

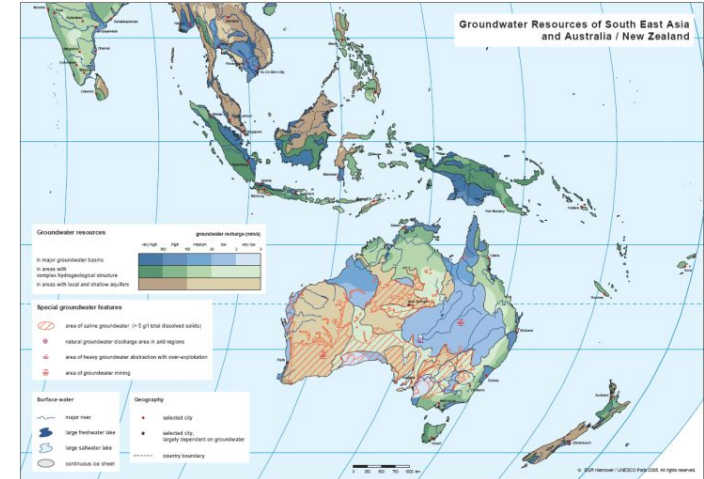
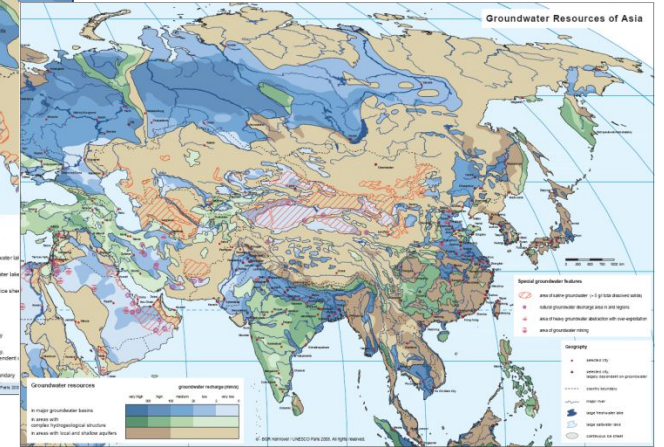
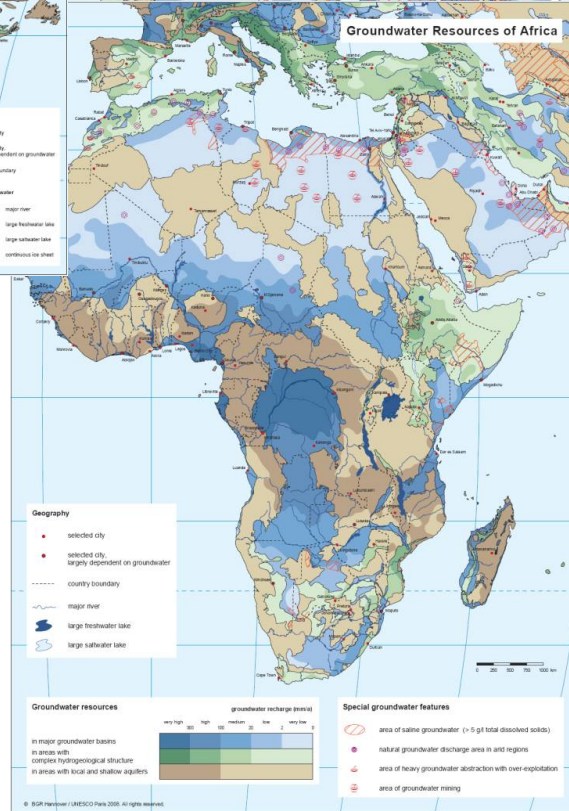
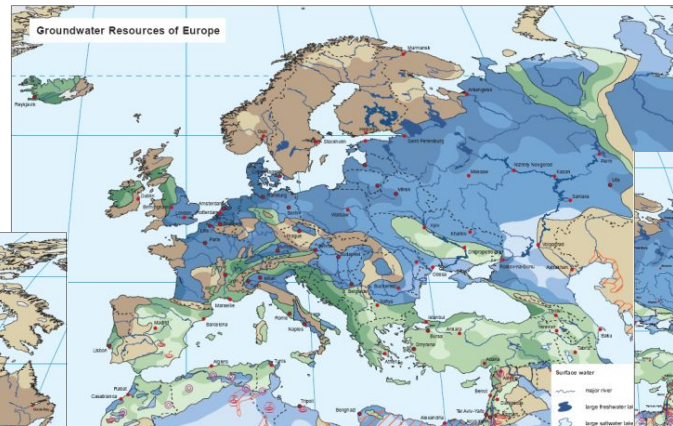
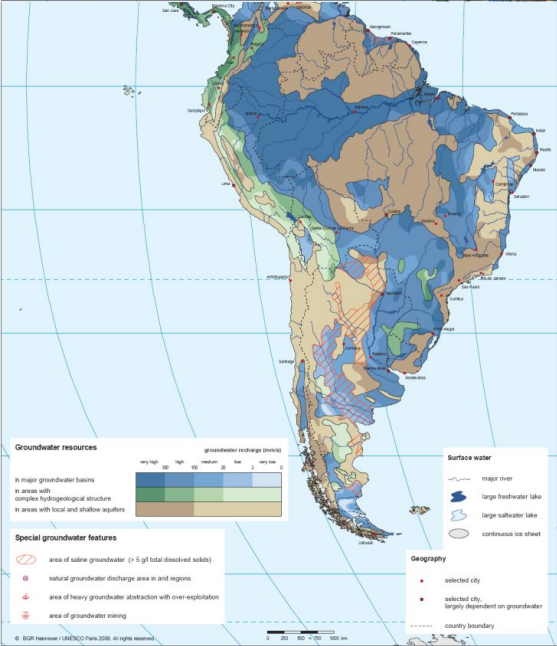
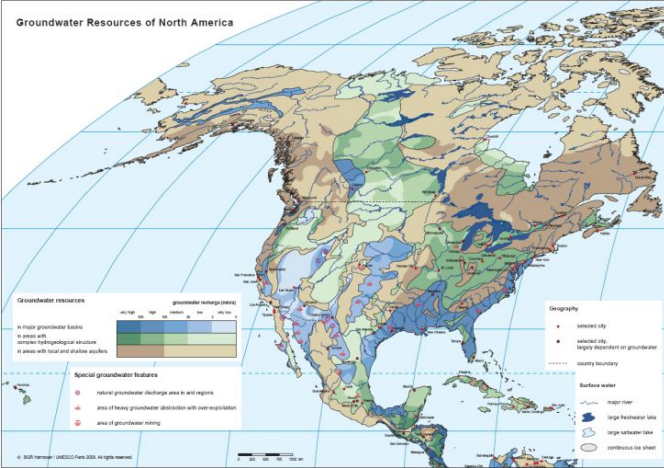
**From Conflict to Cooperation**  
**Techniques of management and resolution of conflicts**

