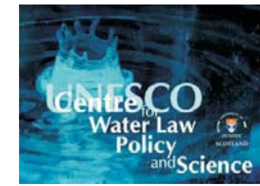

Towards the 6th World Water Forum –
Cooperative Actions for Water Security

International Conference

12-13 May 2011
Tashkent, Uzbekistan

# The Role and Relevance of the 1997 UN Convention to the Countries of Central Asia and Afghanistan in the Aral Sea Basin

Prepared by Dinara Ziganshina

Discussion Note

*Regional Process Commission:*
*Central Asia Cross-Continental Process*

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This note seeks to provide a basis for discussion of the role and relevance of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses (1997 UN WC) to the countries in Central Asia and Afghanistan in the Aral Sea Basin. Out of the six countries sharing the Aral Sea Basin, only Uzbekistan is a party to the 1997 UN WC, having acceded to the instrument in 2007. Hence, a key question that remains to be explored is whether there are benefits for peaceful and effective management of the region's shared waters in more basin states acceding to the 1997 UN Convention. To address the latter question, the note will:

(1) Identify the existing treaty law in the Aral Sea Basin

(2) Clarify the relationship of the 1997 UN WC with watercourse agreements

(3) Provide a summary of a comparative analysis of the existing treaties and the 1997 UN WC to ascertain the value added of the Convention to the regional water management

(4) Highlight the relevance of the 1997 UN WC and advantages of becoming a party to it

(5) Sketch some issues related to the implementation of the 1997 UN WC

## 1. Treaty law as applied to transboundary waters in the Aral Sea Basin

| Central Asia | Afg | Kz | Kg | Tj | Tm | Uz |
|---|---|---|---|---|---|---|
| 1992 Almaty Agreement | - | √ | √ | √ | √ | √ |
| 1993 Kzyl-Orda Agreement | - | √ | √ | √ | √ | √ |
| 1996 Chardjev Agreement | - | - | - | - | √ | √ |
| 1996 Agreement on the use of fuel and water | - | √ | √ | - | - | √ |
| 1998 Syrdarya Agreement | - | √ | √ | √ | - | √ |
| 1998 Environmental Cooperation Agreement | - | √ | √ | - | - | √ |
| 1999 Agreement on the parallel operation of CAR's energy systems | - | √ | √ | √ | - | √ |
| 1999 Hydromet Agreement | - | √ | √ | √ | - | √ |
| 1999 IFAS Agreement | - | √ | √ | √ | √ | √ |
| 2006 Sustainable Development Convention in CA | - | - | s | s | s | - |
| **Commonwealth of Independent States** | **Afg** | **Kz** | **Kg** | **Tj** | **Tm** | **Uz** |
| 1993 Charter of the CIS | - | √ | √ | √ | √ | √ |
| 1992 CIS Agreement on Environmental Interaction | - | √ | √ | √ | √ | √ |
| 1998 CIS Transboundary Watercourses Agreement | - | s | - | √ | - | - |
| 1998 CIS Agreement on Informational Cooperation | - | √ | √ | √ | - | - |
| **UN Economic Commission for Europe** | **Afg** | **Kz** | **Kg** | **Tj** | **Tm** | **Uz** |
| 1991 UNECE Espoo Convention | - | √ | √ | s | - | - |
| 1992 UNECE Water Convention | - | √ | - | - | - | √ |
| 1992 UNECE Industrial Accidents Convention | - | √ | - | - | - | - |
| 1998 UNECE Aarhus Convention | - | √ | √ | √ | √ | - |
| **Global Conventions** | **Afg** | **Kz** | **Kg** | **Tj** | **Tm** | **Uz** |
| 1997 UN Watercourses Convention | - | - | - | - | - | √ |
| 1971 Ramsar Convention on Wetlands | - | √ | √ | √ | √ | √ |
| 1992 UN Convention on Biodiversity | √ | √ | √ | √ | √ | √ |
| 1992 UN Convention on Climate Change | √ | √ | √ | √ | √ | √ |
| 1994 UN Convention on Desertification | √ | √ | √ | √ | √ | √ |

## 2. The relationship of the 1997 UN WC with watercourse agreements

The legal architecture of transboundary water cooperation in the Aral Sea Basin is composed of numerous agreements at different levels. The abundance of treaties on the subject matter raises the question of their relationship with each other. Although most often treaties complement each other, clarity over their relationship is important in case of conflicting obligations. Given its scope, this note confines itself to addressing only the relationship between the 1997 UN WC and the watercourse specific treaties. The 1997 UN WC – a universal framework instrument - carefully spells out its relationship with existing and future watercourse agreements. The five main pillars of such relationship can be derived from Article 3 of the Convention.

(1) First of all, it enunciates that the 1997 UN WC *does not affect* the rights and obligations of a watercourse state arising from *existing treaties*, unless agreed otherwise (art 3(1)). This provision sets forth the complimentary and residual role of the Convention, explicitly stating that if there is a conflict in the provisions of the existing agreements and the 1997 UN WC, the former will prevail. However, the Convention leaves watercourse states to decide on a case-by-case basis whether they want to give priority to the 1997 UN WC's provisions in their relations concerning a particular international watercourse.

(2) Second, the 1997 UN WC, nonetheless *encourages* watercourse states to harmonise watercourse agreements with its basic principles, to avoid conflicts (art 3(2)).

(3) The third point relates to the relationship of the 1997 UN WC, as a framework instrument, with future watercourse-specific agreements. It states that the 1997 UN WC *may be applied and adjusted* to the characteristics and uses of a particular international watercourse or part thereof, when watercourse states enter into watercourse agreements (arts 3(3) and 3(5)). Again with a view to avoiding contradictory obligations, the Convention seems to limit the extent of deviation from its provisions by using the words 'apply and adjust'. It also should be borne in mind that under the 1969 Vienna Convention on the Law of Treaties the modification of multilateral treaties shall 'not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole' (art 41(1)(b)(ii)).

(4) Finally, Article 3(6) of the 1997 UN WC articulates the general rule that rights and obligations of third states, namely non-participating watercourse states, shall not be affected by such watercourse agreements.

## 3. Comparative analysis of watercourse agreements and 1997 UN WC and UNECE Conventions (Summary table)

| 1. Scope | |
|---|---|
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| ‘water resources of interstate sources’ (1992 Almaty Agreement)<br>Does not extend the scope of regulation to transboundary groundwater and only partly includes freshwater ecosystems | • ‘watercourse’ as ‘a system of *surface waters and groundwaters* constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.’ (arts 2(a) and 2(b) of 1997 UN WC)<br>• ‘transboundary waters’ as ‘any surface or ground waters’ (1992 UNECE Convention, art 1(1))<br>• ‘ecosystems’ (1997 UN WC & 1992 UNECE Convention)<br>• ‘drainage basin approach’ (1997 UN WC, art 1(1)) |
| **2. Substantive obligations** | |
| **2.1. Equitable and reasonable use (ERU)** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| No explicit provisions on equitable and reasonable use can be found in the main text of the sub-regional agreements, specifying either what the equitable and reasonable use rule implies in general or what it requires in the context of the basin. | • Codify this customary rule in art 5-6 of 1997 UN WC as a flexible all-encompassing approach to reconciling a broad range of existing and new economic, social and environmental issues – which ultimately provides for a legal framework for such discussions and, if necessary, adjustments.<br>• Specify relations with other obligations such as no-harm and environmental protection (1997 UN WC, art 5, 6 and also Art 7, Art 20-23)<br>• The 1992 UNECE Convention adds a ‘sustainability’ element to ERU (Art 2(2)(c))<br>• Complimentary and residual role for the sub-regional agreements |
| **2.2. No Harm** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |

