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Kabul River: Cooperation Between Pakistan and Afghanistan

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Executive Summary

Question

How can the principles of international water law be utilized to facilitate cooperation between Afghanistan and Pakistan in the management of the Kabul river, considering the river's significance for both countries' water supply, irrigation and power generation needs?

Issue

The Kabul River is vital for both countries, serving various purposes such as irrigation, drinking water supply, and hydroelectric power generation. However, managing this shared river has been challenging due to various factors, including political tensions, water scarcity issues, and competing demands for water use.

Conclusion and Recommendations

- **Understanding Upstream-Downstream Dynamics:** Consultation process involving international and local water experts, lawyers and policy makers to better understanding Pakistan's position and negotiating strategy.
- **Tackling Water Scarcity and Competition:** Understanding water usage needs of both countries and calculating storage capacity against those needs.
- **Planning Infrastructure Development:** Planning infrastructure in both countries according to usage predictions, international law parameters and resource allocation, including aid from international organizations.
- **Accounting for Climate Change and the Environment:** Ensuring any institutional mechanism established for the Kabul River takes into account climate change and sustainability. Furthermore, the water sharing arrangement should respect international climate and environment law.
- **Evaluating Political and Security Considerations:** Any water sharing arrangement needs to take into account the larger Pakistan-Afghanistan security dynamic. Pakistan and Afghanistan can use the platform provided by the Afghanistan-Pakistan Action Plan for Peace and Solidarity (APAPPS) to start a conversation on water sharing also.
- **International Support and Facilitation:** Transboundary water sharing needs to involve international organizations for technical and financial assistance.

Overview

The Kabul River is a transboundary watercourse that flows in Pakistan and Afghanistan. It originates in Afghanistan's Hindu Kush mountain range and flows eastward into Pakistan, eventually joining the Indus River near the city of Attock.

The Kabul River is vital for both countries, serving various purposes such as irrigation, drinking water supply, and hydroelectric power generation. However, managing this shared river has been challenging due to various factors, including political tensions, water scarcity issues, and competing demands for water use.

Efforts to facilitate cooperation between Pakistan and Afghanistan in the management of the Kabul River have included discussions on water sharing agreements, joint infrastructure projects, and mechanisms for dispute resolution. International organizations and donor agencies have also played a role in supporting initiatives aimed at enhancing collaboration and sustainable management of the river's water resources.

Despite challenges, recognizing the importance of transboundary water cooperation is crucial for promoting regional stability, economic development, and environmental sustainability in both Afghanistan and Pakistan.

I) Principles of International Water Law

The governing principles of international water law provide a framework for cooperation and conflict resolution among riparian states sharing water resources. In the case of the Kabul River, utilizing these principles can help facilitate cooperation between the two countries.

United Nations Convention on the Non-navigational Uses of International Watercourses

The United Nations Convention on the Non-navigational Uses of International Watercourses ("1977 Convention") was adopted by the United Nations in May 1977. This is seen as the primary document that is reflective of customary international law on the non-navigational uses of transboundary watercourses.

This Convention is a framework Convention adopted with a view to ensuring the utilization, development, conservation, management and protection of international watercourses and the promotion of their optimal and sustainable utilization for present and future generations. Moreover, the Convention focuses on international rivers as a resource that should be shared rather than divided. International law scholars agree a transboundary river is a resource that is shared by a community of states. Hence, the principles contained in this convention can become the basis for a water sharing agreement between Pakistan and Afghanistan.

The 1977 Convention introduced new principles for the management of transboundary watercourses. These principles include the following:

1. Equitable and Reasonable Utilization
2. Obligation Not to Cause Significant Harm
3. Prior Notification and Consultation
4. Institutional Mechanisms for Cooperation
5. Sustainable Management of the Shared Resource
6. Peaceful Settlement of Disputes

From this list, the first two, “equitable and reasonable utilization” and “obligation not to cause significant harm”, are considered as the backbone of the 1977 Convention. All other principles in essence flow from these two principles so it is important to understand these two in detail.