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# Some 592 transboundary aquifers identified so far



## Climate change is our wild card

- The IPCC forecasts that arid areas will become even drier in the era of climate change
- This includes many areas containing shared groundwater resources





# How can we manage conflicts related to shared water ?

1- Legal principles

2- Extrapolating the principles

3- Beyond the texts: Diplomacy and Alternative Techniques





# **1- Legal principles**

## **International Water Law: main texts**

- The Helsinki rules of 1966 adopted by the ILA**
- The UN ECE Convention on the protection and use of transboundary watercourses and international lakes, Helsinki, 1992**
- The United Nations' Convention on the law of non-navigational uses of international watercourses, New York, 1997**
- The Berlin rules of 2004 adopted by the ILA**
- Draft articles on the law applicable to transboundary aquifers**

## The UNECE Convention, or the 1992 Convention or the Helsinki Convention

- Protects and ensure the adequate quantities, qualities as well as the sustainable uses of transboundary water resources
  - Specific measures to prevent pollution of groundwater
- Provides an inter-governmental platform for the day-to-day management of transboundary water resources and the promotion of transboundary cooperation around the use of water
- Initially negotiated as a regional legal tool (specific to the challenges of transboundary water management in the ECE countries)
- Becomes a framework convention accessible to any country member of the United Nations following the entry into force of the necessary amendments in February 2013
- Amendments providing that countries outside of the UNECE region can access the Convention starting the end of the year 2015



