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## Boundary Blurring in International Law: Globalization, Climate Change, and Cooperation in the Indus Basin

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BOUNDARY BLURRING IN INTERNATIONAL LAW:  
GLOBALIZATION, CLIMATE CHANGE, AND COOPERATION IN  
THE INDUS BASIN

Michael John Cornell\*

**Abstract**

This comment proposes that, to achieve better water cooperation in the Indus Basin, lawyers involved in hydropower development projects should factor into socio-legal research and policy-making as potentially transformative stakeholders. With climate change driving the steady reduction of shared glacially-sourced river waters in India, China, and Pakistan, the need for regional water cooperation has never been higher. The comment first considers the origins and mechanisms of the 1960 Indus Waters Treaty, signed between India and Pakistan, followed by the impact of the related 2013 Kishenganga Arbitration. Next, in light of the three countries' competing economic, political, and security interests, the comment recognizes the limited effectiveness of existing treaty-based legal relations in promoting greater water cooperation in the region. Looking instead to the spaces where local yet globally-minded lawyers practice, this comment imagines how such private sector actors could foster greater water cooperation between the three countries in a series of intercultural encounters, or "boundary-blurring" processes.

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\* Loyola University Chicago School of Law, Class of 2022.

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**I. Introduction**

The rapidly decreasing water supply of the Indus Basin, a condition caused by climate change, has prompted discussions on regional water cooperation. The 1960 Indus Waters Treaty (“IWT,” or “Treaty”), signed by Pakistan and India, has to-date provided the primary framework for resolving disputes over trans-boundary waters. Most recently, the two countries appeared before the Permanent Court of Arbitration, where a neutral World Bank arbitrator resolved an IWT dispute brought by Pakistan over India’s construction of a diversion dam on the Kishenganga River.<sup>1</sup> Although certain commentators find specific aspects of the decision relatively positive,<sup>2</sup> others predict that alternative dispute resolution (“ADR”) methods such as arbitration or mediation will not offer lasting solutions to similar India-Pakistan disputes “because of the mutual political unwillingness to compromise and the persistence upon [sic] bilateralism.”<sup>3</sup> Despite this and

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<sup>1</sup> See generally Kishor Uprety, *The Kishenganga Arbitration: Reviving the Indus Treaty and Managing Transboundary Hydropolitics*, 14 CHINESE J. OF INT’L L. 497 (2015) [hereinafter *Hydropolitics*] (offering a step-by-step overview of the entire arbitration, from Pakistan’s May 17, 2010 request for arbitration until the Court of Arbitration’s Final Award on Dec. 20, 2013).

<sup>2</sup> See *infra*, text accompanying notes 29- & 33.

<sup>3</sup> Kishala Srivastava, *The Future of India-Pakistan Relations: The Declining Role of Mediation Between These Rival States*, 34 OHIO ST. J. ON DISP. RESOL. 221, 246 (2019). Other commentators have suggested that the World Bank’s own understanding of its arbitrator role *vis-à-vis* the IWT reinforces this limiting bilateralism. See, e.g., W.A. Qureshi, *The Indus Waters Treaty and the Role of World Bank as Mediator*, 24 WILLAMETTE J. INT’L L. & DIS. RES. 211, 225 (2017) [hereinafter *World Bank as Mediator*] (“An unnamed high official of the World Bank communicated that the role of the World Bank in the IWT is strictly procedural, to facilitate mediation between the two parties, and no one procedure can encompass another procedure. The official said that, although the issue or dispute is pushed back to both parties,

other past examples of successful ADR under the IWT, increasing regional economic competition and water stress may undermine the effectiveness of the IWT as a cooperative tool. In such situations, intervention by neutral third parties, such as the World Bank, has limited power. Therefore, imagining successful interventions by the legal community to promote water cooperation in the Indus Basin requires accounting for all potential actors, including the emerging corporate legal elite in countries such as Pakistan, India, and China.

This comment reframes the discussion of Indus Basin water use cooperation while assuming the absence of effective ADR options. Following a historical overview of the IWT and its ADR mechanisms, the comment considers the Treaty's overall effectiveness in promoting regional cooperation. Next, the comment provides a critical analysis of existing and proposed solutions for achieving water cooperation under the IWT. Ultimately, by integrating recent sociological research on the globalization of legal services in emerging economies, this comment proposes a more inclusive approach to identifying legal stakeholders. In the face of complex issues arising from discussions on water cooperation, attention must be paid to the experience and activism of legal professionals working at the margins of market and state power. This may, in turn, provide valuable insight into new governance paradigms for the Indus Basin.

## II. Background

This section provides an overview of the history and basic features of the IWT. Next, it describes the events leading up to the 2013 Kishenganga Arbitration. This section accordingly foregrounds a more detailed analysis of the Kishenganga Arbitration, considered alongside regional economic development projects and the escalating effects of climate change on the Indus Basin.

### a. Creation and Elements of the IWT

Following the partition of India and Pakistan in 1947 and the apportionment of Indus River waters per the 1948 Inter-Dominion Accord,<sup>4</sup> India “suspended all the river water flowing to Pakistan, which threatened Pakistan’s agricultural and agrarian infrastructure because it was heavily reliant on the river water for irrigation.”<sup>5</sup> Pakistan appealed for assistance to the international community for the next decade. The World Bank mediated negotiations between India and Pakistan for their mutual allocation and distribution of transboundary river waters, ultimately leading to the 1960 signing of the IWT.<sup>6</sup>

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the World Bank would send an envoy, Jan Solomon, and others in an attempt to engage Islamabad and New Delhi and establish a peaceful mutual agreement between hostile neighboring states without endangering the IWT. He added: ‘It [is] still up to the two countries to mutually discuss and resolve the differences in accordance with the treaty.’”).

<sup>4</sup> See Uprety, *Hydropolitics*, *supra* note 1, at 498 (noting that the Accord “required India to release sufficient waters to the Pakistani regions of the basin in return for annual payments.”).

<sup>5</sup> W.A. Qureshi, *Water as a Human Right: A Case Study of the Pakistan-India Water Conflict*, 5 PENN ST. J.L. & INT’L AFFS. 374, 377 (2017).

<sup>6</sup> *Id.*

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In addition to allocating eastern rivers to India and western rivers to Pakistan, the IWT gave both countries “the right of conditional usage of water of each other’s rivers for domestic reasons, such as power generation, agricultural, and other non-consumptive purposes; however, it was required that such usage must not lower the quantity and natural flow of the water in the river of the other country.”<sup>7</sup> The IWT also established three mechanisms for binding resolution of differences arising between India and Pakistan: first, it created the Permanent Indus Commission (PIC), composed of representatives of both countries who would try and decide such differences; second, upon failure to resolve the issue through the PIC, the IWT provides for the appointment of a “Neutral Expert” per mutual agreement between the countries; and third, in case a Neutral Expert cannot be agreed upon by the countries, the World Bank becomes responsible for appointing such an expert, subject to the countries’ consent.<sup>8</sup> Further, if the PIC instead determines the difference rises to the level of a Dispute, the Neutral Expert is not used and instead India, Pakistan, and the World Bank appoint among them a seven-member arbitral court (a Court of Arbitration, or COA).<sup>9</sup>

### b. The Road to the Kishenganga Arbitration

Although the IWT improved India and Pakistan’s water relations for three decades, the 1990s saw India proceed, in spite of Pakistan’s protests, to construct large water-storage dams on western rivers running through the Indian states of Jammu and Kashmir.<sup>10</sup> India’s Baglihar Dam, located on the Chenab River in Ramban District of Jammu Province, was the subject of legal controversy after India announced its construction in 1999.<sup>11</sup> Tensions intensified following the dam’s initial filling in 2008.<sup>12</sup> Pakistan’s alarm stemmed from the dam’s potential to store “substantial quantities of Pakistani western river water, which can eventually result in shortage of water [sic] in the western rivers within Pakistan.”<sup>13</sup> Ultimately, India and Pakistan successfully used the PIC to resolve the dispute.<sup>14</sup> However, Pakistan voiced similar alarm over India’s construction of what it calls the “Wullar Barrage,”<sup>15</sup> located on the Jhelum River at Wullar Lake

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<sup>7</sup> See Qureshi, *World Bank as Mediator*, *supra* note 3, at 377-78 (noting that “eastern rivers” included the Ravi, Sutlej, and Bias, and “western rivers” included the Sindh, Chenab, and Jhelum).

