

WCD Thematic Review V.4

Institutional and Governance Issues

**Regulation, Compliance and
Implementation**

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This is a working paper prepared for the World Commission on Dams as part of its information gathering activities. The views, conclusions, and recommendations contained in the working paper are not to be taken to represent the views of the Commission

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Executive Summary

Introduction

The World Commission on Dams is testing a premise: that it is possible to agree on a new basis for reaching decisions on large dams that will satisfy all significant players in the dams debate that their principal interests have been addressed adequately.

If the diverse and often conflicting interests surrounding the dams issue have vested trust in the Commission, it is in part because the traditional approaches to decision-taking on dams have too often yielded projects which have been economically questionable, environmentally harmful and socially disruptive. As a result, dam-related developments have become increasingly contentious and the opposition to ill-advised dam projects has become more vocal and better organized.

From the Commission's work, each part of the dams community is looking for a level playing field. Governments are looking to minimise controversy and increase efficiency in reaching the objectives for which dams are constructed. Civil society is looking for greatly increased transparency and participation. Affected peoples are demanding improved accountability and equity. And the industry players are looking for greater predictability and operational clarity, and lowered risk in dam projects. For all four, the success of the Commission is important if their interests and needs are to be met.¹

Although the dams issue is complex, multifaceted and covers a broad range of disciplines, it is nevertheless focused enough to be manageable and the Commission has an opportunity to lay the foundation for a radically-changed approach to decision-making related to dams. But it has often been said that the issues that WCD is grappling with are not confined to dams alone, and indeed could apply with little modification to all large-scale development interventions. If this is so, the significance of WCD's work could be even greater than initially anticipated.

The Changing Context

At the same time, WCD is not working in a vacuum. If the dams debate has reached a stage where a Commission of the WCD's character could even be envisaged, it is because the debate is taking place in the context of a rapidly-changing understanding of and approach to development and governance. This rapidly-changing context is leading to new demands for more sensitive development, decision-making and relations between social and economic groups. Although this is a very dynamic process, it is possible to discern a number of trends, although we are still a long way from satisfying these new demands.

- (a) The world appears to be set to move beyond the growth paradigm, where progress was judged largely in economic terms and a strong premium was attached to activities which offered a clear financial return.
- (b) There is a detectable shift in the way public interest is defined from one which placed a premium on techno-economic interests (such as provision of more megawatts of electric power) to one which places much more weight on the rights and interests of people and communities affected by development activities ; with a focus on equity in the spread of costs

¹ This statement does not imply that the needs and capabilities of the various groups are equivalent. Indeed, there may in fact be an inverse relationship between need and capability with negatively affected people's needs being greatest and their capabilities the weakest.

and benefits from development,² including the concept of inter-generational equity in dealing with resource use.

- (c) Roles and responsibilities among the public and private sectors and civil society are changing.³ This is not to say that the role of governments has become less important; simply that it is pressed to change its character.
- (d) The role of civil society organisations has, by contrast, expanded and their legitimacy in representing and defending interests, in participating in decision-making on development, and in monitoring compliance is increasing, although not unchallenged.
- (e) The private sector has also considerably expanded its role, undertaking functions that were once – and not long ago – the exclusive remit of government.
- (f) The recent emphasis on good governance is shifting to insistence on transparent and participatory decision-making, which requires that the range of stakeholders not only be consulted but be empowered to negotiate in the taking of key decisions affecting them.
- (g) The concepts of legitimacy and accountability are becoming pillars of the new order,⁴ and decisions that have not been taken in a context that guarantees their legitimacy are increasingly being challenged. Legitimacy is being evaluated on the grounds of transparency and openness, and participation. And stakeholders are now developing ways to hold decision-makers and developers accountable for the fulfillment of their undertakings.⁵
- (h) There is a growing body of international instruments relating to human rights, as well as institutions to oversee their further development and application. While little of this is binding and enforceable, there is a growing sense that development activities will be

² It appears probable that other equity-related concerns will similarly gain weight on the scales of development decision-making. Although radical improvement is required in the effectiveness of development initiatives if the incidence of inequity that prevails is to be lessened.

