Section 2

Political and economic perspectives on water
Chapter 4

The role of creative language in addressing political realities: Middle-Eastern water agreements

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INTRODUCTION

International water agreements are often the mechanisms used to foster and institutionalize political cooperation. Water agreements facilitate data and information exchange, lessen the potential for future river basin conflicts, and even serve as a platform to induce cooperation over other more contentious issues. Indeed, historically, over 3,600 treaties have been signed that relate to all aspects of international water, including over 500 addressing water as a commodity since 1950 alone (United Nations Environment Programme 2002). These include cases of treaties signed between hostile countries, such as the 1960 Indus Treaty between India and Pakistan. In contrast, since 1950 there have been only 37 cases of acute dispute (those involving violence) over transboundary waters – of those, 30 are between Israel and one or another of its neighbors. In fact, the only true “water war” between nations on record occurred over 4,500 years ago between the city-states of Lagash and Umma in the Tigris-Euphrates basin.

Since water resources are being driven to the edge of their natural limits, today even the most cooperative of neighboring states finds it difficult to achieve mutually acceptable arrangements over shared water resources (McCaffrey 2001). As a means for helping states negotiate resolutions to water disputes, a number of international bodies have formulated general legal principles and norms focusing on basin-wide development and management, the appropriation of water according to clearly defined water rights, and joint management of shared water resources (Shmueli 1999; Benvenisti and Gvirtzman 1993; Conca et al. 2006). These principles and norms are intended to change the behavior of states by introducing new principles and norms of conduct. Among these international bodies are the International Law Association, which developed the 1966 Helsinki Rules and the 2004 Berlin Rules, and the International Law Commission. Today, nearly all states agree that the numerous water treaties and other international legal instruments testify to the existence of customary international law for transboundary water resources (Dellapenna 2006).

While states are being urged to adopt these principles and norms, emerging trends in transboundary water regulation suggest that, in fact, states tend to embrace

21 Another example for the call to adopt many of these top-down normative norms is the Hayton and Utton’s Bellagio draft Treaty on groundwater. It was the first to comprehensively deal with groundwater. For more, see Hayton and Utton 1989.
The role of creative language in addressing political realities

other less traditional principles that may better address their own political needs. For example, Conca et al. in their study on whether governments are converging on common principles for governing shared river basins found that there is only weak evidence for the actual adoption of common principles for regime formation (Conca, et al. 2006). Also, Kliot et al. determined that very few of the institutions they examined corresponded to the ideal model of institutions for the management of transborder water resources, namely, a basin-wide multipurpose institution that treats the whole basin as a single unit and equitably integrates all riparians (Kliot and Shumueli 2001). Yet, many of these institutions were nevertheless found to be effective in managing the shared resource. Treaties in basins with multiple riparians are still often bilateral and many of these treaties are based on needs rather than rights, as stipulated by customary law, and the coordination achieved is limited. In some cases it seems that even if the language of international law does appear in treaties, it actually has a different meaning there. Such was the case in the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (1995 Mekong River Treaty) that, although employing the term “basin” treaty, often meant a watercourse, which is a smaller spatial unit of jurisdiction than a basin (Sneddon and Fox 2006).

The aim of this study is to examine why states fail or decline to adopt several of the general principles of customary law formulated by these international organizations and to identify the creative language that is adopted instead. The principles to be examined are 1) basin-wide development and management; 2) the appropriation of water according to clearly defined water rights; and 3) joint management of water resources by all basin riparians.

To this end, a comparative research design is offered. Three case studies will be examined in detail, including the water components of the 1994 Treaty of Peace between Israel and Jordan, the 1995 Interim Water Agreement (“Oslo II”) between Israel and the Palestinian Authority; and the 2005 agreement between Israel, the Palestinian Authority and Jordan to conduct feasibility studies for a canal project between the Red and Dead Seas. The last is not a treaty and hence does not have the same weight in international law as do treaties. In addition, the Israeli-Jordanian one is a permanent one with allocation of surface water as a focus while the Israeli-Palestinian one is an interim agreement also with allocation of groundwater.

The study first examines the emergence of international water law and its three core principles. Next, through the three case studies, it seeks to understand why these so-called “ideal” principles are often not adopted and what alternative principles might replace them. Finally, it discusses the limits and limitations of the three principles vis-à-vis their ability to reconcile a negotiation process steeped in conflict.

THE EMERGENCE OF INTERNATIONAL WATER LAW

According to Cano, international water law for the non-navigational uses of transboundary surface water resources did not emerge substantially until after World War I (Cano 1989). Since that time, a number of international organizations have sought to provide general legal principles and norms that can apply to the world’s freshwater resources. These principles and norms were typically codified in non-binding declarations, guidelines, and recommendations. In a number of cases,
though, these principles and norms were adopted into regional agreements, such as the 1995 Mekong River Treaty and the 1995 Protocol on Shared Watercourses in the Southern Africa Development Community, that were binding on the parties to those agreements. The appearance of these principles and norms in multiple international instruments, even non-binding ones, suggests that they may have achieved the status of customary international law.

