

LACK OF LEGISLATION: THE CASE OF THE QOSH TEPA CANAL AND FUNDAMENTAL QUESTIONS ABOUT THE ADEQUACY OF INTERNATIONAL LAW

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Abstract

Afghanistan is building a new irrigation canal. Set on the Amu Darya, it is set to reduce downflow up to 30%, thereby negatively affecting the downstream countries Uzbekistan and Turkmenistan. This article examines the possible legal consequences of the Qosh Tepa Canal for the riparian states, both under regional treaty obligations and customary international law. The Amu Darya Basin is governed by the Interstate Commission for Water Coordination of Central Asia (ICWC), but Afghanistan is not part of it. The article shows that the ICWC is legislatively weak as it operates by consensus and it lacks a mandatory dispute resolution mechanism. However, this very flexibility means its members can adapt their annual water quotas to reduced flows, leaving their treaty obligations intact. A bilateral agreement between Uzbekistan and Afghanistan remains unratified and adds little beyond a reaffirmation of existing customary norms. Turning to customary law, three possible principles of customary law are examined: those of Cooperation; No Significant Harm; and Equitable and Reasonable Usage. It is shown that the principle of cooperation is not reflected in state practice and therefore no customary law, as evidenced by the limited and geographically skewed ratification of the UN Watercourses Convention and even by regional precedents including the Rogun Dam and the Salma Dam. The remaining two principles, while arguably binding on Afghanistan, are so deliberately vague and case-by-case in their application that they offer little practical legal recourse. The article ultimately presents the Qosh Tepa Canal as a case study in the limits of international water management law, where the absence of enforceable obligations leaves the resolution of major transboundary water conflicts to political rather than legal means.

INTRODUCTION

On the 30th of March 2022, just little over half a year after they took power, the new Taliban government inaugurated the continued construction of the Qosh Tepa Canal. The canal taps water from the Amu Darya, a river that is formed from tributaries from Tajikistan, Afghanistan, and Kyrgyzstan and flows on the border between Tajikistan and Afghanistan through Turkmenistan and Uzbekistan and ends at the Aral Sea. Tajikistan, which is an upstream country, uses the discharge of the Amu Darya and its tributaries for electricity generation through hydroelectric power dams. Uzbekistan and Turkmenistan on the other hand have relied on the river for irrigation, in particular for their cotton production, which is a

significant part of their economies. Since the 1960s, under the Soviet Union, the irrigation of the river was massively ramped up, with an ultimate increase of more than 50% between 1960 and 2009.¹ The Aral Sea, where the river (together with the Syr Darya) terminated, started to decline rapidly and after the independence of the Central Asian countries from the Soviet Union, they founded the Interstate Commission for Water Coordination of Central Asia (ICWC) and the subsidiary International Fund for Saving the Aral Sea (IFAS). The ICWC serves as a forum to agree on the withdrawal limits by the five countries. Crucially, Afghanistan was included in neither organisation.

Instead, Afghanistan seems to function in an international legal vacuum as it has never been part of any treaties regarding its water regulation. Even the government officials of Uzbekistan seemed to have been confused by this matter. On the 22nd of March 2024, the Taliban quoted an Uzbek delegation as saying that they were willing to cooperate with the Afghan government on completing the channel “in accordance with international norms and fully considering the privileges and rights of Afghanistan”.² Perhaps instead, they were hinting at international customary law. It is only a year later that a highly symbolic agreement was signed with Afghanistan about its water usage, which seems to have only reaffirmed customary law. Regardless, the actions of Afghanistan will naturally impact the downstream countries. Therefore, this article will examine how the legal obligations of the countries around the Amu Darya will be affected by the construction of the Qosh Tepa canal, which includes the effects for Afghanistan, but also Tajikistan, Uzbekistan, and Turkmenistan. Ultimately, it will be concluded that the effect on treaty obligations for the members of the ICWC is negligible, as are the effects on customary law obligations for Afghanistan. To arrive here, first the treaties and obligations of the ICWC are examined and in the following chapter customary law around water management of cross-boundary rivers will be examined.