³ There has already been a considerable migration of national government authority, in three directions: upwards to regional superstructures (eg. the European Union) or to international regimes (eg. the trade regime administered by the WTO); downwards to provincial and local government levels; and outward to the private sector and to civil society.

⁴ It is interesting also to note that the same principles and issues have arisen in a number of processes dealing with a broad range of issues. They are currently informing a global process, led by the International Institute for Environment and Development (IIED) and the World Business Council on Sustainable Development (WBCSD), looking at how to make mining more compatible with the goals of sustainable development. They were precisely the principles and issues faced in Brazil with the construction of the Trans-Amazon highway. And they are no different from the principles and issues which emerged in the work of the World Commission on Forests and Sustainable Development.

⁵ These notions are not simply being discussed and experimented with, they are rapidly becoming jurisprudence at the international level. In respect of legitimacy and accountability, several recent legal texts have begun to establish a new standard for transparency and accountability. Even though these are still restricted to a limited number of countries or topics, they nevertheless bear witness to an emerging international standard in this area. For example, the OECD Convention on Combatting Bribery of Foreign Officials in International Business Transactions (1997); the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Measures (1998); and the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998) are relevant recent examples.

increasingly open to question and challenge if they infringe on these rights in a substantial and systematic way.

- (i) The mechanisms for oversight of human rights are growing steadily stronger and more influential, both at national and international levels, and these strengthen the arguments in favour of greater transparency, participation in decision-making and accountability for compliance.⁶
- (j) The notion of the right to development is beginning to develop a normative framework for specifying responsibilities in applying the human rights approach to development. In future, it is unlikely that approaches based on a narrow assessment of costs and benefits of specific actions will be tolerated if they do not adequately take into account the real impact of those actions on the rights and welfare of all those affected.⁷
- (k) In the development assistance field, there are declarations of a shift in aid policy towards a focus on poverty alleviation which, if genuine, could reinforce the notion of right to development.

These trends both inform and bolster the work of the Commission.

Focusing in more narrowly on dams, these trends broaden the range of concerns that have a legitimate right to be considered, and therefore of the actors involved in reaching decisions. It will be increasingly impossible to take decisions on the narrow basis of the presumed needs and technical studies of infrastructure development. Instead, dams will have to be considered as part of the broader process of social transformation. Failure to see that is - simply put - socially irresponsible, and has the effect of shifting costs onto vulnerable people or future generations.

On the environment side, that transition is more advanced though far from complete. Although implementation of dam-related environmental measures continue to be plagued with compliance problems, nevertheless there are few dam developers who can now afford to downplay the importance of a dam's environmental impacts, or not to present evidence of taking these impacts seriously. And there are strong signs that what has happened on environmental impacts over the past decades is beginning to happen, in the same way, to social equity concerns. But according equal importance to social, environmental, economic and engineering considerations must be speeded up. Indeed, this is one of the major aims of the Commission.

Thus the legacy as well as the new context for large dam construction now require that the full range of legitimate stakeholders meaningfully negotiate in the taking of the key decisions, on the basis of full access to the necessary information and a clear understanding of the likely costs and benefits to them. If, then, they endorse the decision reached, they will have played a part in reaching that decision, and therefore in evaluating the level of risk involved in achieving the desired benefit. The equity and liability picture will have shifted considerably.

A New Politics of Decision-Making

⁶ Pressure from the human rights community has had an impact not only on governments but also on corporations, as the case of labour conditions at Nike manufacturing plants in Asia has demonstrated.

⁷ As evidence, it is interesting to look at the way in which the rights of indigenous peoples have gained recognition over the past decade. Once routinely disregarded, we are now on the point where developments likely to have a significant negative impact on indigenous peoples will invoke serious questioning.

Arising from this background and context, it would seem that the principal challenge of the Commission is to help provide a new basis for reaching decisions on dams that are acceptable to all key stakeholders. The assumption is made that if the process for decision-making is more open, more participatory, more thorough, characterised by greater integrity, more informed by considerations of equity, and less susceptible to influence on grounds of economically-based interests, then the decisions reached are likely to be more legitimate, enjoy wider support, and more likely to be implemented in good faith. Should this be the case, the resulting dams are likely not only to be appropriate from an engineering design and economic point of view, they are likely to advance social equity and environmental sustainability as well.

