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The Role of Creative Language in Addressing Political Asymmetries: The Israeli-Arab Water Agreements

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Abstract

International water agreements are often used as mechanisms for fostering and institutionalizing political cooperation. Yet, since water resources in many places are being driven to the edge of their natural limits, a number of international organizations have formulated legal principles and norms aimed at helping states resolve water disputes. While states have been urged to adopt these principles, it seems that they often embrace other less-traditional alternatives that may better address their own political needs. 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 investigate how creative language is often adapted instead. The principles examined include basin-wide development and management; the appropriation of water according to clearly defined water rights; and joint management of shared water resources. The study focuses on three contemporary case studies centering on Israel, Jordan, and the Palestinian Territories. It concludes that the negotiation over the legal terminology of agreements between these parties exemplifies the

power struggle and asymmetries between Israel and its neighbors. Much of the deadlock in the negotiations was resolved when the parties moved from their adversarial positions to address the underlying interests, in which a compromise was forged that captured elements of international law while still addressing the needs of the dominant riparian. These results indicate that under asymmetric settings, there is a need for creative legal discourse rather than an entrenchment of international water law, which has found to be a recipe for failure.

Introduction

Since water resources are being driven to the edge of their natural limits, today even the most cooperative neighboring states find 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 (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 (Hayton and Utton 1989), emerging trends in transboundary water regulation suggest that, in fact, states tend to embrace 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 and Shmueli (2001) 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. 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 Liberation Organization (PLO); 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 study first examines the emergence of three core principles in international water law and their potential ability to address asymmetries. 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.

Principles of International Water Law and Addressing Asymmetries

The Principle of Basin-Wide Management

At the beginning of the twentieth 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.

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 the 1966 Helsinki Rules 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 groundwaters as well as transboundary aquifers that are completely dissociated from any surface water resources (Seoul Rules 1986).

The Principle of Water 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 neo-classical 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 (Helsinki Rules 1966). 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 (Berlin Rules 2004).

The Principle of Joint Management

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 non-navigation demands and the technological means to meet those demands grew. Indeed, in the United States from the 1940s to the 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 that 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. For example, 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).

These water law principles were developed to create a more level playing field and offset local asymmetries. To some extent, this position comports with the international legal theory that states are equal under international law, and, because of that equality, they are supposed to cooperate and negotiate in good faith. By requiring states to recognize the equality of sovereigns, and by obligating them to cooperate and negotiate in good faith, international law ensures that weaker states are dealt with fairly and justly by their “bigger siblings.”

The next section examines in detail three case studies in order to understand the applicability of these “ideal” principles to an asymmetrical setting and alternative principles that might replace them if these principles are not adopted.

Middle Eastern Water Agreements

Background on the Israeli-Arab Water Agreements

Most of Israel's water resources are transboundary. Israelis, Jordanians, and the Palestinians share the lower basin of the Jordan River (see fig. 5-1), whose main flow comes from tributaries located in Lebanon and Syria that discharge some 1,250 million cubic meters (MCM) annually (Soffer and Kliot 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. Israelis and the Palestinians also share the Mountain Aquifer, which supplies 672 MCM per year, according to the Oslo Interim Agreement. Israel uses nearly 80% 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. Today it is the only water source for the Palestinians in Gaza.

Despite the shared nature of the resources, both Israel and Jordan, 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, which is part of the same basin. As Israel started implementing its plan, a series of border clashes erupted between Israel and Syria; these clashes escalated to an armed conflict in 1953 (Wolf and Ross 1992). But even earlier the United States 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.