These general legal principles and norms were intended to be legally binding where countries adopted an instrument containing those principles and norms. While it is tempting to look to these principles for clear and binding rules, it is more accurate to think in terms of guidelines for the process of conflict resolution: “The principles (of customary law) themselves derive from the process and the outcomes of the process rather than prescribe either the process or its outcome” (Dellapenna 1997).

The evolution of international water law can be divided into three stages, dominated by different principles: In the early era the world’s transboundary watersheds were parceled by states guarding their sovereignty so tightly that legal cooperation over the resource aspects of water was nearly impossible, rendering only zero-sum solutions. The rights-based approaches and extreme principles of water law, like the absolute territorial sovereignty or the absolute riverine integrity doctrines, dominated the traditional era. In the modern era states abandoned these rigid principles for the sake of international cooperation. Indeed, during this period, numerous treaties were signed between countries sharing a common water resource. This process was coupled by the increasing involvement of several international legal bodes such as the International Law Association. While treaties over navigational issues have been adopted since 805 AD, the postmodern era focused on non-navigational issues (Elver 2006). It has also introduced both the notion of sustainable water management and economic efficacy to reconcile economic interests and environmental concerns.

In 1997, the UN General Assembly voted in favor of a Convention on the Non-Navigational Uses of International Water Courses (UN Watercourse Convention). The UN Watercourse Convention codifies many of the principles deemed essential by the international community for the management of shared water resources, such as equitable and reasonable utilization of waters with specific attention to vital human needs; protection of the aquatic environment; and the promotion of cooperative management mechanisms. Even though it is not yet in force, and may not, the principles and norms it embodies have increasingly been invoked at international fora.

To date, only 15 countries are party to the UN Convention, well below the requisite 35 instruments of ratification, acceptance, accession, or approval needed to bring the Convention into force (United Nations Treaty Collection 2002). Second, while the Convention offers general guidance to co-riparian states, its vague, and occasionally contradictory, language can result in varied, and indeed conflicting, interpretations of the principles contained therein (Biswas 1999). Finally, there is no practical enforcement mechanism to back up the Convention’s guidance.

22 The following countries were listed as Party to the Convention as of July 2007: Finland, Germany, Hungary, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Namibia, Netherlands, Norway, Portugal, Qatar, South Africa, Sweden, and Syrian Arab Republic.
For purposes of this paper, we examine the emergence of three principles in international water law: consideration of the whole basin (rather than merely the waterways); water allocations based on rights; and joint management.

**EVOLUTION OF PRINCIPLES IN INTERNATIONAL WATER LAW**

**Basin wide management considered**

At the beginning of the 20th century, the basin became the recognized unit for developing and managing water resources in individual multipurpose projects. But it was during the 1960s that the concept became widespread in water development (Teclaff 1996). Basin-wide institutions are now pitched as the most appropriate unit for internalizing all externalities associated with water/land/human interaction. Such water institutions include river basin councils, commissions, and authorities. The basin-wide paradigm receives the support of many international bodies, such as the World Bank and the European Union (Alaerts and Moigne eds. 2003; Global Water Partnership 2000; Green Cross International and World Water Vision 2000; European Union Framework Directive for Community Action in the Field of Water 2000). Consequently, the baseline for negotiation and management was often the basin scale (Frey 1993; Waterbury 1997; Fischhendler and Feitelson 2003; Fischhendler, et al. 2004).

In the last few decades, legal scholars have also agreed that the critical unit of analysis for international water resources is that of the international drainage basin. For example, the International Law Association, already in 1951, began endorsing the integrated basin principle (Teclaff 1996). This was followed by the 1966 Helsinki Rules mentioned above that promoted a holistic approach to water management at a basin level. In 1986, the scope and definition was widened by the ILA to encompass interrelated transboundary surface and ground waters as well as transboundary aquifers that are completely dissociated from any surface water resources (The Seoul Rules on International Groundwaters 1986). Finally, the Berlin Rules even more explicitly endorsed the basin concept with a call for the establishment of basin-wide mechanisms to govern shared water resources (The Berlin Rules on Water Resources 2004, see Article 64).

However, when the United Nations considered the Helsinki Rules in 1970 according to Biswas (1999), some states (Brazil, and France, for instance) objected to the prominence of the drainage basin approach, which might be interpreted as an infringement on a nation’s sovereignty. Others argued that, given the complexities and uniqueness of each watershed, general codification should not even be attempted. It should also be noted that in 1991, during the ILC’s effort to draft principles of international water law, it adopted the term “international watercourse” as the unit for water management. This was a compromise between the “surface channel” notion, which ignored hydrological realities, and the “drainage basin” concept, which ignored the realities of sovereignty (Wescoat 1992). Even the Berlin Rules, while endorsing

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23 For some examples of cooperation in the management and use of international resources, see Housen-Couriel 1994.