## UN Convention of 1997

- Codification effort
- Adopted in 1997 with 104 votes “for” and 3 against
- 27 years of negotiations
- Open to ratification by 35 states in order to enter into force
- Entered into force only on 17 August 2014
- Reflects general principles of law as well as customary law on the subject
- Referred to in the few cases of the ICJ even before its entry into force
- Enshrines the principles of:
  - Equitable and reasonable utilization of water resources and identifies a non-exhaustive list of factors to be taken into account in order to identify such utilization (principle perceived as protecting upstream countries rights)
  - Non-significant harm use of water resources (perceived as protecting the rights of downstream countries)



## Draft articles for the management of transboundary aquifers

- In 2002 the ILC decides with the adoption of its workplan to develop a set of articles applicable to the use and management of shared natural resources (water, gaz, oil). It starts by focusing on aquifers (v/s 1997 Convention)
- In February 2008 the ILC adopts the second draft of a set of 19 articles and transfers it to the General Assembly with a number of positive recommendations
- In December 2008, the General Assembly adopts resolution A/RES/63/124 on the law applicable to transboundary aquifers
- These articles contain:
  - Definitions and scope of competences
  - General principles of 1997
  - Protection and preservation as well as management of transboundary aquifers
  - Various provisions (emergency situations, armed conflicts etc...)

## Limits of the IWL

- need for consensus
  - no single international "ruler"
  - no enforcement mechanism ("world police")
  - lack of funding
  - vast differences in cultures, no real "norms"
- 
- ICJ can make decisions in regards to cases brought to it and for which it is competent to rule.
  - Its decisions aren't binding, though.



## **2- Extrapolating the principles**

## Towards “water rationality” \*

Principles of equity and fairness, without causing significant harm (viz. the UN Watercourses Convention of 1997) imply that water users have to respect the needs of other users.



Thus, users will have to (be willing to) forego some potential (and immediate) water benefits.

Why would water users voluntarily accept to forego benefits?

## Towards “water rationality” \*

If water users acknowledge that they depend on each other,

- not only in terms of water but also in other ways
- not only now but also in future

it may be rational for them to cooperate and forego some immediate benefits

- even for upstream users/countries
- even in cases where power-differences are large

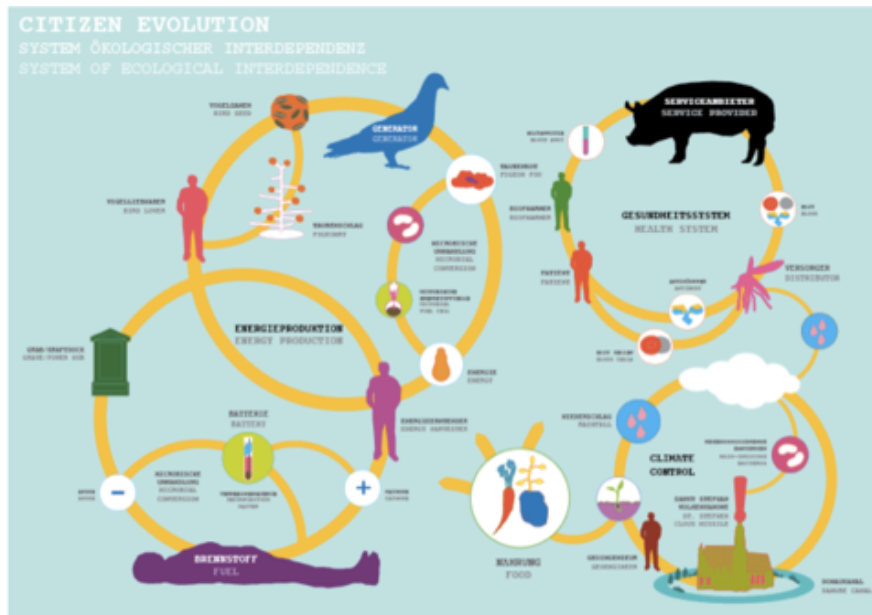
### Strategy:

1. make explicit the existing interdependencies between parties



## Towards water rationality \*

*Independence is limiting, but interdependent relationships are mutually beneficial*



2. actively seek to increase mutual dependencies

### Create interdependencies

- data sharing
- joint infrastructure development
- benefit sharing
- rewards for environmental services
- issue linking
- ..

