

2001

## The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making

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### Recommended Citation

Bradlow, Daniel D. "The World Commission on Dams' Contribution to the Broader Debate on Development Decision-Making." American University International Law Review 16, no. 6 (2001): 1531-1572.

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# THE WORLD COMMISSION ON DAMS' CONTRIBUTION TO THE BROADER DEBATE ON DEVELOPMENT DECISION-MAKING

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## INTRODUCTION

Over the past quarter century, conflicts over large dam projects<sup>1</sup> have become more frequent, widespread, and acrimonious. The intensity of the conflicts between the proponents and the opponents of large dam projects has complicated water and energy management in many countries. The World Commission on Dams (“WCD”) was established to try to find a resolution to this problem. Its task was to study the impacts and costs and benefits of existing large dams and to see if it could develop “recommendations, policies, standards, [and] guidelines”<sup>2</sup> that could assist in reducing the conflict generated by future decisions relating to large dam projects.

The opponents of dams argue that governments decide to build dams without paying adequate attention to their associated social and environmental costs, thereby causing them to be understated and externalized. They also argue that the proponents of dams are too eager to find reasons to build dams and thus under-value other ways of meeting society’s water and energy needs. In addition, they contend that the sponsors of dam projects make decisions about the projects in ways that are not very transparent and do not offer all those who the proposed dam projects will affect an opportunity to participate in the decision-making.

The proponents of dams believe that dams are an efficient and effective way to manage the water and energy needs of human

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1. The World Commission on Dams (“WCD”) defined a “large dam” as a dam with a height of at least 15 m from the foundation or a dam that is between 5-15 m high and has a reservoir volume of more than 3 million m<sup>3</sup>. This is the definition used by International Commission on Large Dams (“ICOLD”). See WORLD COMMISSION ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION MAKING 11, Box 1.2 (Earthscan 2000) [hereinafter WCD REPORT].

2. *Large Dams: Learning from the Past, Looking at the Future: Workshop Proceedings*, Gland, Switzerland, IUCN and the World Bank (1997), at 10.

society. They argue that that their opponents over-estimate the capacity of alternatives to dams to meet the growing water and energy needs of human societies. They also contend that their opponents under-estimate the benefits of dams and the costs of more transparent, participatory, and publicly accountable decision-making processes. Moreover, they argue that there is a risk that these costs could be so high that they effectively make it impossible to build dams. Many proponents also believe that decisions about the broader social and environmental effects of dams are political decisions that should be resolved through the political process and not through the specific project's decision-making process.

This brief description suggests that the underlying conflict between the proponents and opponents of dams is not so much about dams *per se* as it is about governance and perceptions of the appropriate way in which societies should make decisions about water and energy projects. At the intellectual heart of this debate is a disagreement about what constitutes desirable "development decision-making." By "development decision-making," I mean the way in which individuals, groups, and institutions decide to adopt and then implement policies, programs, and projects that affect the evolution of either their own and/or other's social and physical environments. The issue of development decision-making is applicable to all societies regardless of their level of development; and it applies to decision-making at the local, national, and international level in both the public and private sectors.

Thirty or forty years ago, all interested parties shared a common view of appropriate development decision-making. They premised this view on a clear distinction between political and social issues and technical and economic issues. They agreed to address decisions about environmental and social issues through the political process, while addressing technical and economic issues in a project or program specific decision-making process.

Today, this general agreement has broken down, and we are now involved in a complicated process of trying to develop a new model of development decision-making that is generally acceptable to all stakeholders. While the various participants in the debates about development decision-making all have their own views on the subject, their views tend to cluster around two idealized visions of

development decision-making. The first vision is the original view, which in this paper is referred to as the “traditional” view of decision-making for development. The second vision is a new, still evolving view, which in this paper is called the “modern” vision of development decision-making. Since these are both idealized visions, they are not necessarily an accurate description of the views of any particular group.

This debate about development decision-making is occurring in other contexts besides dams. This debate is being waged in many decision-making structures at the local, national, and international level. These include the controversies that have surrounded natural resource and physical infrastructure projects in many countries,<sup>3</sup> the conflicts surrounding corporate relocation decisions,<sup>4</sup> and the protests against the World Trade Organization (“WTO”) in Seattle in

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3. See generally, Ariadne K. Sacharoff, *Multinationals in Host Countries: Can They Be Held Liable Under the Alien Tort Claims Act for Humans Rights Violations?*, 23 BROOK. J. INT'L L. 927, 958-60 (noting the conflict over the environmental impact of Shell Oil operations in Nigeria); *Chilean, Bolivian Presidents Meet in Brasilia*, XINHUA ENG. NEWSWIRE, Sept. 1, 2000, available at 2000 WL 25639192 (discussing a road project designed to link Bolivia, Brazil, Paraguay, and Chile); *Rio Believes It Can Weather Slowdown*, TIMES (London), Apr. 13, 2001 available at 2001 WL 4891452 (discussing opposition to a uranium mining project in northern Australia); *Japan: Airport Projects Take Wing*, TRAVEL TRADE GAZETTE ASIA, May 19, 2000 available at 2000 WL 15017781 (describing airport construction in Japan); WORLD BANK, *Project Information*, at <http://www4.worldbank.org/sprojects/Project.asp?pid=P048202> (last modified June 5, 2001) (describing a pipeline project in Chad-Cameroon); *Indonesian Court Opens Environmental Suit Against Freeport*, AGENCE FR.-PRESSE, Mar. 8, 2001 available at 2001 WL 2357429 (detailing a lawsuit filed by an environmental group against Freeport Indonesia for its mining activities that have degraded the environment).

4. See Janice R. Bellace, *The European Works Council Directive: Transnational Formation and Consultation in the European Union*, 18 COMP. LAB. L.J. 325, 346-349 (1997) (discussing a controversial Vredeling draft directive in 1980 by the European Commission that sought to oblige employers to disclose information to employees and consult with them on certain corporate decisions). See generally ROGER BLANPAIN, *THE BADGER CASE AND THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (Kluwer 1977) (analyzing industrial relations between large multinational enterprises and local societies of smaller nations where they locate business operations); BARRY BLUESTONE & BENNETT HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* (1982) (examining plant closings and their relation to the problem of private industrial development in the United States).

