

# Governing the Amu Darya Basin

The Legal Regime and Implications of the Exclusion of  
Afghanistan from the Regional Treaty Arrangement(s)

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## Acknowledgement

Writing this paper would not have been possible without the outstanding support of many people. First of all I would like to thank the Dr. Sibghatullah Ghaznawai, Director of the Tarzi Research Foundation for showing interest and supporting in very phase of this research. This work would not have been possible without the assistance and patience of Dawood Mohammadi, Deputy Director of Tarzi Research Foundation. I am greatly indebted to Assistant Professor Dr. Medha Bisht from South Asian University, New Delhi; Sher Jan Ahmadzai, Director of Center for Afghanistan Studies, University of Nebraska at Omaha, and Dr. Fazl Akhtar, Center for Development Research, University of Bonn, Germany, whom reviewed and oversaw early drafts of the paper and provide valuable comments and rigorous feedback. Guidance, support and providing data by Mr. Khan Mohammad Takkal, Head of NWARA and Mr. Naeem Salarzai, Director General Water Management Affairs at NWARA are highly appreciated.

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### TRF Publication Code: Code of Publication (2021-02 EN)

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ISBN 978-9936-8086-2-1

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## Governing the Amu Darya Basin: The Legal Regime and Implications of the Exclusion of Afghanistan from the Regional Treaty Arrangement(s)

*Ikramuddin Kamil (Ph.D)*

### **Abstract**

*The Amu Darya is governed by various bilateral and regional treaties: between Afghanistan and Russia/the former USSR and among the Central Asian Republics (CARs). The former are boundary treaties and do not cover the use of the Amu Darya, and the latter are, inter alia, water-sharing agreements that govern the use of water. This paper examines the current legal regime governing the Amu Darya. It outlines one specific question: What are the legal implications for Afghanistan of its exclusion from the regional legal framework governing the apportionment and utilization of the Amu Darya? This paper argues that without Afghanistan's inclusion in the regional water agreements or organizations governing the Amu Darya, no Central Asian regional water agreement or organization is complete. The paper makes two arguments. First, the equitable and reasonable utilization principle has the precedence over the no harm rule and it gives all riparian states a right to an equitable share in shared watercourse, therefore the downstream CARs cannot prevent upstream Afghanistan from developing their water resources. Second, even though Afghanistan is not a party to the agreements governing the Amu Darya, the country can be affected or harmed by downstream uses of water, as Afghanistan's future use of the Amu Darya can be foreclosed or limited. Although Afghanistan can recourse to the 1997 UN Convention for the allocation of Amu Darya waters, the convention does not serve its interests. There are some arguments that the factors determining equitable and reasonable utilization in the 1997 UN Convention refer to past use, the concept of equitable and reasonable utilization protects the interests of early developers (the CARs) against those of late developers (Afghanistan) in regards to the utilization of water resources.*

### **Introduction**

Water is among the most extensively distributed substances, and access to it has been recognized as a fundamental human right.<sup>1</sup> It is estimated that 75 percent of the earth is covered by water and that the planet contains approximately 1386 million cubic kilometers of water.<sup>2</sup> However, out of these enormous amounts of water, fresh water, which humans depend on for many uses, including agricultural, industrial, household, recreational, and environmental activities, amounts to merely 3 percent of the earth's available water.<sup>3</sup> The rest of the water is saline and ocean based. Only 1 percent of fresh water is readily accessible for consumption, as nearly 69 percent of total fresh water is frozen in glaciers and polar ice caps. The remaining 30 percent of water, albeit unfrozen, is mainly groundwater, and only a small fraction (0.3 percent) is present above ground or in the air (2,120 cubic kilometers).<sup>4</sup>

<sup>1</sup> UNGA Res 64/292 (28 July 2010) A/RES/64/292. The UNGA Resolution formally recognizes 'the right to water and sanitation and acknowledges that clean drinking water and sanitation are essential to the realization of all human rights.'

<sup>2</sup> Claudio Cassardo and J. Anthony A. Jones, 'Managing Water in a Changing World' (2011) 3 Water 618, 621.

<sup>3</sup> Ibid.

<sup>4</sup> Jie Liu and others, *Water Ethics and Water Resource Management* (UNESCO Bangkok 2011) 2.

Afghanistan has a significant amount of fresh water from precipitation in its high mountains of Hindu Kush. Winter precipitation (snow) accounts for 80 percent of the country's water resources.<sup>5</sup> It is estimated that Afghanistan has 75 billion cubic meters of potential water resources, 75 billion cubic meters of surface water, and 18 billion cubic meters is groundwater.<sup>6</sup> Afghanistan uses 35 percent of the total surface water, which comes from five main river basins<sup>7</sup>: the Amu Darya Basin (*Darya* is the Persian word for *river*), the Kabul River Basin or Indus River Basin, the Helmand River Basin, the Harirud-Marghab River Basin, and the Northern River Basin.<sup>8</sup> Except for the Northern River, the rivers are transboundary and flow into neighboring countries.<sup>9</sup>

The water of the Amu Darya is mostly used for agriculture, and its allocation is a legacy of the policies of the former Union of Soviet Socialist Republics (USSR) or Soviet Union. The water of the Amu Darya was allocated among the four Central Asian Republics (CARs) through Protocol 566 adopted by the USSR. Immediately after the independence of the republics, they concluded a new agreement that retained the Protocol 566 allocation quotas. The CARs have also established multiple organizations and institutions for the management of the Amu Darya and the Syr Darya. Afghanistan was excluded from these regional agreements.<sup>10</sup> The questions arising from this arrangement are as follows: What could be the possible legal

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<sup>5</sup> Raphy Favre, and Golam Monowar Kamal 'Watershed Atlas of Afghanistan' (2004) 36; Masood Ahmad and Mahwash Wasiq, 'Water Resources Development in Northern Afghanistan and its Implications for Amu Darya Basin' (2004) The World Bank Working Paper No. 36, 9.

<<http://documents.worldbank.org/curated/en/434761468767735080/Water-resource-development-in-Northern-Afghanistan-and-its-implications-for-Amu-Darya-basin>> accessed 01 December 2020.

<sup>6</sup> Ahmad and Wasiq (n 6) 9.

<sup>7</sup> Government of the Islamic Republic of Afghanistan, 'Afghanistan National Development Strategy 2008-2013' (2008) 8.

<sup>8</sup> Ibid.

<sup>9</sup> Ehsanullah Hayat, 'Adopting a Strategic Framework for Transboundary Water Resources Management in Afghanistan' (IWA 2<sup>nd</sup> Regional Symposium on Water, Wastewater and Environment, 2017) 42

<<http://www.cawater-info.net/afghanistan/pdf/hayat.pdf>> accessed 01 December 2020.

<sup>10</sup> The binding and nonbinding instruments of the CARs that deal with water management of the Amu Darya include the Agreement between the Republic of Kazakhstan, the Republic of Kyrgyzstan, the Republic of Uzbekistan, the Republic of Tajikistan and Turkmenistan on Cooperation in the Field of Joint Water Resources Management and Conservation of Interstate Sources (signed 18 February 1992) (Almaty agreement, 1992), the Statute of the Interstate Commission for Water Coordination in Central Asia (ICWC), Tashkent (approved 5 December 1992 by ICWC members); the Agreement about the Status of IFAS and Its Organizations (April, 9, 1999); the Regulation of IFAS (1999 Statute of the ICWC) (approved 5 December 1992 by ICWC members); the Statute of the ICWC (approved 18 September 2008 by ICWC members); the Statute of the Basin Water Association 'Amudarya' (approved April 1992); the Nukus Declaration of the Central Asian States and International Organizations on the Problems of Sustainable Development in the Aral Sea Basin, Nukus (adopted 5 September 1995); the Almaty Declaration of the Heads of States of the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan, Almaty (adopted 28 September 1997); the Joint Statement Made by the Heads of States of the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan (adopted 9 April 1999); the Dushanbe Declaration of the Heads of States of the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan, Dushanbe (adopted 6 October 2002); the Joint Statement Made by the

implications under international law when an upper riparian state is excluded from a regional water treaty? Why has Afghanistan been excluded from these institutions, legal regimes, and governing bodies of the Amu Darya River Basin? Have the Amu Darya regional agreements created any rights for or imposed any obligations on Afghanistan, which is not a party to any of these agreements? If the answer to this question is affirmative, then what are the legal implications of a third party creating rights and obligations under international law?