<sup>8</sup> *Id.* at 218-19.

<sup>9</sup> *Id.* at 220.

<sup>10</sup> W.A. Qureshi, *Equitable Apportionment of Shared Transboundary River Waters: A Case Study of Modifications of the Indus Waters Treaty*, 18 SAN DIEGO INT’L L.J. 199, 211 (2017) [hereinafter *Modifications*]. Misunderstandings with Pakistan have been aggravated by India’s non-sharing of information related to twenty-seven water-management projects. See W.A. Qureshi, *Indus Basin Water Management Under International Law*, 25 U. MIAMI INT’L & COMP. L. REV. 63, 105-06 (2017).

<sup>11</sup> See W.A. Qureshi, *Water as Human Right*, *supra* note 5, at 378 (“India . . . completely disregarded Pakistan’s concerns over the design of the dam”).

<sup>12</sup> Gargi Parsai, *India, Pakistan Resolve Baglihar Dam Issue*, THE HINDU (June 1, 2010, 11:39 PM), <https://www.thehindu.com/news/India-Pakistan-resolve-Baglihar-dam-issue/article16240199.ece>.

<sup>13</sup> See Qureshi, *Equitable Apportionment*, *supra* note 10, at 216.

<sup>14</sup> See Parsai, *supra* note 12.

<sup>15</sup> Or, as it is referred to in India, the Tulbul Navigation Project.

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in Kashmir Province,<sup>16</sup> and despite several attempts by India and Pakistan to resolve issues with the PIC, construction remains stalled pending future talks.<sup>17</sup>

However, India's most controversial project for its relations with Pakistan to date has been the Kishenganga Hydroelectric Project ("KHEP"). India began constructing the KHEP in 2009 on the Kishenganga tributary of the Jhelum River in Bandipora District of Kashmir Province.<sup>18</sup> Pakistan raised its concerns that all three dams (i.e. Baghliar Dam, Wullar Barrage, and KHEP) violated the IWT.<sup>19</sup> Thus, the PIC first referred Pakistan's concerns to a Neutral Expert from the World Bank and, subsequently, to a COA.<sup>20</sup> Although the COA's decisions rendered were not in Pakistan's favor regarding the Baghliar Dam and the Wullar Barrage, they were in regards to the KHEP.<sup>21</sup> In the next section, after reviewing the outcome of the Kishenganga Arbitration in more detail, the discussion shifts to the impact of regional economic development policies and climate change on water relations in the Indus Basin.

### III. Discussion

This section begins with a detailed overview of the Kishenganga Arbitration and its impact on legal relations under the IWT and international law. Then, following a discussion of economic development initiatives by the Indus Basin countries, it describes the growing threat of climate change to their water security.

#### a. The Kishenganga Arbitration and Resulting Legal Relations under the IWT

The Kishenganga Arbitration began when Pakistan made a "Request for Arbitration" on May 17, 2010.<sup>22</sup> The COA, which convened in The Hague following its constitution, ultimately issued its decision [hereinafter referred to as the Kishenganga Arbitration] in three separate documents,<sup>23</sup> including a Partial Award,<sup>24</sup>

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<sup>16</sup> Zaffar Bhutta, *Pakistan-India Water Disputes: No Headway in Wullar Barrage Negotiations*, THE EXPRESS TRIBUNE (May 13, 2011), <https://tribune.com.pk/story/167610/pakistan-india-water-disputes-no-headway-in-wullar-barrage-negotiations>.

<sup>17</sup> Lt. General K. J. Singh, *Must Focus on Harnessing Indus Waters Treaty Better*, TIMES OF INDIA (Sept. 27, 2020), <https://timesofindia.indiatimes.com/blogs/generals-jottings/must-focus-on-harnessing-indus-water-treaty-better/>.

<sup>18</sup> Uptal Bhaskar, *Narendra Modi Inaugurates Kishenganga Hydropower Project in Kashmir*, LIVEMINT (May 19, 2018, 7:57 PM), <https://www.livemint.com/Politics/1d6mcw4oPoymB4h2g40GiK/Narendra-Modi-inaugurates-Kishenganga-hydropower-project-in.html>.

<sup>19</sup> See Qureshi, *World Bank as Mediator*, *supra* note 3, at 220.

<sup>20</sup> *Id.* at 221.

<sup>21</sup> *Id.* at 220-21.

<sup>22</sup> Gargi Parsai, *ICA Gives Go Ahead to Kishenganga Project*, THE HINDU (Dec. 22, 2013, 12:47 AM), <https://www.thehindu.com/news/national/ica-gives-go-ahead-to-kishenganga-project/article5486957.ece>.

<sup>23</sup> These decisions were preceded by an order issued pursuant to Pakistan's application for interim measures to prevent India's further construction activities pending the outcome of the litigation. Kishenganga Arbitration (Pak. v. Ind.), Case No. PCA 59368, Order on Interim Measures (Perm. Ct. Arb. 2011), <https://pcacases.com/web/sendAttach/1682>.

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an answer to India's Request for Clarification or Interpretation dated May 20, 2013,<sup>25</sup> and a Final Award.<sup>26</sup>

Commentators have emphasized that the Kishenganga decision “revives the IWT as a central and viable instrument for cooperation on the use of the waters of the Indus Basin.”<sup>27</sup> Like the IWT, other international law provisions require cooperation between riparian states to ensure the equitable utilization of jointly-managed watercourses.<sup>28</sup> Thus, another positive aspect of the decision is its “[clarification], for the first time in an international judicial decision, [of] the modalities for distinguishing between existing and potential uses of a watercourse.”<sup>29</sup> Furthermore, the decision reaffirmed principles of international environmental law, including “the duty of due diligence, prevention and continuous environmental impact assessment, and confirmed the customary international law status of the obligation to avoid transboundary harm.”<sup>30</sup>

However, there is a concern that the Kishenganga tribunal arrived at the Partial Award through a “selective methodology” of treaty interpretation, allowing it to “assert its jurisdiction and deliver a decision split the difference between the parties, while securing some positive environmental outcomes.”<sup>31</sup> Such inconsistencies are ill-advised, because tribunals may alter their approach based on the outcome they wish to reach.<sup>32</sup> Another perceived drawback of the decision is that it “undermines the principle of equality of right by implying that upstream states have more extensive rights than downstream states under customary international law.”<sup>33</sup>

In addition to these legal observations, subsequent economic development plans must be accounted for when discussing water relations between the Indus Basin countries, a detailed account of which follows in the subsection below.

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<sup>24</sup> Kishenganga Arbitration (Pak v. Ind.), Case No. PK-IN 82842, Partial Award (Perm. Ct. Arb. 2013), <https://pcacases.com/web/sendAttach/1681>.

<sup>25</sup> Kishenganga Arbitration, Case No. PK-IN 109923, Decision on India's Request for Clarification or Interpretation 20 May 2013 (Perm. Ct. Arb. 2013), <https://pcacases.com/web/sendAttach/1680>.

<sup>26</sup> Kishenganga Arbitration, Case No. PK-IN 109924, Final Award (Perm. Ct. Arb. 2013), <https://pcacases.com/web/sendAttach/48>.

<sup>27</sup> See Uprety, *Hydropolitics*, *supra* note 1, at 541-42.

