve water problems et al. [6; 12] The ecological basis for international cooperation in the use and protection of transboundary waters should include compensation liability for damage caused by the guilty side, resulting from transboundary impact. New, higher demands on the organization and management of modern water management, rational, economical use and strict protection of available water resources have found legal consolidation in the Water Code of the Republic of Kazakhstan. Due to the fact that now the Republic of Kazakhstan is a sovereign state, there is need to include in the Code the special provisions on the regulation of the use of waters located on the territory of several states, and with the border waters. These provisions are reflected in the Water Code of the Republic of Kazakhstan.

Based on the foregoing, we believe that the most effective means of legal regulation of transboundary pollution are preventive measures, i.e. legal measures to prevent such pollution. Preventive measures are the most appropriate and are playing an increasing role in protecting the environment as the means of national as well as international law. Thus, today there is a system of international rules governing the different types of

cross-border pollution. Overall, however, the existing rules do not fully meet modern environmental requirements, the current level of science and international cooperation. In our opinion, the further development of international legal regulation of transboundary pollution should follow the path detailing and concretization of norms contained in international treaties, conventions. To succeed in the fight against cross-border pollution, a combination of factors, both objective and subjective (arms control, mutual trust and cooperation in the relations of states). In order to prevent the elimination of environmental threats with cross-border nature, there is the need to solve transboundary water problems by promoting initiatives of Kazakhstan to join the Central Asian states to the Helsinki Convention, as not all countries in the region have joined it and therefore did not take measures to ensure the use of the flow of transboundary waters in a reasonable and equitable manner, avoid the potential transboundary impact of the release of hazardous substances, the implementation of the principle of «polluter pays». A special role in this problem belongs to legal scholars through deep theoretical study of the problem of transboundary pollution, development a set of legal means and mechanisms of its limitations, development of practical recommendations.

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### Қазақстан Республикасында қоршаған табиғи ортаның трансшекаралық ластануын құқықтық реттеудің мәселелері

Мақала қоршаған табиғи ортаның трансшекаралық ластануының мәселелеріне арналған, ол қазіргі таңда ғаламдық маңызға ие. Аталмыш экологиялық мәселе мемлекеттің экологиялық қауіпсіздігіне шынайы сыртқы қауіп төндіреді, оларды қарастыру дереу шешімді талап ететіндігі дәлелденген. Қауіпті қалдықтарды трансшекаралық тасымалдау мен оларды жою үшін бақылау туралы Базельдік Конвенцияның ережелері, трансшекаралық су ағындары мен халықаралық көлдерді қорғау мен пайдалану туралы Хельсинкиде қабылданған Конвенцияның, «трансшекаралық сулар» түсінігін қарастыратын 2003 ж. 9 шілдеде қабылданған Қазақстан Республикасының Су кодексінің нормалары талданды.

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### Проблемы правового регулирования трансграничного загрязнения окружающей природной среды в Республике Казахстан

Статья посвящена проблемам трансграничного загрязнения окружающей природной среды, которые приобрели в настоящее время глобальное значение. Отмечено, что данные экологические проблемы представляют реальную внешнюю угрозу экологической безопасности страны, их рассмотрение требует безотлагательного решения. Анализируются Положения Базельской Конвенции о контроле за трансграничной перевозкой опасных отходов и их удалением, Хельсинской Конвенции об охране и использовании трансграничных водотоков и международных озер, нормы Водного кодекса Республики Казахстан от 9 июля 2003 г., предусматривающего понятие «трансграничные воды».

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Репозиторий Қарғу