¹ P. Micklin, “*The past, present, and future Aral Sea*”, in *Lakes and Reservoirs: Science Policy and Management for Sustainable Use*, no. 3/2010, p. 201.

² Eurasianet (2023, March 24), *Uzbekistan pursues dialogue with Afghanistan on freight canal project* available at: <https://eurasianet.org/uzbekistan-pursues-dialogue-with-afghanistan-on-freight-canal-project>, accessed on 09.03.2026, at 20:02.

1. THE QOSH TEPA CANAL AND REGIONAL TREATY OBLIGATIONS

1.1. The ICWC

With the collapse of the Soviet Union, the overarching body for water management also fell away. The newly independent countries of Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan, and Turkmenistan (also called Central Asia, excluding Afghanistan) quickly established the ICWC on the 18th of February 1992. The commission was subsequently authorised in article 8 of the agreement to manage the “water policy in the region, elaborate its key directions taking into account all economic branches needs, integrated and rational use of water resources, and long-term regional water supply program and measures for its implementation”.³ Interesting here is the emphasis on economic needs, which seems to be an indirect reference to the irrigation needs of the downstream countries specifically, given their large dependence on cotton production. This is something that would prove a reoccurring point of contention.

1.2. The ICWC and legislative weakness

Article 8 further sets out that the ICWC is authorised to “elaborate and approve annually water consumption quotas for each republic and the region as a whole (...)”. The establishment of the water consumption quotas was further devolved to the so-called Basin Water Organisation (BWO) “Amu Darya” and “Syr Darya”.⁴ These BWOs then set the limits for the respective rivers, which are approved by the commission itself. While this may seem like the Central Asian countries are giving the ICWC a lot of legislative power over important water resources, the first By-Law that was passed, set out in article 3.1 that “[the] ICWC consists of water-economic organizations' leaders” and in 3.3: “Each ICWC-member has "veto" right on decision considered.”⁵ As the ICWC needs to approve the water consumption quotas, it

³ The Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan (18 February 1992), *Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan on Cooperation in the Field of Joint Management on Utilization and Protection of Water Resources from Interstate Sources* available at: <http://www.icwc-aral.uz/statute1.htm> accessed on 09.03.2025 at 20:03.

⁴ Idem; Interstate Commission for Water Coordination in Central Asia, *By-law of the Interstate Commission for Water Coordination of Central Asia (ICWC)* available at: <http://www.icwc-aral.uz/statute12.htm> accessed on 09.03.2025 at 20:03.

⁵ Interstate Commission for Water Coordination in Central Asia, *By-law of the Interstate Commission for Water Coordination of Central Asia (ICWC)* available at: <http://www.icwc-aral.uz/statute12.htm> accessed on 09.03.2025 at 20:03.

effectively means that they are decided fully by consensus and in the event of a deadlock, the commission would be powerless to overrule any of the countries. In addition, if the actual discharge from the rivers and tributaries is revealed to be higher or lower than originally anticipated, then the “ICWC permits to BWOs to make water-intake operative correction within the established limits.”,⁶ according to article 5.2. As a result, the agreed water consumption limits can be adjusted at least once every quarter year or more often, if the members deem it necessary.

In short, this all means that the commission in no way has the power to effectively legislate the water discharge between the member countries, without their explicit consent. It also has no predetermined remedy for disputes, other than that “All disputes shall be settled by the heads of national water agencies, with involvement of third party, if necessary.”⁷ This vagueness again underlines the legislative weakness of the ICWC. In addition, prohibited actions only include: “actions on their respective territories that might affect interests of other contracting Parties and cause them harm, lead to deviation from agreed volumes of water discharges and pollution of water sources.”⁸ This largely just serves as a reaffirmation of international law, as the no-harm principle is widely accepted as customary law,⁹ with the prohibition on pollution of cross-boundary waterways being one of the most well-established norms.¹⁰ Consequently, this provision does not bind any of the member states to any new commitments that they were not previously already bound to.