1999 and against the International Monetary Fund (“IMF”) and World Bank in Prague in 2000. The protests against the various aspects of structural adjustment policies that have taken place in many countries around the world implicate the same issue.

The participants in all these protests are motivated by a broad range of often inconsistent and incompatible social, economic, environmental, cultural, and political concerns. However, these protestors all share a common concern with other stakeholders in development decision-making. In particular, like the opponents of dams, they seek to broaden the range of issues that decision-makers consider, and expand the range of actors who can participate in development decision-making at the local, national, and international level. Furthermore, they aim to ensure that people and governments hold key decision-makers accountable for the decisions they make and their consequences. Their opponents, like the supporters of dams, are relatively satisfied with the current approach to development decision-making. The similarities in the view of the protagonists in the dams and these other debates suggest that the WCD’s proposals for decision-making are relevant to this broader debate about development decision-making as well as to dams.

This paper explores the relevance of the WCD’s proposed decision-making framework to the broader debate over development decision-making. The first section of the paper will describe the two idealized views of decision-making for development. This section will also discuss the implications of each vision for their proponents’ understanding of development; the role that participation, accountability, and democracy play in each vision; and the implications of the vision for sovereignty. The second section will focus on the WCD’s report and its proposal for decision-making in the case of dams. The third section will discuss the relevance of the WCD report to the broader debate on development decision-making. The final section will discuss some unresolved issues that arise from the WCD proposal and that are also relevant to the broader debate over development decision-making. It will also contain some comments on the contributions that law and lawyers can make to the resolution of this debate.

## I. TWO VIEWS OF DEVELOPMENT DECISION-MAKING

### A. THE TRADITIONAL VIEW OF DEVELOPMENT DECISION-MAKING

The proponents of the traditional view see development as an economic process whose outputs are discrete projects and specific economic policies that are designed to achieve the highest possible rate of economic growth. Thus, they argue that development decision-makers should focus on designing and constructing the projects and policies that produce economic growth as efficiently (i.e. as quickly and cheaply) as possible.

The proponents of this view understand that the social, environmental, political, and cultural impacts of development are important but see them as being outside the scope of their specific concerns as development decision-makers. They perceive these issues as the prerogative of the society that is building the project or implementing the policy. This means that they see these other factors as issues that governments and societies must address through other decision-making processes – primarily the political process.

One consequence of drawing this distinction between these two categories of issues is that the proponents of this view divide development decision-makers into two categories. The first is the political development decision-makers. This group consists of those people the society has chosen through the political process to make the important political, social, and environmental decisions facing a society. The second category is the technical development decision-makers. This group consists of all those decision-makers in the public and private sectors that have to make development decisions within the constraints of the decisions made by the political decision-makers. While technical development decision-makers can, as citizens, have opinions on political, social, and environmental issues in their professional capacity, they must treat these decisions as part of the background conditions against which they must make their specific technical development decisions.

The sharp distinction that the traditional view draws between economic development and social, environmental, and political

issues means that foreign technical development decision-makers can assume that the country in which the project is located will make these non-economic decisions for itself. The society, acting through its political development decision-makers, will also decide how to share the costs and benefits of the project among the various stakeholders. Consequently, the foreign technical development decision-makers can treat these decisions as background facts during the project negotiations and as fixed variables in their own planning.

In the context of a specific project, the first responsibility of the project or technical decision-makers—its sponsors, financiers, and contractors—is to evaluate the project in terms of its technical, financial, and economic feasibility. As long as they conclude that the project is technically feasible—that its economic and financial benefits exceed its economic and financial costs, and it will produce the desired rate of return—they deem the project justified and developmentally beneficial.<sup>5</sup>

A similar division of labor and authority exists between the political decision-makers and the technical decision-makers in the creation of a specific development policy. The political decision-makers are responsible for making decisions about the political issues, including the social and environmental aspects of the policy. The technical decision-makers have two tasks. They must provide the political leadership with the technical information to make informed political decisions and determine how to turn these political decisions into technically workable policies.

Democracy, in this view, is limited to the political process. The democratic political process will hold the leadership of the society accountable for the way in which they make decisions about the social and environmental impacts of development policies and projects. The technical development decision-makers—those who implement their own policies or projects or those of the political leadership—are responsible for acting in compliance with the political and legal framework established by the political leadership, and ensuring the technical and financial feasibility of their actions

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5. See generally WARREN C. BAUM & STOKES M. TOLBERT, *INVESTING IN DEVELOPMENT* (2d ed. 1985) (presenting an overview and analysis of the World Bank's development investment process).



and decisions. In the normal course of events, society cannot hold them accountable through the political process for their decisions and actions.<sup>6</sup>

The proponents of the traditional view do not believe that technical development decision-making requires broad consultation. To the extent that technical development decision-makers feel the need to consult with others before making any particular development decision, the range of people with whom they need to consult is limited. Since they are responsible exclusively for technical and financial issues, they need to consult only with other technical and financial experts before making their decisions. In fact, proponents of this view tend to be skeptical about the contribution that the public can make to a technical discussion of the project. Consequently, they usually do not value public participation in technical decision-making very highly.

It follows that these proponents also believe that society has a limited need for technical development decision-makers to share information with anyone outside the group of experts participating in the relevant decision. Furthermore, proponents of this view argue that too much sharing of information or consultation is inefficient because it slows down decision-making and increases costs.

The traditional view's proponents' understanding of accountability strengthens their inherent tendency towards restricting participation and disclosure of information. They argue that there are three levels of accountability. The first is legal liability. Technical decision-makers will only be accountable to the project's intended beneficiaries and to those adversely affected by the project in two situations. The first is when they have a direct contractual relationship with these other stakeholders and have failed to perform their contractual obligations. The second is when they have committed a tort against these other stakeholders and a forum is willing to entertain the victim's claim. This forum could be either a national or an international court or tribunal.

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6. This does not mean that the technical decision-makers cannot be held accountable by other means. *See infra* pp. 1553-55 (discussing the responsibilities of technical decision-makers).

The second level of accountability belongs to those who “made” them development decision-makers. This means that shareholders hold corporate actors accountable for their actions.<sup>7</sup> Similarly, the member states collectively hold international organizations accountable.