This paper argues that the CARs, through regional agreements, cannot create rights and obligations for Afghanistan. However, customary international law principles to which Afghanistan is not a persistent objector and that the CARs have incorporated into regional agreements will apply to Afghanistan as a rule of customary international law. In addition, the general principle of equitable and reasonable utilization as codified by the UN Convention on the Law of Non-Navigational Uses of International Watercourses (1997 UN Convention)<sup>11</sup> favors early developers. However, it also recognizes that late developers have the right to develop water resources despite the harm caused to early developers. Moreover, Afghanistan could be harmed by upstream state(s)' (in this case, the CARs') expansion of water utilization, as this would forestall potential and future uses of Afghanistan. Hence, both sides (upstream and downstream users) have an obligation to each other, and they have to consider current and future uses of each other in developing plans and projects on the shared river.

This paper first describes the Amu Darya Basin and the Soviet legacy of water management in the Aral Sea Basin. It then presents an overview and analyzes the legal regime governing the Amu Darya. The political reasons for Afghanistan's exclusion from the regional water management agreement are also discussed here. Finally, the paper focuses on the legal implications of transboundary water-sharing agreements for Afghanistan, which has been excluded from regional water-sharing agreements.

### Hydrology of the Amu Darya

Afghanistan has a substantial amount of water, which originates from precipitation in its high mountains, 80 percent of which receive runoff from snowmelt at elevations above 2000 meters.<sup>12</sup> Recent estimates show that on an annual basis, Afghanistan has 75 billion cubic meters (bcm) of renewable water resources, of

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Heads of States – Founders of the International Fund for Saving the Aral Sea, Almaty (adopted 28 April 2009) and the Framework Convention on Environmental Protection for Sustainable Development in Central Asia (Framework Convention 2006) (signed 22 November 2006 by the Kyrgyz Republic, Tajikistan and Turkmenistan, not yet in force).

<sup>11</sup> Convention on the Law of the Non-Navigational Uses of International Watercourses, New York (adopted 21 May 1997, entered into force 17 August 2014) (UN Convention 1997).

<sup>12</sup> Government of the Islamic Republic of Afghanistan, 'Water Resource Management (2007/08-2012-13' (2008) 4.

which 75 bcm is surface water and 18 bcm is groundwater.<sup>13</sup> The Afghanistan National Development Strategy points out that Afghanistan consumes 35 percent of its total surface water, which originates from five main river basins: the Amu Darya, the Helmand River, the Kabul River, the Harrirud-Marhab River, and the Northern River Basins.

The Amu Darya (also called the Oxus) is the longest river in Central Asia, originating from the Hindu Kush and Wakhan in the Pamir Highlands in Afghanistan, and flows 2,540 kilometers to the Aral Sea in Central Asia.<sup>14</sup> The upper part of the river (after the confluence of the headwaters, namely, the Wakhan River and the Pamir River) flows from Zor-Kul Lake and is called the Panj River. At the confluence of the river with its right tributary, the Vakhsh River, it becomes the Amu Darya.<sup>15</sup> The Amu Darya forms a frontier of 1800 kilometers between Afghanistan and its northern neighbors, beginning from Zor-Kul and ending at Khamaab. The main tributaries of the Amu Darya are the Pamir, Wakhan, Shiwa, Kokacha, Kunduz, Vakhsh, Kafiernigann, Surkhandarya, and Sherabaddarya Rivers. The Payandzh and Vakhsh are the largest tributaries of the Amu Darya.<sup>16</sup> These rivers are mountain tributaries, and the Amu Darya has no significant tributaries along its 1,200 kilometers through the plain.<sup>17</sup> The annual average flow of the Amu Darya is 75 bcm. The flow reaches 108 bcm in high-water years and 47 bcm in dry or low-water years.<sup>18</sup> The catchment area of the Amu Darya is 309,000 square kilometers.<sup>19</sup>

The Amu Darya is the most productive water source for Afghanistan and the region. The total irrigated area of the Amu Darya is estimated at 6 million hectares. In Afghanistan, it irrigates 1.15 million hectares of land.<sup>20</sup> Uzbekistan has the largest irrigated area (2.3 million hectares), followed by Turkmenistan, where the Amu Darya is utilized to irrigate 1.7 million hectares of land. In Tajikistan, the Amu Darya is used for 0.5 million hectares of land, and in the Kyrgyz Republic, it is used for only about 0.1 million hectares of land.<sup>21</sup>

<sup>13</sup> Masood Ahmad and Mahwash Wasiq, 'Water Resources Development in Northern Afghanistan and its Implications for Amu Darya Basin' (2004) The World Bank Working Paper No. 36, 9.

<sup>14</sup> Ahmad and Wasiq (n 6) 10. The Amu Darya forms a border between Afghanistan and Tajikistan and then Uzbekistan, crosses the territory of Turkmenistan and returns to Uzbekistan, where it is discharged into the Aral Sea.

<sup>15</sup> Ibid 10.

<sup>16</sup> Najib Aqa Fahim, *Legal System Governing Amu Darya Basin* (Trs. author: رودخانه آمو بر حقوقی حاکم بر), (1<sup>st</sup> edn, Center for Strategic Studies 2017) 13.

<sup>17</sup> Ahmad and Wasiq (n 6) 12.

<sup>18</sup> Ibid.

<sup>19</sup> Kai Wegerich, 'Hydro-hegemony in the Amu Darya Basin' (2008) 10 (2) Water Policy 71, 73.

<sup>20</sup> Ahmad and Wasiq (n 6) 25; Stuart Horsman, 'Afghanistan and Transboundary Water Management on the Amu Darya: A Political History' in M.M. Rahaman and O. Varis (eds), *Central Asian Waters: Social, Economic, Environmental and Governance Puzzle* (Helsinki University of Technology 2008) 65.

<sup>21</sup> Ahmad and Wasiq (n 6) 25.



Since the Amu Darya is the most significant and productive water source for Afghanistan and the region, it is essential to pursue a cooperative rather than a unilateral strategy of capturing resources, to shift attitudes towards cooperation and to engage in meaningful dialogue.

### Amu Darya Basin



Source: <http://www.cawater-info.net>

### The Soviet Legacy of Water Management

The Aral Sea was the fourth-largest inland body of water on the planet in the 1950s, containing 1090 cubic kilometers of water and covering 66,000 square kilometers of surface area.<sup>22</sup> Almost half of the water from the Amu Darya and Syr Darya reached the Aral Sea, and these rivers sustained the sea's stability.<sup>23</sup> However, in the span of just four decades, the Aral Sea basin was transformed into a major ecological and socioeconomic disaster.<sup>24</sup> This was because of the policies of the former USSR, which diverted the water of the Amu Darya and the Syr Darya for the expansion of cotton production in the arid region.

<sup>22</sup> Micheal H. Glantz, 'Sustainable development and creeping environmental problems in the Aral Sea region' in Michael H. Glantz (ed), *Creeping Environmental Problems and Sustainable Development in the Aral Sea Basin* (Cambridge University Press 1999)

8.