As the only organisation in the region that is authorised to manage the rivers’ water discharge, this means that the region in effect has no effective and strong organisation through which these disputes can be resolved and settled, relying instead on political solutions, which in turn has led not just once to conflict in the border region between Kyrgyzstan and Tajikistan.¹¹

⁶ Idem.

⁷ The Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan (18 February 1992), *Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Tajikistan, Turkmenistan and the Republic of Uzbekistan on Cooperation in the Field of Joint Management on Utilization and Protection of Water Resources from Interstate Sources* available at: <http://www.icwc-aral.uz/statute1.htm> accessed on 09.03.2025 at 20:03.

⁸ Idem, article 3.

⁹ L. Kreuzer, *The Harm Prevention Rule in Cyberspace: An Obligation of Due Diligence*, 1st edition, Nomos Verlagsgesellschaft mbH & Co. KG, Baden-Baden 2024, p. 66-67.

¹⁰ M. Tignino, C. Bréhaut, “The role of international case law in implementing the obligation not to cause significant harm”, in *International Environmental Agreements: Politics, Law and Economics*, no. 20/2020, p. 634.

¹¹ Y. Ulubek uluu, A. Abdyldaev (2022, October 4) *Kyrgyzsko-tadjikskaya granitsa: khronologiya konfliktov* (“Kyrgyz-Tajik border: a chronology of conflicts”) available at: <https://www.azattyqasia.org/a/32063424.html> accessed on 09.03.2025 at 20:05.

1.3. The Basin Water Organisation “Amu Darya” and its geographical limits

Despite its legislative weakness and reliance on political solutions, the ICWC does seem to claim to be the sole organisation responsible for the water management in the region. To reiterate article 8 of the foundational document: the commission “elaborate[s] and approve[s] annually water consumption quotas for each republic and the region as a whole (...)”. This would seem to imply that the commission would also have power to decide on the water management of Afghanistan and arguably even Iran. This of course is remarkable, given that neither are part of the commission. This BWO’s geographical limits do not include the tributaries that originate from Afghanistan, but do include the management of the Panj river, which flows into the Amu Darya.¹²

In addition, if the member countries of the ICWC would wish to make an effective claim over the management of the rivers from beyond their borders, they could have engaged in bilateral treaties. It is striking that Turkmenistan decided to sign a treaty with Iran back in 2007, regulating the water flow of the Tejen river and the exploitation of the Dostluk/Doosti reservoir dam,¹³ but not with Afghanistan, even though the Tejen river and several tributaries of the Amu Darya originate from there. As a result, the claim that the ICWC could regulate the Amu Darya effectively without the inclusion of Afghanistan seems ludicrous.

1.4. The International Fund for Saving the Aral Sea

Under the ICWC, a fund was also established to gather money by the member states and reinvest them in development and scientific research and monitoring of the ecology of the river basins and Aral Sea.¹⁴ In 2016, Kyrgyzstan withdrew from the IFAS and has yet to return.¹⁵ While technically merely ‘freezing’ their participation and becoming an observer in 2021, they

¹² Y. Volovik, *Overview of Regional Transboundary Water Agreements, Institutions and Relevant Legal/Policy Activities in Central Asia* available at: https://www.cawater-info.net/bk/water_law/pdf/water-agreements-in-central-asia-2011.pdf accessed on 09.03.2026 at 20:06.

¹³ Available at: https://www.cawater-info.net/bk/water_law/pdf/water-agreements-in-central-asia-2011.pdf, pp. 15-16.

¹⁴ *Article 3.1* in Glavy gosudarstv Tsentral’noi Azii (“Heads of the governments of Central Asia”), (1999, April 9), *Polozheniye o Mezhdunarodnom Fonde spaseniya Arala* (“The position about the International Fund of saving of the Aral”) available at: https://web.archive.org/web/20181108001204/https://aral.uz/p_ifas.php, accessed on 09.03.2026 at 20:27.