24 For more details on the scope of the 1997 Watercourse Convention and the debate over the geographic unit that would be subject to the Convention’s legal principles, see Eckstein 2005.
the basin-wide management mechanisms as the best mean for achieving equitable and sustainable management of waters, neither specifically require such institutions to be established, nor provide specific details for such mechanisms (The Berlin Rules on Water Resources 2004).

**Water rights considered**

In Western, Roman-based legislation, the economic aspects of water are defined in terms of either public or private rights. Most legal systems today recognize and protect the property aspects of water rights (Solanes 2001). International law strives to delineate those riparian state rights to international water resources (Benvenisti and Gvirtzman 1993). The underlying rationale for establishing water rights is that a clear definition of who is entitled to use the water will reduce uncertainty and conflict (Pradhan and Meinzen-Dick 2001). This is in line with neoclassical economics, which see property rights as a fundamental concept of development (Molle 2004). Thus, the “right” terminology has penetrated many of the legal instruments that seek to articulate or establish international water law. For example, the Helsinki Rules put forth the notion of legal rights to water in many of its clauses (The Helsinki Rules on the Uses of the Waters of International Rivers 1966, see Articles XXX, XXXI). Similarly, the Watercourse Convention stresses the right of watercourse states to utilize the watercourse (Article, 5). The Berlin Rules, though not setting rights as a guideline for appropriating water, stress the right to have access to water. (The Berlin Rules on Water Resources 2004, see Article 17).

Given the predominance of the rights-based language, it is not surprising that during most international negotiations, parties base their initial positions in terms of rights.

However, in almost all of the disputes that have been resolved, particularly on arid or exotic streams, the paradigms used for negotiations have not been “rights-based” at all – neither on relative hydrography nor specifically on chronology of use, but rather “needs-based” (see Table 1). “Needs” are defined by irrigable land, population, or the requirements of a specific project.

**Joint management considered**

Navigation laid the groundwork for a legal or administrative unity of the river basin in politically divided basins. This sense of management unity was built upon as the

### Table 1 Examples of needs-based criteria.

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Criteria for allocations</th>
</tr>
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<tbody>
<tr>
<td>Egypt/Sudan (1929, 1959, Nile)</td>
<td>“Acquired” rights from existing uses, plus even division of any additional water resulting from development projects</td>
</tr>
<tr>
<td>Johnston Accord (1956, Jordan)</td>
<td>Amount of irrigable land within the watershed in each state Historic and planned use (for Pakistan) plus geographic allocations (western vs. eastern rivers)</td>
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<tr>
<td>India/Pakistan (1960, Indus)</td>
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<tr>
<td>South Africa (Southwest Africa)/ Portugal (Angola) (1969, Kunene)</td>
<td>Allocations for human and animal needs, and initial irrigation</td>
</tr>
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non-navigation demands and the technological means to meet those demands grew. Indeed, in the US from 1940s to 1970, a series of river basin commissions were established. During the 1940s and 1950s, basin authorities emerged throughout the world: in India, Sri Lanka, Brazil, Colombia, Ghana, Australia and other countries. These took a variety of forms. Some only coordinated planning while others established a joint mechanism to govern the basin. In a coordinated structure each party has its own institutions which coordinate some of their activities. In a joint structure the activities were carried out by a joint institution to which the parties delegated authority (Haddad, et al. 1999).

Acknowledging the benefits of cooperative water management, it seems that the international community has often advocated a high intensity of cooperation in the form of joint management structure. In 1911, the Institute of International Law published the Madrid Declaration on the International Regulation regarding the Use of International Watercourses for Purposes other than Navigation. The Madrid Declaration outlined certain basic principles of shared water management, recommending that co-riparian states establish permanent joint international commissions. Expanding on these guidelines, in developing the Helsinki Rules, the ILA promoted the establishment of a joint agency that would settle disputes and formulate plans or recommendations for the most efficient use of the transboundary water resource (The Helsinki Rules on the Uses of the Waters of International Rivers 1966, Article XXXI). Also, the 1997 Watercourse Convention establishes the general obligation to cooperate (Article 8) and the management required for cooperation (Article 24) called for the establishment of joint mechanisms or commissions. Similarly, the Berlin Rules call for the establishment of a joint management arrangement to ensure equitable and sustainable use of water (Article 64).

Yet, again it seems that real-life experience often deviates from the ideal joint structure. Kliot and Shmueli (2001), while analyzing nine major river basins found that in only a minority of them, a high level of cooperation is gained. Approximately 106 of the 263 international basins in the world have agreements, only 20% of which include more than two riparians. Dombrowsky likewise finds that only 20% of all multi-partite basins have multilateral organizations in place (Dombrosky 2005).

The next section examines in detail three case studies in order to understand why these so-called “ideal” principles are not adopted and what alternative principles might replace them.