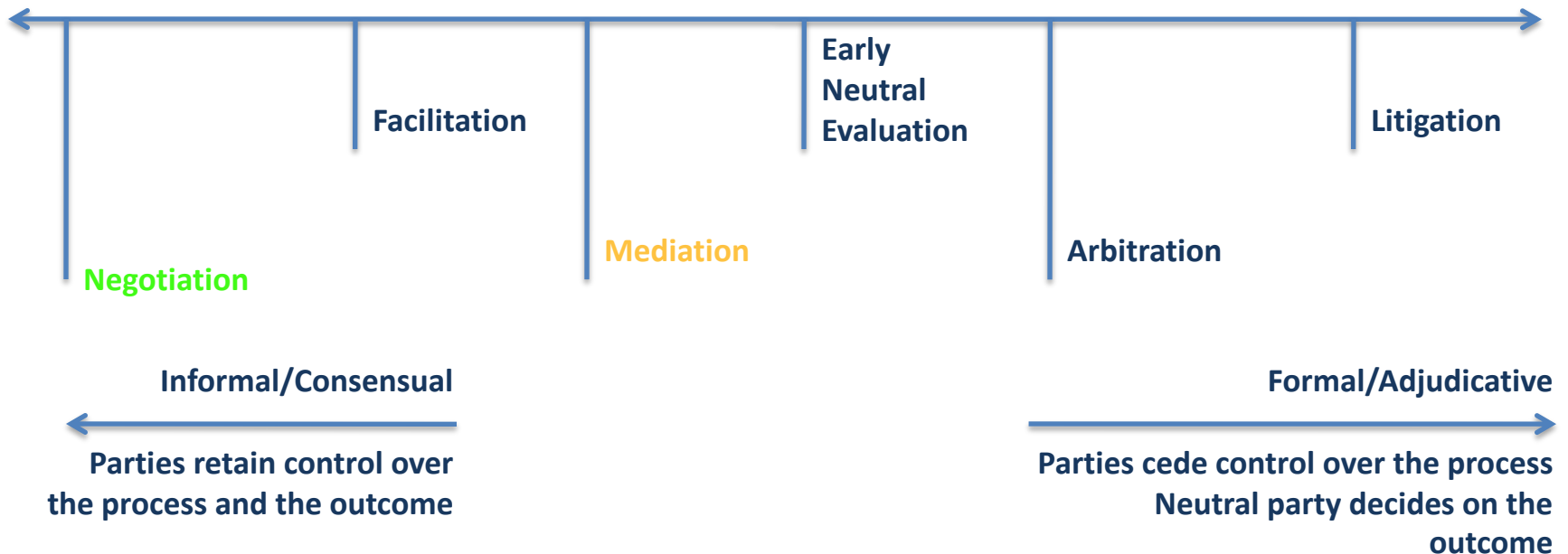
\* Alam, 1998

### **3- Beyond the texts: Diplomacy and Alternative Techniques**

The full spectrum of ADR go from Informal/Consensual processes where the parties retain control and decide the outcome to Formal/Adjudicative processes where the parties cede control and a third neutral party decides the outcome

Check techniques such as:

- Conciliation
- Settlement conferences
- Good offices
- Consensus building
- Impartial fact finding



## **Main legal principles applicable to transboundary freshwater disputes**

**Principle of equitable and reasonable use (ERU)**

**Principle of non-significant harm (NSH)**

- **Two sides of the same coin**
- **Codifying states' practice**
- **No priority of one over the other – Viewed by states as competitive.**
- **Difficult to apply. No practical guidelines – Viewed by States as elusive.**

**Unless states agree to their interpretation and application which is very seldom.**

## Judicial means for conflict resolution (ICJ)

- Applies legal principles
- Carried out by a tribunal with continued existence
- Can facilitate the homogeneous development and interpretation of international water law through the uniform and consistent production of judgments
- Did have a Specialized Chamber for Environmental Matters

### -BUT

- Specialized Chamber was never used and was not renewed after 2006
- Long and costly
- Ill-equipped to evaluate and incorporate data and technical matters in its decisions
- Zero-sum results based on the strict application of the law (which in the case of transboundary waters is not precise enough).