<sup>23</sup> Ibid.

<sup>24</sup> Ibid.

The water of the Amu Darya and Syr Darya is mostly used for agriculture. In the 1970s, the USSR expanded the irrigated area by 150 percent in the Amu Darya Basin only.<sup>25</sup> These irrigated areas have also expanded in recent decades.<sup>26</sup> The USSR perceived that the value of agriculture and animal husbandry output in the Aral Sea Basin outweighed the effects of environmental damage to the area.<sup>27</sup> Therefore, the USSR authorities implemented agricultural policies that encouraged cotton production.<sup>28</sup> Their continual demand was to increase the production of cotton, or 'white gold,' at any cost.<sup>29</sup> They expanded the irrigated area to 7.2 million hectares in 1975 and to 9.4 million hectares by 1989.<sup>30</sup> The CARs, especially Uzbekistan, became the largest cotton producers; however, they processed very little cotton, and most of the harvest was transported to the central and western parts of the USSR, where it was used as an input for textile industries.<sup>31</sup>

It was agreed that Turkmenistan and Uzbekistan, which are downstream riparian state(s), would produce cotton, while upstream Tajikistan would use the water for energy production.<sup>32</sup> However, Afghanistan and Kyrgyzstan were considered producers of water only, without real water rights.<sup>33</sup> The reservoirs that were constructed in Kyrgyzstan were to provide downstream Uzbekistan and Kazakhstan with water so that they could expand their agriculture. In exchange for natural gas, coal, and oil, Kazakhstan would receive water from downstream state(s).<sup>34</sup> Against Afghanistan, a weaker neighbor, the USSR maintained its hydro-hegemony; it did not allow Afghanistan to participate in the 1987 meetings that determined the Amu Darya allocation for four Soviet Republics.<sup>35</sup> These meetings ended with the adoption of a protocol by the Scientific and Technical Council of the USSR's Ministry of Water Resources. The protocol determined water allocation quotas for the four Soviet republics and created the River Basin Organizations (BVO) for the management and enforcement of these quotas.

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<sup>25</sup> Julia Bucknall, Irina Klytchnikova, Julian Lampietti, Mark Lundell, Monica Scatasta and Mike Thurman, *Irrigation in Central Asia – Social, Economic and Environmental Considerations* (The World Bank 2003) 3.

<sup>26</sup> Behzod Gaybullaev, Su Chin Chen and Dilmurod Gaybullaev 'Changing in Water of the Aral Sea After 1960' (2012) 2 Appl Water Sci 285, 285-286.

<sup>27</sup> Kai Wegerich, 'The New Great Game: Water allocation in Post-Soviet Central Asia' (2009) 10 Geo. J. Int'l Aff. 117, 118.

<sup>28</sup> Ibid.

<sup>29</sup> Sarah L. O'Hara 'Central Asia's Water Resources: Contemporary and Future Management Issues' (2000) 16 (3) Int'l J of Water Resources Development 423.

<sup>30</sup> Wegerich 'The Mew Great Game' (n 27) 118.

<sup>31</sup> Max Spoor and Anatoly Krutov, 'The Power of Water in a Divided Central Asia', (2003) 10 Perspectives on Global Development and Technology 596.

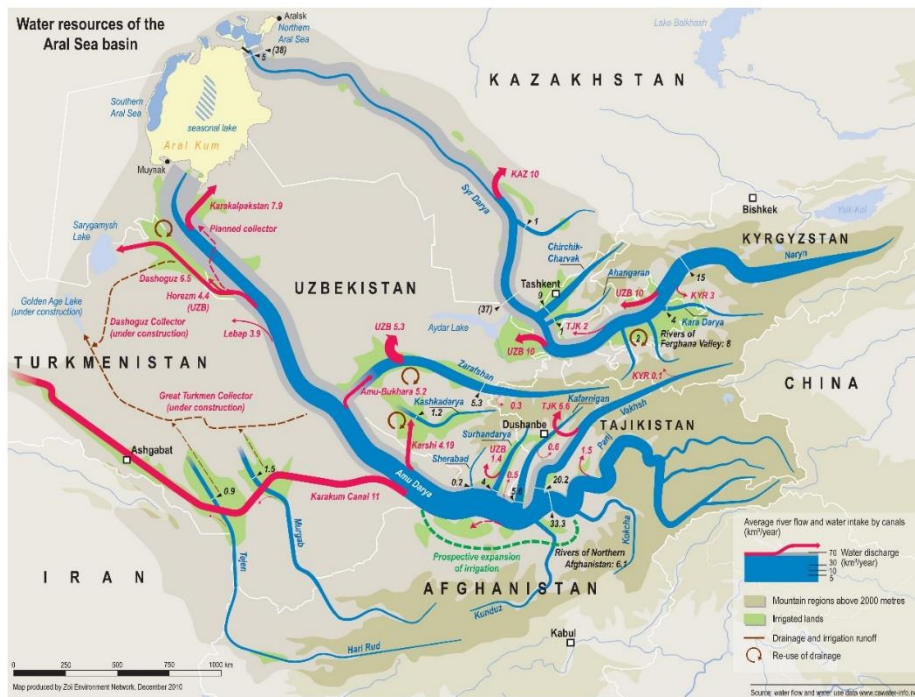
<sup>32</sup> Wegerich, 'Hydro-hegemony' (n 19) 77.

<sup>33</sup> Ibid 71.

<sup>34</sup> Dinara Kemelova and Gennady Zhalkubaev, 'Water, Conflict, and Regional Security in Central Asia Revisited' (2003) 11 N Y U Env'tl L J 479, 480.

<sup>35</sup> Wegerich 'Hydro-hegemony' (n 19) 76.

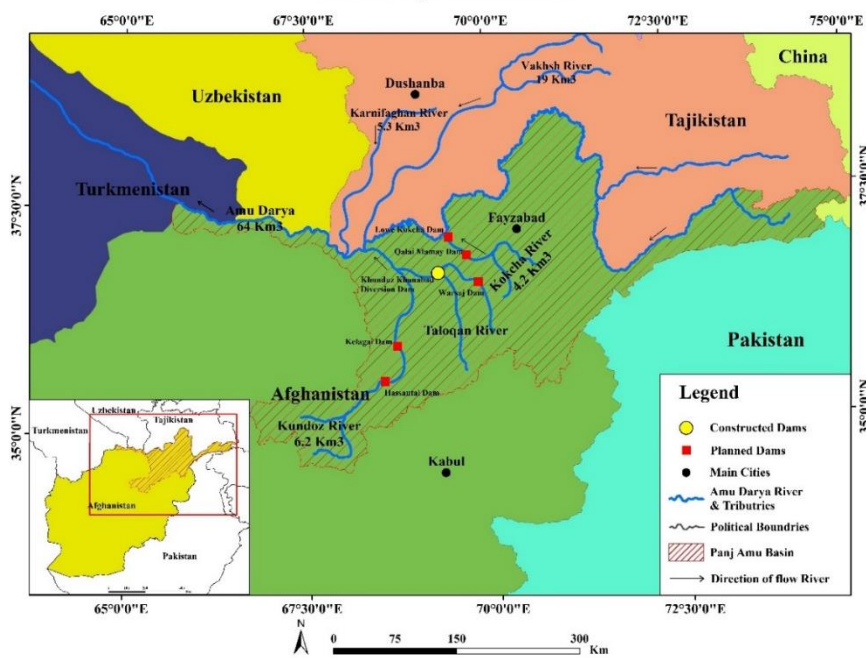
### Aral Sea Basin



Source: [www.cawater-info.net](http://www.cawater-info.net)

With the dissolution of the USSR in 1991, in 1992, the five CARs (Kazakhstan, Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan) entered into a new agreement, where they maintained the quotas set by the 1987 protocol and created the Interstate Commission for Water Coordination of Central Asia (ICWC) for the management of water allocation. Afghanistan, an upper riparian state, is not a party to the Almaty Agreement or the ICWC. The subsequent section analyzes the pre- and post-USSR legal regime for the management of the Amu Darya.