MIDDLE-EASTERN WATER AGREEMENTS

Background to the Israeli-Arab water agreements

Most of Israel’s water resources are transboundary. Israel, Jordan and the Palestinians share the lower basin of the Jordan River, whose main flow comes from tributaries located in Lebanon and Syria and which discharges some 1250 million cubic meters (mcm) annually (Soffer and Kilot 1988). These waters are used both as a potable water supply of the metropolis of Amman, through the King Abdullah Canal, and for the water supply in Israel, through the Israeli National Water Carrier, built in 1964. Israel
and the Palestinians also share the Mountain Aquifer, which supplies 600 million cubic meters per year. Israel utilizes nearly 80 percent of the water in this aquifer, and the Palestinians use the remainder (Trottier 1999). The Mountain Aquifer provides pristine water to both sides, although it is highly susceptible to pollution due to its karstic structure; thus, its management requires a high degree of cooperation (Haddad et al. 1999). Finally there is the Coastal Aquifer, the southern tip of which underlies the Gaza Strip. Until the 2005 disengagement process, it provided water to both the Palestinian population and the Jewish settlements of the Strip.

Despite the shared nature of the resources, both Israel and Jordan, already in the 1950s, announced unilateral plans to develop the Jordan Basin. Israel planned the diversion of the northern Jordan River, through the construction of a carrier, to the Coastal Plain and Negev Desert (Naff and Matson 1984). Jordan opposed this out-of-basin water transfer and instead announced its intention to irrigate the Jordan Valley by channeling the Yarmouk River into the King Abdullah Channel. As Israel started implementing its plan, a series of border clashes erupted between it and Syria; these clashes escalated to an armed conflict in 1953 (Wolf and Ross 1992). But even earlier the US sent Eric Johnston as a special envoy to the region with the mission of reaching regional agreement between the riparian states on the division of the waters of the Jordan and Yarmouk Rivers. Johnston’s 1951 proposal was rejected by all countries as was his 1955 version. Within a decade, the tension over water, coupled with the regional border dispute, led to numerous political clashes over water between Israel and Jordan, some of which developed into significant military confrontations.25

After the Six Day War of 1967 the geopolitical map of the Middle East changed dramatically. Apart from Israel’s victory in terms of land and borders, it also gained water resources by acquiring two of three Jordan River headwaters, as well as winning control over the Mountain Aquifer previously held by Jordan. Israeli military rule extended to all civilian affairs in the territory of the West Bank, including water (Tal 2002). This meant that the drilling of any well in the West Bank required an Israeli permit. Israel granted only 23 of these to Palestinians between 1967–90 (Awartani 1992). In contrast, during the same period Israel exploited this water unsustainably to address the growing political pressure of its agricultural sector (Fischhendler in Feitelson and Shamir eds., forthcoming). Israel has also gradually increased its use of the Yarmouk (Priscoli and Wolf, forthcoming) and during the 1970s and ‘80s had plans to revive the Mediterranean Sea-Dead Sea Canal first visualized a century earlier by the Zionist movement (Varadi 1990). The canal’s aim was to produce hydroelectricity by using the differential sea level between the two seas.

While Israel was developing the resource, Jordan and Syria did not sit idly by. In the mid-1970s, as Jordan faced water shortages in its main cities of Amman and Irbid, it revived its plan to jointly build a large storage facility on the Yarmouk with Syria. The plan for a “Unity Dam” was again discussed by the two at the end of the 1980s and in the ‘90s, causing considerable tension in Israel, which initially opposed its construction (See Hof 1995; Keinan 2005).

25 Yet, it is important to keep in mind that the Israeli-Arab water conflicts of the Fifties and Sixties were not entirely over water. For more see Feitelson 2000.
As all freshwater utilization has reached the limits of its availability in Israel, the West Bank and Gaza Strip, and Jordan, tensions over scarce water have increased. Therefore, it is perhaps not surprising that during early '90s, water wars were expected to erupt in the Middle East (See Starr 1991; Bullock and Darwish 1993). Despite such friction, the Israelis and Jordanians often met to discuss and regulate water sharing on the Yarmouk, which had to be frequently adjusted because of Syrian abstraction of the flow upstream (Haddadin 2001). Yet, as long as the regional conflict over territory and refugees was not resolved at the political level, talks over water were never institutionalized into a treaty.

The Madrid peace conference in 1991 and the many negotiations that followed marked a turning point in water relations. In Madrid, two parallel negotiating tracks – the bilateral and multilateral tracks – were established. The former referred to direct negotiations between Israel and each of its immediate Arab neighbors, with the exception of the Palestinians, who, at the time, were included in the Jordanian delegation at the insistence of Israel (Rubinstein 2004). The latter focused on key issues that concern the entire Middle East and that might generate confidence-building measures (Peters 1996). Each track was divided into groups that included the water issue. While the work on both tracks was progressing, Israel and the Palestinians initiated a secret negotiating track outside the framework of the Madrid conference that resulted in the Oslo I Accord, signed in September 1993. That Accord, which announced the establishment of a Palestinian interim authority, also noted the need for cooperation in the field of water. Subsequent to Oslo I, Israel and the Palestinians in September 1995 signed the Oslo II Interim Agreement, in which article 40 of Annex III addressed issues of water and sewage.