| | |
|---|---|
| The existing treaty law in the Aral Sea Basin incorporates the no-harm rule. Art 3 of the 1992 Almaty Agreement; Art 2 of the 1998 Environmental Cooperation Agreement; Art 9(3)(e) of the 2006 SDC in CA; Arts 9(1), 9(3), 19 and 24(2) of the 1958 Soviet-Afghan Frontier Treaty; Art 2 of the 1998 CIS TW Agreement; Preamble of the 1992 CIS Agreement in Env Interaction. | • Codify this customary rule in art 7 1997 UN WC and art 2(1) of 1992 UNECE Convention<br>• Detail due diligence requirement of no-harm (1992 UNECE Convention)<br>• Introduce more clarity in the legal relationship between the no-harm obligation and the ERU which is lacking in the existing legal framework in the basin (1997 UN WC).<br>• Complimentary and residual role for the sub-regional agreements |
| **2.3. Protection of international watercourses and their ecosystems** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| There are provisions to protect environment but these are mostly general. **ASB**: Arts 1, 3 of the 1993 Kzyl-Orda Agreement; 1988 Decree of the Council of Ministers of the USSR; Art 2 of the 1998 Env Cooperation Agreement; Art 3 of the 2006 SDC in CA. **AFG**: 1958 Soviet-Afghan Treaty, Arts 13 and 22(1)(a). **CIS**: Preamble, art 2 of the 1992 CIS Agreement in Env Interaction; Arts 1 & 2 of the 1992 CIS TW Agreement | • 1992 UNECE Convention provides for more detailed obligations related to environmental protection, including ecosystem approach (especially, arts 1(2), 2, 3, and Annexes 1-3.<br>• Environmental consideration included in ERU (1997 UN WC)<br>• 1997 UN WC strengthens the environmental considerations in the law of international watercourses through the obligation to the obligation to protect and preserve the ecosystems of international watercourses per se (art 20) as well as prevention, reduction and control of pollution (art 22) to prevent the introduction of species, alien or new, into an international watercourse (art 23) |
| **3. Procedural obligations and joint bodies** | |
| **3.1. Cooperation through joint bodies** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| Treaties specific to the Aral Sea Basin envisage the need for joint bodies in strong language. 1992 Almaty Agreement; 1993 Kzyl Orda Agreement; 1999 IFAS Agreement | • The 1992 UNECE Convention (Art 9) sets forth a strict obligation to establish joint bodies to foster bilateral and multilateral cooperation<br>• The 1992 UNECE Convention (Art 9) spells out the basic tasks of these bodies which can be useful in the CARs' current efforts to strengthen the institutional setting of transboundary water cooperation. |

| | |
|---|---|
| | • The 1997 UN WC does not oblige the riparian countries to set up a joint commission but rather mentions the *possibility* of establishing a joint management mechanism (Art 24(1)). |
| **3.2. Regular information exchange** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| Mostly requires the countries to *promote rather than ensure* the exchange of information related to international watercourses. The scope of information subject to exchange in the Commonwealth treaties and treaties specific to states in the Aral Sea basin is rather wide but the *content is less specific*.<br><br>**ASB**: Art 5 of the 1992 Almaty Agreement; Art of the 1998 Environmental Cooperation Agreement; Article 9(3)(e) of the 2006 Sustainable Development Convention in CA. **AFG**: Art 17 of the 1958 Soviet-Afghan Frontier Treaty. **CIS**: Arts 2 and 3 of the 1998 CIS TW Agreement, 1992 CIS Agreement in Informational Cooperation | • The 1997 UN Convention (Art 9, 31) and the 1992 UNECE Convention (Art 13, 8) codifies this customary requirement in stringent terms.<br><br>• Provide a basic for the development of *specific sets* of data and information stipulated in the light of characteristics of the region's watercourses and taking into account special requirements and circumstances related to equitable and reasonable use in the Aral Sea Basin. |
| **3.3. Consultations** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| No direct reference to regular consultations. The only exception is Article 3 of the 1998 CIS TW Agreement which requires the Parties to enter into mutual consultations when they develop water protection measures. | • Clear guidelines on consultations with each other with respect to their shared waters: 1997 UN Convention, arts 6(2), 3(5), 4, 7(2), 21(3), 24(1), 26(2), 30 and 1992 UNECE Convention, art 10.<br><br>• 1992 UNECE Convention assigns an important role to river basin commissions by requiring that '[a]ny such consultations shall be conducted through a joint body […] where one exists.' |
| **3.4. Prior notification on planned measures, reply or absent of reply to notification** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |

| | |
|---|---|
| No agreed detailed procedures to be invoked in case of planned measures on an international watercourse. Instead, as the language of sub-regional agreements suggests these are subject to 'joint consideration' by the parties concerned or an agreement between them. Existing joint bodies also lack a clear mandate that would stipulate their role in the procedures concerning planned measures.<br><br>**ASB**: 1992 Almaty Agreement (joint management); Art 10 ('joint consideration') of Syrdarya Agreement; Art 4 of the 2006 SD Convention in CA; 2008 ICWC Statute. **AFG**: Art 19 of the Soviet-Afghan Treaty (by agreement) | • 1997 UN Convention (art 12) with its sound and detailed procedural framework to guide countries in case of planned measures, is of exceptional relevance for the countries in the Aral Sea Basin.<br><br>• 1997 UN WC establishes the process of a two-way communication between the parties concerned to 'avoid problems inherent in unilateral assessments of the actual nature of such effects.' (reply or absent of reply to notification, links with the duty to exchange information, consult and negotiate on the possible effects of planned measures).<br><br>• Espoo Convention also details notification procedure extensively. The accession to the 1997 UN WC seems not impose additional burden with the respect of notification procedure for Kazakhstan and Kyrgyzstan, as parties to the Espoo Convention. |
| **3.4.2. Environmental impact assessment** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| The 1992 CIS Agreement on the Environmental Interaction (arts 2 and 3), the 1998 CIS Agreement on Informational Cooperation (arts 2(1) and 3), and the 2006 SDC in CA (arts 2(b), 4(6) and 7) requires to conduct assessments, harmonise national EIA procedures, and exchange information about those assessments.<br><br>Uncertainty in the operation of EIA might be induced by the fact that the applicable law envisages diverse thresholds to trigger the obligations to conduct EIA for activities that may cause transboundary harm. | • 1991 Espoo Convention, a regional stand-alone procedural mechanism on EIA, obliges its parties, including Kazakhstan and Kyrgyzstan, to assess the transboundary environmental impact of specified activities and to notify and consult with potentially affected Parties about those effects by prescribing the detailed provisions for such an assessment.<br><br>• 1992 UNECE Convention requires its parties, including Kazakhstan and Uzbekistan, to take measures to ensure that an EIA and 'other means of assessment' are applied by the Parties in order to 'prevent, control and reduce transboundary impact' (art 3(1)(h)).<br><br>• 1997 UN WC is instructive in including the results of EIAs in the package of notification documents, according to Article 12, although seems to impose a less strict obligation than those found in the regional and sub-regional |