### Amu Darya River Basin



## Current Legal Regime Managing the Amu Darya

The following section briefly examines the legal regime that governs the Amu Darya. Two kinds of agreements regulating the Amu Darya are still in force. The first are agreements between Afghanistan and the former USSR, while the second are agreements among the CARs. The former are boundary agreements and do not cover the issue of water sharing. The latter agreements are water sharing and water management agreements and provide an institutional framework. Afghanistan is not a party to any agreements that govern the water sharing of the Amu Darya.

### Agreements between Afghanistan and Russia or the Former USSR

The first treaty over the Amu Darya was the Treaty of Commerce and Navigation between Great Britain and Russia of 1843, which stipulated rules of navigation and commerce on the Amu Darya. The 1872 and 1873 agreements between Great Britain and Russia and the 1946 and 1958 agreements between Afghanistan and Russia primarily focused on the Amu Darya as an international boundary. Nonetheless, the 1921 Treaty of Friendship between Afghanistan and Russia provided that Russia had to give back all territories in the frontier zone, which had been Afghanistan's property in the past century.

The 1946 agreement between Afghanistan and Russia assured Afghanistan's navigation rights on the Amu Darya and the navigable part of the Pyandzh (or Panj) River.<sup>36</sup> The agreement also established a joint commission that was supposed to meet regularly, map the frontier line, determine ownership of islands, and set up boundary posts where it was considered necessary.<sup>37</sup> Moreover, the note of exchange annexed to the 1946 treaty provided that Afghanistan would maintain the status quo and not increase the quantity of water taken from the Kushka River. The note also emphasized that the USSR would not build a dam on the Murghab River or utilize the Afghan bank of the river. However, this stipulation was subject to Afghanistan's assurance that it would not build such a dam on its territory in the frontier sector, as it would diminish water flow from this river to Soviet territory.<sup>38</sup>

The 1958 treaty between Afghanistan and the former USSR was a detailed treaty that dealt with the utilization of frontier water and the main roads intersecting the frontier line as well as fishing, hunting, mining, agriculture, and forestry. In addition, bilateral agreements commonly establish joint institutions to operationalize state parties' intention to cooperate on certain issues. The 1958 treaty provided for the establishment of a joint commission and its powers. The commission is statutorily tasked with the responsibility to cooperate in performing the duties arising from the treaty. Information exchange, which is an essential element in the effective implementation of the treaty, was also incorporated into the 1958 agreement. It obliged both parties to regularly exchange information on water levels and volumes in

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<sup>36</sup> Afghanistan-USSR Agreement 1946, art. 1.

<sup>37</sup> *Ibid.*, art. 2.

<sup>38</sup> *Ibid.*, third letter annexed to the agreement.

frontier rivers and precipitation to prevent flood dangers or damage. The question of sharing the water of the Amu Darya was left for a separate agreement. Article 16 of the treaty provided that 'questions concerning the use of waters that are connected with frontier waters shall be governed by special agreement between the Contracting Parties.' The explanation for leaving the Amu Darya water-sharing issue to a separate agreement was that the USSR never wanted to agree on it, as in the absence of any legal framework, it was receiving a considerable amount of water for irrigation.

In the 1970s, Afghanistan made some efforts to negotiate a water-sharing treaty over the Amu Darya, but these produced no results. Similarly, the Afghan government has strived to collaborate with its neighboring countries in post-Taliban Afghanistan and concluded several MoUs on data sharing and information exchange. In 2007, an MoU was signed between Afghanistan and Tajikistan to cooperate and implement joint water resource development projects.<sup>39</sup> Likewise, in 2014, the government signed another MoU making it imperative for Afghanistan and Tajikistan to exchange hydrological data and information on a regular, mutually beneficial, and free-of-charge basis.<sup>40</sup>

### Agreements among the CARs

As discussed earlier, Afghanistan has never been part of any water-sharing agreements on the Amu Darya. The treaties that Afghanistan has concluded with its neighbors primarily deal with borders. The water-sharing treaties have mainly been signed among the CARs, and Afghanistan is not a party.

The history of water sharing from the Amu Darya dates back to the 1980s when the USSR conducted several meetings to determine the share of the four Soviet Republics in the Amu Darya Basin.<sup>41</sup> The outcome of these meetings was the adoption of Protocol 566 by the Scientific and Technical Council of the USSR's Ministry of Water Resources in 1987.<sup>42</sup> Protocol 566 determined the quotas of Tajikistan, Uzbekistan, Turkmenistan, and the Kyrgyz Republic in the Amu Darya River Basin (see Table 1). The protocol authorized the extraction of 61.5 bcm from the Amu Darya by the four CARs. The objective was to limit water extraction from the Amu Darya and secure additional flows to the Aral Sea, as the USSR was concerned about the sea drying up.<sup>43</sup> Protocol 566 presumed that Afghanistan would divert 2.1 cubic

<sup>39</sup> Afghanistan-Tajikistan 2007 MoU; see also Walter Klemm and Sayed Sharif Shobair, 'Impact of Irrigation in Northern Afghanistan on Water Use in the Amu Darya Basin' (2010) Investment Center Division, FAO Rome 6.

<sup>40</sup> Afghanistan-Tajikistan 2014 MoU; this is cited in a UNECE online report, but the author could not find an authentic copy of the MoU. See:

<https://www.unece.org/environmental-policy/conventions/water/areas-of-work-of-the-convention/envwatercentralasia/strengthening-cooperation-on-hydrology-and-environment-between-afghanistan-and-tajikistan-in-the-upper-amu-darya-river-basin.html>> accessed 29 September 2020.

<sup>41</sup> Wegerich 'Hydro-hegemony' (n 19) 76.

<sup>42</sup> Ibid.

<sup>43</sup> Ahmad and Wasiq (n 6) 33.



kilometers of water from the Amu Darya Basin. Moreover, a River Basin Organization (Basseynoe Vodnoe Ob'edinenie, BVO) was established and tasked with the responsibility of managing and enforcing quotas. Protocol 566, in fact, favored Uzbekistan and Turkmenistan; it neglected one of the significant contributors to the Amu Darya and upper riparian Afghanistan and used Tajikistan as a regulator of the Amu Darya.

**Table 1: Water Allocation Quotas as Per Protocol 566**

Country	BCM per Year	Percentage
Kyrgyzstan	0.40	0.6
Tajikistan	9.50	15.4
Turkmenistan	22.0	35.8
Uzbekistan	29.60	48.20
<b>Total</b>	<b>61.50</b>	<b>100.00</b>

The USSR disintegrated in 1991. The newly independent CARs then concluded a new agreement over the management of the Amu Darya and the Syr Darya, usually referred to as the Almaty agreement of 1992. They also established new institutions and organizations to manage the Amu Darya and Syr Darya, such as ICWC, ICAS, and IFAS.

Under the Almaty agreement, the CARs agreed to maintain the existing water allocation pattern,<sup>44</sup> which was determined by Protocol 566 for the Amu Darya Basin. The Almaty agreement acknowledged the 'equal rights and responsibilities' of the parties to use and protect the water. The ICWC and its executives were statutorily tasked with observing the agreed order of water use, determining water management policy, and approving water use limits.<sup>45</sup> The decisions made by the ICWC on water withdrawal limits, use, and protection of water resources are binding for all water consumers and water users. The phrase 'water consumer and water user' indicates that the agreement imposes an implied obligation on a third state, i.e., Afghanistan, which is not a party to the treaty. Nevertheless, the country uses a significant amount of water from the Amu Darya. The legal implications of such obligations are discussed in the next section. The Almaty agreement also requires the parties to prevent actions that could cause damage, pollute water sources, violate the interests of other parties, or cause deviations from the agreed value of water discharge.