¹⁵ Asia-Plus (2016, May 20), *Kyrgyzstan decides to freeze its participation in IFAS* available at: <https://www.asiaplustj.info/en/news/centralasia/20160520/kyrgyzstan-decides-freeze-its-participation-ifas> accessed on 09.03.2026 at 20:07; News Central Asia (2023, September 15), *Kyrgyzstan Eyes IFAS Return, But Only If All Countries’ Interests Are Considered Equally* available at: <https://www.newscentralasia.net/2023/09/15/kyrgyzstan-eyes-ifas-return-but-only-if-all-countries-interests-are-considered-equally/> accessed on 09.03.2026 at 20:07.

argued that their interests in hydropower generation and the Kyrgyz national interests overall in the fund. This comes from the differences between the usage of the upstream countries in using the water for drinking water and electricity generation and the downstream countries in using the water for irrigation. Kyrgyzstan was in 2023 for 87% of its electricity generation reliant on hydropower.¹⁶ While IFAS forms a small part of the work of ICWC, the fund has done vital work in the region, especially scientifically. This goes a long way to illustrate the central point around the weakness of the legislative prowess. If even Kyrgyzstan can withdraw from this agreement, it stands to reason that the current Afghan regime will be less than inclined to voluntarily bind itself to the existing framework.

1.5. The Water Agreement between Uzbekistan and Afghanistan

Likely recognising the legal black hole and wanting to signal a political intent, Uzbekistan and the governor of the Balkh province in Afghanistan had concluded an agreement. While lauded as a “step towards rational usage of resources”, the text of the document has never been published, and the agreement has also not been ratified.¹⁷ Neither is the content completely clear. While the Uzbek ministry that concluded the agreement talked about “approaches on questions of ecological sustainability and transboundary water resources”.¹⁸ Uzbek state-run media on the other hand reported that it included a mutual management of the water resources of the Amu Darya basin.¹⁹ This does not seem to have been corroborated by Afghan media. In addition, the phrasing is again remarkably vague. There are no terms published of how this management would happen, beyond the rational usage. And even this does not have a clear definition, as customary law does not define a rational usage, but equitable and reasonable usage. Therefore there seems to be a mismatch between the agreement and customary law.

¹⁶ International Energy Agency, *Kyrgyzstan: Sources of electricity generation* available at: <https://web.archive.org/web/20260309023217/https://www.iea.org/countries/kyrgyzstan/electricity> accessed on 09.03.2025 at 20:08.

¹⁷ All laws signed and ratified by the Uzbek president are published in the official gazetta, whose website is lex.uz. While subsequent agreements have been ratified, the ratification of this agreement has never been published.

¹⁸ Own translation from Ministry of Agriculture of the Republic of Uzbekistan (2025, April 30), *Uzbekistan-Afghanistan: noviy strategicheskiy shag k ratsional'nomu ispol'zovaniyu resursov* (“Uzbekistan-Afghanistan: new strategic step towards the rational usage of resources”) available at: https://gov.uz/ru/agro/news/view/50449?utm_source=in_materials accessed on 17.03.2026 at 18:02.

¹⁹ M. Saifullayev (2025, May 1), *Uzbekistan i Afganistan podpicali soglasheniye o sovместnom upravlenii vodnym basseynom Amudar'i* (“Uzbekistan and Afghanistan signed an agreement about the mutual management of the water basin of the Amu Darya”) available at: https://uza.uz/ru/posts/uzbekistan-i-afganistan-podpisali-soglashenie-o-sovmestnom-upravlenii-vodnym-basseynom-amudari_715483 accessed on 17.03.2026 at 18:18.

2. THE QOSH TEPA CANAL AND CUSTOMARY LAW

2.1. Previous Regional Infrastructure Projects

Besides the ICWC and a few specific treaties, to which Afghanistan is not part of, there is customary law to which the country is naturally bound, in accordance with the Statute of the International Court of Justice, article 38(1).²⁰ The construction of the Qosh Tepa canal is not the first time, however, that new water infrastructure projects are being constructed in the region. The most prolific is perhaps the Rogun Dam, being built on and off in Tajikistan since the 1970s, it is set to be the highest dam if and when completed. It is set on the Vakhsh river, a tributary of the Amu Darya and has been plagued by a myriad of problems ever since construction continued since 2011. Recently, amid ecological and corruption concerns, the World Bank froze its funding the construction.²¹ Perhaps unsurprisingly, it will reduce the waterflow downstream significantly. As a tributary of the Amu Darya, it is estimated to reduce its water flow by more than 25%.²² Crucially, the construction had started again without cooperation with any of the downstream countries, with cooperation with Uzbekistan only starting after willingness to cooperate was shown by the then new president Shavkat Mirziyoyev ascended in 2016.²³ As a result, it would seem that cooperation was started due to Uzbek domestic changes, rather than an effective outreach by the Tajik authorities.