The moment it became clear that Israel and the Palestinians were about to sign Oslo I, the bilateral talks between Israel and Jordan intensified. Water was the last and most contentious issue resolved in those negotiations, which came to an end with the signing of the Israeli-Jordanian peace treaty in October 1994; Annex II of the treaty pertains to the two countries’ shared water.

The Israel-Jordanian agreement set in motion the plan to develop the Dead Sea area; both sides declared the Jordan Rift Valley a development zone and established the Trilateral Economic Committee and Jordan Rift Valley (JRV) Steering Committee. Finally, in April 2005, after three years of negotiations, a feasibility study was signed for the environmental and social assessment of the Red Sea-Dead Sea Water Conveyance study.

The next section examines briefly the negotiations over the language negotiated and adopted in each of the three agreements.

**Negotiating international language**

**The Israeli-Jordanian agreement**

A Jordanian demand that Israel reorganize their respective water rights was raised already in 1992 while both countries discussed the common agenda for the coming water negotiations. Water rights were important for Jordan, whose use of the Jordan River had been diminished by Israel’s extensive use of that water (Haddadin 2001) and in light of the Palestinians obtaining reorganization of their own water rights in talks with Israel (Izraeli 2005). Since water rights are based on several factors, such as
Figure 1  The geopolitical units in the Jordan basin.
hydrology, geography, historical use and needs and so on, though the weight of each factor is not determined universally, but rather based on the circumstances of each case it was thus clear to Israel that setting the allocation on the basis of disputable algorithms would result in long-term disagreements (Shamir 2003). Even if the weight of each factor was agreed upon, Israel feared that Jordan’s water needs in the future would change, which may result in a demand for adjustment (Sabel 2005). Finally, Israel was concerned that recognizing its water rights on the Yarmouk may allow its neighbor to raise counter-claims on the Jordan River, which Israel wished to leave as an exclusively Israeli water body (Israeli 2005). Instead, Israel preferred a clear division of water based on a definition of the water source and location, quantities and qualities and pricing (Shamir 1998). The disagreement was resolved by both sides putting forward the notion of securing their respective “rightful water share”, the meaning of which was left to be defined in the next phase of negotiation (International Legal Materials 1993).

As the controversy over water rights continued, it was the technique of incorporating both sides’ needs in the treaty language that defused the deadlock. This occurred only when the formula of “rightful allocation” was introduced at the late stages of negotiations. “Rightful allocation” implies that the Jordanian rights are the allocation both sides agree upon (Rizner 2005). This term served to provide a psychological reference to “rights” that was important to Jordan while basing the allocations on what is specified in the agreement, as that was important to Israel (Shamir 1998).

Next, there was a need to clarify the meaning of “rightful allocation” and to divide the water between the two states accordingly. Jordan’s interpretation of its respected water rights was to receive from Israel 200 mcmy of potable water from the Jordan River, half of it from the Sea of Galilee, also known as Lake Kinneret (Haddadin 2001), on the basis that the lake is an international watercourse where Jordan is a riparian (Rizner 2005). Israel, in contrast, argued that Jordan is not a riparian to the lake itself (Katz-Oz 2005). Thus, Israel opposed including any reference in the treaty to the Jordan River as a “shared basin” (Sabel 2005) and insisted that the term “Lake Kinneret” not appear in the treaty language (Shamir 2005). As a result, although it was clear that the source of some of the water provided to Jordan is the lake itself, the lake’s name was not mentioned in the treaty, nor was there any reference to the Jordan River as a shared basin. Instead, it stated that the source would be “from the Jordan River directly upstream from the Deganya gates on the river” while the meaning of Jordan River was deliberately left ambiguous (Sabel 2005).

Finally, there was a need to set the degree of cooperation and dependency required to execute the treaty provision. Israel was concerned that setting up a joint management structure, in which both countries share and develop the basin resources, might put the burden of droughts and of funding new water resources on it, as it has more water alternatives (Rizner 2006; Shamir 2005). It was also concerned about any interpretation that might describe the treaty and its institutions as a symbol of Israel’s control in the basin (Shatner 2005). Consequently, the Joint Water Committee (JWC) was set up to oversee the treaty implementation established coordination mechanisms rather than a joint or a cooperative framework. These were restricted to cooperation in developing plans for purposes of increasing water supplies and improving water use efficiency within the context of bilateral, regional or international cooperation.
Figure 2 presents the language employed by both sides and how the differences in jargon were reconciled in the negotiation process.

**The Israeli-Palestinian agreement**

While Jordan consented to discussing “allocations”, the Palestinians insisted on the division of water based on water rights (Shamir 1998). As a result, just after the Madrid conference when the multilateral water group met in Geneva to discuss the regional water issues, the Palestinians insisted that their water rights be negotiated; in response, Israel argued that this was a political topic that was outside the multilateral and technical scope (Izraeli 2005). Instead, Israel suggested that until this issue was discussed during the permanent negotiations phase, both sides should adopt a “pragmatic approach” of dividing the water according to the future needs of the Palestinians (Kantor 2005). The Palestinians refused to discuss water needs independently of water rights and left the multilateral water group until this issue returned to the agenda (Haddad 2004).