<sup>28</sup> Waseem Ahmad Qureshi, *The Indus Basin: Water Cooperation, International Law and the Indus Waters Treaty*, 26 MICH. ST. INT'L L. REV. 43, 62-74 (2017).

<sup>29</sup> Jasmine Moussa, *Implications of the Indus Water [sic] Kishenganga Arbitration for the International Law of Watercourses and the Environment*, 64 INT'L & COMP. L.Q. 697, 715 (2015) (noting that the distinction was previously ambiguous under Article 6 of the United Nations Watercourses Convention).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 703.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 715. See also Qureshi, *Modifications*, *supra* note 10, at 202-06 (describing two inequitable water-apportionment frameworks, namely the absolute territorial sovereignty and territorial integrity theories).

b. Regional Economic Development and Hydro-hegemony

India, China, and Pakistan have each recently announced significant regional development initiatives in which energy infrastructure, including hydropower projects, play a central role. The first two subsections conduct overviews of those initiatives, which provides the foundation for a subsequent discussion of the legal challenges these countries face as water stress from climate change escalates and the need for cooperation grows.

i. India's "Connect Central Asia" Policy (CCAP)

India initiated CCAP in 2012 to advance five primary interests, namely: 1) revising failed past paradigms; 2) strengthening bilateral relations regarding energy cooperation; 3) improving anti-terrorism and security cooperation, particularly as regards the situation in Afghanistan; 4) mitigating a lack of trade routes by exploring multi-path connectivity; and 5) signaling its political power and influence in Central Asia.<sup>34</sup> CCAP looks to advance these interests through geopolitical connectivity, efficient use of overseas development assistance for India's Central Asian partnerships, multilateral economic cooperation, and encouraging private sector participation.<sup>35</sup> Thus far, progress has been most limited with respect to plans for upscaling economic and trade cooperation, and for strengthening connectivity.<sup>36</sup> The implementation has been further complicated by India's "relative lack of hard power" as a developing economy, by its being a relative "latecomer" to the region's power structure, and by restrictions upon India imposed by its relations with Pakistan and Afghanistan.<sup>37</sup>

Additionally, CCAP stands to buttress diplomatic relations between India and China. Recent meetings between Indian Prime Minister Narendra Modi and Chinese President Xi Jinping have come to embody moods known as the "Wuhan Spirit" and the "Chennai Connect," owing to perceived synergies between "the Chinese Dream and the 'New India' vision."<sup>38</sup> With India hosting the 2023 G20 Summit,<sup>39</sup> India and China shall have opportunities to "deepen coordination on

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<sup>34</sup> Wu Zhaoli, *India's "Connect Central Asia" Policy: Elements and Outcomes*, 80 CHINA INT'L STUD. 103, 107-11 (2020).

<sup>35</sup> *Id.* at 111-14.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 120-21.

<sup>38</sup> Rong Ying & Zhang Lei, *The New India Vision and the Building of a Closer China-India Partnership*, 80 CHINA INT'L STUD. 28, 38-39 (2020). For more on "Chennai Connect" and "Wuhan Spirit," see Sudha Ramachandran, *India-China Relations: From the "Wuhan Spirit" to the "Chennai Connect"*, 19 CHINA BRIEF (Nov. 1, 2019, 3:32 PM), <https://jamestown.org/program/india-china-relations-from-the-wuhan-spirit-to-the-chennai-connect/>.

<sup>39</sup> See, e.g., Dipanjan Roy Chaudhury, *India to Host G20 Summit in 2023; [sic] Riyadh Summit Eyes to Spur Growth & Control Virus*, ECON. TIMES (Nov. 23, 2020, 7:45 AM), <https://economictimes.indiatimes.com/news/politics-and-nation/india-to-host-g20-summit-in-2023-riyadh-summit-eyes-to-spur-growth-control-virus/articleshow/79360599.cms>.



the issue of global economic governance reform, and enhance the collective voice of developing countries.”<sup>40</sup>

ii. *China’s “One Belt, One Road” (OBOR) / Belt and Road Initiative (BRI)*

In 2013, China initiated OBOR, an investment strategy targeting “a highly varied foreign investment landscape [with] a host of international interests” and regulatory regimes, in order to finance deals for developing land-based infrastructure (the “Silk Road Economic Belt” (SREB)) and sea ports (the “Maritime Silk Road” (MSR)).<sup>41</sup> The initiatives were named “as an evocative reference to the old caravan trade routes in which Chinese silk was a major commodity,” but the new silk roads cross three continents (Asia, Europe, and Africa, all connected by the Middle East), two seas (the South China Sea and the Mediterranean Sea), and two oceans (the Indian Ocean and the southern Pacific Ocean).<sup>42</sup> Since 2015, OBOR has become known as the Belt and Road Initiative (“BRI”), although related literature tends to use the terms interchangeably.<sup>43</sup> China views BRI “as an evolving initiative that will engage new states, partners, sources of funding and projects over coming decades.”<sup>44</sup>

China’s shift from OBOR to BRI has expanded the program from two routes to five. In addition to SREB and MSR, BRI has added Polar, Green, and Digital Silk Roads.<sup>45</sup> With plans to continue through 2049, BRI stands to advance Chinese policy.<sup>46</sup> For China’s developing partners, the program could help close gaps between supply and demand for infrastructure financing.<sup>47</sup> Thus far, China has invested no less than \$1 trillion in the initiative, though some estimates go as high as \$8 trillion.<sup>48</sup> China has traditionally been a land-based power, but these recent events have shown China’s desire to expand its presence on and access to the seas – as of July 2018, it had funded projects in forty-two foreign ports in over thirty countries.<sup>49</sup> This in fact complements land-based initiatives “facilitating mega-connectivity through railways and roads, information and communica-

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<sup>40</sup> See Ying & Lei, *supra* note 38, at 40-41; see also Dipanjan Roy Chaudhury, *India to Host G20 Summit in 2022*, *ECONOMIC TIMES* (Dec. 18, 2018, 12:57 PM), <https://economictimes.indiatimes.com/news/politics-and-nation/india-to-host-g20-summit-in-2022/articleshow/66900904.cms?from=mdr> (referring to the same G20 summit as *id.* that was postponed due to Covid).

<sup>41</sup> Zachary Strom, *A Silk Road for Capital: Trade Policy and Foreign Investment Laws for China’s Neighbors*, 38 *NW. J. OF INT’L L. & BUS.* 475, 476-77 (2018).

<sup>42</sup> Rosita Dellios & R. James Ferguson, *The Human Security Dimension of China’s Belt and Road Initiative*, 7 *J. MGMT. & SUSTAINABILITY* 48, 50 (2017).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> Jin Sheng, *The “One Belt, One Road” Initiative as Regional Public Good: Opportunities and Risks*, 21 *OR. REV. INT’L L.* 75, 78 (2020).

<sup>46</sup> *Id.* (describing China’s priorities as “exporting overcapacity, soft power, and [Chinese currency] internationalization.”).

<sup>47</sup> See Sheng, *supra* note 45, at 86.

<sup>48</sup> *Id.* at 86-87.

<sup>49</sup> *Id.* at 87.

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tions technology [. . .] projects, and special economic zones.”<sup>50</sup> To date, over sixty countries on multiple continents have joined BRI.<sup>51</sup>

Critics have emphasized the China-centric aspects of BRI, including lopsided gains from deals and “debt-trap” diplomacy.<sup>52</sup> Additionally, BRI invests in infrastructure projects in developing countries but simultaneously lacks insurance mechanisms such as the Multilateral Investment Guarantee Agency (MIGA) to mitigate the risk of political instability.<sup>53</sup> Such instability is common in the areas in which the BRI works, and magnifies “geopolitical events such as international conflicts, power shifts, policy shifts, [. . .] social unrest, and political interventions.”<sup>54</sup> BRI also involves a plethora of legal risks.<sup>55</sup> Finally, BRI implicates security concerns, since extending the reach of its “Go West” strategy – which has “sought to develop Xinjiang as an oil and gas center and to build infrastructure networks that would connect the province to coastal areas within China as well as to neighboring states in Central and South Asia”<sup>56</sup> – depends on a stable situation in Afghanistan.<sup>57</sup> Thus, BRI may evolve into “a patchwork of uncoordinated but overlapping initiatives driven by the interests of regional states.”<sup>58</sup>

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<sup>50</sup> *Id.* See Sheng, *supra* note 45, at 87.

