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# THE LEGAL APPROACH



**Avenues for resolving  
conflicts over the use of  
water**

AVOCATS



## **PECC INTERNATIONAL PROJECT 2007-2009**

**NOUMEA : Second seminar on water management in  
Island coastal and isolated areas**

*Towards a better governance in the management of  
water*

# THE OPPOSING INTERESTS



- I need water
- I have no access to pure water
- I have no access to water
- Water I can consume is bad quality
- Water is too expensive
- I have no money to pay water
- Next generations have no future
- I have water
- I consume pure water
- I don't want to share water
- I waste water
- I pollute water
- I can pay water
- Or I don't pay water !
- I don't matter what is going to happen in the future

# THE STAKES \*



- A sustainable and responsible integrated and long term management of water,
- The preservation of water quality,
- An access to water for all populations victims of exclusion: island or isolated areas,
- A fair sharing of water.

\* Millenium development objectives



- Between operators and users
- Between public entity and private operator
- Between geographical, economic or social category of users

# FOUR FUNDAMENTAL QUESTIONS



- How to save and share water resources?
- How to regulate water's waste and water prices?
- How to solve conflicts between different types of use : domestic, industrial and agricultural ?
- **How to share a common and sustainable vision of the future in water governance?**



**Let's start with the conclusions  
... .. of BORA BORA**



1. Settle new rules with incitation and financial penalties,
2. Define the good levels of governance, and eventually create local water agencies or committees with a subsidiary power,
3. Reinforce the strength of the contract when regulation is weak, for example through Public Private Partnership and favour firms' innovations and their diffusion,
4. Conceive and sign a framework agreement for water management in Island territories, coastal regions and isolated communities to establish institutional perimeters of solidarity : geographical or social, or functional, or economic,  
(for ex : *Convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation*)
5. Create a new entity and alternative procedure of conflicts resolution.



# MEANS TO PREVENT CONFLICTS



**Then, as no specific modes of resolution of water conflicts prevail, the best way to solve conflicts is to prevent them :**

- By the rules and strong regulations : dissuasion and sanctions,
- By a better governance and control,
- By the contract which federates financial means, competences and technologies,
- By alternative modes of resolution of disputes,

