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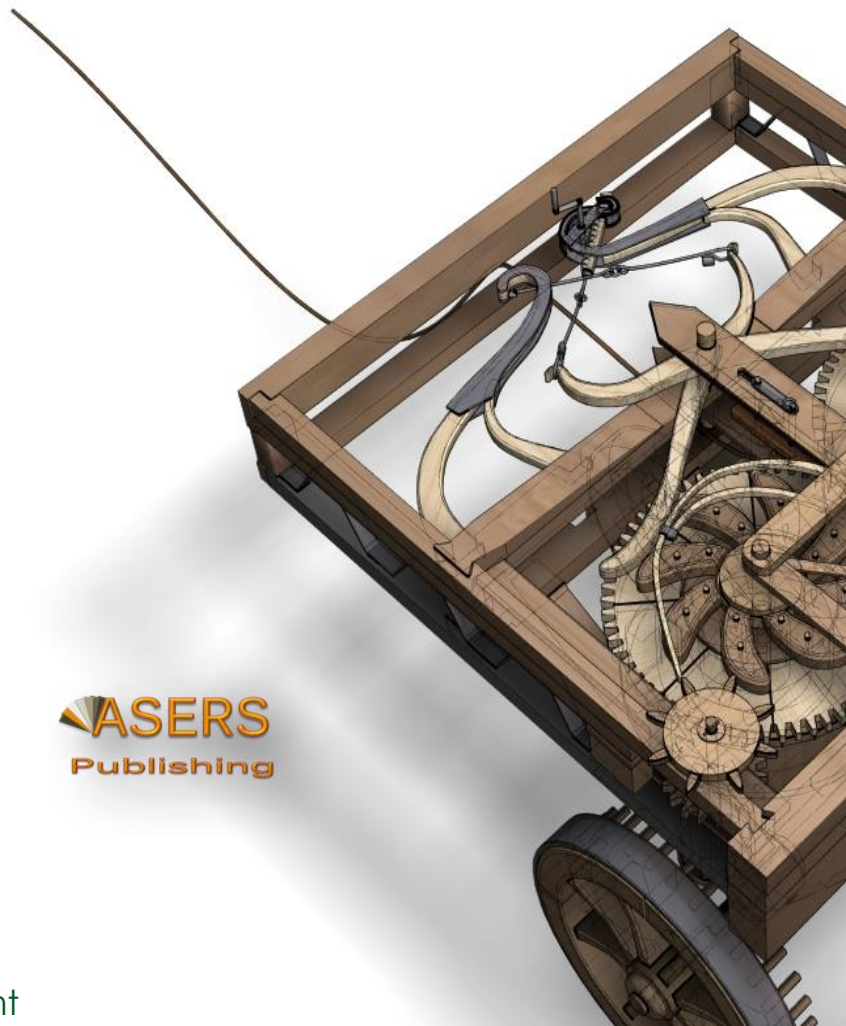
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Journal of Environmental Management and Tourism is an interdisciplinary research journal, aimed to publish articles and original research papers that should contribute to the development of both experimental and theoretical nature in the field of Environmental Management and Tourism Sciences.

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Some Theoretical Issues on the Sources of Environmental Law in the Republic of Kazakhstan

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Abstract:

The article explores the concept, role and theoretical issues of sources of environmental law of the Republic of Kazakhstan and some foreign countries. The literature on the relevant topic of leading domestic and foreign researchers has been studied. A theoretical and comparative legal analysis of the sources of environmental law of the Republic of Kazakhstan and some foreign countries has been carried out. Scientifically substantiated theoretical propositions and practical recommendations on the improvement of the theory of sources of environmental law of the Republic of Kazakhstan have been developed. Theoretical and practical recommendations on improving the existing environmental legislation of the Republic of Kazakhstan are proposed.

Keywords: environmental legislation; sources of law; sources of environmental law; national legislation

JEL Classification: K30; K32; Q50

Introduction

To date, the problem of environmental protection is the subject of discussion not only of one state, but of the whole world community. In this regard, it is very important to investigate the theoretical problems of environmental law. Accordingly, the sources of environmental law are the main and fundamental issue of environmental protection. Because it is from the sources of environmental law that the construction and application of specific legislation in the field of environmental protection depends. And of course, this category can play an important role in establishing the legality in a certain country.