<table>
<tr><td></td><td>agreements</td></tr>
<tr><td colspan="2">3.5. Continuous monitoring and assessment</td></tr>
<tr><td>Treaty law in the ASB, Afghanistan and CIS</td><td>Value-added from 1997 UN WC & UNECE</td></tr>
<tr><td>No explicit provisions in the ASB agreement but arguably can be included within ‘join management’ framework.<br><br>But see CIS: 1998 CIS TW Agreement ‘take measures for establishing a common monitoring system of water bodies’ (art 4) and ASB: 2006 SDC in CA (not in force yet), art 2(b)) and art 7.</td><td>Can strengthen the existing legal framework through<br>(a) The requirements of the 1992 UNECE Convention to conduct joint monitoring and joint or coordinated assessments of the conditions of transboundary waters (art 11)<br>(b) Espoo Convention to undertake post-project analysis (art 7)<br>(c)1997 UN WC on the management of an international watercourse (art 24)</td></tr>
<tr><td colspan="2">3.6. Emergency cooperation</td></tr>
<tr><td>Treaty law in the ASB, Afghanistan and CIS</td><td>Value-added from 1997 UN WC & UNECE</td></tr>
<tr><td>The presence of emergency-related obligations in the regional and sub-regional agreements is laudable and does credits to the countries’ intentions to cooperate in critical situations.<br><br>ASB: Preventive & responsive obligations: 1999 Hydromet Agreement, art 3; 1999 Agreement on Parallel Operation, art 8; 1996 Agreement on the Rehabilitation of Tailings, arts 1-5, 1996 Agreement on Gas Pipelines, art 1; and ICWC Statute. AFG:: 1958 Soviet-Afghan Treaty, art 17 (exchange information). CIS: 1992 Agreement on Env Interaction, arts 2-4; 1998 TW Agreement, arts 1&6; 1998 Informational Cooperation Agreement, art 3.</td><td>• 1997 UN WC (art 27-28) can play an important complimentary role with the respect to emergency cooperation in the Aral Sea Basin.<br>(a) 1997 UN WC can serve as a single reference point for emergency-related obligations as applied to transboundary waters<br>(b) ‘Prevention’ is an application of ERU. 1997 UN WC establishes linkages between emergency-related and other obligations under the Convention. E.g. Art 27 is an application of the general obligation of ERU that received a special consideration due to the severity of these problems.<br>• 1992 UNECE Convention contains emergency-related provisions (arts 3(j) and 14).<br>• 1992 UNECE Convention on the Transboundary Effects of Industrial Accidents protects human beings and the environment against industrial accidents. Kazakhstan is a party.</td></tr>
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| 4. Compliance review and dispute settlement | |
|---|---|
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| The sub-regional agreements does not provide for a compliance review procedure. | • Compliance review and monitoring (e.g. reporting) under Espoo Convention and Aarhus Convention<br>• Institutional mechanisms such as the Meeting of the Parties, Secretariats, Implementation and Compliance Committees, Working Groups) under the UNECE Conventions<br>• Does not exist in 1997 UN WC but can be established by the decision of the parties |
| **4.3. Dispute settlement** | |
| *Treaty law in the ASB, Afghanistan and CIS* | *Value-added from 1997 UN WC & UNECE* |
| • Few provisions in **ASB**: Ministers of Water Resources + impartial 3rd party (1992 Almaty Agreement, art 13); Ad hoc arbitral tribunal (1998 Syrdarya Agreement, art 9); 'subject to negotiation and consultation'. **CIS**: 'subject to negotiation and consultation'<br>• No details the procedure for such a dispute settlement and further measures if a dispute cannot be resolved in this manner. | • A range of means, including an innovative mechanism of an impartial fact-finding commission to resolve a dispute, which can be triggered if the parties concerned have not been able to settle their dispute through negotiation or any other means within six months from the time of the request for negotiations (1997 UN WC, art 33(3-10)).<br>• A would-be implementation mechanism under 1992 UNECE Convention |

## Summary conclusions on comparative analysis of the 1997 UN WC and existing agreements

### 3.1. Scope

In terms of the geographical or hydrological extent of the waters covered by the legal regime, the 1992 Almaty Agreement recognises without further explanation, 'water resources of interstate sources' as 'common and integral' for the region. The existing instruments do not extend the scope of regulation to transboundary groundwater and only partly include freshwater ecosystems, which will be discussed in more detail below. In this context, countries would benefit greatly from the 1997 UN WC and the UNECE Water Convention which reflect contemporary approaches to water use and

protection by defining a hydrological scope based on the concepts of a 'watercourse' (or a river system) and an 'ecosystem' (1994 ILC Commentary). In addition to the explicit reference to groundwater and the idea of 'hydrologic system composed of … rivers, lakes, aquifers, glaciers, reservoirs and canals,' these instruments have a broadened scope that includes provisions related to freshwater ecosystems. 'Watercourse ecosystem' under the 1997 UN WC does not cover areas beyond the watercourse itself, whereas UNECE Recommendations include in the definition of 'water-related ecosystems', 'ecosystems such as forests, wetlands, grasslands, and agricultural land that play vital roles in the hydrological cycle through the services they provide.'

Concerning legal actors eligible to participate in the utilisation of the resource, the existing basin agreements define rights and obligations only with respect to the five post-Soviet republics of Central Asia. Afghanistan, a riparian country to the Amudarya basin, is not formally involved in the regional water management. Clearly, the absence of a new treaty between all riparian countries does not preclude them from using the waters of an international watercourse as long as this use in conformity with the rules of customary law and other international legal commitments. Nevertheless, the 1997 UN WC is useful in promoting a basin-wide approach to the management of international watercourses (article 4(1)).

### 3.2. Substantive norms

Three substantive norms dominate the law relating to transboundary watercourses, namely the rule of equitable and reasonable use, the no-harm rule, and obligations related to the protection of international watercourses and their ecosystems.

#### 3.2.1. Equitable and reasonable utilisation

The rule of equitable and reasonable use is broadly recognized as 'a general rule of law for the determination of the rights and obligations of States' with respect to international watercourses. Nonetheless, no explicit provisions on equitable and reasonable use can be found in the main text of the sub-regional agreements. Some preambular recitals do refer to the principle of international water law or the principle of equity as guiding for the countries but do not navigate cases when the 'equity' of these norms questioned.

In contrast, the 1997 UN WC presents the rule of equitable and reasonable use as being responsive to the necessities of time and place, and as providing a flexible all-encompassing approach to reconciling a broad range of existing and new economic, social and environmental issues – which ultimately provides for a legal framework for such discussions and, if necessary, adjustments (article 5-6). Although historically the formula of equitable and reasonable use has been developed as a basis for water allocation, the rule also embraces the issues of water quality and ecosystem considerations (article 5(1) of the 1997 UN WC, article 2(2)(c) and article 2(5)(c) of the 1992 UNECE Convention). The 1997 UN WC 'set[s] out principles central to human development' and 'provides a framework for putting people at the centre of transboundary water governance' (2006 UNDP HDR) by, *inter alia,* requiring 'special regard' to be given to 'the requirements of vital human needs' in weighting and

balancing various factors and circumstances relevant to equitable and reasonable use (Article 10). The 1997 UN WC may also be useful in regulating the relations between the CARs and Afghanistan, since the provisions of the existing treaties on Afghanistan's water use are rather limited.