Under this view of accountability, political development decision-makers are accountable through the process of democratic governance to their electorate. However, this form of government accountability has limits. The electorate only has an opportunity to periodically state its preference on who should govern them. In these elections, they must base their choices on all the decisions that the government has made. Consequently, as a general rule, they are more likely to hold governments accountable for their overall performance than they are for any one particular development decision. This suggests that elections are not particularly well-suited vehicles for holding governments accountable for each specific development decision they make. Interested private actors can also challenge governments through existing administrative or judicial procedures.

The third level of accountability is that the state may hold non-state decision-makers responsible for the way in which they complied with the applicable regulatory framework. This level of accountability depends on the judicial and administrative forums available in the relevant jurisdiction.

The traditional view of development decision-making is consistent with the conventional view of sovereignty. By treating social, political, and environmental factors as externalities in technical development decision-making, the traditional view implicitly defines the scope of the state’s sovereignty with regard to other actors in development decision-making. It allocates decision-making about the social, political, and environmental factors to the sovereign and makes all other actors defer to the sovereign’s decisions on these issues. However, in regard to economic and technical development decisions, other decision-makers do not necessarily have to defer to

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7. See HARRY G. HENN & JOHN R. ALEXANDER, *LAWS OF CORPORATIONS* 717-43 (3d ed. 1983) (describing the management structure of corporations and noting that the board of directors’ primary obligation is to the corporation’s shareholders).

the sovereign's preferences.<sup>8</sup> The result is that, for example, states expect private investors to respect and comply with the sovereign's decisions about national environmental law and policy, but the investors do not necessarily have to comply with the sovereign's decisions about where they should invest their money. This is consistent with the legal rule that a foreign project sponsor or contractor must obey the law of the host state and refrain from interfering in the affairs of the host state.<sup>9</sup>

It should be noted that the traditional view contemplates two rather limited roles for non-governmental organizations ("NGOs") in development. The first is that NGOs can help lobby the government to adopt certain policies dealing with the social, political, cultural and environmental aspects of development. The second is that they can assist project victims in holding project decision-makers accountable for their decisions and actions. Their efficacy in doing so will depend, in the first instance, on how much access they have to local judicial and administrative tribunals and to the media. They may also hold decision-makers accountable through international forums and through developing international campaigns in conjunction with international NGOs.<sup>10</sup> According to this view, only technical NGOs may be able to play a direct role in decision-making for development.

Finally, the traditional view places some constraints on the topics that are open for negotiation in any development transaction. Since

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8. A number of official documents reflect this view. *See, e.g.*, WORLD BANK, INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT ARTICLES OF AGREEMENT art. IV, § 10 (amended Feb. 16, 1989), available at <http://www.worldbank.org/html/extdr/backgrd/ibrd/art4.htm> ("The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned.") (last visited June 16, 2001); *see also* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 250-55 (Philip Collidge et al. eds., 1977) (outlining the components of cooperative relationships between multinational enterprises and the countries in which they operate).

9. *See generally* M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT (1994).

10. *See infra* pp. 1544-45 (discussing these international forums and the growing ability of stakeholders to internationalize their concerns).

the broad social, political, and environmental decisions are the prerogative of the government, they are outside the scope of the negotiations between the project sponsor and the government or the project sponsor and the contractors. In both sets of negotiations, the parties must treat the broad social, environmental, and political parameters of the project as fixed and negotiate the terms of their transaction within these parameters.

## B. THE MODERN VIEW OF DEVELOPMENT DECISION-MAKING

### 1. *The Three Stimuli for the Modern View*

The modern view of decision-making for development is a response to three developments in human affairs. The first is our growing recognition that the environment has a limited capacity to maintain the human societies that we have created.<sup>11</sup> There is mounting empirical evidence supporting this realization and in too many cases project sponsors have so underestimated project costs and overestimated project benefits that they have mistakenly constructed, and continue to construct, developmentally harmful projects.<sup>12</sup>

One consequence of this insight is that the world community is attaching increasing importance to the assessment of all the environmental impacts associated with human activity. As a result, many project stakeholders are demanding that project sponsors

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11. See DAVID HUNTER ET AL., *Introduction* to INTERNATIONAL ENVIRONMENTAL LAW AND POLICY at v-vi (David Hunter et al. eds., 1998) (noting that "human economic activity threatens to surpass the ecological limits of the biosphere (if it has not already done so in certain instances)").

12. See, e.g., BRUCE RICH, MORTGAGING THE EARTH: THE WORLD BANK, ENVIRONMENTAL IMPOVERISHMENT, AND THE CRISIS OF DEVELOPMENT (1994) (analyzing the World Bank's often destructive environmental and political impact on millions of people); see also BRADFORD MORSE & THOMAS R. BERGER, THE REPORT OF THE INDEPENDENT REVIEW: SARDAR SAROVAR (1992) (describing how Sardar Sarovar projects, which faced resistance from tribal peoples living in the project area, have adversely effected these peoples, including families being physically removed from their land); RAYMOND F. MIKESSELL & LARRY WILLIAMS, INTERNATIONAL BANKS AND THE ENVIRONMENT (1992) (discussing several case studies in which poor assessments of projects costs have resulted in excessive environmental costs). See also WCD REPORT, *supra* note 1, at 39-40, 97-100.

account for all the expected human and physical environmental costs and benefits of their proposed projects before they can proceed with the project. The modern view seeks to place the responsibility for assessing these impacts on the party who is undertaking the action that will cause them. It also seeks to hold this party responsible for any adverse impacts actually caused by the action. The operational expressions of these demands are the importance project stakeholders attach to impact assessments in project planning and the growing acceptance of the precautionary principle.<sup>13</sup> It has also resulted in stakeholders paying more careful attention to identifying the party responsible for assessing the environmental consequences of the proposed activity. This is a significant change from the traditional view, which assigned this responsibility to the sovereign and allowed all other actors to defer to the sovereign's decision in this regard.