As you know, the first ecological law in the philosophical sense, introduced in the 19th century by the German biologist Ernst Haeckel, says: "Everything is interconnected with everything" in the world. This means that a person with his activities, even useful, cannot but affect other objects of nature without violating some orderly processes of the environment. This circumstance imposes on the individual, society and the state an obligation rationally and to the maximum extent to safely use the objects of the surrounding natural environment.

But we live in the XXI century and the level of the impact of anthropogenic activity on the environment increases every year and every decade. Therefore, at present the environmental factor is beginning to play an increasingly important role for economic development and the quality of life of people. This began to manifest itself both for individual countries and the entire planet in the form of rapidly escalating global environmental problems. The world began to form anthropogenic type of economic development, associated with active development of mineral resources, depletion and degradation of natural resources, increasing environmental pollution. In one form or another, the thesis of the growing threat of an ecological crisis for the development and existence of human civilization itself has become common in the documents of international organizations, as well as in the strategies and programs of many countries.

The Republic of Kazakhstan is no exception in this process. Environmental law, like any other branch of law has its sources. Under the source of law in the legal aspect is understood a special form of expression of rules of conduct, which directly makes them universally binding. A rule of conduct to become legally binding must be vested in a certain legal form. It must be expressed in the form of a law, edict, decree, decision, order, instruction, or in another established form. The sources of environmental law should be understood as a form of fixing compulsory legal norms that regulate public relations for the protection of the environment and the rational use of natural resources. In the Kazakhstan legal system, which refers to the continental legal system (or as it is otherwise called – Romano-Germanic), sources are normative legal acts. A normative act should be understood as a document combining a set of objectively related norms. The existing normative legal acts form the legislation in their unity and interaction.

1. Literature Review

The analysis of existing scientific researches of domestic and foreign scientific lawyers on environmental and natural-resource law and, in particular, studies on the environmental legislation of the Republic of Kazakhstan, shows that so far, no special complex studies of theoretical problematic issues of sources of environmental law of the Republic of Kazakhstan have been conducted. However, among the works of foreign scientists, it is possible to meet scientific papers at the article level, exploring the legal nature of sources of environmental law. So, for example, J. Brunnée (2017) in his work explores the legal features of sources of international environmental law. B. B. Nikishin (2011) analyzes the formation and development of sources of environmental law of the European Union. Particular attention was paid to the sources of case law, the study of their legal nature as acts of interpretation and judicial control. Based on the practice of implementing the jurisdiction of the EU Courts, he determined the normative nature of judicial acts, revealed the possibilities of recognizing and protecting environmental rights by courts. A. V. Kodolova and A.M. Solntsev (2014) examine various international legal sources in the field of atmospheric protection and conclude that it is necessary to adopt a framework convention on the protection of the atmosphere. L. A. Kanayeva (2005) in her thesis study examines the theoretical issues of sources of EU law in the field of environmental protection, as elements of the EU environmental law system, as well as their interrelationships. The subject of her dissertation research is a system of forms of fixing one or several norms, which includes: constituent treaties on the European Union, secondary acts of the EU, i.e. published on its basis regulations, directives, decisions, recommendations and conclusions, decisions of the EU Court having normative significance, international conventions the participant in which become Euro community in a whole.

V. Nanda and G.R. Pring (2013) single out the following categories as sources of international environmental law:

- International conventional law;

- International customary law;
- General Principles of Law;
- Judicial decisions;
- Scholarly writings;
- New sources of international law.

Since the main source of environmental law is legislation on environmental protection, it can be attributed to this category and those scientific works that are aimed at studying the specific nature of environmental legislation. For example, the well-known Kazakhstan scientist D. L. Baideldinov S.G. Kuratov (1998) regard environmental legislation as an integrated industry regulating responsible relations that arise between society and nature.

2. Material and Methods

Sources of environmental law of the Republic of Kazakhstan have a complex structure, therefore, in our view, the issue of the need for a theoretical and comparative legal analysis of the sources of environmental law of the Republic of Kazakhstan and some foreign countries is acute. The purpose of the study is the development of scientifically based theoretical information and practical recommendations on the reconciliation of the theory of sources of environmental law of the Republic of Kazakhstan.

To achieve the research objectives, the following methods were used:

- materialistic dialectics;
- formal-logical method;
- historical and legal method;
- system-analytical method;
- a comparative legal method;
- a concrete sociological method.