<sup>51</sup> *Id.* (“[I]ncluding eight South Asian countries, eleven Southeast Asian countries, five Central Asian countries, sixteen West Asian and North African countries, sixteen Central Asian countries, six countries of the Commonwealth of Independent States (CIS), as well as Mongolia and Russia.”).

<sup>52</sup> *Id.* at 95, 111 (For example, “[o]f the sixty-eight BRI partner countries, twenty-seven countries’ sovereign debt was ‘junk rated,’ or below investment grade, and fourteen countries’ sovereign debt was not rated at all, according to the three major international credit rating agencies: Standard & Poor’s, Moody’s, and Fitch Ratings. In addition, eight countries [. . .] are at risk of debt distress due to BRI lending.” *Id.* at 111). For a different author’s discussion of a similar China-centric mindset underpinning BRI development strategy, see Asif H. Qureshi, *China/Pakistan Economic Corridor: A Critical National and International Law Policy Based Perspective*, 14 *CHINESE J. INT’L L.* 777, 784 (2015) (“The principles [behind BRI] are aspirational and not set out as conditions for the development package. Thus, fundamentally market rules do not apply to the awarding of contracts under certain projects—which seem to be confined to Chinese bidders alone.”).

<sup>53</sup> See Sheng, *supra* note 45, at 96.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 98-99 (The author outlines the legal risks as follows: “the fairness, speediness, and effectiveness of the judicial system; enforceability of contracts; discrimination against foreign companies; anti-trust and unfair competition; lack of safeguards for intellectual and other property; and the integrity of accounting standards. Generally speaking, regulatory risks concern changes in laws and regulations that affect a certain industry or market. Delays in acquiring necessary licenses or permits, stalled transfers of ownership, difficulties in acquiring land, contractual risks, and transparency of procurement procedures—all of which are legal or regulatory risks—may disrupt infrastructure projects.”).

<sup>56</sup> Elizabeth Wishnick, *There Goes the Neighborhood: Afghanistan’s Challenges to China’s Regional Security Goals*, 19 *BROWN J. WORLD AFFS.* 83, 84 (2012).

<sup>57</sup> *Id.* (“Xinjiang in Western China shares borders with Afghanistan, Pakistan, and three Central Asian states Kazakhstan, Kyrgyzstan and Tajikistan.”).

<sup>58</sup> *Id.* at 96.

iii. *China-Pakistan Economic Corridor (CPEC)*

CPEC falls within the BRI's purview, and it is the most recent example in a history of similar bilateral agreements between Pakistan and China.<sup>59</sup> However, CPEC's scope surpasses that of prior agreements, leading to its characterization as China's "response" to the Trans-Pacific Partnership (TPP) and the Transatlantic Trade and Investment Partnership (TTIP).<sup>60</sup> Financed with Chinese investments and loans, CPEC's projects aim to develop Pakistan's energy and transportation infrastructure, to coordinate investment and industry, and to cultivate other mutual interests.<sup>61</sup> Along with bolstering China-Pakistan connectivity through the construction of Karakoram Highway,<sup>62</sup> CPEC's primary focus is developing Pakistan's energy sector, with approximately "61 percent of the total investment . . . specifically targeted at energy infrastructure development, enhancing capacity, distribution and transmission networks."<sup>63</sup> CPEC energy projects will contract with private companies and be paid for through China's Export-Import (Ex-Im) Bank.<sup>64</sup>

One of CPEC's most substantial undertakings is the upgrade of Gwadar Port, located on the Balochistan coast of the Arabian Sea. Modeled after Chinese Special Economic Zones (such as the Kashgar Economic Development Zone in Xinjiang),<sup>65</sup> Gwadar Port has been leased to China for a forty-three-year term, terminating in 2059.<sup>66</sup> The contract contemplates the construction of an airport, a free trade area, and a port servicing and management company.<sup>67</sup> Like in Xinji-

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<sup>59</sup> See Strom, *supra* note 41, at 479-80 (explaining that "Pakistan was one of first countries to get a bilateral trade agreement with China, and in 2008 China and Pakistan amended their FTA, a combination of five smaller agreements, to promote bilateral investment. [There were] four stages in the evolution of trade relations: first, the 2003 agreement for preferential tariffs towards each other's exports, followed by an "Early Harvest" program providing for more tariff elimination. This led the way to the 2008 amendments and a 2009 agreement on trade and services[. . .]"). See also A.H. Qureshi, *supra* note 48, at 795 (providing an overview of Pakistan's bilateral trade agreements from the 1990s onwards); Shirin Lakhani, *The China-Pakistan Economic Corridor: Regional Effects and Recommendations for Sustainable Development and Trade*, 45 DENV. J. INT'L L. & POL'Y 417, 417 (2017); Rohimi Shapiee & Rao Qasim Idrees, *China Pakistan Economic Corridor (CPEC): Most Valuable Dream for Pakistan Through Economic Integration in the Region but May Not Become True Without Upgradation [sic] of Physical Infrastructure and Legal System!*, 8 BEIJING L. REV. 481, 483 (2017).

<sup>60</sup> See Lakhani, *supra* note 59, at 418.

<sup>61</sup> *Id.* at 484. See also Gurmeet Kanwal, *Pakistan's Gwadar Port: A New Naval Base in China's String of Pearls in the Indo-Pacific* 1, 2 (Ctr. for Strategic & Int'l Stud., Apr. 2, 2018), <https://www.csis.org/analysis/pakistans-gwadar-port-new-naval-base-chinas-string-pearls-indo-pacific>.

<sup>62</sup> See Kanwal, *supra* note 61, at 3.

<sup>63</sup> Khuram Iqbal, *Significance and Security of CPEC: A Pakistani Perspective*, 66 CHINA INT'L STUD. 132, 138 (2017).

<sup>64</sup> See Strom, *supra* note 41, at 485.

<sup>65</sup> *Id.*; see also *Special Economic Zone*, GWADAR PORT AUTHORITY (last visited Dec. 20, 2021), <http://www.gwadarport.gov.pk/ecomoniczone.aspx>.

<sup>66</sup> *Pakistan Hands Over 2000 Acres to China in Gwadar Port City*, INDIAN EXPRESS (Nov. 12, 2015, 5:50 PM), <https://indianexpress.com/article/india/india-news-india/pakistan-hands-over-2000-acres-to-china-in-gwadar-port-city/>.