### 3.2.2. No-harm rule

Another fundamental substantive norm applicable to international watercourses is the no-harm rule which derives its normative foundation from *sic utere tuo ut alienum non laedas*, or the good neighbourliness principle.

In the Aral Sea Basin, a substantive obligation embedded in Article 3 of the 1992 Almaty Agreement requires the parties 'to refrain from actions on their respective territories that might affect interests of other contracting parties and cause harm to them, lead to deviations from the agreed volumes of water flow and pollution of water sources.' The 1998 Environmental Cooperation Agreement between Kazakhstan, the Kyrgyz Republic and Uzbekistan is another agreement by which the parties are clearly committed to cooperate and 'coordinate their actions in building new facilities in frontier areas or in any areas that might have adverse transboundary impact,' 'with a view to attaining practical results' (article 2, preamble). Finally, Article 9(3)(e) of the 2006 Sustainable Development Convention will encourage its would-be parties to set up rules and procedures concerning measures to be taken to prevent and reduce water pollution to the level that does not harm the territories of downstream countries. The no-harm rule, requiring from the parties a significant level of engagement, can be found in the treaty law relating to the environment under the auspices of the CIS. See, for example, Article 2 of the 1998 CIS Agreement on Transboundary Waters and the preambular recitals of the 1992 CIS Agreement on the Environmental Interaction.

As far as treaties with Afghanistan are concerned, these also require the avoidance of harm arising from the use of frontier rivers. The 1958 Soviet-Afghan Frontier Treaty states that '[t]he location and direction of frontier watercourses shall as far as possible be preserved unchanged,' that '[n]either Contracting Party shall cause an artificial displacement of river beds,' and that '[m]ineral deposits in the immediate vicinity of the frontier line shall be so prospected or worked and agricultural operations so conducted as not to harm the territory of the other Party' (arts 9(1), 9(3) and 24(2). It further details of the no-harm rule are contained in Article 19 which clearly states that the parties shall reach an agreement before introducing any changes that may influence the flow of water or cause other damages.

Thus, the existing treaty law in the Aral Sea Basin incorporates the no-harm rule. Moreover, the nature of the obligation imposed by the Article 3 of the 1992 Almaty Agreement appears to be result-oriented and more demanding than the relevant provisions of the 1997 UN WC and the 1992 UNECE Convention. The terms of the 1997 UN WC clearly suggest that states are not under an absolute obligation to guarantee that no significant harm will occur to other watercourse states but rather they must 'take all appropriate measures to prevent the causing of significant harm to other watercourse States' (article 7). In a similar fashion, by invoking a lower threshold, Article 2(1) of the 1992 UNECE Convention provides that '[t]he Parties shall take all appropriate measures to prevent, control and reduce any transboundary

impact.' Hence, by committing to the 1997 UN WC, the CARs will not be under any stricter requirements than arise for them from the existing treaties. At the same time, the 1997 UN WC can introduce more clarity in the legal relationship between the no-harm obligation and the equitable and reasonable use rule which is lacking in the existing legal framework in the basin (article 7(2)).

#### 3.2.3. Protection of international watercourses and their ecosystems

In the Aral Sea basin, few provisions of the sub-regional agreements explicitly recognize the Aral Sea itself and its deltas as a legitimate water user (article 1 of the 1993 Kzyl-Orda Agreement) and stipulate ecosystem-related obligations. For example, Article 3 of the 1993 Kzyl-Orda Agreement 'recognises' 'common objectives' relating to the protection of the environment to include the maintenance of appropriate water quality, restoration of degraded ecosystems in the region, and the development and implementation of a coordinated strategy for social and economic development that meets environmental security objectives for peoples of the region. According to the 1998 Environmental Cooperation Agreement, the parties shall cooperate in a wide range of environmental protection areas, including transboundary water resources conservation, rational use and pollution prevention (article 2). If the 2006 Framework Convention on Sustainable Development enters into force it, will require the parties 'to ensure effective environmental protection for sustainable development in Central Asia, including […] reduction and prevention of transboundary harm to the environment' (article 3).

The 1958 Treaty between USSR and Afghanistan requires the competent authorities of both Contracting Parties to 'take the necessary measures to protect the frontier waters from pollution by acids and waste products and from fouling by any other means' (article 13). It further prohibits the nationals of the Counteracting Parties to fish in frontier waters with using 'explosive, poisonous or narcotic substances that result in the destruction or mutilation of fish' (article 22(1)(a)).

Under the Commonwealth umbrella, the 1992 CIS Agreement on the Environmental Interaction, 'based on an understanding of the integrity and indivisibility of the environment,' stipulates that 'the Contracting Parties within their territories shall establish science-based norms for the inclusion of natural resources in economic and other activities and shall limit their irretrievable [consumptive] withdrawals, taking into account the need to ensure a universal ecological security and wellbeing' (article 2). The terms of the 1998 CIS Agreement on Transboundary Waters require active engagement from the parties to achieve the objectives of environmental protection (article 1 and 2).

As far as the 1997 UN WC concerned, 'the environmental protection factor runs through virtually all the provisions of the convention' (Tanzi and Arcari (2001). The Convention's provisions that embody the objective of protection of the watercourse and the principle of sustainability within the framework of equitable and reasonable use clearly reflect a general duty of states. Article 21(2) as 'a special application of the general principles contained in Article 5 [equitable utilisation] and 7 [no harm]' requires the parties to exercise due diligence and to co-operate to 'prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human

health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse.' To clarify the relationship between these rules, McCaffrey (2007) explains that 'a use becomes inequitable and unreasonable to the extent that it causes pollution harm to other watercourse states.' Moreover, the 1997 UN WC envisages a general obligation to protect and preserve the ecosystems of international watercourses *per se*, as reflected in Article 20 of the 1997 UN WC. This obligation has probably not yet become a customary norm of international law. Therefore, by joining to the 1997 UN Convention, the CARs and Afghanistan will not only strengthen the legal framework for the protection of freshwater ecosystems within their shared basins but also contribute to the strengthening the law of international watercourses in general.

The 1992 UNECE Convention furthers the protection of international watercourses establishing sound rules for the Parties to 'take all appropriate measures' in order 'to ensure that transboundary waters are used with the aim of ecologically sound and rational water management, conservation of water resources and environmental protection'; 'to ensure conservation and, where necessary, restoration of ecosystems' (article 2(2); and providing a definition of 'transboundary impact' that encompasses environmental considerations (article 1(2)). Other relevant provisions include article 2(5), article 2(6), article 3 and annexes I-III.

### 3.3. Procedural obligations and joint bodies

The procedural obligations and joint bodies complement substantive obligations by establishing a process of interaction between the riparian countries. The procedural law of cooperation over transboundary watercourses incorporates obligations to establish joint bodies, to exchange information with riparian states, to consult with each other, to notify regarding proposed activities, to conduct impact assessments and monitoring, and to work together in emergency situations.