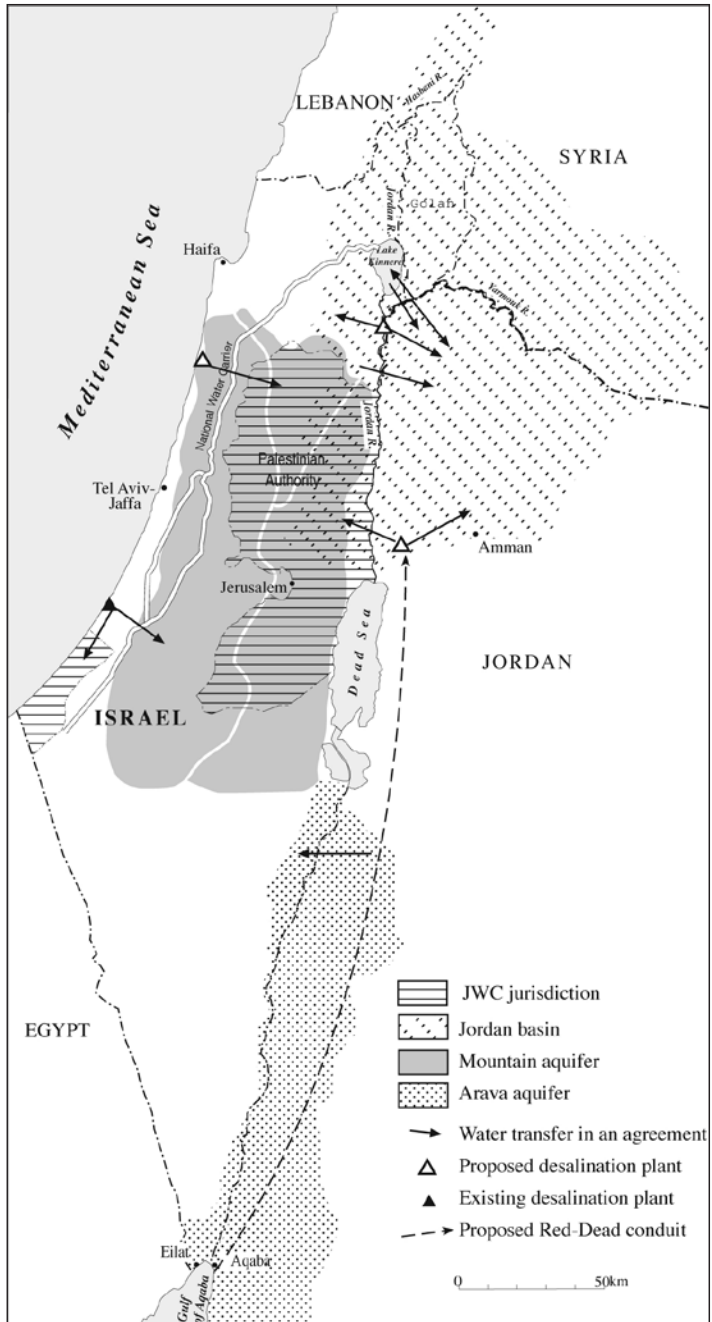


Figure 5-1. The geopolitical units in the Jordan River basin.

Source: Soffer and Kliot 1988.

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 the 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 drilling any well in the West Bank required an Israeli permit. Israel granted only 23 of these to Palestinians from 1967 to 1990 (Awartani 1992). In contrast, during the same period Israel exploited this water to address the growing political pressure of its agricultural sector. Israel has also gradually increased its use of the Yarmouk 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).

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 '90s, causing considerable tension in Israel, which initially opposed its construction (Hof 1995; Keinan 2005). As all freshwater use has reached the limits of its availability in Israel, the West Bank and Gaza Strip, and Jordan, tensions over scarce water have increased.

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—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 concerned 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 Palestinian Liberation Organization (PLO)

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 PLO 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 3 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 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). Water rights are based on several factors, such as hydrology, geography, and historical use and needs; 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 were 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 might allow its neighbor to raise counter-claims on the Jordan River, which Israel wished to leave as an exclusively Israeli water body (Izraeli 2005). Instead, Israel preferred a clear division of water based on a definition of the water source and location, quantities, qualities, and pricing (Shamir 2003). 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 (Common Agenda 1993).

As the controversy over water rights continued, the technique of incorporating both sides’ needs in the treaty language 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, which was important to Israel (Shamir 2003).

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 MCM per year 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 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 funding new water resources on it, as it has more water alternatives (Rizner 2006). 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 and 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 5-2 presents the language employed by both sides and how the differences in jargon were reconciled in the negotiation process.

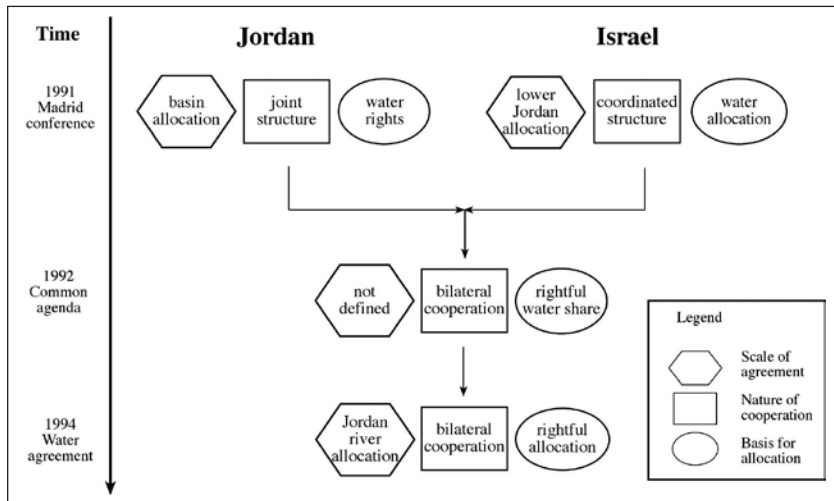


Figure 5-2. Language evolution in the Israeli-Jordanian negotiations.