<sup>67</sup> *Id.*

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ang, Gwadar's Special Economic Zone provides tax breaks to benefit Chinese investors during the construction process.<sup>68</sup>

Both Pakistan and China stand to benefit from access to financing and increased regional connectivity through CPEC. CPEC provides Pakistan with means to increase foreign direct investment (FDI) and make it more attractive to foreign investors.<sup>69</sup> For Pakistan, after CPEC, other States in the region may begin using the new transit route "to diversify their economic ventures across Europe and Africa via the Middle Eastern states."<sup>70</sup> China, as the world's largest energy consumer, has hitherto depended on crude oil imports from Africa and the Middle East which must pass through the Malacca Strait (passing between Malaysia and Indonesia).<sup>71</sup> CPEC allows China to diversify its energy sources and supply routes: Gwadar Port provides China with easy access to the Arabian Sea and the Indian Ocean, bypasses the Malacca Strait, and reduces the shipping distance by 9,000 kilometers.<sup>72</sup>

Under CPEC, Pakistan has been one of the first countries to obtain OBOR/BRI's development benefits, but also bears the burdens of being the focus of massive Chinese investment efforts.<sup>73</sup> Although CPEC may strengthen China's influence in the greater region and among world trade leaders,<sup>74</sup> CPEC also poses foreseeable political and security challenges. CPEC connects Kashgar to Gwadar with road projects leading through Pakistan's volatile tribal areas, in addition to Balochistan, a province fraught with insurgency for over a decade.<sup>75</sup> Since these measures provide China with easy access to Indian seaports, India has criticized CPEC as a ploy "entrenching China's role in the Indian Ocean, supporting Pakistan's claims to disputed areas of Kashmir, and undermining India's own developmental project running from Chabahar in Iran to Central Asia."<sup>76</sup> CPEC may also lead to objections from local communities in Pakistan who may not stand to "benefit proportionately from such megaprojects unless inclusive growth is generated fairly rapidly."<sup>77</sup> Insurgents could easily coopt these local concerns and resist national development projects under CPEC which in turn may yield increased police and military action.<sup>78</sup> Furthermore, CPEC has raised concerns as to whether all of Pakistan will benefit from civil projects as mandated by the Pakistani constitution.<sup>79</sup>

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<sup>68</sup> See Strom, *supra* note 41, at 485.

<sup>69</sup> See Iqbal, *supra* note 63, at 138.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See Strom, *supra* note 41, at 497. For more on Pakistan's debt burdens to China under CPEC, see Lakhani, *supra* note 59, at 420.

<sup>74</sup> See Strom, *supra* note 41, at 498.

<sup>75</sup> See Dellios & Ferguson, *supra* note 42, at 55.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See Strom, *supra* note 41, at 485.

## c. Climate Change and Hydropower on the Indus Basin

The rivers of the Indus Basin, whose water supply and flow depend on seasonal melt from mountain glaciers in the Hindu Kush Himalaya (“HKH”) region, support the livelihood of an estimated 270 million people.<sup>80</sup> However, environmental researchers have recently projected that rising temperatures linked to global climate change will significantly reduce the snow, ice, and permafrost making up the HKH’s cryosphere.<sup>81</sup> Thus, even if countries were to eliminate all greenhouse gas emissions by 2050,<sup>82</sup> the researchers predict that HKH glaciers will still lose more than one third of their volume.<sup>83</sup> Further, if emissions remain at current global levels, researchers forecast a loss of more than half of HKH glacier volume by 2100.<sup>84</sup> Therefore, in the very near future, affected communities, countries, and the international community will witness and need to address the irreversible consequences of the world’s vanishing “third pole.”<sup>85</sup>

The degradation of HKH glaciers threatens water, food, and economic security across the Indus Basin,<sup>86</sup> which encompasses Pakistan, India, China, and Afghanistan.<sup>87</sup> These countries remain uncommitted to regional cooperation to forecast and mitigate growing water stress and declining water productivity.<sup>88</sup> Rather, in

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<sup>80</sup> See Alice Albinia, *A Water Crisis Looms for 270 Million People as South Asia’s Glaciers Shrink*, NAT’L GEOGRAPHIC (June 16, 2020), <https://www.nationalgeographic.com/magazine/2020/07/water-crisis-looms-for-270-million-people-south-asia-perpetual-feature/>.

<sup>81</sup> Tobias Bolch et al., *Status and Change of the Cryosphere in the Extended Hindu Kush Himalaya Region*, in THE HINDU KUSH HIMALAYA ASSESSMENT: MOUNTAINS, CLIMATE CHANGE, SUSTAINABILITY AND PEOPLE 209, 211 (Philippus Wester et al., eds., Int’l Ctr. for Integrated Mountain Dev. 2019).

<sup>82</sup> Joe McCarthy & Erica Sanchez, *Billions Rely on Himalayan Glaciers for Water. But They’re Disappearing.*, GLOB. CITIZEN (Feb. 5, 2019), <https://www.globalcitizen.org/en/content/himalayas-melting-climate-change/>.

<sup>83</sup> See Bolch et al., *supra* note 81, at 231.

<sup>84</sup> *Id.*; see also Damian Carrington, *A Third of Himalayan Ice Cap Doomed, Finds Report*, THE GUARDIAN (Feb. 4, 2019, 6:45 PM), <https://www.theguardian.com/environment/2019/feb/04/a-third-of-himalayan-ice-cap-doomed-finds-shocking-report>.

<sup>85</sup> The sheer volume of HKH glaciers has led to their colloquial naming as the “third pole.” See, e.g., Chelsea Harvey, *World’s “Third Pole” Is Melting Away*, SCI. AM. (Feb. 4, 2019), <https://www.scientificamerican.com/article/worlds-third-pole-is-melting-away/>.

<sup>86</sup> See, e.g., Aamir Saeed, *Water and Food Shortage Imminent in the Himalayas*, THE THIRD POLE (Nov. 13, 2019), <https://www.thethirdpole.net/2019/11/13/water-and-food-shortage-imminent-in-the-himalayas/>; Albinia, *supra* note 80.

<sup>87</sup> Sadiq I. Khan & Thomas E. Adams III, *Introduction of Indus River Basin: Water Security and Sustainability*, in INDUS RIVER BASIN: WATER SECURITY AND SUSTAINABILITY 3 (Sadiq I. Khan & Thomas E. Adams III, eds., Science Direct 2019) (The authors order the countries according to their share of the basin area: Pakistan (61%), India (29%), and China and Afghanistan (8%). *Id.* The order holds when considering total share of the affected population: Pakistan (61%), India (35%), and China and Afghanistan (4%).

<sup>88</sup> Archana Chaudhary & Faseeh Mangi, *New Weather Patterns Are Turning Water into a Weapon*, BLOOMBERG (Mar. 11, 2020, 4:00 PM), <https://www.bloomberg.com/features/2020-indus-river>. “Water stress” occurs where countries withdraw too much water from their systems and “water productivity” refers to the extent of economic value derived from waters so withdrawn. See Ryan Morris et al., *Indus Lifeline*, NAT’L GEOGRAPHIC (July 2020), <https://www.nationalgeographic.com/magazine/2020/07/the-indus-river-is-a-lifeline-for-millions-this-map-shows-the-threats-it-faces-feature/>. Although Afghanistan is relevant to the conversation, see Wishnick, *supra* note 56, at 83-100 (providing an analysis of Afghanistan’s impact on China’s post-2000 “Go West” strategy), this comment only considers the situation as it relates to China, India, and Pakistan.

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light of a long history of territorial and power struggles, the countries have pursued unilateral and bilateral measures to capture and capitalize on precious water resources, in turn stoking apprehensions of water becoming increasingly “weaponized.”<sup>89</sup>

Of the Indus Basin countries, Pakistan is the most dependent on irrigation for its agricultural production, and therefore remains the most vulnerable to increasing water stress.<sup>90</sup> Moreover, HKH glacial melting threatens the long-term viability of hydropower projects built and planned throughout the Indus Basin,<sup>91</sup> and Pakistan recently partnered with China on two such projects.<sup>92</sup> On June 25, 2020, Pakistan and China signed an implementation agreement to begin constructing the Kohala Hydroelectric Project, a run-of-river hydroelectric plant located on the Jhelum River in Pakistan’s Azad Jammu and Kashmir region.<sup>93</sup> A few months later, on December 1, 2020, representatives from the two countries signed a separate implementation agreement to begin constructing the Azad Pattan Hydroelectric Project, another run-of-the-river plant to be situated about 100 km further south on the same river.<sup>94</sup> Given the looming water crisis in the region, the continuation of such projects would be difficult to justify absent other overriding interests.