As a normative legal basis for the study, such national and international documents were made:

- Law of the Republic of Kazakhstan "On Legal Acts";
- The Constitution of the Republic of Kazakhstan;
- Ecological Code of the Republic of Kazakhstan;
- Rio Declaration on Environment and Development.

3. Results and Discussion

Analysis of the literature showed that there is no common opinion on the concept of sources of environmental law. V.V. Petrov (2010), considering the question of the sources of environmental law, singled out the sources of law in the material sense (the will of the people) and in the formal sense (forms of law in which the general rules of conduct are the rules of law). Sources of environmental law are defined by him as normative legal acts, which contain legal norms regulating ecological relations. M.M. Brinchuk (2003) defines sources of environmental law as normative legal acts containing norms regulating relations in the sphere of interaction between society and nature. B.V. Erofeev (1999) notes that "sources of environmental law are normative legal acts containing environmental and legal norms". O.I. Krassov (2014) defines the sources of environmental law as "normative legal acts adopted by public authorities or local self-government bodies within the limits of their competence, which establish, modify or abolish environmental and legal norms – legally binding models of behavior of participants in environmental relations. N. Vedenin (2001) believes that "the sources of environmental law are a special form of expression of the rules of behavior, making them universally binding." At the same time, the author considers normative legal acts as sources of environmental law. N.G. Tsyparkov (2012) defines sources of environmental law as normative legal acts that contain norms regulating ecological relations.

Thus, among the sources of environmental law, the main focus of legal scholars is on the normative legal act, which is predetermined by its leading role in the legal regulation of all spheres of social relations.

L.G. Klyukanova (2002), defining the process of the penetration of environmental norms into the main branches of legislation as having a general and even purposeful character, believes that sources of modern environmental law can be interpreted in narrow (complex and sectoral acts adopted in the established manner by authorized bodies and regulating the order and principles of nature management and environmental protection) and broad (all ecologized norms of law) sense.

Among the sources of environmental law in a formally legal sense, V. Petrov (2010) singled out laws, decrees, resolutions, orders, normative legal acts of ministries and departments.

A normative legal act is a written official document on paper and (or) an electronic document of the established form identical to it, adopted at the national referendum or by an authorized body, establishing the norms of law, changing, stopping or suspending their operation. According to Article 10 of the Law of the Republic of Kazakhstan "On Legal Acts" (Law of the Republic of Kazakhstan... 2016), the hierarchy of regulatory legal acts in the Republic of Kazakhstan is defined as follows:

1. The Constitution of the Republic of Kazakhstan possesses the highest legal force (Constitution of the Republic of Kazakhstan 1995).

2. The ratio of the legal force of other normative legal acts other than the Constitution of the Republic of Kazakhstan corresponds to the following downward levels:

- 2.1. Laws that introduce amendments and additions to the Constitution;
- 2.2. Constitutional laws of the Republic of Kazakhstan;
- 2.3. Codes of the Republic of Kazakhstan;
- 2.4. Consolidated laws, laws of the Republic of Kazakhstan;
- 2.5. Normative decrees of the Parliament of the Republic of Kazakhstan and its Chambers;
- 2.6. Normative legal decrees of the President of the Republic of Kazakhstan;
- 2.7. Regulatory legal acts of the Government of the Republic of Kazakhstan;
- 2.8. Regulatory legal orders of ministers of the Republic of Kazakhstan and other heads of central state bodies, regulatory legal decisions of the Central Election Commission of the Republic of Kazakhstan, the Accounts Committee for Control over the Execution of the Republican Budget of the Republic of Kazakhstan, the National Bank of the Republic of Kazakhstan and other central state bodies;
- 2.9. Normative legal orders of heads of departments of central state bodies;
- 2.10. Normative legal decisions of maslikhats, normative legal decisions of akimats, normative legal decisions of akims and normative legal decisions of revision commissions.

3. Each of the normative legal acts of the subordinate level should not contradict the normative legal acts of higher levels.

4. The place of the normative legal act of the derived species in the hierarchy of normative legal acts is determined by the level of the act of the main type.

5. Normative decisions of the Constitutional Council of the Republic of Kazakhstan and the Supreme Court of the Republic of Kazakhstan are outside the hierarchy of normative legal acts established by this article.