The Israeli objection to discussing Palestinian water rights based on the “reasonable and equitable” criteria originates with the fear that this term was not quantifiable (Kinarti 2006), and thus may build great expectations on the Palestinian side (Rizner 2005). Israel was further concerned about water rights providing the Palestinians fixed entitlement to water even during a regional drought (Kantor 2005). The Palestinians, on the other hand, opted for water rights as leverage for land rights (Haddad 2004).
Another point of disagreement was the Palestinians’ wish that the agreement include “joint” management over the entire basin and a reference to them as riparian to the Dead Sea (Sabel 2005). For the Palestinians, terminology commonly used in international law was assumed to assure them the support of the international community (Attili 2006). Furthermore, attaining a joint basin-wide agreement and even a joint water utility might have provided the Palestinians with the power to reallocate existing water uses, which were dominated by Israel outside the West Bank (Attili 2004). Thus, not surprisingly, Israel opposed such terminology and opted for a coordinated management structure over the West Bank that would better reflect the existing status quo. Yet, it also suggested augmenting the Palestinians’ water supply through a desalinization plant on the Israeli coast at Hadera (Katz-Oz 2005).

A breakthrough for the Palestinians occurred when Abraham Katz-Oz, the head of the Israeli negotiation team to the multilateral talks, agreed to acknowledge the Palestinians’ water rights on an equitable basis as well as their affinity to the Dead Sea. Once this was accepted there was no return and these issues were included in the Declaration of Principles (DOP) on the interim self-governance arrangements signed in Washington on September 13, 1993 (Annex, III, article 1). Yet, many of the Israeli negotiators that were against acknowledging the Palestinians’ water rights decided on a strategy of postponing the clarification of the meaning of equitable water rights to the permanent status negotiations. In the meantime, the Israeli strategy was to continue to advance water allocation based on the pragmatic approach (Kinarti 2006).

Next, in 1994 the Cairo Agreement was signed, Annex II (Article II) of which touched on shared water in the Gaza Strip. The agreement announced that a sub-committee would deal with water issues of mutual interest while its scope and scale were restricted, allowing water sovereignty of each side to be maintained. The Cairo Agreement was followed by intensified negotiations that led, a year later, to the Tabo Agreement, often called Oslo II, article 40 of which addressed water and sewage. The clash between allocation based on rights versus allocation based on pragmatism was resolved in the negotiations only when a third approach was adopted: the approach negotiated the Palestinians’ interim water needs on the basis of population patterns and irrigation needs. Once the allocation was agreed, the Palestinian allotment was to be presented in the negotiated agreement as water rights based on reasonable and equitable criteria, again without clarifying what reasonable and equitable actually meant (Rizner 2005).

At Israel’s insistence the scale of the agreement was restricted to the West Bank rather than the entire basin (see Figure 1). Narrowing the scale prevented the Palestinians from gaining control of the major water source of Israel, located on the western fringe of the Mountain Aquifer outside the West Bank zone. To ensure that the agreement would not affect the Kinneret or the Jordan River, Israel made sure that it did not recognize the Palestinians as riparian to the Jordan basin; the agreement did not even mention this water resource (Rizner 2005). Instead, it said that “various” water resources would be negotiated in the permanent status negotiations, without clarifying the meaning of “various”.

Finally, to address the Israeli demand, a coordinating mechanism was set up to administer the agreement, with decisions made on a veto basis. Coordination should be understood in this context as an alternative to joint management (1). “Joint” would suggest ownership and “management” of a resource versus coordination, which indicates that each side is sovereign in its domain but agrees that certain matters can be managed together (Shamir 2005). The only shared structure was the establishment
of an enforcement arm of the JWC, termed Joint Supervision and Enforcement Team (JSETs). The assumption was that a joint structure for enforcement is inevitable since this is the only way to prevent disagreements (Shamir 1998).

Figure 3 presents the language advanced by both sides and how the differences in terms were reconciled in the negotiation process.

The Israeli-Palestinian-Jordanian agreement

Following a request by Jordan at the beginning of 2002, a World Bank Technical Assistance Mission visited the Hashemite Kingdom. The purpose of the visit was to assess the support of both Israel and Jordan for the Red Sea-Dead Sea Canal with the aim of saving the Dead Sea and providing desalinated freshwater to the region, and especially to Amman (Read Sea-Dead Sea Water Conveyance Project 2002a). The two countries agreed to establish a small joint Steering Committee that included the World Bank and that would prepare the Terms of Reference (TOR) required for the project (Read Sea-Dead Sea Water Conveyance Project 2002b). Several months later, the principles for the TOR were submitted for acceptance by the Israeli Ministry of Regional Cooperation. The draft called for joint examination of the project by the two governments with the involvement of the World Bank, USAID and/or the U.S. State Department. Both Jordan and Israel preferred a route entirely in Jordan. This would exclude some of the Israeli pressure groups that might oppose the project and would make it eligible for World Bank funding that only developing countries can receive (Benvenisti and Gvirtzman 1993). Yet, the early draft addressed neither the scale of the examination nor the number of alternative routes to be examined (Israeli Government, Ministry of Regional Cooperation

Figure 3 Language evolution in Israeli-Palestinian negotiations.
The role of creative language in addressing political realities

2002). Following the early draft, the need to further advance the project was boosted by the Johannesburg World Summit on Sustainable Development and the Third Water Forum in Kyoto, both of which stressed the vision of saving the Dead Sea through the “peace conduit” (Johannesburg Summit 2002).