One explanation for the ongoing development of such hydroelectric projects is Pakistan’s desire to both honor and benefit optimally from foreign investment secured through agreements with China.<sup>95</sup> Falling within the purview of CPEC<sup>96</sup>

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<sup>89</sup> See Chaudhary & Mangi, *supra* note 83; see also *infra* text accompanying note 111; Sovacool & Walter, *infra* note 98, at 50-51, 56-57 (providing an overview of research opposing hydroelectric dams for political, economic, environmental, and social reasons).

<sup>90</sup> See Morris et al., *supra* note 88.

<sup>91</sup> While rising temperatures are anticipated to cause an initial increase in water flow, future decline in flow is practically certain. See, e.g., A.F. Lutz et al., *Climate Change Impacts on the Upper Indus Hydrology: Sources, Shifts and Extremes*, 11 PLoS ONE 1, 3 (2016).

<sup>92</sup> See, e.g., Iqbal, *supra* note 63, at 138.

<sup>93</sup> Press Release, Priv. Power & Infrastructure Bd., Power Div., Ministry of Energy, Gov’t of Pak., Security Package Agreements for 1,124 MW Kohala Hydropower Project (June 25, 2020), <http://www.ppib.gov.pk/kohala25jun20.htm> [hereinafter Kohala Press Release]; *1,124 MW Kohala Hydropower Project: Pakistan Signs \$2.4bn Tripartite Agreement with China*, THE NEWS (June 26, 2020), <https://www.thenews.com.pk/print/677782-1-124mw-kohala-hydropower-project-pakistan-signs-2-4b-tripartite-agreement>; *China to Construct 1,124-Megawatt Power Project in PoK Under CPEC*, ECON. TIMES (June 2, 2020, 2:40 PM), <https://economictimes.indiatimes.com/news/international/business/china-to-construct-1124-megawatt-power-project-in-pok-under-cpec/articleshow/76153010.cms>. A ‘run-of-river,’ or diversion facility, channels part of a river through a canal without blocking flow like a traditional dam would do, see *Types of Hydropower Plants*, U.S. DEPT. OF ENERGY (last visited Dec. 20, 2020), <https://www.energy.gov/eere/water/types-hydropower-plants>.

<sup>94</sup> Press Release, Priv. Power & Infrastructure Bd., Project Agreements Inked for 700.7 MW Hydropower Project under CPEC (Dec. 1, 2020), <http://www.ppib.gov.pk/azad1dec20.htm> [hereinafter Azad Pattan Press Release]; *Agreements Signed on 700MW Kashmir Hydropower Project*, THE NEWS (Dec. 2, 2020), <https://www.thenews.com.pk/print/752231-agreements-signed-on-700mw-kashmir-hydropower-project>; *PoK Government Signs Agreements with Chinese Firm to Build 700MW Hydropower Project*, THE HINDU (Dec. 2, 2020), <https://www.thehindu.com/news/international/pok-government-signs-agreements-with-chinese-firm-to-build-700mw-hydropower-project/article33230584.ece>.

<sup>95</sup> See A.H. Qureshi, *China/Pakistan*, *supra* note 52, at 778.

and calling for nearly \$3 billion in FDI,<sup>97</sup> the Kohala and Azad Pattan hydroelectric projects also reflect the emergence of sustainable energy, especially low-carbon forms of electricity, as a policy priority in global governance.<sup>98</sup> Negotiated and realized within a complex security, economic, and political environment, development initiatives in the Indus Basin reflect a gradual shift from an attitude of collaboration common in the 1900s towards a competitive one where “major economic powers each negotiate separate, competing agreements to create trade cartels that might influence future multilateral trade negotiations.”<sup>99</sup> Furthermore, the projects demonstrate the growing economic leverage of the BRICS countries (an acronym for Brazil, Russia, India, China, and South Africa) which, since 2000, have generally shifted from primarily being recipients of FDI to expanding their own outbound investments.<sup>100</sup> Project agreements, like those between Pakistan and China, may provide a workable model for increasing energy independence for emerging markets and developing countries where infrastructural needs often exceed available financing.<sup>101</sup>

However, India and Pakistan’s history of transboundary water disputes,<sup>102</sup> in addition to the three countries’ conflicting claims to the Kashmir territory,<sup>103</sup> turn such hydropower projects into potential sources of increased tension by aggravating water and food insecurity, or even spurring violence.<sup>104</sup> Although India and Pakistan agreed to ensure unrestricted flow of transboundary river waters under the IWT,<sup>105</sup> the two countries have brought numerous subsequent legal disputes

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<sup>96</sup> Launched in 2013, CPEC delivers investment primarily from Chinese state and non-state actors into Pakistan to support an array of Pakistani energy development projects. *Id.* The agreement also forwards the countries’ mutual interests in connectivity. *Id.*

<sup>97</sup> See Kohala Press Release, *supra* note 93 (stating that the project requires \$2.4 billion in FDI); Azad Pattan Press Release, *supra* note 94 (explaining that the project requires \$1.35 billion in FDI).

<sup>98</sup> Benjamin K. Sovacool & Götz Walter, *Internationalizing the Political Economy of Hydroelectricity: Security, Development and Sustainability in Hydropower States*, 26 REV. INT’L POL. ECON. 49, 50 (2019).

<sup>99</sup> See Strom, *supra* note 41, at 476.

<sup>100</sup> David B. Wilkins & Mihaela Papa, *The Rise of the Corporate Legal Elite in the BRICS: Implications for Global Governance*, 54 B.C.L. REV. 1149, 1150 (2013).

<sup>101</sup> Jin Sheng, *The “One Belt, One Road” Initiative as Regional Public Good: Opportunities and Risks*, 21 OR. REV. INT’L L. 75, 81-82 (2020) (The United Nations Conference on Trade and Development noted that, as of 2018, China accounted for 34% of global infrastructure investment needs, followed by India at 8%, the Middle East at 4%, and “Other Emerging Asia” at 6%, also noting that Eastern Europe, Africa, and Latin America represent 12% of needs).

<sup>102</sup> See Qureshi, *Water as Human Right*, *supra* note 5, at 376-81 (noting Pakistan’s concern regarding India’s construction of hydropower facilities on other westbound rivers in the Indus Basin, such as the Ratle Dam on the Chenab River); Qureshi, *World Bank as Mediator*, *supra* note 3, at 221.

<sup>103</sup> See generally Kamran Bokhari, *China Joins India and Pakistan in the Kashmir Battlespace*, NEWLINES INST. FOR STRATEGY & POL’Y (June 18, 2020), <https://newlinesinstitute.org/kashmir/china-joins-india-and-pakistan-in-the-kashmir-battlespace/> (providing an overview of Indian, Pakistani, and Chinese positions and involvement in disputes over Kashmir).

<sup>104</sup> See, e.g., Syed Shafiq, *Not Nuclear Bombs, but Climate Change the Biggest Threat to India, Pakistan, China*, THE EURASIAN TIMES (Nov. 15, 2019), <https://eurasianimes.com/not-nuclear-bombs-but-climate-change-biggest-threat-to-india-pakistan-china/>; McCarthy & Sanchez, *supra* note 82; Chaudhary & Mangi, *supra* note 88.

<sup>105</sup> The Indus Waters Treaty 1960, Ind.-Pak., Sep. 19, 1960, 6032 U.N.T.S. 126 (signed in Karachi by India, Pakistan, and the International Bank for Reconstruction and Development [i.e., the World Bank]).

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under the treaty as discussed *infra*.<sup>106</sup> In addition, the three countries figure into the Kashmir territorial dispute, which has been the source of ongoing diplomatic and security tensions, including military standoffs, between the three, who also happen to be nuclear powers.<sup>107</sup> Given the potentially limited effectiveness of mediation and the obvious risks to human security involved,<sup>108</sup> imagining effective legal frameworks for future Indus Basin water cooperation becomes even more urgent.