Reasonable and Equitable Utilization

This is the fundamental doctrine guiding water-sharing for international watercourses. This principle aims to ensure a fair apportionment of water while reconciling conflicting interests across international borders, with a goal to provide the maximum benefit to each State. The idea is to balance economic, social and environmental factors in the use of natural resources while taking into account the capacity of the watercourses.

It should be realized that equity is not synonymous with equal and the two should not be confused. The concept of equity is central to international water law. Equity requires that the needs and the interests of states are considered equal and then these interests are weighed in a fair and just manner. The idea is that every

interest is equal, and if a state has more to gain from the use of the water, justice requires the water to be divided accordingly.

The International Court of justice (“ICJ”) has explained that what is equitable (to each riparian) may differ “according to levels of economic development, and economic and cultural traditions”. The principle advocates for optimal use. The aim is to maximize the use of the water body and resources in a way that it provides the maximum benefit to everyone and minimum damage to the river.

International courts and tribunals have also elaborated on this principle. Leading cases on this principle include the Lake Lanoux arbitration between France and Spain, the Gabchicovo Nagymarous case Between Slovakia and Hungary and the North Sea Continental Shelf case between Denmark, Germany, and the Netherlands.

Obligation Not to Cause Significant Harm

Unlike the first principle, the obligation not to cause significant harm finds its basis in the prevention of harm principle in international law more generally. Over time a number of prominent domestic law principles have found their way in international law and have culminated in the no harm principle.

In international water law, the no-harm principle is at the heart of the several international conventions focusing on the uses, allocation, management and protection of transboundary water resources. What constitutes significant harm under international law has been the source of a lot of debate amongst the international community. Generally, the level of harm, in order to qualify as ‘significant’, has to be higher than merely small or trivial. However, it does not have to be severe or substantial.

The ‘harm’ has to be more than just an ‘negative effect’ – it has to endanger an existing use by a state, or have a detrimental impact on the environment or the socioeconomic development of the harmed state (e.g. public health, industry, property, agriculture). For instance, in the Lake Lanox case between France and Spain, it was stated that alteration of the flow of water by an upper riparian can qualify as significant harm to a lower riparian State.

Also, obligation not to cause significant harm places upon states the obligation to conduct due diligence. Due diligence has also become a defining factor of the

obligation not to cause harm. Due diligence implies that the harm must have been foreseeable for the state of origin on the basis of current knowledge.

The obligation not to cause significant harm, in the context of international water law, has been elaborated upon by the ICJ also. This issue came up in the Pulp Mills case which was a dispute between Argentina and Uruguay concerning the construction of pulp mills on the Uruguay River. With regards to the significant harm principle, the court held that the obligation to prevent transboundary harm is closely related to the duty to carry out an environmental impact assessment.

This environmental aspect of the no harm principle was further elaborated in the San Juan River case in which the ICJ recognized the right of a state to be compensated for harm done by another state to a shared water resource. Environmental importance of the no harm principle was confirmed in the Rainy Rivers Case, between Canada and the United States.

The no harm principle is based on the understanding that all countries are part of one whole community and so there exists a social contract under which each has an obligation not to do anything that would harm the other. Like in a community, the no harm principle is a reciprocal obligation.

Prior Notification and Consultation

States are required to notify and consult with other riparian states about planned measures that may significantly affect the condition of the watercourse. This principle promotes transparency and cooperation among states sharing international watercourses.

Institutional Mechanisms for Cooperation

States are encouraged to cooperate in the management and development of shared watercourses. Cooperation may include the exchange of data and information, joint management initiatives, and the establishment of joint institutions for watercourse management.

Sustainable Management of the Shared Resource

States should strive to achieve sustainable management and development of shared water resources, taking into account the long-term environmental, economic, and social implications of their actions.

Peaceful Settlement of Disputes

An effective dispute resolution mechanism should be in place to ensure the peaceful settlement of disputes.