As elements of the plurality of sources of environmental law, it is legitimate to consider only normative legal acts that are linked by the existence of a single subject of legal regulation, in other words, they contain norms regulating ecological relations. To a great extent, the methods of legal regulation of ecological relations are derived from the subject of legal regulation. The environmental law is characterized by a preferential combination of mandatory prescriptions (for the purpose of determining environmental requirements), permitting (with a view to ensuring rational nature management) and prohibition (imposition of duties on persons to refrain from violating environmental rules and norms) that are reflected in relevant sources of law. The single subject and methods of legal regulation predetermine the interrelation of norms as elements of the plurality of sources of environmental law. One of the basic conditions for the unity of the system of environmental law, the structuring of the multiplicity of its interrelated elements is to ensure that the norms of the lower sources of environmental law are following the norms of higher sources of law. This phenomenon is expressed in the hierarchical structure of the system of sources of environmental law. The hierarchy of sources of environmental law reflects the hierarchy and limits of the conduct of state bodies and other entities that have competence in the field of regulation of environmental relations.

Legal regulation of environmental relations is detailed based on a combination of rulemaking of all state bodies, based on their principle of separation of powers. At the same time, various acts of the same government body may have different legal force. To the greatest extent, this concerns the internal hierarchy of such sources of law as normative legal acts.

Thus, in the final analysis, the hierarchical structure of the system of sources of environmental law reflects the legal force of the sources of environmental law and their subordination in a single system.

The legal significance of the legal norms included in it depends on the position of the source in the legal system. To consolidate environmental norms, the importance of which is the most important, they choose such forms of sources of law that are at the top of the hierarchy. The hierarchy of the system of sources of environmental law also reflects the internal interconnection of various sources of law. Thus, for example, the abrogation or amendment of a basic normative legal act entails the need to review all acts that are subordinate to a given source, which regulate the corresponding relations. Consequently, the election of the form of the act in which the

environmental legal norm is fixed depends on the need to give the legal norm a corresponding level of legal significance, from the established competence of state bodies, from objective conditions that have an impact on the order of environmental and legal regulation. The value of the hierarchy of sources of law also consists in eliminating possible conflicts between them, ensuring the consistency of the system of law.

The legal force of the source of law consists of several essential components. Rule of law, supreme legal force.

The Constitution and the legislative acts adopted on its basis are not only the bases of the constitutional system of the Republic of Kazakhstan, but also the most important principles for the development of the system of sources of environmental law. The principle of the rule of law is enshrined in the Basic Law as the obligation of the state, all its bodies and officials to act within the limits of the Constitution and the acts of legislation adopted in accordance with it. Legal acts or their separate provisions, recognized in accordance with the procedure established by law, are contrary to the provisions of the Constitution, do not have legal force. It should be noted that, even though the sources of environmental law differ in the degree of their legal force, they are equally obligatory for execution.

The Constitution of the Republic of Kazakhstan, is the legal basis for the development of the branches of the Kazakhstan legislation, including the environmental one. The Constitution, being a powerful organizational factor of lawmaking, creates the beginning of the legal regulation of relations for the protection of the environment and ensuring environmental security, for environmental management. Environmental legislation is in accordance with the Constitution, is based on its provisions, which is predetermined by the supreme legal force of the Constitution and must not contradict its published laws.

The Constitution stipulates:

- norms establishing the ecological basis of the constitutional order;
- norms regulating constitutional environmental rights and obligations;
- norms that establish ownership of natural resources;
- norms providing for the powers of the supreme bodies of state power in the field of regulation of environmental relations.

According to Article 38 of the Constitution of the Republic of Kazakhstan, citizens of the Republic are obliged to preserve nature and take care of natural resources. In addition to this norm, the right of citizens to a favorable environment, which follows from the meaning and content of the legislative norm, enshrined in Article 31, paragraph 1, of the Constitution of the Republic of Kazakhstan, is also defined at the constitutional level (Constitution of the Republic of Kazakhstan 1995). It states that "the state sets as its goal the protection of the environment that is conducive to human life and health." This constitutional provision is included in the section of the Basic Law that provides for the rights and obligations of a citizen and a person, and therefore his literal interpretation allows one to come to the conclusion that such a right of a citizen and a person is a constitutional right that must be provided by the state in all lawful ways and means.