Put simply, better decision-making leads to better decisions, and better decisions increase the likelihood of better options being selected, including potentially more acceptable dams. So the focus is on a decision-making process that would lead to more acceptable decisions and more equitable and sustainable development.

But this cannot take place in a vacuum. The decision process is in essence a process of interpreting and applying the body of norms by which a society chooses to govern itself as well as those specifically directed to the enterprise in hand. That is, the regulatory and compliance framework.

Regulatory frameworks (laws, policies, criteria, guidelines and standards) provide the principles and procedures, incentives and sanctions that govern decision-making potentially involving dam projects. Affected peoples, lenders, developers, consultants, government agencies, nongovernmental organisations, etc. all require effective regulatory frameworks in order to be clear of their expected rights and responsibilities. In their absence, it is difficult if not impossible to adequately address the range of issues that arise in the planning and project cycle in which dams might be an option. Countries and organisations that have well-developed and effective regulatory frameworks are thus more likely to have efficient and more accountable decision-making processes.

But more regulation is not always the answer. Indeed, while existing regulatory frameworks may or may not be perfect, lack of compliance with and poor implementation of these laws, policies, criteria and guidelines often results in a more conflictual and less efficient decision-making process. The factors that contribute to non-compliance range from non-transparent decision-making to weak incentive and sanction mechanisms to the lack of human and organisational capacity. On the other hand, there are a number of options that might be recommended for increasing the implementation of good practice such as monitoring by independent panels of experts, performance bonds linked to timely compliance, appeals and dispute resolution mechanisms, and even national or international certification systems.

Improving Regulation

There is broad body of regulation potentially or explicitly applicable to dams-related decision-making - at the international and national levels, within both the public and private sectors. However, there is no single statutory formulation that accumulates and reflects them. The sheer multiplicity of sources and layers that may be applicable to dams decision-making and operations results in an unsystematic and unstructured bundle of principles and provisions.

The multiplicity and incoherence of existing regulations seems to negate their full and effective use. In other words, it may not be that more regulation is needed - but there is a great need for clarification, rationalisation and specification.

Many countries have not only national-level policies and procedures to govern dams-related decision-making, but also are signatories to numerous applicable international treaties and conventions. These include, among others, the Convention on the Non-Navigational Uses of International Watercourses,

Convention for the Protection of the World's Cultural and Natural Heritage, Convention on Biological Diversity, Convention on Wetlands of International Importance, etc. More than 100 countries, for example, have signed the conventions on biodiversity and wetlands. There are also the various elements of international common law, including those on human rights, social and economic rights, indigenous/tribal peoples that also have been promulgated.

The provisions of these international conventions, treaties and other legal instruments directly apply to dams-related decision-making. In countries where national level regulation is weak, these international legal instruments might provide considerable guidance for dams-related decision-making. Given that international organisations are dependent on states for their legal existence, they too are obligated to these international conventions and treaties.

Dams and dams related projects funded by multilateral development banks (MDBs) are covered by a fairly broad set of policies, criteria and guidelines that have been adopted since the 1980s as a result of lessons learned from experience and public criticism. Although there is still substantive contestation over particular policy areas, issues related to economic analysis, technical requirements, and social and environmental aspects ranging from information disclosure to environmental impact assessment to resettlement and public participation are covered.

Ironically, the development of this broad set of regulation has occurred at the same time that the amount of funding from MDBs for large dams has decreased. Nevertheless, the regulatory frameworks of MDBs are still not internally well-integrated across the planning and project cycle or across sectoral areas. They are also still lacking coherent policies to facilitate options-assessment upstream in the decision-making process, or post-construction management including monitoring, operations, and the use of existing assets which is of increasing relevance as the number of new dams being built decreases and the stock of existing dams continues to age. Finally, the policies, criteria and guidelines of the various MDBs are not harmonised.

Indeed, harmonisation of the regulatory frameworks within and across countries, international organisations and private sector firms remains uneven. Numerous northern countries have bilateral agencies (like the Canadian International Development Agency) and/or export credit agencies (such as Germany's Hermes) which also fund or support the financing of a large number of dams and dam-related projects. Bilateral aid agencies vary in the stringency of the requirements they have for supporting dam projects. And while they are relatively small actors in the dam sector - their funding for specific aspects of projects can be critical.