#### 3.3.1. Cooperation through joint bodies

Treaties specific to the Aral Sea Basin envisage the need for joint bodies in strong language, namely in the 1992 Almaty Agreement, the 1993 Kzyl-Orda Agreement and 1999 IFAS Agreement. In this context, the 1997 UN WC might not add much value to the sub-regional instruments, since it does not oblige the riparian countries to set up a joint commission but rather mentions the *possibility* of establishing a joint management mechanism (article 24(1)). In contrast, according to the 1992 UNECE Convention, the riparian parties are under a strict obligation to establish joint bodies to foster bilateral and multilateral cooperation (article 9). The Convention further spells out the basic tasks of these bodies (article 9(2)) which can be useful in the countries' current efforts to strengthen the institutional setting of transboundary water cooperation.

#### 3.3.2. Regular information exchange

Most CIS and sub-regional agreements require the countries to *promote rather than ensure* the exchange of information related to international watercourses. The 1998

CIS Agreement on Transboundary Waters requires countries ‘to establish principles of cooperation,’ (article 2) the 1992 Almaty Agreement provides that the parties ‘shall facilitate a wide information exchange' (article 5). In contrast, the 1997 UN WC (article 9) and the 1992 UNECE Convention (article 13) codifies this customary requirement in stringent terms.

The scope of information subject to exchange in the Commonwealth treaties and treaties specific to states in the Aral Sea basin is rather wide but the content is less specific. It appears that in order to provide the riparian countries with the material necessary to comply with their substantive obligations, the sub-regional agreements more emphasis should have been placed on *specific sets* of data and information stipulated in the light of characteristics of the region’s watercourses and taking into account special requirements and circumstances related to equitable and reasonable use in the Aral Sea Basin. In this context, the 1997 UN WC might be helpful in detailing *what* information, should be exchanged, and *when* and *how*. In requiring the ‘regular’ exchange of data and information, as distinct from *ad hoc* provision of information concerning planned measures, the 1997 UN WC calls for establishing ‘an ongoing and systematic process’ of information flow between countries sharing an international watercourse (1994 ILC Commentary). The 1992 UNECE Convention indicates joint bodies as a preferential platform for information exchange (article 9(2)).

### 3.3.3. Consultations

By joining to the 1997 UN WC, the countries would also have clearer guidelines on consultations with each other with respect to their shared waters. To date, the agreements concluded under the umbrella of the Commonwealth and within the Aral Sea Basin make no direct reference to regular consultations. The only exception is Article 3 of the 1998 CIS Transboundary Waters Agreement which requires the Parties to enter into mutual consultations when they develop water protection measures. For the rest, the regional and sub-regional agreements encompass consultation mainly as a means of dispute settlement (See eg article 14 of the 1999 IFAS Agreement, article 7 of the 1999 Hydromet Agreement, article 13 of the 1998 CIS TW Agreement, article 7 of the 1998 CIS Informational Cooperation Agreement). By contrast, the 1997 UN WC envisages a set of obligations on consultations between riparians. As a matter of customary law, the 1997 UN WC strictly requires countries to consult each other at least in two instances: when planned measures in one country may cause significant transboundary effect in another, and when it is necessary to achieve and maintain equitable and reasonable use. The Convention also requires countries to consult each other in other circumstances, including consultations concerning concluding watercourse agreements (art 3 (5)), consultations concerning the elimination or mitigation of the harm (art 7(2)), consultations concerning pollution control measures (art 21(3)), consultations concerning the management of an international watercourse (art 24(1)), consultations concerning the safe operation, maintenance and protection of installations (art 26(2)), consultations through indirect procedures (art 30). Moreover, Article 4 sets forth an entitlement of every watercourse state ‘to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations’ (art 4). In similar fashion, the 1992 UNECE Convention prescribes in forceful terms that consultations

between the Riparian Parties 'shall be held […] on the basis of reciprocity, good faith and good-neighbourliness' and 'aim at cooperation regarding the issues covered by the […] Convention' (art 10). It further assigns an important role to river basin commissions by requiring that '[a]ny such consultations shall be conducted through a joint body […] where one exists.'

#### 3.3.4. Prior notification on planned measures and other related obligations

The CARs and Afghanistan have not agreed on detailed procedures to be invoked in case of planned measures on an international watercourse. Instead, as the language of sub-regional agreements suggests these are subject to 'joint consideration' by the parties concerned or an agreement between them. The preambular recitals of the 1992 Almaty Agreement refers to the need for 'coordinated and organised solution to the issues' and 'unified and coordinated actions' but the operative part of the agreement falls short of specifying those procedures. Similarly, while the terms of Article 10 of the 1998 Syrdarya Agreement clearly endorses that such matters as the construction of new water facilities, dam safety, water conservation issues and wastewater disposal are subject to joint consideration by the countries, the extent of such consideration remains to be defined. The 1998 Environmental Cooperation Agreement between Kazakhstan, the Kyrgyz Republic and Uzbekistan stipulates that the Parties cooperate in the coordination of actions on building new facilities in frontier zone as well as facilities that may have transboundary adverse effect irrespective of their geographical location but silent about how they should do so (art 2(z)). Article 19 of the 1958 Soviet-Afghan Frontier Treaty strictly requires a prior agreement between the parties to allow the construction of new facilities or the introduction of any changes that are 'likely to hinder navigation or influence the flow of water' or 'may affect the flow of water and the state of the banks, and also cause damage thereto.' The only document that makes a reference to the obligations related to planned measures in the context of the Aral Sea Basin is the 2006 Convention on Sustainable Development, which is not yet in force (art 4). Existing joint bodies also lack a clear mandate that would stipulate their role in the procedures concerning planned measures. The 1992 ICWC Statute envisaged that it is a main task of the Commission to 'coordina[te] implementation of large water related works and joint use of existing water management potential of the countries.' A new 2008 ICWC Statute went one step further and introduced a provision concerning planned measures in the Commission's tasks and authorises the Commission to 'take up notifications from a Party concerning construction of new water facilities that affect regimes of water resources of interstate watercourses' and to 'flesh out proposals of the countries on construction, reconstruction and operation of water management facilities of interstate significance with countries' shared funding.' Although positive *in abstracto*, these provisions carry little legal weight in the absence of relevant treaty obligations.

Therefore, the 1997 UN WC, with its sound and detailed procedural framework to guide countries in case of planned measures, is of exceptional relevance for the countries in the Aral Sea Basin. As a reflection of the customary law, Article 12 of the 1997 UN WC forcefully states, 'Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof.'

A determination of a likelihood of significant adverse effect is best made through an impact assessment. Supported by widespread state practice, environmental impact assessment (EIA) became an essential part of the notification procedure in case of planned measures. Nonetheless, the 1997 UN WC, rather than actually imposing an independent obligation to conduct EIAs, considers EIA as a source of 'available technical data and information' under a general obligation to notify and exchange information on planned measures (art 12).