In addition to the Constitution of the Republic of Kazakhstan, international treaties ratified by the Parliament of Kazakhstan are also sources of law. According to the norms of the Constitution of the Republic of Kazakhstan, international treaties ratified by the Republic have priority over its laws. The procedure and conditions for the operation in the territory of the Republic of Kazakhstan of international treaties to which Kazakhstan is a party are determined by the legislation of the Republic. All laws, international treaties to which the Republic is a party, are published. The official publication of normative legal acts concerning the rights, freedoms and duties of citizens is an indispensable condition for their application (Constitution of the Republic of Kazakhstan 1995).

International legal norms, as a rule, impose obligations, first of all, on states as the main creators of such norms. In this sense, one can assert the effect of such norms on the territory of states. At the same time, it is not true to believe that such obligations through the state are also imposed on participants in intra-state relations. Their impact on these relations, however, is of an indirect nature and is realized through regulation of international interstate relations (Mingazov 2000).

Customary international law is a direct source of domestic law if the State does not take explicit measures to ensure that a particular customary rule does not have the power of domestic law. In the event of any such step, the customary rule may be applied by the courts in judicial proceedings between citizens. International customary law can also restrict the exercise of state power and can equally determine the parameters in which a state can lawfully enact laws. For example, it can define the limits of the jurisdiction of states over persons and territory (De Mestral and Fox-Decent 2008).

The environmental law of the Republic of Kazakhstan was objectively influenced by the processes and results of international lawmaking on topical issues of environmental protection. Recognition of the international treaty and other obligations of the Republic (Part 1, Article 4 of the Constitution) in the Constitution of the Republic of Kazakhstan, as well as the prevalence of norms of international treaties ratified by Kazakhstan in relation to the norms of national laws (part 3, article 4 Constitution) directly implies the allocation of special international legal sources in the general system of sources of environmental law (Constitution of the Republic of Kazakhstan 1995). Thus, as already noted, the constitutional and legal recognition and perception of the norms of international environmental conventions and international environmental treaties of the Republic of Kazakhstan directly contribute to the process of transforming Kazakhstan's international treaty norms in the field of environmental protection into existing national environmental legislation.

The international obligations adopted by Kazakhstan have a significant impact on national environmental legislation, one of the principles of which is the harmonization of the environmental legislation of the Republic of Kazakhstan with the principles and norms of international law, as well as the conscientious fulfillment of international obligations (Environmental Code of the Republic of Kazakhstan 2007).

Some principles of international law are incorporated into national legislation (such as the principles of preventing damage to the environment of other states, precautionary measures and preventive measures, the peaceful settlement of international disputes, the responsibility of the polluter for costs, etc. (Environmental Code of the Republic of Kazakhstan 2007)) as stipulated in the Declaration on Environment and Development (United Nations General Assembly 1992).

It should be noted that the polluter pays principle is a key principle of the European Union's environmental law and is to a greater extent considered by European and international law within the framework of the concept of strict liability, that is, not only for "unlawful" but also "legitimate" damage to the environment (Elyubayev 2007-2008).

The next main source of environmental law of the Republic of Kazakhstan is the Environmental Code of the Republic of Kazakhstan (Environmental Code of the Republic of Kazakhstan 2007), this normative act was developed considering the international obligations of the Republic of Kazakhstan (Elyubayev 2010) and provides for a significant number of provisions aimed at implementing international obligations, including:

- Ecological rationing (chapter 4);
- Environmental impact assessment (chapter 6);
- Environmental due diligence (chapter 7);
- Environmental permits (chapter 8);
- Environmental control (Section 4);
- Environmental monitoring and inventories (Section 5), including environmental information (Chapter 21);
- Environmental education and enlightenment, scientific research and international cooperation in the field of environmental protection (Section 7);
- Environmental requirements when carrying out economic and other activities in the state protected area in the northern part of the Caspian Sea (chapter 38);
- Environmental requirements for handling production and consumption wastes (Chapter 42) and others (Environmental Code of the Republic of Kazakhstan 2007).

Conclusion

The international contractual cooperation of the Republic of Kazakhstan in the field of the environment is not limited solely to recognition and readiness to comply with the norms of international environmental conventions; it directly imposes an obligation on the state to perceive such international legal acts as an integral part of the domestic law, equating them into national laws or giving them a predominant force in relation to law.