A similar process can be seen in the construction of the Salma Dam. Constructed under the previous regime in Afghanistan, it is situated on the river Harirud, which flows downstream to the aforementioned Doostluk/Doosti dam that had already been constructed by Iran and Turkmenistan. Reducing the water flow by a staggering 73%, the dam was constructed without cooperation with either of the downstream countries.²⁴

²⁰ *Statute of the International Court of Justice*, published in XV UNCIO 355, of 1945, 26 June.

²¹ Eurasianet (2025, August 26), *World Bank seems to be having second thoughts about Tajikistan's Rogun Dam* available at: <https://eurasianet.org/world-bank-seems-to-be-having-second-thoughts-about-tajikistans-rogun-dam> accessed on 09.03.2026 at 20:09.

²² Rivers.Help! (2025, April 10), *Riski Rogunskoi GES trebuyut osobogo rassledovaniya* ("Risks of the Rogun Hydro Electro power Station require a special investigation") available at: <https://rivers.help/n/4699> accessed on 09.03.2026 at 20:10.

²³ K. A. Salewicz, M. Nakayama, "The Rogun Dam project: evolution from conflict to cooperation between Tajikistan and Uzbekistan", in *Frontiers in Water*, no. 7/2025, p. 7-9.

²⁴ M. Nagheeb, M. Piri D., M. Faure, "The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin", in *Transnational Environment Law* no. 2/2019, p. 248-249.

2.2. UN Watercourses Convention, the Duty to cooperate and Customary Law

This issue of cooperation is a contentious one in international customary law, especially when it comes to cross-boundary rivers. Customary law is constituted of two elements: *opinio juris* and state practice. While other organisations and institutions can indicate what can be considered customary law, they do not on their own make customary law. In their analysis of the Salma Dam, Nagheebby, Piri D. and Faure contend that the 1997 United Nations Watercourses Convention (UNWC) constitutes customary law. The UNWC was drafted by the International Law Commission (ILC) and Nagheebby et al. subsequently conclude that “ILC plays an important role in the identification of customary law.”²⁵ In addition, they argue that the UNWC reflects customary law as it contains “substantive and procedural norms” and parts of its norms were supported by ICJ cases. Similarly, Bibi et al. in their analysis of the Kabul River Basin (KRB), which flows from Afghanistan to Pakistan, seem to consider the UNWC as international customary law as well, although they do admit it serves largely as merely a framework.²⁶

I find the claim that the UNWC constitutes customary law unsubstantiated. At the time of writing the signatories to the convention are limited, as it is currently ratified by 42 countries.²⁷ In addition, it distinctly lacks *opinio juris* and state practice. Article 8 of the convention sets out the “General obligation to cooperate”.²⁸ When examining the drafting of this article, Christina Leb shows that during the drafting of the article, multiple members of the ILC doubted whether this would constitute a legal principle or general obligation. She eventually concludes that the duty to cooperate is “general obligation with a legal nature of its own”.²⁹ While the intention to create this obligation in the convention is successfully argued for by Leb, this in itself does not mean it constitutes customary law.

²⁵ M. Nagheebby, M. Piri D., M. Faure, “The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin”, in *Transnational Environment Law* no. 2/2019, p. 261

²⁶ S. Bibi, R. Moorthy, M. I. M. Huda, N. Ullah, S. Marimuthu, “The Kabul River Basin Issue: Navigating International Legal Frameworks and the Path Toward Afghanistan-Pakistan Water Cooperation”, in *e-Bangi Journal of Social Science and Humanities* no. 2/2025, p. 250.