On the other hand, data on export credit agencies indicate that they are increasingly the largest public financiers of large scale infrastructure projects in developing countries. It appears from the evidence, however, that very few export credit agencies currently have environmental (or other) safeguard policies that govern the funding of large dam projects although some such as the US Exim Bank and Japan's JBIC are moving in that direction.

There are countries in which regulation in certain areas have been cited as well formulated such as China's resettlement policy, South Africa's water law, Australia's dam safety regulation or Vietnam's licensing requirements. There are a few countries, such as Norway, that have strong and comprehensive regulatory frameworks. Of course, national constitutions are the ultimate source of individual and group rights and responsibilities; given democratisation trends globally, these have become more elaborate over the last two decades.

Correspondingly many countries have updated their policy and regulatory framework in the 1990s to give a stronger base to environmental and social concerns, public participation, efficiency and cost-recovery. But clear gaps continue to exist within most national regulatory frameworks. Existing regulations in most countries tend to focus on project appraisal and implementation with insufficient

focus on a level-playing field for options-assessment planning upstream in the decision-making process where fundamental choices are made, or "downstream" in the areas of monitoring, operations, relicensing/replanning and decommissioning. Regulation on social issues such as those protecting indigenous peoples, on resettlement and downstream social impacts remain underdeveloped.

Moreover, in recent years, numerous countries have undertaken reforms towards deregulation and privatisation, particularly in the energy sector. As a result, the role and importance of the private sector in dam financing, construction and operations, particularly those involving hydropower, seems to have increased and may continue to do so - although this is still an uncertain prospect. This raises critical issues about the adequacy of extant regulatory frameworks of states and international organisations, and private sector firms.

Firms contribute to their own self- regulation through codes of conduct and generally through terms and conditions in specific contracts. Although few specific such company codes of conduct seem to exist specifically for dams (Hydro-Quebec is one such firm that does), there are various types that are applicable including: 1) sector wide standards such as OECD's Code of Conduct for Multinational Enterprises or the ICC Business Charter on Sustainable Development; 2) those adopted by individual companies on corporate social and environmental responsibility, and 3) guidelines of various professional associations like the International Commission on Large Dams.

The second way in which the corporate sector contributes to the regulation of dams-related decision-making is through the terms and conditions they establish in their contractual relations. Thus, financial institutions and developers which include/fail to include social and environmental covenants in their loan agreements and contracts help/fail to ensure that a dam project will comply with good social and environmental practices. The key point is that because contracts are binding and enforceable legal documents, the terms they set can shape the performance and effectiveness of a project.

Enhancing Compliance

The existence of varying sets of laws, policies, guidelines and criteria at different levels and in different organisations continues to generate a lack of clarity and conflicting messages about the rights, responsibilities, risks and rewards for different stakeholders. Moreover, however well formulated, these regulatory frameworks governing dams-related decision-making are not necessarily guarantees by themselves that compliance and implementation will occur.

Compliance is about abiding by regulations, agreements and understandings. If the work of WCD is aimed at creating a new basis for decision-making in relation to large dams that respects internationally accepted criteria and guidelines, and if applying this new approach is to reduce the controversy that has characterised dam development in the past, it is important to review and further develop the tools and mechanisms through which compliance with agreements is monitored and enforced. While political will or altruism are hoped for, it is unlikely that these exist in sufficient quantities in most contexts.