A year later, a more mature draft was issued by the World Bank. Following the Bank’s insistence, the draft now included the Palestinians as riparians in the agreement along with Israel and Jordan (Blitz 2006). It also paved the way for an examination of the water resources of the entire Jordan basin and for establishing regional joint institutions to govern the TOR (The Red Sea-Dead Sea Water Conveyance Project 2003a). Finally, it acknowledged the need for consultation with the public and implicitly the entitlement of all basin parties (including the Palestinians) to water and land rights in the basin. Broadening both the scale and scope of investigation raised strong objection on behalf of Israel, while it was the Palestinians who insisted on these changes (The Red Sea-Dead Sea Water Conveyance Project 2003b). For the Palestinians, an agreement that touched on water and land issues in the entire basin, with reference to international law, was assumed to provide them with leverage for obtaining their “reasonable and equitable” water and land share in the permanent status negotiations with Israel (Attili 2006). In contrast, for Israel such an agreement might prejudge the results of the permanent status talks with the Palestinians and might infringe on its sovereignty and water/land resources, including Lake Kinneret and the Dead Sea (Blitz 2006; The Red Sea-Dead Sea Water Conveyance Project 2003b; Keidar 2005). Instead, Israel suggested that the Palestinians’ participation be examined at a later stage, in accordance with the progress on the final negotiations and to decouple the TOR from the regional water use, the peace process, and the upper basin riparians (Alaster 2006; The Red Sea-Dead Sea Water Conveyance Project 2003b).

Despite pressure from both Jordan and the World Bank to accept the early draft (Bein 2006), Israel’s strong objection to the 2003 draft resulted in a revised draft published by the World Bank (The Red Sea-Dead Sea Water Conveyance Project 2004). The new version of the TOR excluded much of the customary law language found in the previous draft, including any reference to Lebanon and Syria as upper riparians, the option for a joint management structure governed by a regional institution and the status of the Palestinians as riparians (see Table 1). Instead, the TOR included a statement that the agreement will not prejudice the riparian rights of any of the parties, that the nature of cooperation remains to be studied, and that the parties status would change from riparians to “beneficiary party” (The Red Sea-Dead Sea Water Conveyance Project 2003). The “beneficiary” language adopted satisfied the Israeli demand for the passive status of the Palestinians (See Alaster 2006; Yinon 2006) while the term “party” addressed the Palestinians’ needs for recognition as equal parties to the agreement (Attili 2006). The statement also addressed the Palestinians’ wish that the agreement not infringe on the rights of Syria and Lebanon, which were not involved in the negotiations, while for Israel it enabled decoupling of the agreement from the final negotiations.

However, despite the many compromises reached in the 2004 TOR version, Israel still objected to it. Israel wished to modify the objective of the study from saving the Dead Sea to a technical study that focuses on examining only the convenience route preferable to Jordan and Israel (Blitz 2006). Reframing the objectives of the agreement would have lowered the importance of an investigation into the management of the water uses in the entire basin, an issue that was problematic for both Jordan and Israel (Alaster 2006). However, the World Bank continued to insist on the need to see the
TOR in a wider regional context that includes the peace and water management of the entire basin (Yinon 2006).

The breakthrough in the negotiations came just after the Israeli disengagement from Gaza in 2005 and with the help of some more creative drafting (Yinon 2006). In the fourth draft of the agreement the basin water study was replaced by policy statements each country issued on water resources management indicating that the nature of cooperation was to be studied rather than pointing towards joint management (The Red Sea-Dead Sea Water Conveyance Project 2005). Finally, the objectives of the study were framed to take on the semblance of a technical agreement, as requested by Jordan and Israel. This affected the parties involved in the negotiations on the Israeli side: the professional environmental community that headed the negotiations was replaced by the Israeli Water Commission team that now also addressed the political realities of negotiations in a conflict area. Politicizing the negotiation process further excluded from the negotiation process the examination of other alternatives for the conveyance (Bein 2006). Finally, in April 2005, the three beneficiaries signed an agreement to launch a feasibility study for the environmental and social assessment for the Red Sea-Dead Sea Water Conveyance study.

Figure 4 presents the language advanced by both the Palestinians and the Israelis and shows how the differences in language were reconciled in the negotiation process.
Table 2 presents the evolution of negotiations over the Red Sea-Dead Sea agreements. Essentially it shows how the aim, scale, scope and public participation of the early drafts have changed during an intense two years of negotiations.