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, when the multilateral water group met in Geneva just after the Madrid conference to discuss 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 of the discussion (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 in 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 who 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 subcommittee would deal with water issues of mutual interest while its scope and scale were restricted, allowing the water sovereignty of each side to be maintained. The Cairo Agreement was followed by intensified negotiations that led, a year later, to the Taba 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: negotiating 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 fig. 5-1). 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. “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. The only shared structure was the establishment of an enforcement arm

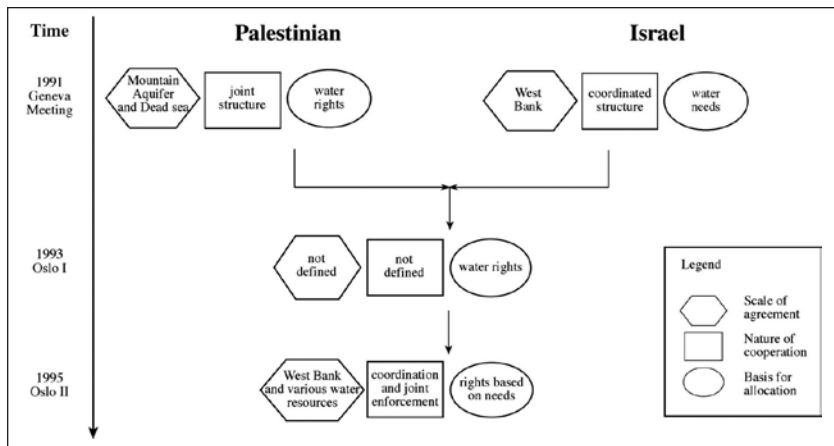


Figure 5-3. Language evolution in Israeli-Palestinian negotiations.

of the JWC, termed Joint Supervision and Enforcement Team (JSET). The assumption was that a joint structure for enforcement would be inevitable since this would be the only way to prevent disagreements.

Figure 5-3 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 (Red Sea–Dead Sea 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 (Red Sea–Dead Sea 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 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 (Red Sea–Dead Sea 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 the Palestinians insisted on these changes (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 prejudice the results of the permanent status talks with the Palestinians and might infringe on its sovereignty and water and land resources, including Lake Kinneret and the Dead Sea (Keidar 2005; Blitz 2006). 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).

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 (Red Sea–Dead Sea 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. 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” (Red Sea–Dead Sea 2004). The “beneficiary” language adopted satisfied the Israeli demand for the passive status of the Palestinians (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 toward joint management (Red Sea–Dead Sea 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. Finally, in April 2005, the

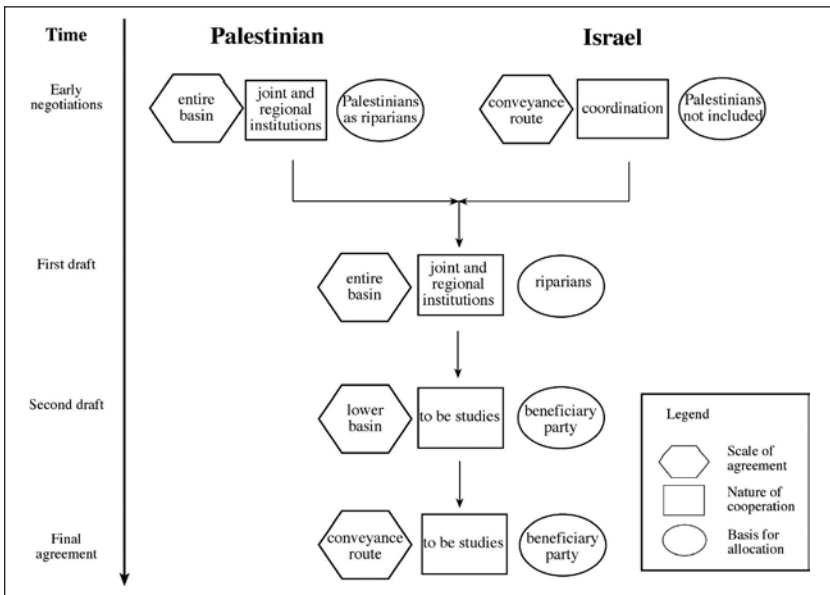


Figure 5-4. Language evolution in the Red–Dead negotiations.