The second development is the increasing influence of international human rights law and forums around the world. The development of international human rights law has educated governments and international organizations about their responsibilities towards those whom their actions affect. It has also raised awareness among people about their rights and increased their willingness to take steps to oppose development projects that they believe will harm them. The existence of international mechanisms for raising human rights claims means that many of those adversely affected by development projects may now challenge these projects in an international forum where they can obtain an "on the record"

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13. See, e.g., *UNECE Convention on Environmental Impact Assessment in a Transboundary Context*, Feb. 25, 1991, UN-ECE, 30 I.L.M. 802 [hereinafter *Espoo Convention*] (not yet in force as of Nov. 25, 1999); see also HUNTER ET AL., *supra* note 11, at 360 (defining the precautionary principle, which evolved from the recognition that scientific certainty comes too late to design effective legal and policy responses for preventing environmental threats). The principle shifts the burden of scientific proof necessary for triggering policy responses from those whose support prohibiting a harmful activity to those who want to continue the activity. See HUNTER ET AL., *supra* note 11, at 366 (describing environmental impact assessment ("EIA") as the "process for examining, analyzing and assessing proposed activities, policies or programs to integrate environmental issues into development planning and maximize the potential for environmentally sound and sustainable development").

hearing.<sup>14</sup> This makes it feasible for the adversely affected people to seek to hold accountable those who actually harmed them. For example, people who feel that they have suffered material harm because the World Bank has not followed its own operating rules and procedures can file a “Request for Inspection” with the World Bank’s Inspection Panel.<sup>15</sup> Similarly, groups who feel that development projects are violating their human rights may be able to file claims before bodies such as the Inter-American Human Rights Commission.<sup>16</sup> In addition, some domestic courts in the project sponsor’s or contractor’s home state have been willing to consider these cases.<sup>17</sup> Regardless of the outcome of the proceedings in these forums, the mere fact that people have filed these cases can damage the reputations and financial positions of the project sponsors, contractors and the government, who approved the project. These increased costs can be enough to change the calculus of the project’s relative costs and benefits. The result is that, in addition to public interest groups, some in the corporate sector are calling for all the key actors in the project to take more account of human rights considerations in their project planning and implementation.

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14. See Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS 3, 11-14 (Hurst Hannum, ed., 3d ed. 1999) (describing the methods by which international human rights obligations can be enforced).

15. See Daniel Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT’L L. 553 (1994); see also IBRAHIM F. I. SHIHATA, *THE WORLD BANK INSPECTION PANEL: IN PRACTICE* (2000). See also World Bank Inspection Panel, *The Chad-Cameroon Petroleum Development and Pipeline Project (modified Mar. 22, 2001)*, at <http://wbIn0018.worldbank.org/IPN/ipnweb.nsf/WRequest48D29E3AE8970CDE85256A410070A5AB> (last visited June 16, 2001).

16. See INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, at <http://www.iachr.org> (last visited June 16, 2001) (explaining the process that allows persons and groups to petition the Commission for an investigation of violations of rights protected by the American Convention on Human Rights, adopted in 1969).

17. See, e.g. *Jota v. Texaco*, 157 F.3d 153 (2d Cir. 1998) (allowing residents of Ecuador to file suit against Texaco in New York for environmental and personal injuries). See also *Adams v. Cape Indus., Plc.*, 1989 WL 651250 (Cal. Ct. App. July 27, 1989) (involving South African employees of the defendants who filed suit in England when they were exposed to asbestos during their employment in South Africa).

The third development is the impact of technology on development projects. The dramatic developments in telecommunications and information technology have helped to globalize financial markets. They have also accelerated the flow of information around the world so that it is now possible for people in one place to learn within seconds about developments on the other side of the world. One consequence is that many more financial institutions and multinational companies are able to compete for contracts associated with the development projects being sponsored by governments and private entities around the world. Another is that opponents of any development project, in principle, are able to mobilize support for their cause around the globe. The result is that all large development projects are now internationalized in the sense that foreign companies are likely to participate in them. In addition, international NGOs as well as local organizations may campaign for or against them.

The involvement of the NGOs not only may cause delays and change the cost calculations for the project, but it tends to internationalize the regulatory framework applicable to the project. The reason is that these groups do not necessarily see any reason to defer to national regulatory and legal standards in developing their positions on a particular project, even though these might be the only applicable binding standards. In fact, they are likely to demand that the project satisfy higher standards if they are aware that other countries' laws, regulations, international agreements, guidelines, or industry best practices establish higher standards for the relevant aspects of the project than do the applicable national regulations.

This internationalization of regulatory frameworks means that prudent development decision-makers need to be aware of all potentially applicable standards, regardless of whether the government in the relevant state has established its own standards and has its own laws and regulations on the subject. They will also have to determine how to apply these various standards and rules to their projects and their decision-making. If the decision-makers ignore these standards or fail to conform to them, they run the risk of being the target of an international campaign, being found "guilty" in the court of public opinion, and suffering either damage to their reputation or unexpected increases in their project costs. The

challenge, however, is that there is not necessarily any consensus on how to interpret and apply all these potentially relevant standards.

## 2. *The Modern View*

The proponents of the modern view see development as an economically, politically, socially, culturally, and environmentally integrated process. They argue that everyone involved in development projects must see them not as discrete events but as episodes of economic, environmental, and social transformation. This suggests that the primary interest of the proponents of the modern view is ensuring an optimal process for reaching decisions about managing this transformation. They are relatively less concerned with the specific outputs of development decision-making than are the proponents of the traditional view.

This should not, however, be interpreted to mean that they are not interested in the outputs of development. Instead, it should be understood as meaning that their first concern is ensuring that the choice of outputs is a reflection of the priorities and decisions of all the relevant stakeholders as determined through the optimal decision-making process. In addition, they want to ensure that the outputs meet the appropriate social, environmental, cultural, technical, economic, political, and financial standards.

According to this view, the desirability of a particular activity depends on the way in which the activity will affect the social and physical environment in which it takes place and how these impacts will evolve over the life cycle of the activity. This means that to fully assess the desirability of a particular project proposal it is necessary to account for all its impacts over the life cycle of the project. Without all this information, the decision-makers cannot be confident that they understand the economic, financial, environmental, social, cultural, and political consequences of their decisions. They also cannot accurately measure all the costs and benefits of the project, thereby increasing the risk that they will approve projects that may cause injuries to the social and physical environment that they did not anticipate in their planning. The result may be outputs—projects or policies—that are less beneficial than anticipated and more harmful than expected.