Furthermore, for the effective implementation of the Almaty agreement, the parties must exchange information and cooperate in the management of water resources.<sup>46</sup> The Almaty agreement also provides for dispute settlement and recommends that differences be resolved by the heads of the water management

<sup>44</sup> Almaty Agreement 1992 Preamble.

<sup>45</sup> Article 7-8.

<sup>46</sup> Articles 5, 7, 8, 9 and 11.

agencies of the republics along with, if necessary, an independent representative's participation. However, the agreement does not provide for resolving a dispute, and if the ICWC fails to resolve an issue, what other remedies do state(s) have?

In 1992, the CARs established the IFAS to generate funds for the management of the Aral Sea Basin. They also established the Interstate Commission for the Aral Sea (ICAR), which was in charge of the Aral Sea. The IFAS was restructured in 1997 by a decision of the heads of the member state(s). The decision led to the merger of IFAS and ICAR. Following that, in 1999, the CARs entered into a new agreement, where all institutions and organizations were merged into the IFAS.<sup>47</sup> The purpose of this amalgamation was to simplify the procedures and reduce duplications because the creation of a single institution to direct the terms of use and cooperation between member state(s) creates a window of opportunity to eliminate potential institutional conflicts and uncertainties. However, the hierarchy and relations of each of these organizations and institutions was not specified in the agreement, which has led to various interpretations of the whole structure of cooperation under the IFAS. This created problems in establishing an unambiguous line in these bodies' interaction with each other.<sup>48</sup> The main objective of IFAS was, among other things, 'to finance and credit joint practical measures, programs, and projects for saving the Aral Sea, ecological rehabilitation of the Aral Sea surroundings and Aral Sea Basin as a whole, taking into account the interests of all states in the region.'<sup>49</sup> The 1999 agreement about the status of the IFAS and its organizations gives legal personality to the IFAS organizations, which are competent to conclude contracts, be claimants and respondents, and obtain and dispose of property. Out of 12 articles, ten are dedicated to the organizations' privileges and immunities and the privileges and immunities of IFAS personnel. The legal status of the IFAS is not established at all in the agreement.<sup>50</sup>

Another agreement that deals with the Amu Darya is the statute of the ICWC adopted on 5 December 1992. The ICWC was established under Article 7 of the Almaty agreement. The body was given a mission to ensure that water is allocated and used in a coordinated way.<sup>51</sup> The ICWC, which was heavily grounded in pre-USSR institutions (BMW) and practices, was strengthened by the establishment of the Scientific Information Center (SIC). The main objective of the ICWC under the 1992 statute is, among other things, to determine a unified water policy, approve annual water consumption limits for each state, create a unified

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<sup>47</sup> Article 1 of the agreement mentions that the IFAS includes a board, a revision committee, an executive committee, branches of the executive committee for the states of Central Asia, the ICWC, the secretary of the ICWC, the Scientific-Information Centre (SIC ICWC), the Amu Darya and Syr Darya Basin Water-Economic Organizations (BWOs), the Commission on Sustainable Development (CSD), a secretary, and the Scientific-Information Centre at the Institute of Deserts of Turkmenistan (SIC CSD).

<sup>48</sup> 'Strengthening the Institutional and Legal Frameworks of the International Fund for Saving the Aral Sea: Review and Proposals: Discussion paper' (2010) 14.

<sup>49</sup> See <[http://ec-ifas.waterunites-ca.org/aral\\_basin/institutions/ifas/index.html](http://ec-ifas.waterunites-ca.org/aral_basin/institutions/ifas/index.html)> accessed 01 December 2020.

<sup>50</sup> Ibid 11.

<sup>51</sup> Dinara Ziganshina, 'Central Asia: The Aral Sea Basin' in Stephen C. McCaffrey, Christina Leb and Riley T. Denoon (eds), *Research Handbook on International Water Law*, (Edward Elgar 2019) 426.

information system on water resource use and coordinate joint research on regional water problems.<sup>52</sup> It has been statutorily tasked with the responsibility to approve water intake limits from water resources, and its decisions are binding upon all parties.<sup>53</sup>

In 2008, a new statute of the ICWC was adopted; however, it has not yet come into force. The 2008 ICWC statute is more detailed. It acknowledges the principles of equitable and reasonable utilization, obligations not to cause harm, cooperation, exchange of information, and dispute settlement. The 2008 statute empowers the ICWC to solve water management issues and implement common programs following the principles of collectivity and mutual respect of parties' interests.<sup>54</sup>

The heads of the CARs have adopted several declarations and statements on water-related matters. These instruments are the Nukus declaration (1995), Ashgabat declaration (1999), Tashkent statement (2001), Dushanbe declaration (2002), and Joint Statement of the Heads of States – Founders of IFAS (2009). Notwithstanding the fact that these declarations are soft law and have no binding force, some provisions seek to regulate water-related matters by establishing guiding principles and modifying regional institutional bodies. The language of these declarations (*shall, decide, duties*) demonstrates their legal significance.

There are several reasons for Afghanistan's exclusion from these regional water-sharing agreements and organizations, which is itself a constraint in implementing the concept of integrated water resource management (IWRM). Horsman highlights these reasons, including practicalities, regional relations, regional attitudes toward cooperation, institutional inertia and self-interest, and upstream and downstream differences.<sup>55</sup> The next section analyzes these political reasons for Afghanistan's exclusion from regional water management.

### Reasons for Afghanistan's Exclusion from the Current Legal Regime

There are multiple reasons for Afghanistan's exclusion from the current legal regime governing the Amu Darya. The first is the practical situation of Afghanistan. Afghanistan can only increase the land under irrigation from the Amu Darya by only 20 percent, which would raise Afghanistan's diversion from the river to 5-6 cubic kilometers, which is still less than 2 percent of the total river supply, and achieving this increase would take two decades.<sup>56</sup> As a result, Afghanistan's neighbors do not feel a sense of competition

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<sup>52</sup> ICWC Statute 1992 article 2.

<sup>53</sup> ICWC Statute article 5.1.

<sup>54</sup> ICWC Statute 2008, art 1.4.

<sup>55</sup> Stuart Horsman, 'Afghanistan and Transboundary Water Management on the Amu Darya: A Political History' in M.M. Rahaman and O. Varis (eds), *Central Asian Waters: Social, Economic, Environmental and Governance Puzzle* (Helsinki University of Technology 2008) 67-70.

<sup>56</sup> Ahmad and Wasiq, (n 6) 3-41; *ibid* 67-68.



incentivizing the reaching of a water-sharing agreement with Afghanistan. The need for Afghanistan to be a party to the existing agreements and organizations managing the Amu Darya is not a priority for them. The second reason is Afghanistan's domestic situation, which has profound implications for its neighbors' relations. Afghanistan has been facing a war for the last 40 years; its governments have been unstable and weak and either unable or uninterested in cooperating with the country's neighbors.<sup>57</sup> Gleick points out that the political context is vital for trans-state management.<sup>58</sup> The third reason is that all Amu Darya Basin stakeholders do not share the same values and interests in promoting regional cooperation. They take unilateral actions to manage water resources. Their laws define water as national wealth rather than a public or common good. Hence, Afghanistan's exclusion suggests a lack of commitment to the goals of the Almaty agreement and other agreements governing the Amu Darya, which emphasize equitable utilization and the concept of equal rights and responsibilities.<sup>59</sup> The fourth reason for Afghanistan's exclusion is that the parties to the CARs' regional and sub-regional organizations do not want to change their existing institutional framework out of self-interest.