# Virtuous circle of water

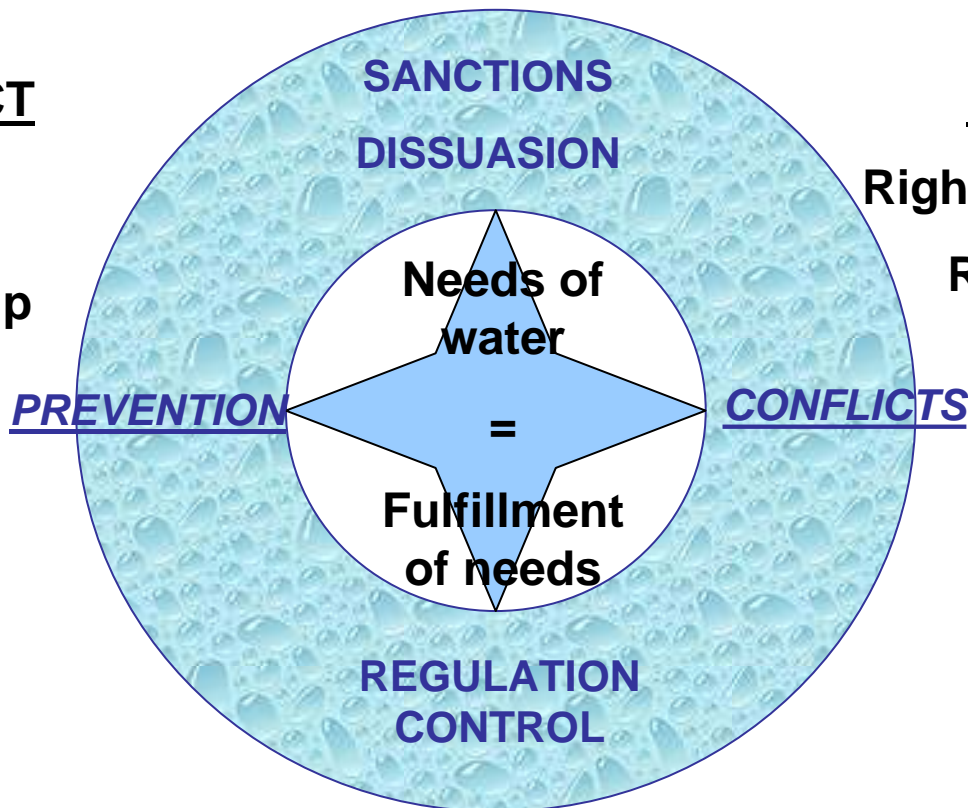


## CONTRACT

Public  
Private  
Partnership

## REGULATIONS

Rights / Obligations  
Responsibilities



## GOVERNANCE

Authorities / Organization

**AGREEMENT TRANS-TERRITORIES/BOUNDARIES/ACTIVITIES**



# 1. RULES



## At the global level

- A necessity : an efficient, coherent and sustainable **water policy**,
- Common and essential **principles** : **guarantee of access to water** “*water is not a consumer good to sale but an heritage to protect* “(european directive 2000/60/CE October 23 of 2000 setting a framework for a european water policy),
- A « **directive** » for preservation, protection, improvement of environment and rational use of natural resources with **sanctions**,
- A **global program of actions** well adapted to local contexts,
- The elaboration of environmental **quality standards (mandatory or voluntary)**,
- Actions through prices adjustments (taxes against pollution \*... )

\*France, Germany, Netherland



## At the local level

- Rules and procedures for solving trans-frontiers problems within the boundaries of a common hydrographical basin
- Obligations of surveillance by each entity of the concerned community or through an independent third party, with implementation of measures.
- Specific rules and rights of property can also be necessary to organise new market areas.
- About quality standards, and as an alternative way, dialogue and agreement between stakeholders regarding the good level of quality (best efforts clauses and practices)



- Around 20 EU Directives since 1972,
- The outline EU Directive (*n° 2000/60/EC, 22 of December 2000*), with ambitious objectives 2015,
- The EU Directive (*n°2004-35, 21 avril 2004*) that settles an environmental liability end organizes a peculiar system of administrative police for, among others things, damage to water environment when it's represents a risk for human health.
- What about the EU Directive (*n° 2003/87/EC, 13 October 2003*) establishing a scheme for greenhouse gas emission allowance trading within the EU Community? Is it possible to imagine a similar system for water, is it opportune? Water use permissions or rights water use with rules to organize?

# EX : FRENCH GOVERNANCE RULES



Last French law on water and aquatic environment ( *n°2006-1772, 31 of December 2006*)

- **gives tools to French administration and local authorities :**
  - to plan management of water resources
  - for quality of water,
  - to adapt the management of water and sanitization public services as regard to transparence, solidarity and environmental efficiency,
- **renovates water agencies,**
- **fightes against pollution** with subsidies, taxes and license fees,
- **reinforces water police,**
- **reinforces powers of control of local authorities,**
- **creates a guarantee Fund.**

# FRENCH LIABILITY RULES



- **A code of environment**, with the main principle “**pollueur-payeur**” or “**polluter-pays-principle**” ( *law n° 95-101, 2 of february 2005*) of prevention and reparation obligation,
- **Constitutional charter** ( *1st of march 2005*), with the principle of **environmental liability**,
- **Legal precedents** :  
The ERIKA case, ( *TA Paris, 16 of january 2008*), the court recognizes the existence of ecological damage and responsibility and the ability of the administration or environmental associations to act with peculiar mission,
- **Transposition in progress of the 2004 directive**, future law ?  
increase of liability? integral amends for damage? penalties system?





## **2. GOVERNANCE**



- **Mechanisms of market are necessary but not sufficient** to allocate scarce resources,
- Over 200 hydrographical basins in the world ignore political frontiers, **governance is the main problem in water problem**
- Water difficulties are always linked to :
  - local, regional and international components,
  - sociological and cultural components,
- **Scarcity has to conduct to new models of regulation and governance** of production and sharing out, with a link between the global and the local level,
- Very few entity of regulation and very often no national water policy (UN 1997),  
**UN thinks about creating a Water Agency or Committee.**



- **Water Academy** for prospective thoughts,
- **Ministry** diffuses guidelines regarding the regulation to apply,
- **National water committee** : research, expertise, evaluation, elaboration of programs, control of the resources, financial solidarity between basins,
- **Basin committee: good level for integrated management and** to define strategic orientations, link between state, public local authorities, users and associations, and to give technical and scientific assistance to the services of water agencies,
- **Water Agency ( national water service)** or others kind of committee : intermediate organisms (*law on water and aquatic environment n°2006-1772, 31 of December 2006*)
  - Mission of solidarity with the rural world,
  - To measure quantity of water consumption and quality of water,
  - To share water, along its natural life-cycle,
  - To regulate on basis of solidarity included financial one,
  - With no extra cost for the user !
  - Trust determined by public strength or by independence both from public power and private economic operators.
- **Public local authorities** or group of authorities (“intercommunality”) in charge of the public services with their possibilities to mobilize private operators and investors.