A number of consequences follow from this view of development. The first is that development decision-makers have greater and more complex responsibilities than proponents of the traditional view assigned to them. According to the traditional view, development decision-makers are only responsible for the performance of their specific project related functions. Under the modern view, they are responsible for both the performance of their specific project functions and for the impact of these functions on the other stakeholders in the project and on the physical and human environment. This suggests that development decision-makers may no longer acceptably treat social and environmental costs as externalities that are the responsibility of the sovereign. All stakeholders now expect them to internalize these costs and account for them in their project planning. In other words, it is not responsible, in an economic or risk management sense, for development decision-makers to rely on government decisions relating to environmental and social matters.

The modern view blurs the distinction that the traditional view drew between technical and political development decision-makers. According to the modern view, all technical development decision-makers must pay careful attention to the social, political, cultural, and environmental impacts of their decisions. They can no longer assume that they may prudently defer to the political decision-makers on these issues. Consequently, the modern view requires all development decision-makers to become proficient technical and political decision-makers.

The second consequence, which follows from the first, is that proponents of this view of development attach great importance to consultations between development decision-makers and all those who their proposed decision, action, or project will affect. For example, project development decision-makers can only be confident that they have accurately assessed the costs and benefits of the proposed project if they understand how all the project-affected people will react to the resulting changes in their social and physical environment. Project developers can only uncover this information through consultation with all those parties that the project will affect or with those who have the ability to influence how these affected parties will respond to the project.

The emphasis on consultations has two important implications. First, the consultation process can only give project sponsors and contractors the desired result if the project decision-makers provide the affected people with adequate information about the project. Unless these people have sufficient information on the project to understand its potential impacts, the developers cannot know with any confidence how the affected people will respond. The need for consultation, therefore, necessarily leads to a requirement for disclosure of information.<sup>18</sup>

The requirements for consultation and disclosure of information raise the difficult issue of the appropriate timing for these actions. If they take place too late in the decision-making process, the range of issues that the parties can usefully discuss and the types of changes that project managers will make are limited. This is because the project sponsors have invested too much time and too many resources in the project to be willing to consider significant changes. Consequently, the stakeholders are likely to view consultations that take place too late in the decision-making process as insufficient and the risk of conflict is thereby increased. They are also likely to be dissatisfied with consultations that end before they are able to fully assess the actual impact of the proposed activity on their lives. This suggests that consultations and information disclosure needs to begin as early as possible, ideally during the needs assessment phase, and continue throughout the life cycle of the proposed activity.

The need for consultations also has the effect of partially localizing the focus of the proposed activity.<sup>19</sup> This follows from the need for the development decision-makers to pay greater attention to

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18. See generally, e.g., ROBERT L. SCHIFFMAN & MARK S. SQUILLACE, ENVIRONMENTAL DECISIONMAKING: NEPA AND THE ENDANGERED SPECIES ACT (3d ed. 2000) (examining the integration of the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA") into the study of assessment-based decision-making).

19. Note this is taking place at the same time as the regulatory framework for projects is being globalized. See *supra* p. 1544 (discussing globalization of regulatory frameworks). See generally Claudio Grossman & Daniel D. Bradlow, *Are We Being Propelled Towards a People-Centered Transnational Legal Order?*, 9 AM. U. J. INT'L L. & POL'Y 1 (1993) (discussing the development of international organizations and standards and the erosion of the concept of absolute sovereignty of individual nations).

local concerns and impacts, even if the project's ultimate rationale is to provide national or even transnational benefits. This necessarily has the effect of empowering local stakeholders and their representatives in their consultations with the project decision-makers. In this regard, it is important to note that the modern view highlights the importance of consulting groups traditionally excluded from power, such as women and indigenous people. Since these groups have the ability to influence the future impacts of the activity and its likely success, project sponsors cannot ignore them in the consultation process.

Local and national governments will need to pay careful attention to removing legal barriers that might impair the ability of these groups to participate in the consultation process. These barriers could include both overtly discriminatory laws and legal measures that have the effect of inhibiting these groups from participating in the consultations. Clearly, these legal reforms may have benefits for all stakeholders in the proposed activity.

Another implication is that consultations necessarily politicize all development activity because both the disclosure of information and the actual consultations become part of the efforts of the sponsor of the activity to secure the affected stakeholders' support for the activity. If the affected people do not support the activity, the development decision-makers cannot be confident that they will act in their best interests. They also cannot be certain that the proposed activity will be sufficiently sustainable to actually produce the expected benefits, or that it will have the predicted impacts. Consequently, the consultations become an important arena of contest between those who support and those who oppose the activity.

Interestingly, the politicization of the project also affects the issue of disclosure of information. The sponsors feel that if they disclose information before they have fully developed their plans and responses to all likely concerns they may undermine public support for the activity and, therefore, its success. The activity's opponents, on the other hand, argue that the failure to disclose information very early in the planning process unfairly biases the consultation process in favor of the activity.

Projects can also be politicized in another way. This occurs in cases where the local stakeholders and the relevant governmental authorities have differences of opinion over the desirability of the activity. In this case, the other development decision-makers will need to make a choice as to how to respond to these differences in opinions. This clearly forces foreign development decision-makers—contractors, financiers—to take a position on a domestic political issue.

Another complication that affects the consultation process is that it is unclear who should be invited to participate. To the frustration of development decision-makers, this is, to a significant extent, a question of self-definition. Those who believe the proposed activity will affect them and those that can demonstrate that they represent interests that the activity will affect should be included in the consultation process. The failure to include all these people exposes the proposed project or activity to the risks of disruption and unanticipated increases in costs caused by those groups who believe that they have been unfairly excluded from the consultations. This means that the development decision-makers need to ensure that they include weaker stakeholders in the consultations. Weaker stakeholders may not have the ability to effectively protest their exclusion from the consultations, but their actions can influence the success of the project. Good examples of this latter group of stakeholders are women, indigenous people, and other minority groups.

The politicization of projects also has an important effect on the skills that the development decision-makers, including international organizations, demand of their management and staff. It is no longer sufficient for the management and staff to be technically proficient. They must also have an understanding of the social, cultural, political, and economic dynamics of the communities that their activities will affect. In addition, they should learn how to encourage the people in these communities to participate in the impact assessment exercises that they undertake as part of their planning process. This requires them to learn how to persuade these people to support their projects and to bear the costs that these projects may impose on them. Thus, they need to begin developing much better political skills than they have previously viewed as necessary. It is no

longer sufficient for them to know how to lobby governments and other key decision-makers; they now must be able to practice the kind of politics that appeal to ordinary people.