Afghanistan may pose challenges to existing members' interests, which are favored under the current institutional mechanisms. The membership of Afghanistan could challenge the status quo and the interests of the downstream states in particular.<sup>60</sup> The fifth reason is upstream and downstream differences. There are two different competing interests related to Amu Darya utilization. Afghanistan and Tajikistan (upstream states) see the Amu Darya as a source of hydroelectric power (HEP) and irrigation. However, downstream Turkmenistan and Uzbekistan see the river mainly as a source of irrigation for cotton and rice production. Upstream Afghanistan and Tajikistan are planning to expand HEP production, and therefore, their plans may lead to disputes with downstream Turkmenistan and Uzbekistan.<sup>61</sup>

The nature of the transboundary river is such that one state's actions can negatively affect other state(s). Therefore, stakeholders' participation in negotiations, consultations, management, and decision making increases legitimacy and effectiveness. The involvement of stakeholders in water resource management should be from a lower to a higher level—from local communities to civil society to the level of the state. Scholars argue that participation of stakeholders in the management of water resources has three benefits: first, it ensures greater efficiency of policies; second, it improves the empowerment of individuals<sup>62</sup>; and

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<sup>57</sup> Horsman (n 55) 69.

<sup>58</sup> Pater H. Gleick, 'Water and Conflict: Fresh Water Resources and International Security' in Sean M. Lynn-Jones Steven E. Miller (ed) *Global Dangers: Changing Dimensions of International Security* (MIT Press Cambridge 1995) 85.

<sup>59</sup> Horsman (n 55) 69.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 70.

<sup>62</sup> Frances Cleaver, 'Paradoxes of Participation: Questioning Participatory Approaches to Development' 11 J. Int. Dev. 597, 598-600.

third, it gives greater legitimacy to governance measures.<sup>63</sup> Principle 2 of the Dublin Conference<sup>64</sup> emphasizes multi-stakeholder participation from a lower to a higher level. Decisions have to be made at the most appropriate lower level, with full public consultation and user involvement in the planning and implementation of water projects.

Similarly, the Rio Declaration on Environment and Development and the Agenda 21 action plan explicitly call for public participation in the governance of national and international watercourses.<sup>65</sup> Hence, the necessary foundation of efficient water management of a transboundary river basin is the participation of all stakeholders, including the riparian states. Afghanistan's exclusion from regional water-sharing and management treaties and organizations make it very challenging to achieve sustainable management of transboundary water resources among the CARs. Therefore, without Afghanistan's inclusion in the regional water agreements or organizations governing the Amu Darya, no Central Asian regional water agreement or organization is complete.

A lack of participation of all stakeholders in the management of shared watercourses also leads to environmental injustice. Environmental justice requires the meaningful involvement of all communities that will potentially be affected by a proposed activity. Therefore, they must be given a fair opportunity to participate in decision making about a proposed action. The second dimension of environmental justice is the equitable distribution of costs and benefits. Hence, environmental justice recognizes the differences among people in the distribution of costs and benefits; the concept is basically a call for equality.<sup>66</sup> As a result, under the concept of environmental justice, states have common but differentiated responsibilities. This means that contributions to environmental degradation, vulnerability to environmental harm, and capacity to address the environment differ from state to state.<sup>67</sup> Those states that have contributed to more environmental degradation, even in the past, have greater responsibility than others. This principle can also be applied to the allocation and preservation of the Amu Darya.

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<sup>63</sup> Sabine Schulze, 'Public Participation in the Governance of Transboundary Water Resources - Mechanisms Provided by River Basin Organizations' 3 *L'Europe en Formation* 49, 51.

<sup>64</sup> The Dublin Statement and Report of the Conference, International Conference on Water and the Environment: Development issues for the 21<sup>st</sup> century (Dublin 26-31 January 1992), <<https://www.ircwash.org/sites/default/files/71-ICWE92-9739.pdf>> accessed 10 November 2020.

<sup>65</sup> UNCED, 'Chapter 18, Protection of the quality and supply of fresh water resources: Application of integrated approaches to the development, management and use of water resources, Agenda 21: Programme of Action for Sustainable Development. Rio Declaration on Environment and Development' (1992) (Chapter 18 Agenda 21).

<sup>66</sup> Marina de Oiverira Finger and Felipe Bortoncetto Zorzi, 'Environmental Justice' (2013) 1 *UFRGS Model U.N. J* 222, 225.

<sup>67</sup> Carmen G. Gonzalez, 'Environmental Justice and International Environmental Law' in Shawkat Alam, Md Jahid Hossain Bhuiyan, Tareq M.R. Chowdhury and Erika J Techera (eds) *Routledge Handbook of International Environmental Law*, (Routledge 2013) 89-91.

## Legal Implications of Afghanistan's Exclusion from Transboundary Water-Sharing

### Agreements

As discussed earlier, Afghanistan was excluded from the 1987 meetings leading to the adoption of Protocol 566, which allocates the water of the Amu Darya among the four CARs. Protocol 566 estimated Afghanistan's water withdrawal from the Amu Darya at 2.1 billion cubic meters per annum. Subsequently, after the USSR's dissolution, the CARs concluded the Almaty agreement, and they maintained Protocol 566's allocation quotas, agreed not to cause harm, and decided to exchange information. Afghanistan was excluded from the 1992 Almaty agreement and other agreements that established institutions and organizations to manage the Aral Sea Basin, including the Amu Darya Basin. The legal implications of Afghanistan's exclusion from regional agreements regulating the Amu Darya will be discussed in this section.

### VCLT and Third States' Rights and Obligations

It is evident under the Vienna Convention on the Law of Treaties (VCLT) that 'a treaty does not create either obligations or rights for a third State without its consent.'<sup>68</sup> Consequently, a treaty, whether bilateral, regional, or multilateral, cannot impose any obligation on a third state or in any way alter a third state's legal rights without its consent. However, the VCLT provides two conditions; if they are fulfilled, a treaty may impose an obligation. The first condition is that the parties to a treaty intend for a treaty provision to create a responsibility for a third state. The second condition is that the third state expressly and in writing accept that obligation.<sup>69</sup> For treaties that provide for rights for third state(s), the prevailing view is that no rule of international law prohibits states from creating rights in favor of a third state.<sup>70</sup> However, treaties cannot alter a third state's rights without its consent. The VCLT requires that a right arise for a third state from a provision of a treaty first if the parties to the treaty intended so and the third party consents.<sup>71</sup> Hence, two conditions are required: the first is the parties' intention, which creates a right in favor of the third state, and the second is the consent of the third state.

Furthermore, the VCLT states that a treaty may establish or formulate a rule of customary international law that will apply to a third state, albeit not as treaty law.<sup>72</sup> There are many examples of the codification of customary international law by the International Law Commission (ILC), such as the substantive and

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<sup>68</sup> Vienna Convention on the Law of Treaties, Vienna (adopted 23 May 1969, entered into force 27 January 1980) 8 ILM 679, art 31. (VCLT).

<sup>69</sup> VCLT, art 35.

<sup>70</sup> Anthony Aust, *Modern Treaty Law and Practice*, (2<sup>nd</sup> edn, Cambridge University Press 2007) 256.

<sup>71</sup> VCLT, art 36.

<sup>72</sup> VCLT, art 38.

procedural rules of the 1997 UN Convention and the VCLT itself. The substantive principles of these two conventions also apply to nonparties not as treaty obligations but as rules of customary law.