As far as EIA is concerned, the 1997 UN WC seems to impose a less strict obligation than those found in the regional and sub-regional agreements. Two conventions under the auspices of UNECE formulate EIA provisions in a more robust way by requiring state parties to take real actions to undertake EIAs. The 1992 UNECE Convention requires its parties, including Kazakhstan and Uzbekistan, to take measures to ensure that an EIA and 'other means of assessment' are applied by the Parties in order to 'prevent, control and reduce transboundary impact' (art 3(1)(h)). The 1991 Espoo Convention, a regional stand-alone procedural mechanism on EIA, obliges its parties, including Kazakhstan and Kyrgyzstan, to assess the transboundary environmental impact of specified activities and to notify and consult with potentially affected Parties about those effects by prescribing the detailed provisions for such an assessment. EIA related commitments within the CIS treaties and agreements specific to the Aral Sea Basin states, such as the 1992 CIS Agreement on the Environmental Interaction (arts 2 and 3), the 1998 CIS Agreement on Informational Cooperation (arts 2(1) and 3), and the 2006 Framework Convention on Sustainable Development in CA (arts 2(b), 4(6) and 7), are also couched in mandatory terms by requiring the parties to conduct assessments, harmonise national EIA procedures, and exchange information about those assessments. Despite the weak language of the 1997 UN Convention on EIAs, the Convention is instructive in including the results of EIAs in the package of notification documents, according to Article 12 of the 1997 UN WC.

The 1997 UN WC envisages a set of provisions on reply or absent of reply to notification (arts 13-16), as well as links the duty to exchange information, consult and negotiate on the possible effects of planned measures as a part of the system. These requirements help establish the process of a two-way communication between the parties concerned and 'avoid problems inherent in unilateral assessments of the actual nature of such effects' (1994 ILC Commentary). The provisions of the 1997 UN WC are more precise as to establishing the six months period within which the notified State is expected 'to study and evaluate the possible effects of the planned measures and to communicate the findings to it' (art 13), whereas the Espoo Convention requires the notified State to reply within 'a reasonable time' (arts 3(2)(c) art 5). The 1997 UN WC couches the provisions on information exchange, consultations and negotiations in stringent language (arts 11 and 19(3)). In similarly forceful terms, the Espoo Convention goes further in specifying that notification shall be given 'for the purpose of ensuring adequate and effective consultations' between affected Parties (art 3(1)), laying down the possible content of consultations (art 5), and requesting consultations on the revision of the decision on the proposed activity (art 6) and during the post-project analysis (art 7). Therefore, for the Kazakhstan and Kyrgyzstan as parties to the Espoo Convention, the accession to the 1997 UN WC will not impose additional burden with the respect of notification procedure.

### 3.3.5. Continuous monitoring and assessment

The need for both prior and on-going assessments of activities on transboundary waters finds support in regional treaty practice. The 2006 Framework Convention on Sustainable Development in CA goes beyond the requirement of *ad hoc* assessment by prescribing that its would-be Parties 'shall ensure that ecological monitoring and audit of [any plans, strategies, projects and activities that may have an adverse affect on natural resources and the environment as a whole] are conducted regularly' (art 2(b)). This provision, combined with the requirement to 'cooperate in establishing regional mechanisms for monitoring of basic parameters and indicators of the environment status' (art 7), echoes the requirements of the 1992 UNECE Convention to conduct joint monitoring and joint or coordinated assessments of the conditions of transboundary waters (art 11), of the 1998 CIS Agreement on Transboundary Waters to 'take measures for establishing a common monitoring system of water bodies' (art 4), of the Espoo Convention to undertake post-project analysis (art 7), and of the 1997 UN WC on the management of an international watercourse (art 24). It is also consistent with the decisions of international courts and tribunals emphasizing that the no-harm principle anticipates the obligation of continuous monitoring (*Gabčíkovo-Nagymaros Project, Pulp Mills, Land Reclamation*).

The practice of international financial institutions (IFIs) illustrates a more inclusive approach to impact assessment in order to reflect economic, environmental, social and cultural considerations. For instance, the World Bank is presently supporting the preparation of an Assessment Study for the proposed Rogun HPP in Tajikistan to assess its (a) techno-economic/dam safety, and (b) environmental/social impacts.[1] The Techno-Economic Assessment Study (TEAS) will conduct the analysis of techno-economic aspects of the construction of the Rogun HPP, including dam type, dam height, construction phasing, reservoir operations and dam safety issues, and the entire Vaksh River Development Masterplan. Environmental and Social Impact Assessment (ESIA) will address the environmental, socio-economic and cultural situation at the project site, identify potential impacts, including the cumulative impact of the entire Vakhsh river cascade on the relevant areas of Tajikistan and all the riparian states. Among others, the ESIA will assess Tajikistan's energy policy from environmental and social perspectives (strategic impact assessment), and in terms of riparian and cross-border impacts (regional impacts). The Assessment Studies will be undertaken separately but in parallel, and the recommendations of the TEAS will include possible trade-offs between techno-economic issues and the safeguard issues of dam safety, environmental, social, resettlement and impacts on other riparian states. Assessments will be based on Tajik laws and regulation, international good practices and the World Bank's Safeguard Policies which are to be consistent with relevant customary and treaty law.

[1] World Bank, 'Assessment Studies for Proposed Rogun Regional Water Reservoir and Hydropower Project in Tajikistan' <http://go.worldbank.org/ZQXIA8J0H0> accessed 7 April 2011.

### 3.3.6. Emergency cooperation

In the context of the Aral Sea Basin, Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan committed to cooperate in order to ensure timely forecasting of natural hydrometeorological events and provide assistance to each other on the basis of international law in case of their occurrence (art 3 of the 1999 Hydromet Agreement). They also assumed the obligation under the Agreement on the Parallel Operation of the Energy System to provide mutual assistance in the cases of emergencies to undertake remedial actions on energy facilities and restore normal energy supply for consumers (art 8). In their efforts to prevent emergencies arising from the possible breakdown of tailings and rock dump due to adverse natural, climatic and hydrometeorological conditions, Kazakhstan, Kyrgyzstan and Uzbekistan agreed to assess the danger, prepare tailings deactivation and closure projects, and undertake activities on rock dump reclamation (arts 1-5 of the 1996 Agreement on the Rehabilitation of Tailings). These countries also committed to assign respective ministries and agencies to inform each other on the occurrence or likelihood of occurrence of contingency situations on reservoir cascades, hydropower stations and interconnection lines and to participate jointly in their prevention and elimination under the 1996 Agreement on the Use of Fuel and Energy Resources and Water Resources, Construction and Operation of Gas Pipelines (art 1). The tasks of the ICWC include emergencies-related functions, prescribing that the Commission shall develop joint contingency plans to prevent emergencies and natural disasters and eliminate their consequences. Finally, back in 1958, the USSR and Afghanistan also agreed to exchange information in order to avert danger or damage from flooding and alert each other during periods of high water (art 17).

Treaty law under the umbrella of the Commonwealth envisages preventive and responsive obligations dealing with emergencies situations in forceful language. In the 1998 CIS Transboundary Waters Agreement, the Parties assumed the due diligence obligation to take measures to reduce and eliminate the effects of natural and human-induced emergencies, such as floods, ice drift and accidental pollution (arts 1 and 6). The 1992 CIS Environmental Interaction Agreement obliged its Parties to set up and maintain special forces and assets in order to prevent ecological disasters and accidents as well as eliminate their effects (arts 2-4). It is a main task of the Parties to the 1998 CIS Informational Cooperation Agreement to warn each other of environmental emergencies, accidents and hazardous waste transfers (art 3).

The presence of emergency-related obligations in the regional and sub-regional agreements is laudable and does credits to the countries' intentions to cooperate in critical situations. It also makes it easier for the countries to commit to largely similar obligations under the 1997 UN WC (arts 27-28). This is especially so for Kazakhstan which is also a party to the 1992 UNECE Convention on the Transboundary Effects of Industrial Accidents – designed to protect human beings and the environment against industrial accidents and the 1992 UNECE Convention which contains emergency-related provisions (arts 3(j) and 14).