The modern view of development clearly requires a more participatory form of decision-making than the traditional view. The reason is that without people feeling that they are able to influence the decision-making process, they are unlikely to have confidence in and be willing to take part in the consultation process. This in turn means that development decision-makers who insist on a top-down form of decision-making are unlikely to obtain all the information they need to anticipate and assess all project impacts.<sup>20</sup>

The modern view of development favors the bottom-up style of decision-making, which not only demands organizational change from development decision-makers but also requires a redefinition of efficiency in project planning and execution. Project sponsors can no longer calculate efficiency purely in terms of the time taken for decision-making and financial costs. Now, they must recognize that slower decision-making can be more efficient if it produces greater consensus and more sustainable projects. More expensive planning costs can be justified if they lead to reduced expenses over the life of the project. This is a significant distinction from the traditional view and it suggests that the modern view may not be fully compatible with the traditional financial accounting practices, based on discounting all costs and benefits to net present value, which project planners currently use.

The need for consultation in project decision-making highlights another characteristic of the modern view, which is that it impacts on our perception of democracy. It requires us to draw a distinction between democratic governance and democratic decision-making. Democratic governance refers to the participatory way in which societies choose their leaders and hold them accountable. In this selection process, people base their choice on how they expect their leaders to govern the entire society and manage all the issues and

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20. *See, e.g.* OPERATIONS POL'Y DEP'T, WORLD BANK, THE WORLD BANK AND PARTICIPATION 5 (1994) (indicating that greater transparency, accountability, improved institutional performance, and enhanced information flows are some of the potential benefits of increased stakeholder participation).

challenges that it may face over the whole period between elections.

Democratic decision-making, on the other hand, refers to the way in which decisions relating to each policy, project or program that directly affects people and the social and physical environment in which they live is made. Thus, democratic decision-making deals with the way in which individual policy, program, and project decisions are made in both the public and private sectors. It places a high premium on participatory decision-making, transparency in decision-making and holding those who have decision-making authority accountable for their decisions. The modern view of development, while not diminishing the importance of democratic governance, places great emphasis on democratic decision-making.

It is possible for a society that has all the features of democratic governance to have a minimal number of the features of democratic decision-making. The modern view of development decision-making brings this characteristic of a society into sharp focus and creates pressures for more democratic decision-making.

A third consequence of the modern view is that it has begun to blur the boundaries of the scope of development decision-makers' responsibility. Under the traditional view, the scope of their responsibilities is relatively well defined. In the context of a specific project, their responsibilities are limited to the discrete location of the project and, more specifically, to those aspects of the project for which they had direct responsibility. Furthermore, their responsibilities have relatively clear temporal boundaries. For example, the project sponsors and contractors are responsible for events that happen during the time they are working on the project site and for problems that develop directly out of their work for a defined period thereafter.<sup>21</sup> Their responsibilities will only be ongoing if they continue to be involved in the operation and maintenance of the project after construction is completed.

In the modern view, on the other hand, since all aspects of the project are seen as intertwined, the sponsors and contractors cannot

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21. The time period for which the project sponsors and contractors remain liable for damage may be set by contractual warranties, by statute, or may depend on their continuing relationship with the project.

easily divide responsibility amongst themselves. This makes it harder to identify the limits of the responsibility of each development decision-maker. In addition, the modern perception of a project requires project decision-makers to account for all impacts over the entire life cycle of the project. This means that, in principle, their responsibility will also extend over the entire life cycle of the project and for the period thereafter in which the project's impacts are still socially or environmentally significant. In fact, under the modern vision of development, any attempt to draw boundaries around the development decision-makers' responsibilities is a question of judgement and requires debate and consultation.

The significance of the difference in perceptions of responsibility between the two views can be seen in the case of a dam. Under the traditional view of development, the scope of any particular technical development decision-maker's responsibility is limited to its direct contributions to the dam itself and its immediately surrounding areas. The duration of its responsibilities is limited to the time of its actual involvement in the dam project and for a defined period thereafter. On the other hand, the modern view would hold the development decision-makers at least partly responsible for the dam's social, economic, cultural, political, and environmental impacts on the whole river basin. Moreover, it would hold them responsible for its effect on all those who depend on the river basin and for how these will evolve over the period of the dam's construction, operation and decommissioning. Its responsibility would also continue during the period in which the environment and the affected people adapt to the decommissioning of the dam.

The changing view of development decision-maker responsibility has legal significance. It used to be the case that both local and foreign businesses could feel relatively confident that they had met all their legal obligations if they acted in conformity with the national law of their host countries. However, the changing scope of their responsibilities begins to call this into question. First, as the example of the dam project suggests, the project may have impacts outside the borders of the state in which the project is located that each of the relevant development decision-makers must incorporate into its planning. Thus they will need to pay attention to the international and national law that may be applicable to these "extra-

territorial” effects.

In addition, as was discussed above, it may not be sufficient for decision-makers to be complacent if the host state law does not adequately deal with particular issues. They now must take into account the possibility that the adversely affected people can claim, either in a legal forum or in the “court” of public opinion, that the particular decision-maker is liable for their suffering. Those harmed may argue that the decision-maker is responsible because it did not follow the best practices in the industry or meet the highest regulatory standards in the world. This argument can be a powerful moral argument that has the potential to cause significant harm to the reputation of the development decision-maker, although it may not be a winning legal argument.

Consequently, prudent development decision-makers need to consider whether the law of the state of the project conforms to the best practices in the industry or regulatory standards in the world. In cases where these legal requirements are found to be less than best practices, the project decision-maker must decide whether to comply with the higher non-national and even non-binding regulatory standards even though they are not applicable under local law.

Another legal consequence is that the modern view does not show the same respect for the concept of sovereignty as the traditional view. Under the traditional view, the sovereign has the final decision over the social, political, cultural, and environmental externalities in development projects and policies. Under the modern view, these externalities have been internalized and are now part of the responsibility of each of the actors in the development project. This means that there is no set of issues that is specifically reserved for the sovereign’s final decision. In fact, responsible development decision-makers and other project stakeholders are expected to make their own decisions about these “externalities” even if it places them in conflict with the sovereign. According to the modern concept of development, the sovereign is only one actor in the development drama, and there is no clear justification for international organizations, private corporations, financial institutions, and NGOs to give its opinions greater weight than those of other actors in the drama. In fact, the case for deferring to the sovereign’s opinions is weak when these opinions conflict with the expressed interests of



those who will be most directly affected by the project.