²⁷ United Nations Treaty Collection, 12. *Convention on the Law of the Non-Navigational Uses of International Watercourses* available at: https://web.archive.org/web/20260309051033/https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-12&chapter=27&clang=en accessed on 09.03.2026 at 06:11.

²⁸ *Convention on the Law of the Non-navigational Uses of International Watercourses*, adopted by the General Assembly, resolution 51/229, annex, supplement no. 49, A/51/49 of May 21, 1997.

²⁹ C. Leb, *Cooperation in the Law of Transboundary Water Resources*, 1st Edition, Cambridge University Press, Cambridge 2013, p. 81.

When we look at the state practice it becomes rather clear that cooperation is not a general obligation or legal principle. Rather, Nagheeby et al., Bibi et al, and Leb seem to conflate *Lex Feranda*, law as it should be, with *Lex Lata*, law as it is. In defending that the UNWC forms customary law, Nagheeby et al. reference two International Court of Justice (ICJ) court cases: the Gabčíkovo-Nagymaros case between Hungary and Slovakia and the Pulp Mills on the River Uruguay between Argentina and Uruguay.³⁰ Central to these rulings, however, were the issues of failure to adhere to treaty obligations and the measurement of pollution respectively,³¹ the latter of which is – as aforementioned – ostensibly customary law on its own merits. In neither case the issue of cooperation formed part of the judgement. Rather, the disputes arguably rose up due to a lack of cooperation.

At the same time, it is clear from the actions of the states in the region that most countries do not abide by this cooperation principle. Afghanistan did not cooperate with Turkmenistan or Iran when they built the Salma dam,³² with Pakistan in regulating the KRB,³³ or now initially with the Qosh Tepa canal (and still does not with either Turkmenistan or Tajikistan). At the same time, Tajikistan's start of the construction on the Rogun Dam again in 2011 was not hindered by a lack of cooperation with Uzbekistan. While the ICWC and IFAS could best fit what Article 8 of the UNWC considers "joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation",³⁴ the withdrawal of Kyrgyzstan from the IFAS clearly shows that they do not consider it a legal obligation. It must be admitted that Kazakhstan and Uzbekistan have ratified the UNWC and Turkmenistan has ratified the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which similarly contains a cooperation principle. However, these are distinctly downstream countries, so it is perhaps no coincidence that they would ratify treaties that provide for more protection for them. Without the ratification, state practice or *opinio juris* of upstream countries as well, this duty to cooperate can hardly be considered a customary rule under international law. As a result, the lack of cooperation by Afghanistan with the downstream countries around the Qosh Tepa canal

³⁰ M. Nagheeby, M. Piri D., M. Faure, "The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin", in *Transnational Environment Law* no. 2/2019, p. 261.

³¹ International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 7; International Court of Justice, Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, I.C.J. Reports 2010, p. 10.

³² M. Nagheeby, M. Piri D., M. Faure, "The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin", in *Transnational Environment Law* no. 2/2019, p. 257.

³³ S. Bibi, R. Moorthy, M. I. M. Huda, N. Ullah, S. Marimuthu, "The Kabul River Basin Issue: Navigating International Legal Frameworks and the Path Toward Afghanistan-Pakistan Water Cooperation", in *e-Bangi Journal of Social Science and Humanities* no. 2/2025, p. 255-256.

³⁴ *Convention on the Law of the Non-navigational Uses of International Watercourses*, adopted by the General Assembly, resolution 51/229, annex, supplement no. 49, A/51/49 of May 21, 1997.

construction does not violate a customary obligation to cooperate and is legally of no consequence to them.