Hence, it is evident that the Almaty agreement and other agreements cannot create either rights or obligations for Afghanistan without its consent. Protocol 566's quotas and the Almaty agreement do not apply to Afghanistan, and Afghanistan will not be held liable if it breaches any provision of these agreements. However, those provisions of the Almaty agreement and other agreements that incorporated principles of customary international law apply to Afghanistan as a customary international law rule. Afghanistan and the CARs are bound to adhere to these principles of customary international law. The 1997 UN Convention codified some customary international law principles, such as equitable and reasonable utilization, the obligation not to cause harm to other riparian states, and the duty to cooperate. There is no legal document that indicates that Afghanistan and the CARs have been persistent objectors to these principles of customary international law.

### **Participation of States in Transboundary Water-Sharing Agreement(s) and the Provisions of the 1997 UN Convention**

The 1997 UN Convention encourages states to enter into an agreement over a shared watercourse and become parties to the convention while 'considering harmonizing' existing agreements with the 'basic principles' of the convention.<sup>73</sup> However, the convention does not affect or modify the rights and obligations arising from a specific agreement over a transboundary watercourse.<sup>74</sup> What can be understood from the language of Articles 3(1) and 3(2) is that states are allowed to preserve the existing agreements but can '[consider] harmonizing' such agreements with the fundamental principles of the 1997 convention. The language of Article 3(2) explicitly shows that harmonization with the UN Convention is not mandatory, and whether to amend the agreement for purposes of harmonization is up to the state parties. Moreover, states are not bound to agree to share a watercourse before using its water.<sup>75</sup> Therefore, to utilize international watercourses, riparian states are not bound to have an agreement. The ILC Commentary on Article 3 of the 1997 UN Convention provides that the requirement to have an agreement as a precondition to using the water of an international watercourse would mean giving the riparian state the power to veto the use of water by the co-riparian states or providing power to states to refuse the conclusion of an agreement over the shared watercourse. Such a result is supported by neither state practice nor judicial decisions or the terms and intent of Article 3.<sup>76</sup>

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<sup>73</sup> UN Convention 1997, art 3(2); Stephen C. McCaffrey, *The Law of International Watercourses* (2<sup>nd</sup> edn, OUP, 2007) 360-361.

<sup>74</sup> UN Convention 1997, 3(1).

<sup>75</sup> ILC, 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses' (1994) II Part 2 Year Book of International Law Commission 89, 94.

<sup>76</sup> *Ibid.*

Article 3(4) provides that states may enter into an agreement over an entire watercourse or part of it; they may not adversely affect to a significant extent the uses of other watercourse states without their express consent. Similarly, under Article 3(6), nonparties are protected by explicitly stating that their rights and obligations would not be affected by a specific watercourse agreement over a shared watercourse. In other words, Article 3(6) protects the rights of states that are not parties to a partial agreement but are parties to the convention. Accordingly, Article 3(6) upholds Article 34 of the Vienna Convention, which affirms that treaties do create neither rights nor obligations for a third state without its consent.<sup>77</sup>

The 1997 UN Convention gives states the right to participate in negotiations and consultations and become a party to any agreement that applies to the whole or part of the watercourse.<sup>78</sup> It also provides that

"a watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected."<sup>79</sup>

There have been some concerns about Article 4 in UN deliberations. For various reasons, a state may not want to include third countries sharing the same watercourse in negotiations or may prefer that other states not become parties to the agreement.<sup>80</sup> The same concern was expressed about the partial agreements explained in Article 4(2) of the Convention. Furthermore, the inclusion of the phrase 'where appropriate' in Article 4(2) gives considerable leverage to the original parties to an agreement to allow or not allow a state to become a party to the agreement over a shared watercourse.<sup>81</sup>

During the negotiations over the 1997 UN Convention, those countries that were 'well served by the existing agreements' argued for Article 4. They succeeded in incorporating this article into the convention, as their interests might have been better protected under existing agreements. As the UN Convention does not affect existing agreements or the rights and obligations arising out of a specific agreement, it was concluded that the inequitable agreements concluded under colonial basin plans, i.e., the Nile<sup>82</sup> and Amu Darya<sup>83</sup> Basin

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<sup>77</sup> VCLT, art 34.

<sup>78</sup> UN Convention 1997, art 4 (1).

<sup>79</sup> UN Convention 1997, art 4 (2).

<sup>80</sup> McCaffrey 'The Law of International Watercourses' (n 73) 362.

<sup>81</sup> Lucius Caflisch, 'Regulation of the Uses of International Watercourses' in Salman, M.A. Salman and Laurence Boisson de Chazournes (eds), *International Watercourses – Enhancing Cooperation and Managing Conflict*, (World Bank Technical Paper No. 414, World Bank 1998) 12.

<sup>82</sup> Exchange of notes between Great Britain and Northern Ireland and Egypt in regard to the use of the waters of the River Nile for irrigation purposes (signed May 1929) (Nile Agreement).

<sup>83</sup> Protocol 566 and Almaty Agreement 1992.

plans, would, therefore, not be affected. The new rules or convention would cover only basins that did not have an agreement.<sup>84</sup>

### Early and Late Developers and the Foreclosure of Afghanistan's Future Use

The 1997 UN Convention provides in Article 6 a non-exhaustive list that determines the factors for reasonable and equitable utilization that have to be taken into account in determining the share of each riparian state. These factors essentially favor downstream states that have already developed transboundary resources against upstream late developers. Wegerich and Olsson argue that the criteria set by the 1997 UN Convention (eight out of eleven factors) and Helsinki Rules (six out of seven) to determine equitable and reasonable utilization of water resources refer to prior utilization of water resources.<sup>85</sup> Therefore it protects the early developer uses and interests against the late developers. They argue that the factors determining the equitable and reasonable utilization essentially closes the basin for late developers.<sup>86</sup> In addition, under Articles 6 (e) and (f) of the 1997 UN Convention, prior uses are preserved against new uses; nevertheless, Afghanistan, as a late developer, is not barred from claiming new uses, although it would be challenging to relocate prior uses.<sup>87</sup> If Afghanistan is developing new uses, it has to show that it uses water efficiently, and proving that will be quite difficult.

Article 7 of the 1997 UN Convention provides for 'no harm rule' and require riparian states to prevent significant harm to other riparian states. Paragraph 2 of the same Article deals with a situation where 'significant harm' is nevertheless caused, and require the state who caused such harm to take appropriate measure having due regard for Article 5 and 6 (equitable and reasonable utilization). The prevailing view is that the obligation of not to cause harm is subordinated to the principle of equitable and reasonable utilization<sup>88</sup> and this view is endorsed by the International Court of Justice also in the *Gabcikovo-Nagymaros* case<sup>89</sup> also in which it emphasized on equitable and reasonable utilization and did not refer to the obligation not to cause harm.<sup>90</sup> Similarly, McCaffrey argues that paragraph 2 of Article 7 gives

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<sup>84</sup> Kai Wegerich and Oliver Olsson, 'Late Developers and the Inequity of "Equitable Utilization" and the Harm of "Do No Harm"' (2010) 35 (6) *Water International* 707, 710.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*, 710-711.

<sup>87</sup> James C. McMurray and A. Dan Tarlock, 'The Law of Later-developing riparian States: The Case of Afghanistan' 12 *Env. L. J.* 711, 752.

<sup>88</sup> Salman M.A. Salman, 'The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspective on International Water Law' 23 *Water Resources Development* 625, 633.

<sup>89</sup> *Case Concerning the Gabcikovo-Nagymaros Project (Hungary vs Slovakia)* [1997] ICJ Rep 4.