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 5-4 presents the language advanced by both the Palestinians and the Israelis and shows how the differences in language were reconciled in the negotiation process.

Creative Language to Circumvent Political Realities

Water problems are often characterized as “wicked” problems that face multiple and conflicting interests over the use of integrated natural systems such as an aquifer or a watershed (Scholz and Stiffler 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. These principles presuppose the easing of existing power asymmetries between parties and prevent unilateral development activities that ignore the rights of other basin riparians (Molle et al. 2006).

In our case study, by requiring Israel to allocate water according to clearly defined Palestinian water rights, all riparian water rights are recognized, regardless of their relative economic, military, or other power. That recognition, theoretically, would prevent a more powerful state from unilaterally negating or diminishing the water rights of a weaker riparian. Similarly, by requiring a multilateral approach (e.g., joint management) to the administration of the Jordan Basin and the Mountain Aquifer by all basin riparians, the objectives and designs of the more powerful state would be subject to the full cooperation of the weaker riparian.

Against this assumption, it seems that real-life experience often deviates from the ideal legal structures. For example, Kliot and Shmueli (2001), while analyzing nine major river basins, found that in only a minority of them a high level of cooperation in the form of joint management is gained and only a minority of the multipartite basins has multilateral organizations in place (Dombrowsky 2005). When it comes to adopting water rights the situation is not different. In many 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” (such as the case

of Egypt and Sudan in their Nile River agreement from 1929 and 1959). In the case of basin-wide approaches it seems that there is a gap between real and ideal legal principles. For example, in 1970 when the United Nations considered the Helsinki Rules, according to Biswas (1999), some states objected to the prominence of the drainage basin approach, which can be interpreted as an infringement on a nation's sovereignty.

The present study argues that it is unrealistic to expect a powerful riparian (in our case study, Israel) to relinquish its power advantage by accepting these three water principles, especially when the nature of the water dispute extends beyond water. 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—the Jordanians and the Palestinians—that, in order to change the power balance and enhance their access to land and water resources, endorsed the language of 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, the adoption of 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.

The Weakness of Creative Language

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 “creative ambiguity” was already found to be destructive, as both sides found it difficult to clarify under conflict (Fischhendler 2008). In the case of Israel-Palestinian agreement, due to the language adopted, some do not even 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” (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 (Huseni 2006). As a result, the 2000 water agreement draft agreed at Camp David (that was to replace the Oslo agreement) included more explicit language of international law, as it contains both references to “equitable and reasonable” and water rights language (Sher 2006). This entails the risk behind the use of such creative language in that it is still adopted in order to allow the more powerful state to cajole, or even force, the weaker state into submission. At the very least, by using its position of power, the

more powerful party can protect the status quo, which typically favors the stronger party.

Also in the case of the Red–Dead negotiations, many international and Israeli NGOs are dissatisfied with the exclusion of the entire basin, or at least the lower basin, from the feasibility study. As a result, many of these NGOs refer to the negative environmental externalities and inferior economic solutions that are adopted with the nonbasin approach (Bein 2011; Gavrieli et al. 2002).

Conclusion

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 1993). These conditions can often create conflicting patterns of interests such that under conflict conditions a basically nonpolitical issue, such as water allocation, can become politicized. These conditions, in addition to stochastic power asymmetry, were often found to impede cooperation in many environmental and especially water problems (UNEP 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.

This linguistic compromises forged are based on the fact that all players had specific objectives in entering into negotiations and that a failure to reach an accord would result in harm to both parties. This was clearly the case regarding the Dead Sea water conduit since such an agreement upon development would provide benefits to all parties.

While the solutions crafted by the parties have not been adopted by other states or regions, they constitute examples of creative 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. Yet, this study also highlights that

the negotiations do not occur in a vacuum but against the backdrop of asymmetrical power balance. This implies that the hegemonic state often is the one that set the tune in how the creative language would look like.

Acknowledging the political realities in crafting legal language for agreements still leaves us asking who typically comes up with the alternative mechanism or alternative principle—the stronger or the weaker state? It can be argued that the weaker state has an incentive to be creative in its relations with its more powerful neighbor; however, we can also argue that, because of its stature, the more powerful state is in a better position to formulate and suggest alternatives. The second explanation might fit with the conclusions of this paper, namely that Israel, as the hegemonic riparian, sought alternative terminology as a means of circumventing the Jordanian and Palestinian endorsement of traditional international law concepts.

At the same time, recognizing the importance of creative terminology implies that skillful negotiators and implementers able to exploit openings crafted by ambiguous language are assets that weaker parties need to cultivate.

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