2.3. Sovereignty, no-harm and equitability

If a principle of cooperation is not customary law, three other principles arguably are: Sovereignty, the Principle of No Significant Harm and the Principle of Equitable and Reasonable Utilization. The rationale for the principle of sovereignty is likely to be clear: it is the foundation of what constitutes modern states and has been used by Afghanistan as legal basis for its water management infrastructure for years and continues to do so now.³⁵ The principle of no significant harm is a more contentious one. As aforementioned, the codification of this principle in the ICWC specifically mentions the pollution of river water or deviations from agreed water consumption. This pollution principle is one that is perhaps the clearest iteration of significant harm.³⁶ However, it is not the only possible iteration of harm. In their assessment of what constitutes the no-harm principle through case law, Tignino and Bréhaut argue one of the facets that should be considered part of due diligence to prevent harm is the conduct of an Environmental Impact Assessment (EIA).³⁷ While it can still be debated whether this can rightfully be considered customary law, it should be noted that Afghanistan did conduct an independent EIA before construction started and according to the authors, most recommendations were heeded.³⁸

Besides the EIA, there is also an element of the no-harm principle which interjects with the principle of equitable and reasonable utilization of the river's resources. Unlike the principle of cooperation, which lacks consistent state practice, the principle of equitable and reasonable utilisation does have widely supported state practice and can be considered a rule under customary international law.³⁹ An argument could be made that Afghanistan's reduction of the river flow constitutes an unequitable usage of the water. However, in the current situation, the

³⁵ S. Bibi, R. Moorthy, M. I. M. Huda, N. Ullah, S. Marimuthu, "The Kabul River Basin Issue: Navigating International Legal Frameworks and the Path Toward Afghanistan-Pakistan Water Cooperation", in *e-Bangi Journal of Social Science and Humanities* no. 2/2025, p. 253.

³⁶ L. Kreuzer, *The Harm Prevention Rule in Cyberspace: An Obligation of Due Diligence*, 1st edition, Nomos Verlagsgesellschaft mbH & Co. KG, Baden-Baden 2024, p. 66-67.

³⁷ M. Tignino, C. Bréhaut, "The role of international case law in implementing the obligation not to cause significant harm", in *International Environmental Agreements: Politics, Law and Economics*, no. 20/2020, p. 645

³⁸ S. Rao, M. Q. Nazari (2023) *Case Study: Large-scale Technical Feasibility Studies for the Qosh Tepa Canal Irrigation Project* available at: <https://adroitassociates.org/media/documents/publications/2025/test/Large-Scale-Technical-Feasibility-Studies-for-the-Qosh-Tepa-Canal-Irrigation-Project.pdf> accessed on 09.03.2026 at 20:13

³⁹ A. Earle, *Transboundary Water Management: Principles and Practice*, 1st Edition, Earthscan, London, 2010, p. 114-117.

downstream countries use the vast majority of the river's water. A 2010 report by the UN Food and Agriculture Organisation found that Uzbekistan and Turkmenistan are responsible for about 80% of the usage of the annual water flow, while Afghanistan used 7%.⁴⁰ It is therefore reasonable to consider the current situation not equitable. This would imply that far from breaching international obligations, Afghanistan is actually entitled to use more of the Amu Darya. Similarly, an argument can be made that would contradict the idea of a duty to cooperate. Over time Uzbekistan had started to cooperate with Tajikistan in the construction of the Rogun Dam, which is set to reduce the water flow by 20%, similar to the Qosh Tepa's reduction of 30%. Although Uzbekistan will likely have a difficult argument to claim significant harm by the Qosh Tepa canal, most of the Amu Darya is formed inside Tajik territory, while only just under 15% of the river is formed in Afghanistan.⁴¹ As a result, the 30% usage would seem to exceed what could be considered equitable usage. However, this is where the shortcomings of the equitable principle become apparent: it is simply deliberately vaguely worded and can mean different things on a case-by-case basis.⁴² So while the no-harm and equitable usage principles are arguably the only two real rules of international law that bind Afghanistan in the construction of the Qosh Tepa canal, these are of little legal consequences as well.

CONCLUSION

This article focused on the question of possible legal consequences of the construction of the Qosh Tepa Irrigation Canal. Firstly, treaty obligations were examined, which boiled down to examining the treaty obligations in the ICWC. The ICWC sets the water consumption levels for the member states and serves as a forum for cooperation in the basin. With a claim to the whole Amu Darya Basin, it has failed to include Afghanistan in the commission, which therefore is not bound in any way to its agreements. In addition, given that the discharge limits are set annually and subject to possible change, with full consensus by its member states, who all hold a veto, the legal obligations of its members will not be hurt by a sudden decrease in water discharge.