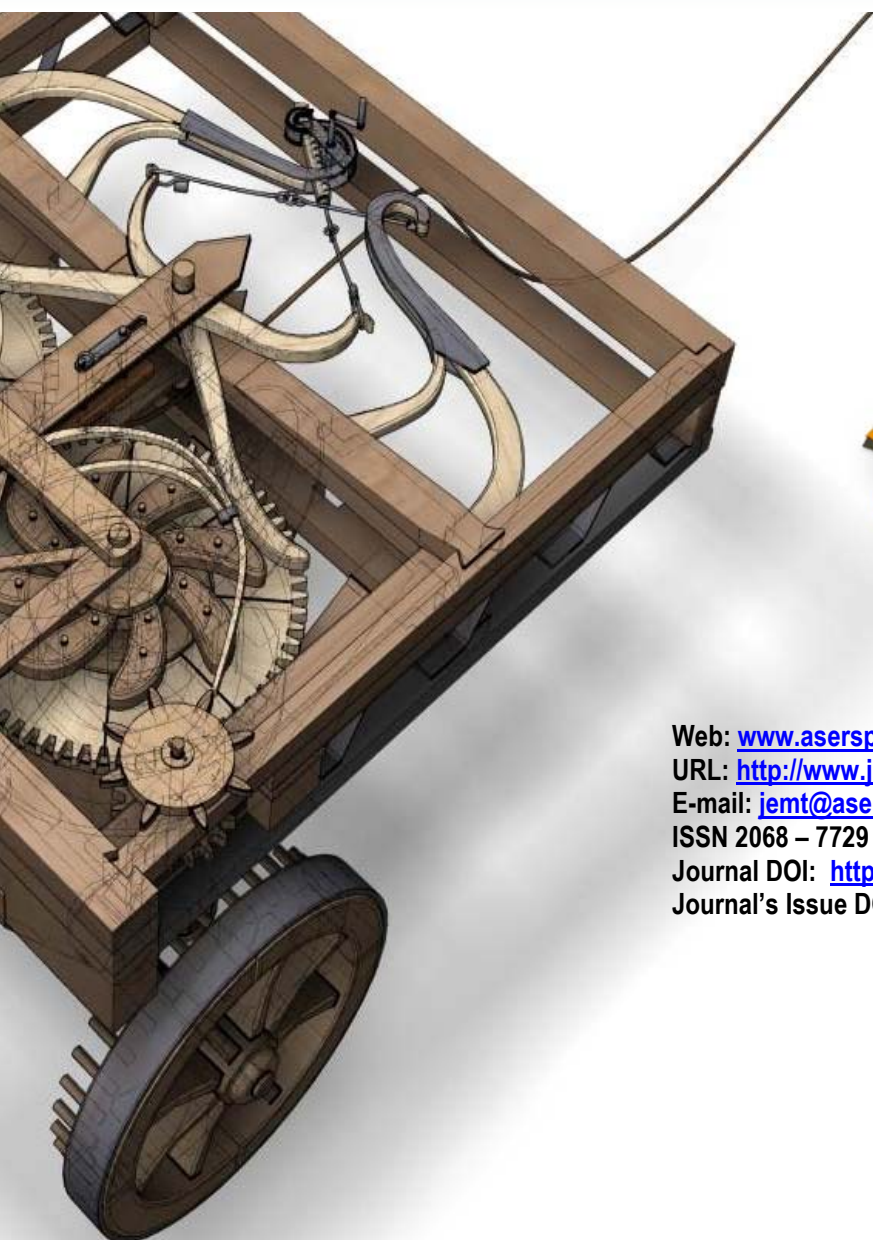
Participation in international environmental agreements obliges the Republic of Kazakhstan to continue activities aimed at bringing the norms of national environmental law in accordance with such treaty acts, adapting Kazakhstan's international legal obligations to the existing environmental legislation by introducing necessary amendments and additions to it, adopting appropriate legislative acts for the purposes of full implementation the main provisions of international treaties in this field.

Cooperation of the Republic of Kazakhstan should not be limited to entering certain international treaties. It is necessary to continue activation of Kazakhstan's activity in the system of international institutional mechanisms and bodies, whose activities are directly related to solving problematic issues of environmental protection.

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