In addition, there are also at least two extra-benefits from the joining to the 1997 UN WC. First, since the relevant provisions dealing with emergencies are scattered in

various regional and sub-regional, and not always water, treaties, the 1997 UN WC can serve as a single reference point for their application to transboundary waters. Second, in fleshing out the anticipatory and responsive actions in case of emergencies, the 1997 UN WC establishes linkages between these and other obligations under the Convention. For example, as the 1994 ILC Commentary explains, the wording of Article 27 is an application of the general obligation of equitable participation that received a special consideration due to the severity of these problems, whereas a response to an actual emergency situation differs from other Convention's obligations by requiring the countries notify each other 'without delay and by the most expeditious means available' (art 28(2)). Hence, the 1997 UN WC can play an important complimentary role with the respect to emergency cooperation in the Aral Sea Basin.

### 3.4. Compliance review and dispute settlement

The sub-regional agreements do not provide for a compliance review procedure. Article 2 of the 1992 Almaty Agreement prescribes that the parties shall ensure that the agreed regime is 'strictly observed' but it remains unclear how non-compliance shall be detected and monitored. Article 12 of the Almaty Agreement stipulated that within 1992 the Parties should have been elaborated economic and other measures to deal with the cases of non-compliance with the established regime and limits of water use. However such mechanisms are still lacking. Some disjointed attempts to monitor and facilitate compliance have been undertaken under the 1998 Syrdarya Agreement. Article 5 stipulates that parties shall take appropriate measures to ensure compliance with the provisions of the agreement through various forms of guarantees such as credit lines, security deposits and others. Article 7 of the 2001 Protocol adopted to implement the 1998 Syrdarya Agreement states that, when necessary, the parties shall ensure that access of observers from other contracting parties to water management facilities in the Syrdarya River Basin operation area will be secured during the growing period. Although a compliance control system is yet to be established in the region, the activities of the ICWC and its executive bodies appear to provide a basis on which such a system can be built. Although the ICWC does not have a mandate to monitor compliance, its practice helps to establish a collective and transparent forum for preventing and addressing controversies. A recent development of regional and national information systems on water and environmental issues under the aegis of the ICWC is one of the examples.

The 1997 UN WC does not require compliance monitoring but does establish various provisions to facilitate it. These include Article 8 on the general obligation to cooperate, Article 9 on regular exchange of data and information, Articles 11-19 on planned measures, and Article 24 on management. It is also unfortunate that there is not an institutional body, such as the Meeting of the Parties or the Secretariat, established under the 1997 UN WC that could facilitate and review implementation of and compliance with the Convention. It should be noted, however, that Special Rapporteur, Stephen C. McCaffrey, in his sixth report proposed a draft article on the Conference of the Parties that would provide for 'institutionalized and regular collective action by the contracting parties,' and 'permit the parties to review, on a regular basis, the effectiveness of the convention in question and monitor its performance' (6th Report, 1990). The Special Rapporteur was hesitant to propose the establishment of the Secretariat 'in connection to what is envisaged as a framework

agreement' (6th Report, 1990). The fact that negotiating countries were not prepared to accept these provisions during the preparation of the Convention does not preclude the parties to the Convention establish such institutions in the future if they so decide.

The conventions under the umbrella of the UNECE provide a sound institutional support to facilitate implementation and compliance with their requirements through the Meetings of the Parties, secretariats, implementation and compliance committees, and various working groups and boards (see eg arts 17 and 19 of the 1992 UNECE Convention, arts 11 and 13 of the Espoo Convention). Some of these agreements also set up compliance review and monitoring systems (eg Espoo Convention, Aarhus Convention).

Dispute settlement mechanisms relating to transboundary waters are largely undeveloped in Central Asia. The 1992 Agreement refers any dispute that could arise between the Parties to the Ministers of Water Resources for the five CARs. In other words, disputes shall be resolved internally within the ICWC, the body responsible for the implementation of this agreement. As such, the ICWC acts to prevent and resolve emerging controversies and provides a forum where representatives of the five basin states can meet, discuss, and make binding decisions on contentious issues. The 1992 Agreement further states that 'if necessary, an impartial third party can be involved' (art 13) but fails to detail the procedure for such a dispute settlement, and further measures if a dispute cannot be resolved in this manner. Article 9 of the 1998 Syrdarya Agreement prescribes that 'Any dispute or controversy under this agreement is subject of negotiation and consultations. If the dispute cannot be resolved in this manner, the issue shall be submitted to *ad hoc* arbitral tribunal.' Equally, there are no provisions according to which such tribunal shall take place.

Hence, as far as dispute settlement concerned, the 1997 UN WC has much to offer to supplement the insufficient provisions of the existing sub-regional instruments. The relevant provisions reiterate the residual character of the 1997 UN WC by stating that its dispute settlement provisions can be invoked in the absence of an applicable agreement between the parties (art 33(1)). Further, the Convention requires that the parties concerned shall seek a settlement of the dispute by peaceful means. Such means may include negotiations, good offices, mediation or conciliation by a third party, or joint watercourse institutions. The parties may also agree to submit the dispute to arbitration, according to the procedure established in the Annexes to the Convention, or to the International Court of Justice. What is more, the Convention provides an innovative mechanism of an impartial fact-finding commission to resolve a dispute, which can be triggered if the parties concerned have not been able to settle their dispute through negotiation or any other means within six months from the time of the request for negotiations (art 33(3-10)).

## 4. The relevance of the 1997 UN Convention in the Aral Sea Basin and advantages of becoming a party

The 1997 UN WC can make a significant contribution to transboundary water cooperation in the Aral Sea Basin and assist countries in building and maintaining effective and peaceful management systems for their shared resources. There are at least ten advantages of becoming a party to the 1997 UN WC.

### (1) 1997 UN WC increases transparency of international law

The 1997 UN Convention codified and crystallised existing customary legal norms in the field. In doing so, the Convention made it easier for riparian countries to consult the written text and rely on its specific language in interpreting their customary rights and obligations. The law of international watercourses became 'more easily accessible and more transparent' and the countries got 'a more reliable knowledge of the scope of their rights and obligation' (Dinstein, 2006). The relative clarity of language of the *jus scriptum* and a universal reference to the Convention's customary provisions helps to increase transparency of international law which is an essential prerequisite for building trust among the countries.

### (2) 1997 UN WC promotes new approaches to water management and creates new legal norms

The 1997 UN WC promotes novel approaches and creates new legal norms for the contracting parties, such as the obligation to protect and preserve freshwater ecosystems and the fact-finding procedure. Strong endorsement of the 1997 UN WC will also fill loopholes in customary law by providing missing definitions (e.g. 'international watercourse'), prescribing timeframes (e.g. six month period for reply to notification) and clarifying linkages between norms (e.g. between the equitable and reasonable use rule and no-significant harm). By joining the 1997 UN WC, the CARs and Afghanistan will be able to not only strengthen the legal framework for their shared waters but also contribute to strengthening the law of international watercourses at a global level.

### (3) 1997 UN WC provides for legal protection

1997 UN WC does not only regulate the conduct of states, defining their rights and obligations, but also provides for a legal protection of the values and interests underlying its provisions such as equity and justice.