The modern view of development, with its expanded vision of development decision-maker responsibility, challenges the view that a corporation's primary function is to maximize profits and produce the largest possible return for its shareholders. This view of development suggests that they have additional responsibilities to all the stakeholders in the project and to all who will be affected by the changes in the physical and social environment that their actions will cause. Consequently, under this view, the primary function of corporations is making the largest possible profit consistent with the overall social and environmental sustainability of their activities and the interests of all stakeholders. It is not merely to maximize either short or long-term profits.<sup>22</sup>

The modern view also has implications for the rights of private property owners. While the rights of property owners have never been absolute and have always been subject to changing conceptions of the public good, the modern view of development has the potential to impose important new restrictions on private property owners. It would impose on private property owners, who propose to use their private property in any way which could impact on the rights of others or their environment, the same obligations as it imposes on other development decision-makers. Thus, in principle, these property owners will need to consider all the ways in which their actions will affect others. They will also be expected to share this information with and consult with all those who may be affected by their proposed action. Finally, they should arrive at a mutually acceptable arrangement with these affected parties before proceeding with their proposed use of their property.

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22. This argument can be applied by analogy to international economic organizations. Like corporations, they can no longer only be concerned with producing benefits for their member states whose interests are expressed by their government representatives. They must also be concerned with the interests of all the stakeholders in their operations.

## II. THE COMPETING VISIONS OF DEVELOPMENT AND THE WCD

The descriptions of the traditional and modern views of development suggest that, in general, opponents of dams, opponents of other large development projects, and those who protest against the WTO, the World Bank, and the IMF all propound some version of the modern vision of development decision-making. These descriptions also suggest that, in general, the supporters of dams, multinational corporations, international economic organizations, and governments advocate a view of development decision-making that is closer to the traditional vision. The similarities in the position of the protagonists of the dams debate and the competing participants in other debates about development projects and policies and about governance suggest that the WCD report can offer some interesting lessons for the broader debate about development decision-making.

The following description of the findings and proposals of the WCD will clarify the relevance of the WCD Report to this broader debate. It will be followed by a discussion of the lessons that the WCD offers to the protagonists in the broader debate about development decision-making.

### A. THE WCD REPORT

The WCD's assignment was to study the issue of dams and to recommend criteria, guidelines, and standards that could be used in future proposed dam projects. The twelve member WCD, in order to produce its report, developed a knowledge base that consisted of: eight dam case studies, country studies of India and China, a briefing paper on Russia and the newly independent states, a cross-check study of one hundred twenty-five dams, seventeen thematic reviews, one hundred thirty technical papers, nine hundred forty-seven written submissions, and four regional consultations in which fourteen hundred people from fifty-nine countries participated.

#### *1. The Findings of the WCD*

Today, there are approximately 45,000 large dams in 145

countries.<sup>23</sup> Approximately 40,000 of these large dams were constructed in the second half of the twentieth century.<sup>24</sup> About eighty percent of these large dams are in five countries: China (22,000), the United States (6,390), India (over 4,000), Spain and Japan (1,000-1,200 each).<sup>25</sup> While the rate of construction has decreased, 1,700 large dams are currently under construction.<sup>26</sup> This means, given that the average construction period for a large dam is 5-10 years, between 160-320 new dams become operational each year.<sup>27</sup>

These dams have profoundly impacted the world as “large dams have fragmented and transformed . . . rivers.”<sup>28</sup> Forty-six percent of the world’s primary watersheds have at least one dam.<sup>29</sup> Dams supply water to thirty to forty percent of the two hundred sixty-eight million hectare of irrigated land in the world and, as a consequence, contribute to “at most” twelve to sixteen percent of world food production.<sup>30</sup> They produce nineteen percent of the world’s electricity supply.<sup>31</sup> In about one-third of the world’s countries, however, hydropower generates over fifty percent of the available electricity.<sup>32</sup> About thirteen percent of all large dams play an important role in managing floods, which affect the lives of more

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23. *See supra* note 1 (providing a definition of “large dams”).

24. *See* WCD REPORT, *supra* note 1, fig.1.5, at 8 (showing distribution of large dams at end of 20<sup>th</sup> century).

25. *See id.* at 9.

26. *See id.* at 10 (explaining that currently, the largest dam builders are India (695 to 960 dams under construction), China (280), Turkey (209), South Korea (132), and Japan (90)). The number of dams under construction in India is a matter of debate and the number depends on the source consulted. *See id.*

27. *See id.* at 10 (discussing world average of dams constructed annually).

28. *See id.* at 15.

29. *See id.* (noting that the world has 106 primary watersheds).

30. *See* WCD REPORT, *supra* note 1, at 13 (analyzing the considerable variation between countries). For example, dams account for 100 percent of irrigated land in Egypt but only 1 percent in Bangladesh and Nepal. *See id.*

31. *See id.* at 14 (stating that hydropower is used in over 150 countries).

32. *See id.* (expressing the fact that in 24 countries, over 90 percent of power is provided by hydropower, and, in another 63 countries, over 50 percent of electricity is provided by hydropower).

people than any other type of disaster including war, drought, and famine.<sup>33</sup>

The WCD found that governments have often over-estimated the benefits that these dams would produce, while simultaneously underestimating the costs.<sup>34</sup> This is due both to poor estimations of costs and benefits and to the failure to incorporate all the costs into the planning of the project. Most significantly, project planners have tended to pay inadequate attention to the social and environmental costs associated with dams.

The social costs of dams have nevertheless been substantial. Dams have displaced people, disrupted the lives of the communities into which the displaced people have moved, and deprived riverine communities, particularly those downstream from dams of their livelihoods.<sup>35</sup> In some cases, the reservoirs or rivers transformed by dams have deprived whole societies of their access to natural resources and of their cultural heritages.<sup>36</sup>

No one is sure how many people dam projects have adversely affected. However, experts have estimated that the construction of large dams has displaced between forty to eighty million people worldwide.<sup>37</sup> This estimate only refers to those whom dams have displaced directly. It does not include people displaced by other aspects of dam projects such as canals, powerhouses, roads, and compensatory measures such as biological reserves.<sup>38</sup> Commonly, the

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33. *See id.* at 14–15 (revealing that floods affected the lives of 65 million people between 1972-1996, and that during this period, an estimated 3.3 million people were left homeless each year by floods).