### IV. Analysis

This section begins with an assessment of existing and proposed avenues to Indus Basin water cooperation both under and beyond the IWT. The section then reframes the discussion of water cooperation within the context of globalization by integrating perspectives from recent socio-legal research.

#### a. Assessing Existing and Proposed Avenues to Indus Waters Cooperation

One potential method to increase water cooperation in the Indus Basin involves modifications to the IWT.<sup>109</sup> Some argue that the original IWT “is the finest example of the pragmatic implementation of the equitable apportionment and equitable utilization concepts” embraced under the international law of waterways.<sup>110</sup> However, the issue of modification would depend heavily on the diverging perspectives India and Pakistan of the IWT’s dispute resolution mechanism.

For Pakistan, the ineffectiveness of IWT dispute resolution mechanisms can be explained through several factors. The politics of hydro-hegemony, for one, underlies India’s noncompliance with and attempts at modifying or discarding IWT provisions.<sup>111</sup> India’s continual failure to provide six months’ advance notice to

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<sup>106</sup> See generally SALMAN M. A. SALMAN & KISHOR UPRETY, CONFLICT AND COOPERATION ON SOUTH ASIA’S INTERNATIONAL RIVERS: A LEGAL PERSPECTIVE 38-61 (2002) (providing an historical overview of India-Pakistan water relations before and after the IWT’s signing).

<sup>107</sup> See generally Lowell Dittmer, *Introduction*, in SOUTH ASIA’S NUCLEAR SECURITY DILEMMA: INDIA, PAKISTAN, & CHINA vii-xxi (Lowell Dittmer ed., 2005) (offering a concise historical overview of nuclear proliferation and post-1947 relations between the three countries in the Kashmir region).

<sup>108</sup> See Dellios & Ferguson, *supra* note 42, at 48 (“Human security focuses on individuals, families, local communities and indigenous groups who face a wide range of threats, including natural disasters, environmental collapse, poverty, and civil war.”).

<sup>109</sup> For a thorough discussion on modification of the IWT from both India and Pakistan’s perspectives, see Qureshi, *Modifications*, *supra* note 10, at 223-238.

<sup>110</sup> *Id.* at 220.

<sup>111</sup> W.A. Qureshi, *Indus Waters Treaty: An Impediment to the Indian Hydrohegemony*, 46 DENV. J. INT’L L. & POL’Y, 45, 70 (2017) (“Over time, and through the construction of numerous, massive water storage and management facilities, India has managed to acquire considerable storage and managerial capability over the western tributaries. With this ability, India can cause droughts and floods in Pakistan at whim. It is calculated that India can stop all water supplies of Pakistan in a conflict for twenty-eight consecutive days. As such, India’s capacity to hold Pakistan’s water supplies is tantamount to a political maneuver to ensure Indian political supremacy in times of war or conflict. Additionally, this translates into Indian hydro-hegemony over Pakistan, so that India can use hydropolitics to influence Pakistan during conflicts and political disputes, which will ensure Indian political supremacy in the regional politics as well.”).



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Pakistan before initiating construction projects has further aggravated trust issues between the two countries in matters of IWT implementation.<sup>112</sup> Further, the IWT's mechanisms have proven to be so slow that by the time Pakistan can finally fully invoke dispute resolution processes, Indian construction projects are either completed or so substantially advanced that justice has become unavailable.<sup>113</sup>

India, on the other hand, has justified its construction of dams on westbound rivers flowing towards Pakistan by pointing to the absence of relevant restrictions in the IWT.<sup>114</sup> However, India has favored modification of the IWT in order to secure "a greater share of the waters of the Indus basin to satisfy the agrarian and electricity demands of its growing population[.]"<sup>115</sup> The obvious schism between India and Pakistan's practices and postures may account for the challenges these two countries have had in achieving constructive direct diplomacy, arguably the most fundamental mechanism for dispute resolution under the IWT.

Another avenue for cooperation involves China's potential role in balancing Indian water aggression. Pakistan's good relations with China could motivate China to threaten curtailing water flows into India, since China is an upper riparian state for India on the Brahmaputra River.<sup>116</sup> However, based on China and India's recent diplomatic exchanges, China would be unlikely to employ such an extreme strategy that appears more like brinkmanship than cooperation.

Under such circumstances, efforts in ADR like the Kishenganga Arbitration may not be able to overcome underlying tensions in the India-Pakistan relationship in order to move towards regional water cooperation. Historically, among the different choices for types of mediators in international disputes,<sup>117</sup> the only parties who have had relative success in resolving India-Pakistan tensions have been international organizations and individual countries.<sup>118</sup> In spite of these limited successes, several factors make mediation unlikely to significantly or constructively alter existing India-Pakistan tensions.<sup>119</sup> As a result, water

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<sup>112</sup> See Qureshi, *Indus Waters Treaty*, *supra* note 111, at 66, 71 (exploring how India's actions prevent Pakistan from raising timely objections to planned construction).

<sup>113</sup> *Id.* at 70.

<sup>114</sup> See Qureshi, *Modifications*, *supra* note 10, at 225-26.

<sup>115</sup> *Id.* at 230.

<sup>116</sup> See Qureshi, *World Bank as Mediator*, *supra* note 3, at 231; Qureshi, *Water as Human Right*, *supra* note 5, at 394.

<sup>117</sup> See Srivastava, *supra* note 3, at 233 ("There are five types of mediators that are typically involved in international disputes: (1) international organizations (e.g., the UN, World Trade Organization); (2) regional governmental organizations (e.g., Organization of American States, European Union); (3) individuals (e.g., U. Thant); (4) states (in the instant issue, China and United States); and (5) non-governmental organizations.").

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 240 ("Mediation will not be a viable option in resolving the tension between the two states for a multitude of reasons: (1) the deep-rooted animosity is difficult to alleviate; (2) the issue of sovereignty prevents the acceptance of a mediated resolution; (3) the lack of a viable actor to serve as a mediator due to a large sense of distrust; and (4) India's focus upon bilateralism as the sole means of achieving peace between India and Pakistan.").

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cooperation may require the input of different legal actors, including those in the region's growing corporate sector.

### b. Reframing Cooperation Within the Context of Globalization

The activities and position of the corporate legal elite emerging in countries like China and India may offer an alternative means of promoting regional water cooperation. This comment builds on recent work by sociologists researching the legal services sector in emerging economies in the age of globalization. These legal professionals, increasingly outside of the realms of state and market, provide a marginal perspective that can lead to the kind of “boundary-blurring” necessary to imagine complex solutions in a context where cooperation may prevent tragedy.<sup>120</sup>

As the rising global market presence of the BRICS countries has increased demand within each of them for means through which to govern new economic activities and “interface with the broader economic and political environment,” so too has the need emerged for lawyers able to practice in this new legal ecosystem.<sup>121</sup> Emerging corporate elites may impact the direction of global governance by driving the emergence of transnational law,<sup>122</sup> apparent in an era when “liberal internationalism” has been giving way to increasing privatization.<sup>123</sup> In particular, “the emergence of a new globalizing corporate sector might spur broader cooperation in the legal field.”<sup>124</sup> Future research may reveal further interplay between emerging corporate elites and global governance by considering the identity of members of the elite, their means of influence, their engagement in processes of global integration, and their impact on the (dis)continuation of the “global rule of capital.”<sup>125</sup>

To more fully comprehend the constitution and organization of social spaces in international law, one legal sociologist has advocated a hybrid approach based on field and ecological theories.<sup>126</sup> She explains that field theory views society as structured social spaces in which agents mobilize resources to achieve dominant

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<sup>120</sup> See generally Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 L. & Soc. REV. 771 [hereinafter *Boundary-Blurring*] (discussing how market boundaries usually present between local and foreign law firms are blurred in an atmosphere lacking clear governmental regulation of transnational legal practice).