# Ex : AFRICAN RECENT EXPERIENCE



- **A selective approach** concentrated on supplying water in rural areas,
- **The creation of a Fund in 2002** (la Facilité africaine de l'eau) managed by ADB to enable states to:
  - Reinforce their financial and human capacities,
  - Reform the general legal and institutional framework,
  - Valorise and diffuse information,
  - Define and settle the regulations frameworks
  - Develop exploitation and maintenance means.
- **A coordination** by the ADB, between all the countries and the local economic entities, rather than an individual approach, even in the infrastructures field,
- **A progressive transfer of water management** toward the regional or local public entities, through « **water management unities** », is organised to assure proper maintenance of the networks and an adequate control of prices and quality,
- **A control from the African Ministerial Conference.**



### **3. An adapted economic and contractual pattern**



At the central or local level, to look for :

- a « public – private » equilibrium,
- a « public –private » partnership.

Through, before :

- Concession of work and services (Casablanca)
- Build, Operate & Transfer (Sydney)
- Exploitation, maintenance et services (Dunkerque)...

**Through PPPs that is the solution that presents the biggest potential for contractual invention and adaptation to diverse social and cultural contexts**

# TOPIC POINTS OF « PPP »



**PPP has different contractual realities, but is always a tool to :**

- Mobilize and optimize **massive financing** with serious guarantees,
- Improve forms of **governance** and efficiency of management of public services,
- Establish a clear breakdown and **allocation of risks** between strong supervising public authorities, service private operators and financial institutions,
- Transmit **formation** of local professionals and **education** of populations,
- Implement **sustainable development policies** through long term vision and day-to-day management preserving future generation,
- Build **trust between partners**, with the staff retained, with the consumers, with the population,
- Organize **economic stability and predictability**,
- Offer disposals about **disputes resolution**.

# TOPIC POINTS OF « *water* PPP »



- **Clear sharing of responsibilities and benefits** for an equilibrated relationship,
- **Governance by contractual means** to regulate ( by the contract or a third person) and fulfill the political engagement for an equal access to water for all people,
- **Regulation of water prices** by public authorities
- **Incentive measures :**
  - either a mix of public financing and private management only remunerated by fees based on volume (percentage of new users) , to protect poor populations from discrimination,
  - or a mix of private financing and public subsidies (output based aids) for realizing new infrastructures to bring water to isolated places,
- **Good balance between financial and social aims**, by taking into account populations' capacity of payment
- **Clause of best efforts and resolution of disputes.**





## **4. ENTITIES AND PROCEDURES to resolve conflicts**

# WAYS OF CONFLICTS RESOLUTION



## **Three means to answer needs and resolve disputes:**

- Define a (local or regional) area of solidarity
- At this level of solidarity, recognise or create a supra-local entity to regulate the conflicts about water property and water waste,
- Search for solutions through regional dialogue between public entities, users, associations and NGO.



## Domain name dispute resolution service

- **WIPO\* Arbitration and Mediation Centre**
- Based in Geneva, Switzerland, the WIPO Arbitration and Mediation Centre was established in 1994 to offer [Alternative Dispute Resolution \(ADR\) options](#), in particular [arbitration](#) and [mediation](#), for the resolution of international commercial disputes between private parties. Developed by leading experts in cross-border dispute settlement, the procedures offered by the Centre are widely recognized as [particularly appropriate](#) for technology, entertainment and other disputes involving intellectual property.

\*World Intellectual Property Organization



**Let's finish with conclusions ...  
... of NOUMEA**



To support and complete BORA BORA proposals :

## Recommendations at the multilateral level

1. Prepare a framework agreement for water management in Island territories, coastal regions and isolated communities to establish institutional perimeters of solidarity : geographical or social, or functional, or economic,
2. ***Create Island, Coastal and Isolated Areas Committee for water, to establish the basis of a global governance,***
3. ***Define a water policy and articulate it with existing policies and sectoral policies ( cities, agriculture, industry, tourism, biodiversity) in the concerned areas,***
4. Create a new entity and alternative procedure for dispute resolution.

## Recommendations to governments


1. Settle new rules with voluntary or mandatory recognition of quality standards, incitation and financial penalties,
2. ***Establish the framework of an ecological damage or disaster and ecological responsibility, (polluter-pays-principle)***
3. ***Define scheme for “water pollution allowance trading”,***

## Recommendations to utilities

1. Define the right level of local governance, and create local water agencies or committees with a subsidiary power,
2. ***Create a monitoring third independent entity,***
3. ***Favor circulation of water data between stakeholders and “selfregulation” via best efforts practices for guarantying quality of water,***
4. Reinforce the strength of the contract when regulation is weak, for example through Public Private Partnership.
5. ***Favour firms’ innovations and their diffusion, education, training and transfer of know how.***



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