II) Applicability of International Water Law to the Kabul River

In the context of the Kabul River, Afghanistan is the upper riparian country, while Pakistan is the lower riparian country. This is because the Kabul River originates in Afghanistan's Hindu Kush Mountains and flows downstream into Pakistan, making Afghanistan the country situated upstream along the river's course.

As the upper riparian country, Afghanistan holds a significant position in terms of water management and allocation along the Kabul River. It has control over the headwaters and initial flow of the river, which gives it a certain level of influence over downstream water availability and quality in Pakistan.

This upper-lower riparian dynamic is important to understand for negotiating an effective water sharing arrangement between the two countries. International water law principles are applicable to the Pakistan and Afghanistan dynamic in the following way:

Reasonable and Equitable Utilization: Both Afghanistan and Pakistan should aim for reasonable and equitable utilization of the Kabul River's waters. This means that there needs to be a transparent exchange of data between both countries, including the current and estimated future usage. This exchange of data will enable both countries to find an equitable distribution of water according to the need of each country.

Obligation Not to Cause Significant Harm: This principle dictates that water use by one country should not cause significant harm to other riparian states. Both Afghanistan and Pakistan must ensure that their actions regarding water use do not negatively impact the other country's interests, such as by maintaining water quality and quantity

standards. In practice, the implementation of the no harm principle on the Kabul River requires both countries to consider the broader socio-economic and environmental implications of their water-related activities and to work together to find mutually beneficial solutions. This may involve sharing relevant data and information and conducting joint assessments of potential impacts.

Prior Notification and Consultation: Both countries should notify and consult each other about planned water projects or activities that could affect the Kabul River and its water flow. This ensures transparency and helps build trust between the parties, as well as providing an opportunity to address any concerns or potential conflicts early on.

Institutional Mechanisms for Cooperation: The institutional mechanisms for managing the Kabul River between Pakistan and Afghanistan should involve a combination of bilateral agreements, joint commissions, and regional cooperation initiatives. Cooperation and sharing of relevant data and information regarding the Kabul River's hydrology, water quality, and water infrastructure are essential.

Sustainable Management of the Shared Resource: The sustainable management of the Kabul River requires a holistic approach that addresses various interconnected aspects, including environmental conservation, water resource management, socio-economic development, and international cooperation.

Peaceful Settlement of Disputes: In the event of disagreements or disputes regarding the management of the Kabul River, both Pakistan and Afghanistan should have mechanisms in place for resolving conflicts through negotiation, mediation, or arbitration. These mechanisms should be based on principles of fairness, equity, and international law. Sample dispute resolution mechanisms in other water sharing treaties should be a good starting point for negotiations such as the one found in the Indus Waters Treaty.

By adhering to these principles and fostering cooperation and dialogue, Afghanistan and Pakistan can effectively manage the Kabul River's water resources for the benefit of both countries, while also promoting regional stability and development.

IV) Recommendations

The water-sharing issues between Pakistan and Afghanistan are complex and multifaceted, revolving around the management and utilization of shared rivers, including the Kabul River. Recommendations for Pakistan include:

1. Understanding Upstream-Downstream Dynamics: Pakistan needs to be cognizant of the fact that it is a downstream riparian. This means that Afghanistan will have a greater degree of control over water resources and may have the ability to construct dams, reservoirs, or other infrastructure projects that affect Pakistan. The negotiating power of Pakistan is impacted by its position as a downstream riparian and so policy makers and academics have to focus research and strategy on understanding this dimension in light of evolving principles of international water law.
2. Tackling Water Scarcity and Competition: Both Pakistan and Afghanistan face water scarcity challenges due to factors such as population growth, climate change, and inefficient water management practices. Competition for water resources, particularly for irrigation, domestic use, and hydropower generation, can exacerbate tensions between the two countries. Water scarcity can only be managed by having institutional mechanisms in place that focus on the sustainable development of the river.
3. Planning Infrastructure Development: Infrastructure projects such as dams, reservoirs, and irrigation schemes in Afghanistan have the potential to affect downstream water flow and quality in Pakistan and so an institutional mechanism for cooperation is crucial. Moreover, Pakistan should start planning its own infrastructure projects on the river, to cope with water scarcity.
4. Accounting for Climate Change and the Environment: Changes in water quantity and quality resulting from upstream activities can have environmental consequences for both countries, including habitat degradation, loss of biodiversity, and soil erosion. Sustainable water management practices are essential to mitigate these environmental impacts and ensure the long-term health of the Kabul River.
5. Evaluating Political and Security Considerations: Political tensions and security concerns between Pakistan and Afghanistan can complicate water-sharing negotiations and cooperation efforts. Historical disputes, border conflicts, and