## Direct negotiations

- Parties control the process and the outcome
- Voluntary mechanisms
- Preserves the relationship
- High rate of implementation
- Not costly (relatively)

## BUT

- Reflects the parties' negotiating power
- It is political and subject to external pressure
- Reflects parties' technical abilities
- Subject to parties' bullying, denial and unreasonable tactics
- May be impacted by parties' political model, psychology, public opinion

Can be a first step....



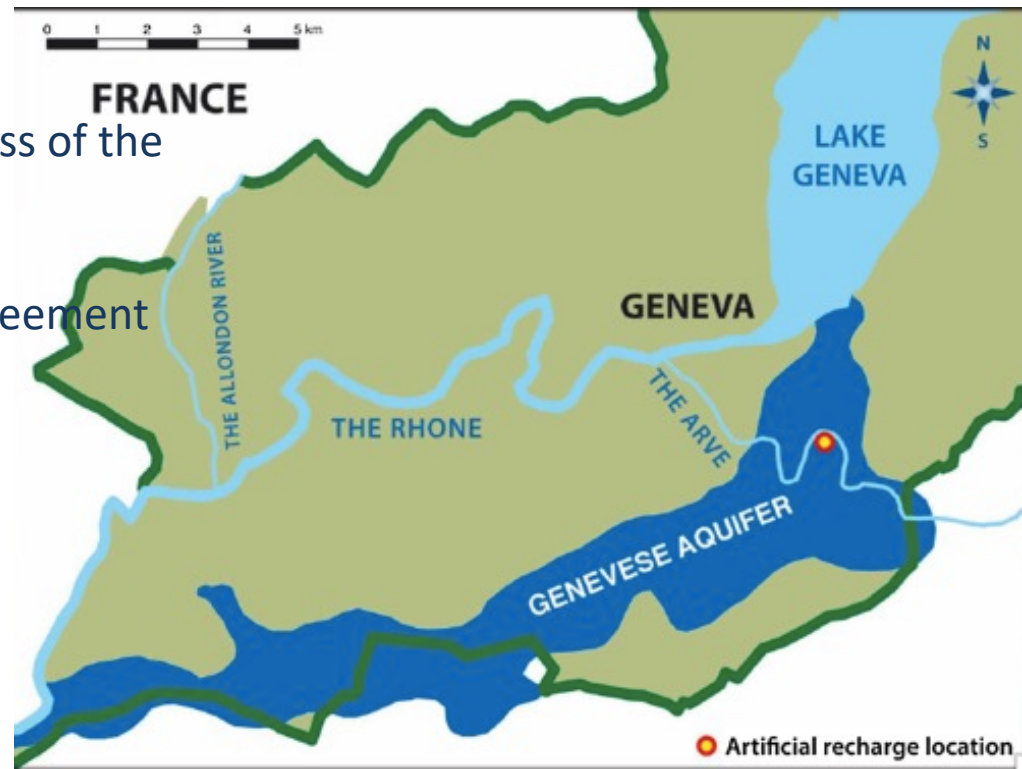
The Genevese transboundary aquifer has been overpumped during the 1960s and 1970s.

Negotiations to establish a joint water management between Geneva and France.

Agreements signed in 1978 and 2008 for the transboundary aquifer management.

Key elements contributed to the success of the agreements.

A rare example of a transboundary agreement management.



### **Third party's (mediation, good offices, fact finding, conciliation)**

- Flexible and may involve non-state actors
- May be offered by neutral states, international organization
- May also be offered by individuals acting freely, not encumbered by political issues
- Precise and facts' oriented with experts advice (in some cases)

### **BUT**

- May fail to produce affirmative and effective accord among states to follow-up on output
- May leave free way for States to potentially draw divergent conclusions
- May lead to further conflict concerning their actual application
- Mixed results: case of the World Bank in the Indus v/s case of the WB in the Nile.