<sup>121</sup> See Wilkins & Papa, *supra* note 100, at 1150.

<sup>122</sup> See Wilkins & Papa, *supra* note 100, at 1179 (noting how, “at the global level, there is also a trend toward creating a legal order that is increasingly private, autonomous, and transnational in that the laws are removed from local and national legal systems.”).

<sup>123</sup> *Id.* at 1154. With respect to the BRICS, the term “global governance” changes, see *Id.* at 1157-58 (“The concept has been used to describe various forms of coordination of regulatory activities in the global sphere, where demand for regulation cannot be met by a single state, the world government does not exist, and many non-state actors—such as international organizations, civil society organizations, and businesses—contribute to regulatory outcomes. [ . . .and] [a]s economic power becomes concentrated in the BRICS, private actors from these jurisdictions will be able to shape global governance according to their own experiences and value systems.”).

<sup>124</sup> *Id.* at 1160.

<sup>125</sup> See *id.* at 1158-61.

<sup>126</sup> See Sida Liu & Mustafa Emirbayer, *Field and Ecology*, 34 SOCIO. THEORY 62, 62-63, 65 (2016).

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positions.<sup>127</sup> In contrast, ecological theory describes society as fluid interactional spaces where competition between agents leads to a more cooperative equilibrium.<sup>128</sup> The interaction of the two theories lays the foundation for the possibility of “boundary-blurring,” assessing the ways that foreign and local agents negotiate their market boundaries “when formal government regulation of transnational law practice is ambiguous[.]”<sup>129</sup> Importantly, boundary-blurring does not amount to institutional “diffusion or structural isomorphism.”<sup>130</sup> Instead, boundary-blurring allows a social actor engaged in an interaction “to mimic the other and blur the spatial or cultural boundary between them.”<sup>131</sup> Effectuating a “hybridization between the global formal structure and the local cultural substance,”<sup>132</sup> boundary-blurring leads to “the production of localized expertise that is experience-based and highly adaptive to the local political and social environment in which . . . global-looking corporate lawyers are embedded.”<sup>133</sup> Ultimately, this legal sociologist concludes that, “[i]n this boundary-blurring process, the structural barriers of legal practice might be gradually removed, but the cultural substance of this expertise will never disappear.”<sup>134</sup>

Another author supports the theory of boundary-blurring in the context of globalization, in that “the basic architecture of legal systems consisting of different patterns and systems in different countries persists even under effect of significant legal transformations like the process of global professionalization as a result of ongoing ‘Americanization.’”<sup>135</sup> In effect, corporate legal elites may be instrumental in realizing a cooperative framework in which a state’s responsibilities do not center on the hierarchy of politics, but instead on a system of ethics and support that respond to “societal and ecological needs of human security.”<sup>136</sup>

## V. Proposal

Corporate legal professionals working at the intersection of the global and the local may be best suited to achieving the cooperative principle of subsidiarity

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<sup>127</sup> See *Field and Ecology*, *supra* note 126, at 62.

<sup>128</sup> *Id.* at 62, 68-69.

<sup>129</sup> See *Boundary-Blurring*, *supra* note 120, at 773.

<sup>130</sup> *Id.* at 774 (defining structural isomorphism as “the diffusion of new institutional models from the core countries of the global market to the periphery, during which the institutional forms largely remain the same”).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 801.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 802.

<sup>135</sup> Lukas Frederik Müller, *The Taxonomy of Legal Systems Under Effect of Globalization: Classification of China and the United States*, 16 *GLOB. JURIST* 51, 57 (2016). The author’s model classifies legal systems in the era of globalization into three types: “rule of professional law” systems (in which legal systems remain uninfluenced by other aspects of society due to, e.g., secularization); “political rule of law” systems (where “political forces act within autonomous fields of operation, which are not controlled by paramount legal principles”); and, “traditional rule of law” systems (“in which the law is not separate from religious or philosophical ideas”). *Id.* at 53.

<sup>136</sup> See Dellios & Ferguson, *supra* note 42, at 56.

## Boundary Blurring in International Law

among the State powers at play in the Indus Basin situation examined here. The socio-legal theorists *supra* situate the transformation of the contemporary legal profession within “a narrative of globalization wherein individuals acting at the junction of various social systems are able to create and then maintain a new transnational space.”<sup>137</sup> Legal professionals in the corporate sector may thus increase their influence “by occupying and building on a strategic position as brokers among the key players” in a dispute.<sup>138</sup> Since globalization involves “the gradual convergence between national and transnational institutions and normative orders,” a more adequate optic for understanding the position of these lawyers involves “boundary-blurring,” referring to “a process of hybridization in which local actors become structurally global-looking while global actors [become] localized.”<sup>139</sup>

Among the many social and legal policy considerations for successful hydropower development, “stable, local, and flexible local licensing policies,” as well as a well-informed local community and workforce, are crucial.<sup>140</sup> The theory of subsidiarity suggests that competent authorities at lower, more local levels in licensing and regulatory processes tend to be the most efficient regulators.<sup>141</sup> Subsidiarity applied by localizing licensing responsibilities can ensure the efficient development, as well as the economic and environmental viability, of such hydropower projects.<sup>142</sup> The principle also points to more transparent involvement and education of the public, in turn potentiating significant reduction in project costs through use of local resources.<sup>143</sup>

For this reason, commentators have even recommended creating centralized local agencies for managing the small hydropower licensing process.<sup>144</sup> This comment highlights a need for additional empirical research regarding the lawyers involved in these hydropower transactions. Better insight into the work of lawyers situated at the boundary of the local and the global would highlight the potential constructive role such lawyers may play in bolstering regional cooperation and mitigating the effects of future unavoidable water disputes.

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<sup>137</sup> Florian Grisel, *Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession*, 51 L. & SOC. REV. 790, 822 (2017).

<sup>138</sup> Bryant G. Garth, *Corporate Lawyers in Emerging Markets*, 12 ANN. REV. L. & SOC. SCI. 441, 452 (2016).

<sup>139</sup> See Liu, *supra* note 120, at 774.

<sup>140</sup> Gina S. Warren et al., *Small Hydropower Toolkit: Considerations for Improving Global Development and an Accompanying Case Study for Pakistan*, 80 U. PITT. L. REV. 137, 160 (2018). The authors restate the minimum conditions for the successful development of small hydropower as follows: “(1) technical, site-specific data; (2) a stable, yet flexible regulatory scheme with incentives for investment; and (3) an educated and involved community and workforce.” *Id.* at 174.

<sup>141</sup> *Id.* at 160.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 170 (defining “resources” as materials, labor, and knowledge).

<sup>144</sup> *Id.* at 173.

## VI. Conclusion

While the Indus Basin situation confirms the characterization of the “political economy of hydroelectricity” as “perpetually managing a series of pernicious risks, not always optimally,” this comment suggests decentering the question of “who wins and loses” at the state level.<sup>145</sup> Rather, researching lawyers “whose efficacy flows from their positions as skilled actors along systemic borders” may kindle the necessary shift from competition to cooperation among stakeholders.<sup>146</sup> Accordingly, the legal methodology of traditional State diplomacy may be insufficient to address the need for water security in the Indus Basin. Studying alternative legal spaces, including the increasingly transnational regime comprised of corporate legal elites, may be crucial for regional water cooperation. Moreover, a theoretical posture adequate to ensure comprehension of the complex intersection of interests, disciplines, and communities at issue here calls for expanding beyond a field orientation, to including an ecological orientation, and remaining open to their interplay. In other words, water cooperation is a problem that “boundary-blurring” in the global legal services sector may in fact help to address.<sup>147</sup>

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<sup>145</sup> See Sovacool & Walter, *supra* note 98, at 73.

<sup>146</sup> See Grisel, *supra* note 137, at 794.

<sup>147</sup> See Liu, *supra* note 120, at 801.