regional geopolitics may influence decision-making regarding water management and allocation. Pakistan and Afghanistan can use the platform provided by the Afghanistan-Pakistan Action Plan for Peace and Solidarity (APAPPS) to start a conversation on water sharing also.

6. International Support and Facilitation: International organizations, such as the United Nations, World Bank, and Asian Development Bank, play a facilitating role in supporting Afghanistan and Pakistan in their efforts to manage shared water resources. These organizations provide technical assistance, capacity-building support, and funding for joint projects aimed at improving water management and infrastructure. Pakistan should increase their engagement with these institutions to work towards a water sharing agreement with Afghanistan and for financial and technical support for infrastructure projects in both countries.

Addressing these issues requires sustained diplomatic engagement, technical cooperation, and collaborative efforts between Pakistan and Afghanistan, as well as support from regional and international stakeholders. Developing transparent and equitable mechanisms for water management and sharing is crucial for promoting peace, stability, and sustainable development in the region.

Action Matrix

Recommendations	Pathways to Solution	Implementation of Solution	Actors Responsible	Implementation Timelines
Understanding Upstream-Downstream Dynamics	Consultation process involving international and local water experts, lawyers and policy makers.	Creation of policy matrix to form the basis of any Pakistan-Afghanistan water sharing arrangement. Initiate discussions with the Afghanistan Water Ministry.	1. Federal Ministry of Water Resources 2. Federal Ministry of Energy 3. Federal Ministries of Law and Justice	6-8 Months for consultation 2-4 Months for creation of negotiation strategy
Tackling Water Scarcity	Understanding Water Usage needs and calculating storage capacity against those needs.	Create focus groups comprising of technical experts to study and propose pathways to increasing water storage and capacity. Initiate conversations with Afghanistan to understand their needs to work towards a reasonable and equitable utilization of Kabul River.	1. Federal Ministry of Water Resources 2. Provincial Water Ministries 3. Water and Power Development Authority	6-12 Months for conducting on ground research
Planning Infrastructure Development	Planning infrastructure according to usage predictions and international law parameters.	Undertaking infrastructure activities to increase Pakistan's storage capacity.	1. Federal Ministry of Water Resources 2. Provincial Water Ministries 3. Water and Power Development Authority	2-3 Years
Accounting for Climate Change and the Environment	Ensuring any institutional mechanism established for the Kabul River takes into account climate change and sustainability.	Analyzing and understanding international law on climate change and water to ensure a holistic water sharing arrangement with Afghanistan.	1. Federal Ministry of Water Resources 2. Federal Ministry of Climate Change	1-2 Years

Evaluating Political and Security Considerations	Any water sharing arrangement needs to take into account the larger Pakistan-Afghanistan security dynamic.	Use the platform provided by the Afghanistan-Pakistan Action Plan for Peace and Solidarity (APAPPS) to start a conversation on water sharing.	1. Federal Ministry of Water Resources 2. Ministry of Foreign Affairs	1-2 Years for negotiations
International Support and Facilitation	Effective transboundary water sharing needs to involve international organizations for assistance.	Engage with the World Bank and Asian Development Bank for their facilitation and assistance in the negotiating process and for infrastructure development.	1. Federal Ministry of Water Resources 2. Ministry of Foreign Affairs 3. World Bank 4. Asian Development Bank	1-2 Years for negotiations