### DISCUSSION AND CONCLUSIONS

Water problems are often characterized as “wicked” problems that face multiple and conflicting interests over the utilization of integrated natural systems such as an aquifer or a watershed (Scholz and Stiftel 2005). To solve these problems in an equitable and optimal manner, certain principles of international water law call for a higher degree of physical and institutional integration, often at a basin-wide scale, and a clearer definition of water rights. Otherwise, it is assumed that fragmented water systems will result in unilaterally development activities that ignore the rights of other basin riparians (Alaerts 2003; Molle, et al. 2006). Against these assumptions stands the low commonality of the use of joint basin-wide management based upon water rights in water treaties. The present study argues the importance of power asymmetries between states and the nature of the
water dispute that often extends beyond water as explanatory variables to explain this discrepancy between theory and practice. Under those conditions this study argues that the adoption of these principles is not feasible. Thus, a more traditional “bottom-up” approach is employed to adopt “creative terminology” as a means for circumventing the volatility inherent in these principles.

Both the negotiation over the legal terminology and the language adopted were found in themselves to be a manifestation of the power struggle and asymmetries between Israel and its neighbors. It was the weak riparians – both Jordan and the Palestinians – that, in order to change the power balance and enhance their access to land and water resources, endorsed the language of the international law, that is, calling for joint basin-wide management based upon water rights, while Israel sought alternative terminology that would uphold the status quo. This explains why drafting the water treaties was found to be a complex, lengthy and often contradictory process, and one associated with high transaction costs. It also explains why the legal language that was finally adopted is rather ambiguous as ambiguity enabled virtual consent, which in turn allowed each side to assume that its own language dominates the treaty.

Much of the deadlock was resolved only when the parties moved from their adversarial positions to address the interests behind the positions, where a compromise was forged that captures elements of international law while still addressing the needs of the stronger riparian – for example, adopting rightful allocation terminology in the case of Israel and Jordan, and rights based on needs in the case of Israel and the Palestinians. The “rights” terminology came to satisfy the Jordanians or the Palestinians while the “allocation” or the “needs” terminology came to address the Israeli needs. The Red-Dead talks also exposed an integrative stage of negotiation during which the parties started to add benefits to the agreements. This is the “beneficiary party” definition, which helped bypass any allocation and recognition based upon water “rights.”

This evolution of water conflict negotiation under asymmetrical conditions explains why the language adopted deviated from the recommended international legal norms while still managing to address the needs of the weak riparian. The result was often in adopting only minimal and vague definitions that capture the spirit of international law principles but also allowing the freedom to tailor the agreements to the specific asymmetries of these case studies. Yet, it seems that while Israel was willing to compromise on the rights issue and the nature of cooperation, on the spatial scale the treaty’s language still reflects its power inequities. In fact, in all three agreements the mandate of the regime does not go beyond parts of the basin that may endanger Israeli sovereignty and water and land control.

Although the study’s aim is not to identify the ramifications of following these non-traditional language alternatives, attention should be paid to the long-term implications of the language adopted—especially given its abundant ambiguity and repeated failure to change the water status quo. In the case of the Israeli-Jordanian water agreement, this so-called creative ambiguity was already found to be destructive (Fischhendler 2004). In the case of Israel-Palestinian agreement, due to the language adopted, some even do not consider their allocations under the interim agreement to reflect their water rights as based on reasonable and equitable criteria (Attili 2006). Some international scholars have also criticized many of the institutional components of the Israeli-Palestinian agreement as dressing up domination as “co-operation”
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(Selby 2003) or as an imposed-order regime that benefits the Israeli side at the expense of Palestinian water (Zeitoun 2007). Consequently, the Palestinians have stated that in the final negotiations they must not repeat the language mistakes made in the Oslo agreement (Husseni 2006). As a result, the 2000 water agreement draft agreed at Camp David (that was to replace the Oslo agreement) included a more explicit language of international law as it contains both references to “equitable and reasonable” and water rights language (Sher 2006).

Negotiations in conflict areas over water resources are often conducted between unequal partners, with each bringing to the negotiation table considerations that go beyond water (LOWI). These conditions can often create conflicting patterns of interests such that under conflict conditions a basic non-political issue, such as water allocation, can become politicized. These conditions that were often found to impede cooperation characterize many environmental and especially water problems (United Nations Environment Programme 2006). This suggests that the Israeli-Palestinian-Jordanian case is not exceptional. A more realistic language that better reflects the political and power asymmetries but still acknowledges the importance of the existing rules of customary law turns the Middle Eastern example to a possible option for other regions facing water disputes. While the solutions crafted by the parties have not been adopted by other states/regions, they constitute examples of local decision-making that might someday be adopted elsewhere under similar asymmetrical conditions. Ultimately, the Middle Eastern water experience teaches us that despite attempts to establish a “top-down” approach for the development of international water law for facilitating the drafting of water treaties, a broader approach that acknowledges the volatility, unique characteristics, and asymmetries inherent in these situations must be adopted. Otherwise the result may be no agreement at all.

REFERENCES