⁴⁰ W. Klemm, S. S. Shobair (2010) *The Afghan Part of the Amu Darya Basin: Impact of Irrigation in Northern Afghanistan on Water Use in the Amu Darya Basin* available at: https://unece.org/fileadmin/DAM/SPECA/documents/ecf/2010/FAO_report_e.pdf accessed on 09.03.2026 at 20:13.

⁴¹ CAWater-Info, *Amu Darya: Water resources of Amu Darya basin* available at: https://www.cawater-info.net/amudarya-knowledge-base/water_e.htm accessed on 09.03.2026 at 20:13.

⁴² A. Earle, *Transboundary Water Management: Principles and Practice*, 1st Edition, Earthscan, London, 2010, p. 113.

At the same time, Afghanistan is not bound by customary international law to not build the Qosh Tepa Canal. As the withdrawal from the IFAS by Kyrgyzstan illustrates, widespread state practice, both globally and regionally, indicate that although there has been an attempt to codify a “duty to cooperate”, this is not yet customary law. As such Afghanistan is not beholden to this. The principles that are ostensibly customary law – the No Significant Harm Principle and the Equitable and Reasonable Utilization Principle – are similarly of little consequence for Afghanistan. Beyond outright polluting the rivers, significant harm is difficult to prove and intrinsically tied to the equitable principle. For the latter, it can be effectively argued that Afghanistan is underdeveloped compared to its neighbours and has a right to use the Amu Darya River water for irrigation, just as the downstream countries do. With the equitable principle being deliberately vaguely worded and instead judged on a case-by-case basis, it is unclear whether Afghanistan can be held to reduce its water consumption after the canal’s completion.

The lack of international obligations, notwithstanding, the consequences of the canal will likely be huge for the region. In their assessment of the Rogun Dam, the petition of the Rivers.Help! to the World Bank estimated that the 20% downflow reduction will negatively impact 8-10 million people in Uzbekistan and Turkmenistan.⁴³ While reliable figures of a similar impact by Qosh Tepa are hard to come by, it stands to reason that with its possible reduction of 30%, it will have an even greater impact. In addition, it is widely anticipated that the finalisation of the construction will negatively impact the region’s security.⁴⁴ It is therefore perhaps not surprising to see the Central Asian states slowly starting to advocate for more treaties: whether it is by Uzbekistan through the vague treaty with an Afghan governor or by the Kazakh president Kassym-Jomart Tokayev, who called for the creation of an UN Water Agency at a forum⁴⁵ in Ashgabat, the capital of Turkmenistan.⁴⁶ Regardless, it is clear that a more secure and effective body of legislation is needed in the near-future to mitigate risks and tensions in the region.

⁴³ Rivers.Help! (2025, April 10), *Riski Rogunskoi GES trebuyut osobogo rassledovaniya* (“Risks of the Rogun Hydro Electro power Station require a special investigation”) available at: <https://rivers.help/n/4699> accessed on 09.03.2026 at 20:10.

⁴⁴ K. Fayzieva (2025, September 11), *Afghanistan’s Qosh Tepa Canal and the Paradox of Central Asian Water Politics* available at: <https://thediplomat.com/2025/09/afghanistans-qosh-tepa-canal-and-the-paradox-of-central-asian-water-politics/> accessed on 09.03.2026 at 20:14

⁴⁵ The “International Year of Peace and Trust and the 30th anniversary of Turkmenistan’s permanent neutrality” forum.

⁴⁶ The Times of Central Asia (2025, December 15), *Kazakhstan Proposes Creation of UN Water Agency to Tackle Global Resource Challenges* available at: <https://timesca.com/kazakhstan-proposes-creation-of-un-water-agency-to-tackle-global-resource-challenges/> accessed on 09.03.2026 at 20:14.

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