## Arbitration in its “true nature”

Today’s perception and practice of arbitration:

- Deeply enmeshed with adjudication
- Applies legal principles exclusively
- Inappropriate for the resolution of complex conflict over a vital resource that involves non-legal, political and diplomatic input.

## **BUT**

- Originally an arbitrator was supposed to be able to consider the equity of a case and was not bound by the letter of the law like a judge.
- Was supposed to use “diplomatic” and “legal” means to reconcile parties

Over time... the process of arbitration was influenced by legal traditions and gradually evolved into a mechanism devoted to the application of the law where diplomatic adjustments were seen as flawed.

## **Arbitration in its “true nature” (*cont.*)**

A possible alternative option to States involved in TFD, where understood correctly.

Dispassionate third parties use facts, bring light to a dispute, assess claims positions and interests based on their merits, and render a decision aiming at reconciling the parties based on equity, justice and the respect of law.

Advantages, where understood correctly,

1. Applies through punctual tribunal: no political, prestige, symbolic values or historical ties get in the way.
2. Applies “practical justice” focused on the outcome and the resolution of the conflict rather than on the application of the law.
3. “Assigns to law basic but by no means exclusive function” (Pinto)
4. Balances legal and non-legal consideration and ensures the application of changing factors that do not reflect in the law.
5. Parties choose the decision-makers, who are familiar with the issues at hand if not expert in it who can assess and incorporate data and technical issues in their decision.
6. Parties can control the process
7. Outcome preserve the relationship, it avoids the “winner takes it all” verdicts, it preserves States positions, political and reputational costs.

## Tribunal de las Agua, Valencia



- Established in 960
  - Every Thursday
- In front of the Cathedral of Valence
  - Members of the Water Tribunal meet
  - Arbitrate during public sessions, conflicts related to the distribution of water coming from the eight canals that irrigate 1700 hectares where oranges, rice, grapes and peach are produced for the whole of Spain and for export
- The denounced person is mentioned by the Guard of the drain for the following Thursday
- Effective and respected by all the members of an agricultural community
- No lawyers.
- No documents
- No important economic costs
- No long bureaucratic proceedings that delay what constitutes the most elementary of the human rights: justice
- Subjects can only be delayed up to 21 days, by failure to appear of the denounced ones.





Dark Zone : 1950



Arvari River Parliament



Community working together for Jahod Construction



Jahod over Arvari River



Revived River

- 6000 Jahods (mud and rubble barriers built across the contour of a slope to collect rainwater)
- 2500 old structures rejuvenated
- 1058 villages concerned
- Water brought life back to the area
- 1996 onwards the Arvari river, began to flow to its full capacity

### The story of the “Arvari Parliament” or Arvari Sansad

- Story started in 1985-86
- Drought in Rajasthan/Alwar
- Dark zones were declared – warrant for the extraction of GW
- Tribal elder – NGO collaboration

Until...

- Intervention of a private Cie for fish catching
- Conflict erupted

## The “Arvari Parliament” or Arvari Sansad

Informal decision-making and conflict-resolution body

Revives old Indian traditions

Represents 72 villages, each of which sends two representatives.  
144 members nominated by their respective village institutions

Primary objective: safeguard Integrated and Water Management efforts of the community of river catchment

Follows Gandhian ethos of participatory, equitable and decentralized paradigm for water management (Jal Swaraj), where decisions are made at the grassroots not by centralized institutions

Policies and rules for integrated management of interlinked natural resources like water, soils and the forest for the wellbeing of flora and fauna

Convenes twice a year to deliberate upon best strategies for resource conservation and management issues

- Has no legal status.
- Decisions are not legally binding.
- BUT the moral force of the people makes its survival possible.



## Lazur rangeland management

- Hableh Rood river basin in the Province of Teheran
- Unique system of resources distribution for livestock breeding
- Permits are given collectively not to individuals



- Associations in the spring
- In front of the Mosque
- Division of the mountain by random drawing of Yurds names
- Equity and preservation of the resources