<sup>90</sup> *Ibid.* (n 88) 634.

precedence to the principle of equitable and reasonable utilization over the obligation not to cause harm.<sup>91</sup> He authoritatively mentions that the 'very existence of a second paragraph implicitly acknowledging that harm may be caused without engaging the harming state's responsibility supports this conclusion'.<sup>92</sup> However, even if the principle of equitable and reasonable utilization is dominant over the no harm doctrine, Wegerich argue that the factors that determine the equitable utilization are "biased" towards the early developers and the late developers can only claim the water resources which have not been utilized already.<sup>93</sup> Thus if we rely on this argument, the conclusion will be that Afghanistan could be harmed by the uses of CARs by way of foreclosing its future water rights. As a late developer, even the 1997 UN Convention will not serve Afghanistan's interests as its water allocation rules favor early developers against the late developers.

On the other hand, it is often assumed that only upstream riparian state(s) can harm their downstream counterparts. Thus, upstream state(s) must not pollute the river, divert the water for agricultural or industrial purposes, and build a dam or a canal, if it cause significant harm to the downstream state(s). Upstream riparian state(s) can indeed harm downstream riparian state(s) in various ways, such as pollution, building a dam or canal that diverts the water of shared river and which adversely affect the flow of the river or by leaving insufficient water for the ecology of the river. Similarly, the no harm rule on its face seems to impose most of the obligations on upstream and gives most rights to downstream riparian state.<sup>94</sup> However, the idea that only upstream state(s) can harm the downstream counterparts is a misconception.<sup>95</sup> McCaffrey argues that as downstream state(s) can harm upstream state(s), upstream state(s) can be harmed if their present or future use is limited in favor of downstream state(s).<sup>96</sup> The downstream riparian state(s) can foreclose the future use of upstream state(s) due to their prior or past uses and latter claiming of rights to such water by downstream riparian. What happens in most of the cases is that downstream state(s) develop their infrastructure and water resources earlier than their upstream counterparts for various reasons. For example, in the case of CARs, especially in Uzbekistan, their flatter topography, which was readily available for agriculture, and climate which was more conducive for

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<sup>91</sup> Stephen C. McCaffrey, 'The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls' in Salman M.A. Salman and L. Boisson de Chazournes (eds), Laurence Boisson de Chazournes (eds), *International Watercourses – Enhancing Cooperation and Managing Conflict*, (World Bank Technical Paper No. 414, World Bank 1998) 22.

<sup>92</sup> Ibid.

<sup>93</sup> Wegerich (n 84) 712.

<sup>94</sup> Stephen C McCaffrey, 'Some Developments in the Law of International Watercourses' in Marcelo G Kohen (ed), *Promoting Justice, Human Rights, and Conflict Resolution through International Law* (Martinus NijHoff Publishers 2007) 785.

<sup>95</sup> Salman M.A. Salman, 'Downstream Riparians Can also Harm Upstream Riparians: The Concept of Foreclosure of Future Uses' (2010) 35 (4) *Water International*, 350, 351.

<sup>96</sup> McCaffrey (n 94) 788.

agriculture, helped them expand their cotton production to the extent that they become one of the largest cotton producers. On the other hand, upstream state(s) in many cases and particularly in Amu Darya (Tajikistan and Afghanistan), are best suited for hydroelectric power production and building dams because of mountainous topography; however, it did not come into the scene until recently, long after the downstream state(s) have well developed their uses. If the no harm rule is applied strictly and out of the context of an overall equitable and reasonable utilization it could lead us to a conclusion, where every new activity regarding the use of water by the later developing upstream state(s) (i.e., Afghanistan) will be considered as violation of no harm rule as it interfered with established uses of downstream state(s) and thus causing significant harm. Consequently the downstream state(s) will be foreclosing or at least limiting future uses of upstream state(s) and the upstream state(s) will have no legal recourse.<sup>97</sup>

However, the broader understanding of the principle of equitable and reasonable utilization which has the precedence over the no harm rule, is that it gives all riparian state(s) a right to an equitable share in shared water resources or in other words states have an equal right to an equitable share to use and benefit from a shared river. In this context, the term 'equitable' is not synonymous with 'equal', every riparian state has the right to use water equitably, but they are not entitled to an equal share in the water.<sup>98</sup> Therefore, the upstream state(s) may, initiate new uses (i.e., build a dam, canal or divert water for agricultural propose) of shared water resources which is consistent with the principle of equitable and reasonable utilization even if the result of such uses cause harm to downstream state.<sup>99</sup> However, if the new uses are such that it 'significantly' harm the downstream state(s), than in that case the upstream new uses will be inequitable and thus a violation of the principle of equitable and reasonable utilization.

Similarly, the World Bank practice is such that it requires the riparian state to notify each other regarding the planned measure. The World Bank policy clearly indicates that it did not accept the upstream and downstream approach, and its policy extends equally to all watercourse states.<sup>100</sup> Thus, the riparian states of a shared watercourse need to formally notify each other regarding the proposed project. The downstream states (CARs in this case) is also required to formally notify about their planned projects to the upstream (Afghanistan in this case), as their projects may foreclose the future uses of upstream Afghanistan and hence may significantly cause harm to it.

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<sup>97</sup> Ibid, 786.

<sup>98</sup> ILC, 'Draft Articles on the Law of the Non-Navigational Uses of International Watercourses' (1994) II Part 2 Year Book of International Law Commission 89, 98.

<sup>99</sup> McCaffrey (n 94) 787.

<sup>100</sup> Raj Krishna, 'The Evolution and Context of the Bank Policy for Projects on International Waterways' in Salman M.A. Salman (ed), *International Watercourses – Enhancing Cooperation and Managing Conflict* (World Bank, Technical Paper No. 414, 1998) 40.



To conclude, the broader definition of the principle of equitable and reasonable utilization is that downstream CARs cannot prevent upstream state Afghanistan from developing their water resources. However, upstream Afghanistan cannot claim the river's entire flow, which originates inside Afghanistan. Hence, a middle ground that harms neither late nor early developers must be sought.

## Conclusion

The regional legal and institutional framework governing the Amu Darya has excluded Afghanistan, an important stakeholder and a significant contributor to the Amu Darya, from water resource management. However, effective transboundary water management is contingent on all riparian state(s)' participation in the management of a basin. The legal implications of Afghanistan's exclusion from regional agreements and institutions are that these agreements create neither rights nor obligations and that Afghanistan cannot implement the water allocation quotas under these agreements. Furthermore, the 1997 UN Convention does encourage state(s) to participate in negotiations and consultations over the shared river; it also entitles all riparian state(s) to become a party of an agreement governing a shared watercourse, though it is not mandatory. Hence, state parties to existing agreements, such as the parties to the Almaty agreement, have been given considerable leverage on whether to allow a state to become a party to a shared watercourse agreement. Thus, even if an agreement governing a transboundary watercourse such as the Amu Darya is inequitable and unreasonable, it is not be affected by the 1997 UN Convention's provisions. Even though Afghanistan is not a party to the agreements governing the Amu Darya, Afghanistan can be affected or harmed by downstream uses of water, as Afghanistan's future use of the Amu Darya could be foreclosed. The downstream state(s) can cause harm by foreclosing the future uses of the upstream state(s). The 1997 UN Convention also favors early developers over late developers.

The participation of all stakeholders in water management is also a significant pillar of environmental justice, which requires the meaningful involvement of all those communities that will potentially be affected by a proposed activity. Environmental justice also necessitates common but differentiated responsibility; hence, costs and benefits must be equitably distributed among users. Therefore, it is recommended that the CARs consider all stakeholders' participation in the management of the Amu Darya and allow either accession to the existing agreements or the conclusion of a new agreement and creation of new institutions for the management of the Amu Darya. The most feasible path is to allow accession and development of the current legal and institutional framework, as without the participation of all stakeholders, no regional agreement is complete.

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ISBN 978-9936-8086-2-1



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