Indeed, from the emergent WCD knowledge base, it is increasingly clear that various factors often inhibit compliance and the implementation of good practice. These include:

- incompleteness, incoherence and ambiguity of regulations,
- non-enforceability of international law,
- underspecification of social and environmental requirements and integration of these components into the implementation schedule of projects,
- lack of transparency and corruption at key points in the decision-making process,

- lack of meaningful participation at key points in the decision-making process,
- low levels of monitoring that effectively feedback into decision-making,
- weak or non-existent legal recourse and appeals mechanisms, particularly for negatively affected and vulnerable groups,
- lack of political will and interest,
- lack of human, organisational and financial capacity

The range of mechanisms and tools, some of them existing but not widely utilised, that could increase the likelihood of successful compliance and implementation of good practice correspondingly includes:

- clear and rationalised regulatory frameworks governing dams-related decision-making that define the rights, responsibilities, risks and rewards of all stakeholders,
- self-regulation through the appointment of in-house compliance officers,
- independent and well-funded monitoring by multi-stakeholder groups or expert panels throughout the planning and project cycle to ensure not only implementation but quality,
- integrity pacts in which all principals and agents contractually agree to not engage in bribery or corruption,
- access to credit/equity or better terms of credit for agents that accept and implement guidelines and criteria in a timely and acceptable manner,
- social and environmental performance bonds set aside specifically to ensure that commitments in these areas are fulfilled,
- contingency funds to increase the likelihood that the manifold unanticipated impacts of dam construction can be addressed,
- appeals, recourse and adjudication mechanisms in cases of non-fulfilment or conflict, such as multi-stakeholder monitoring groups, independent inspection panels, dispute resolution boards, or ombudsmen at the national or international levels,
- licenses that require periodic reappraisal of the state of existing infrastructure and the range of options available for meeting societal needs,
- national or international certification systems that "stamp" good practices,
- human and organisational capacity building.

Within this broad list, several seem to stand out as particularly interesting and viable. In the short term, the adoption of codes of conduct backed up by public exposure is a viable strategy for increasing the cost of non-compliance. In addition, in-house compliance officers or units such as that recently been set up by the International Finance Corporation, or panel of experts like those required for some World Bank funded projects, or multi-stakeholder monitoring arrangements such as those recently introduced in Japan for over 100 projects could be useful.

Over the medium-term, strong incentive and sanction mechanisms may add further "teeth" to the compliance framework for dams-related decision-making. Integrity pacts, which legally obligate parties not to engage in corruption or bribery, with stiff penalties for non-compliance could become widely accepted as standard practice for decision-making around dams and other large infrastructure projects. Assurance or performance bonds, where a sum of money - usually equivalent to the full value of potential worst case costs to be remedied in the event of damage resulting from compliance failure - is posted to be redeemed upon satisfactory implementation of agreed activities, could be helpful too. One interesting example is an environmental bond associated with Placer Dome's Equity Silver Mine in the United States in which \$28 million was set aside, administered by a committee that included community representatives, the state environmental department and the mining company.

An area that also could be developed over the medium term is that of strengthening existing and creating new redress and dispute-resolution mechanisms. The various inspection panels of

multilateral development banks were established to hear appeals and mediate conflicts. Similar ones might be adopted by other financing institutions or even by countries. Countries might find these alternative dispute settlement mechanisms more efficient and less onerous than a series of cases that add further burdens to already overloaded court systems.

The experience of mediation and arbitration mechanisms within the private sector should also be explored. The International Chamber of Commerce, for example, has a long history of international commercial dispute resolution and its International Court of Arbitration has administered over 10,000 cases since 1923. More recently, it has established services in conciliation through its 1988 ICC Rules of Conciliation and set up a system of dispute review boards and experts. Integrating social and environmental issues and making these arrangements more transparent might serve the purpose of increasing compliance in dams-related decision-making as well.

Over the longer term, legal/regulatory action and certification processes could be engendered. Legal reforms in areas that are consistently weak across national and international systems may be vital to not only to improving regulation, but also compliance. A legally codified set of steps for appeals, for example, might be necessary in order to protect the rights of the most vulnerable groups (such as recent legislation in the Philippines with respect to indigenous peoples) or policy measures to mandate in-stream flows may be required (such as South Africa's recently adopted water law).

Finally, certification offers the advantage of providing an objective, practical and repeatable test for determining whether the appropriate steps have been followed in dams-related decision-making. This could be done through the creation of a national certification board, for example. Or process standards for dams-related decision-making could be integrated into the broader set developed by the International Standards Organisation as most governments and many firms have already committed themselves to ISO 14000. Finally, a multi-stakeholder "Dam Stewardship Council" that accredits national dam councils modelled after the Forest Stewardship Council could be formed.