### (4) 1997 UN WC establishes a regime which results from all of its provisions in conjunction

By joining the 1997 UN WC, the CARs and Afghanistan can benefit not only from its individual (customary) provisions but also the entire text of the Convention that was

carefully crafted to provide a *system* of interacting and mutually supporting rules and procedures. The 1997 UN WC provides a sound framework for 'the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations' by

a. Linking together substantive obligations related to use *and* protection of transboundary waters
b. Linking together substantive *and* procedural obligations
c. Providing *a procedural system* of interacting rules and procedures which is lacking in the Aral Sea Basin
d. Providing *a regime* of mutually supporting *substantive rules and procedures.*

(5) 1997 UN WC supplements the existing agreements

The 1997 UN WC can play a *supplementary* role to the existing agreements which do not comprehensively define the rights and obligations of the parties. Given its framework and residual nature, the norms of the 1997 UN WC are mostly couched in broad terms to be applied to a range of different river basins. Nonetheless, as the analysis above demonstrated, some of its provisions are still more precise and specific than the norms of sub-regional agreements in the Aral Sea Basin. The rule of equitable and reasonable use and notification procedure on planned measures, which the sub-regional agreements seem to subsume under 'joint management' and 'joint consideration' provisions, are the most notable examples. In this context, the 1997 UN WC can strengthen the substantive and procedural system of cooperation in the basin.

(6) 1997 UN WC provides a common platform to negotiate future agreements

The 1997 UN WC can serve for the CARs and Afghanistan as a *common platform for the negotiation of future agreements* in the Aral Sea Basin, since this global framework instrument does not preclude or dismiss the need for watercourse agreements. Existing legal arrangements in the basin were not designed to accommodate changing circumstances, nor can they be easily amended. As a result, many treaties became stagnant and lost their effectiveness. The negotiations of new agreements have not succeeded so far. Hence, the CARs and Afghanistan may want to join the 1997 UN WC to have an agreed common framework at the global level, and later on they can strengthen their commitments and/or adjust them to the characteristics of their watercourses.

(7) 1997 UN WC signals the willingness of the countries to deploy international law in dealing with water challenges

The 1997 UN WC can play an *expressive* role by signaling the willingness of those countries that join it to actively deploy the rules and principles of international law to deal with the pressing water problems.

(8) 1997 UN WC enhances the collective interest dimension of the law on international watercourses

Operating at the global scale, the 1997 UN WC extends concerns about shared waters beyond the interests of riparian countries to the broader interest of the international community in attaining sustainable development and maintaining peace and security. Cooperative conduct from *all* states in ensuring equitable and reasonable use of transboundary waters gains a special relevance and importance in the context of the globalised world that struggles to achieve water security and ensure water for all. In this context, the 1997 UN Convention's entry into force may enhance the collective interest dimension of the law of international watercourses.

(9) 1997 UN WC enhances the domestic dimension of water management

The provisions of the 1997 UN WC require changes in both regional and domestic approaches to water management. The domestic application is especially evident in the need for integrated water resources management, ecosystem protection, and establishing 'all appropriate measures' such as relevant legal, administrative, technical and practical mechanisms for the implementation of the Convention.

(10) 1997 UN WC contributes to the peaceful settlement of disputes

1997 UN WC contribution to the peaceful settlement of disputes is manifested in its sound procedural system and a range of dispute settlement mechanisms, including an impartial fact-finding commission.

## 5. Implementation of the 1997 UN WC

The accession to the 1997 UN WC is only an initial step in a long way towards putting its provisions into practice. The changes will not happen overnight. A range of measures at national, regional and international levels will be required to facilitate the process of implementation of the 1997 UN WC. These might include:

(1) Dispel misperceptions about the 1997 UN WC

Misperceptions about the normative requirements imposed by the 1997 UN WC are still present in the region. The provisions of the 1997 UN WC have been interpreted as giving preferential treatment to the interests of wealthy and powerful states,

ignoring the situation in water-stress countries, leaving too much discretion on individual states to interpret its provisions on their own benefits, and being vague and imprecise in defining the rights and obligations imposed on riparian countries. To help countries to dispel the most common misperceptions, WWF and UNESCO Centre for Water, Law and Policy (University of Dundee) is preparing a Guide to the 1997 UN WC which will explain its main provisions coupled with examples of good practices around the world.

(2) Strengthen the institutional basis for the 1997 UN WC at the global level

Once the 1997 UN WC enters into force, the establishment of an institutional mechanism under the Convention, such as the Meeting of the Parties or the Secretariat, might help to facilitate its implementation. Such institutional bodies would provide for 'institutionalized and regular collective action by the contracting parties,' and 'permit the parties to review, on a regular basis, the effectiveness of the convention in question and monitor its performance.'

(3) Develop a national strategy and action plan to implement the 1997 UN WC

Many multilateral agreements encourage parties to elaborate national implementation plans which are important in integrating their obligations into domestic legal, policy, and institutional frameworks and building capacity on the subject matter of the Convention. Such national implementation plans can also identify policies, programmes, and plans in various sectors through which specific measures may need to be taken in order for the 1997 UN WC to be effectively implemented.

(4) Conduct an 'inventory' of national legal and institutional frameworks

In addition to regional actions, the 1997 UN WC requires a number of domestic measures towards cooperation and sustainability of water resources use. Therefore, in-depth analysis of national legal and institutional frameworks might be required to consider the extent to which domestic law already fulfils the obligations under the 1997 UN WC and what changes needed.

(5) Enact implementing laws and regulation

As a result of the inventory, development and adoption of implementing laws and regulations might be required to ensure the implementation of and compliance with the Convention.

(6) Strengthen the institutional basis for the 1997 UN WC at national level

It is also necessary to designate national focal points which have relevant technical expertise, mandate and skills to promote implementation across the sectors within the country and also liaison with relevant regional bodies. Implementation is often the responsibility of more than one government agency, therefore coordination among departments and agencies should be improved.

(7) Build capacity and raise awareness at national level

The implementation of the 1997 UN WC will require building capacity of the relevant government officials, legislators, judiciary, local authorities and civil society. Conducting training seminars and preparing guidelines might be necessary. Public awareness campaigns and the role of media are also essential.

(8) Identify the resources available to implement the 1997 UN WC

These resources can relate to legal, policy, scientific, technical, educational, financial, and other aspects of implementation. This exercise can help to identify the types of assistance (financial, technical, advisory, etc.) that might be required to facilitate the implementation of the 1997 UN WC.

(9) Identify potential barriers to effective implementation of the 1997 UN WC

Potential barriers may be legal, policy, and institutional, as well as political, cultural, or social. These barriers may be within the country or external.

(10) Identify potential projects to build national and regional capacity to implement the 1997 UN WC

Cooperation in implementing water-related projects at national and regional levels can facilitate the implementation of the Convention through building relevant capacity, establishing connections, networking and achieving ‘common’ and practical results. The regional projects on water conservation are of especial relevance.

(11) Place the 1997 UN WC in a broader context of good governance

For the most part the provisions of the 1997 UN WC operate within a due diligence framework, requiring to ‘take all appropriate measures’ to fulfil the obligations. Such measures are often associated to a state’s capacity to act. Therefore, the building and maintaining good governance across the countries and the region is vital.