34. *See id.* at 37-71(examining the technical, financial, and economic performance of large dams).

35. *See* WCD REPORT, *supra* note 1, at 16 (evaluating the negative impacts of large dams on populations).

36. *See id.* (describing the losses caused by dams).

37. *See id.* at 104 (analyzing the level of global displacement). Experts estimate that between 1986-1993, an average of 300 dams starting construction each year displaced four million people annually. *See id.* at 17 (citing WORLD BANK, RESETTLEMENT AND DEVELOPMENT: THE BANKWIDE REVIEW OF PROJECTS INVOLVING INVOLUNTARY RESETTLEMENT 77 (1996)).

38. *See id.* at 104 (noting the limitations of the figures, and emphasizing that the figures only refer to physical displacement).

definition of “affected persons” governments have used in determining who to compensate excludes downstream communities and landless and indigenous people.<sup>39</sup> The result is that often only those with legal title to land receive compensation. Consequently, many adversely affected people have not been adequately compensated for their losses.

Dams have also involved significant environmental costs. For example, dams are the main physical threat to riverine ecosystems.<sup>40</sup> The reason is that dams fragment the river thereby transforming both aquatic and terrestrial ecosystems.<sup>41</sup> This has contributed to the extinction or endangerment of at least twenty percent of all fresh water fish species in recent years.<sup>42</sup> This, in turn, has adverse consequences for the one billion people for whom fish is a critical source of protein.<sup>43</sup> The fragmented rivers also impair the ability of watersheds to perform their many ecosystem functions, including nutrient recycling, water purification, soil replenishment, and flood control. It has also adversely impacted estuaries leading to loss of mangrove swamps, wetlands, and salt intrusion.<sup>44</sup> Interestingly, the WCD found that dams, because of the rotting vegetation left in their reservoirs, are net emitters of greenhouse gases, thereby challenging the conventional wisdom that dams are a clean source of energy.<sup>45</sup>

The financial costs of dams are also significant. Economists estimate that the world has invested two trillion United States dollars

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39. *See id.* at 105 (stating that WCD case studies show that communities situated downstream from the dam, those without land or legal title, indigenous people, and those affected by project infrastructure were not considered as affected people at the time of the dam design and so were not included in any planned compensation schemes).

40. *See* WCD REPORT, *supra* note 1, at 16 (citing dams as one of the many factors leading to the degradation of ecosystems).

41. *See id.* (noting that the ecosystems are transformed with a range of effects varying in duration and degree of reversibility).

42. *See id.* at 16 (noting that the world has over 9,000 fresh water fish).

43. *See id.* (stating that 40 percent of the world’s fish inhabit watersheds).

44. *See id.* (noting that ecosystem transformations also close the mouths of major rivers).

45. *See id.* at 75 (estimating that emissions from reservoirs may account for 1-28 percent of greenhouse gases).

in large dams.<sup>46</sup> During the 1990s, the world spent approximately thirty-two to forty-six billion United States dollars annually on large dams, eight percent of which was spent by developing countries.<sup>47</sup> The public sector directly financed about eighty percent of the twenty-two to thirty billion dollars spent annually in developing countries.<sup>48</sup> The WCD found that many dams have not met their financial and economic projections.<sup>49</sup>

## 2. *The WCD's Proposal: A New Framework for Decision-Making*

The WCD proposes a new framework for decision-making about water and energy management that is based on the United Nations Charter, the Universal Declaration of Human Rights, the United Nations Declaration on the Right to Development and the Rio Declaration on Environment and Development.<sup>50</sup> The first two documents establish the principle that all human beings have human rights by virtue of their humanity and that any policy or law "must contain the intention to respect the rights and entitlements of all."<sup>51</sup> These two documents, together with the Declaration on the Right to Development, establish the indivisibility of civil, political, economic, social, and cultural rights. A rights based approach to development therefore includes "rights to life, health care, education, shelter, food, water, remedy, security, subsistence, and livelihood"<sup>52</sup> as well as rights of free speech and association, due process, religion, and culture.<sup>53</sup> These documents also place on each state the responsibility to use its legal system and legislative process to give expression to

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46. See WCD REPORT, *supra* note 1, at 11 (explaining that dams are promoted as an important means of satisfying water and energy needs).

47. See *id.* (estimating annual large dam expenditures).

48. See *id.* at 11 (describing the public sector's investment in dams in developing countries).

49. See *id.* at 39-42 (stating that the average cost overrun of dam projects surveyed was 56 percent).

50. See *id.* at 197-211 (discussing the foundations of the globally accepted framework for establishing universal goals and norms).

51. See *id.* at 200.

52. See WCD REPORT, *supra* note 1, at 200

53. See *id.* (noting the expression of rights and entitlements in law).

and establish institutional mechanisms for upholding these rights. Therefore, the WCD argues that, “a rights based approach . . . provides a principled basis for mediating development choices among competing interests.”<sup>54</sup>

The Rio principles, while recognizing the right to development, insist that it must be met in a way that equitably balances the rights of both the present and future generations.<sup>55</sup> Principle 10 of the Rio Declaration imposes on all human beings the obligation to involve themselves in environmental issues and to participate in decisions relating to the environment.<sup>56</sup> Principle 22 elaborates on this by recognizing the vital role of indigenous people and other local communities in environmental management and development.<sup>57</sup>

The WCD uses these documents to develop a decision-making framework based on the following five “core values and shared understandings:” equity, efficiency, participatory decision-making, sustainability and accountability.<sup>58</sup> Based on these principles, it derives a principle for decision-making that aims to assess both the rights affected by the proposed decision and the associated risks it creates. Its approach assumes that no party’s rights will extinguish any other party’s rights and that, where different people’s rights come into conflict or competition, “negotiations conducted in good faith offer the only process through which various interests can be legitimately reconciled.”<sup>59</sup> These negotiations should take place “within a legal and procedural framework, including arbitration, recourse and appeal mechanisms to ensure equitable adjudication in cases where negotiated settlements are not achievable or are

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54. *See id.*

55. *See Report of U.N. Conf. on Environment and Development: Rio Declaration on Environment and Development*, U.N. GAOR 47th Sess., Annex 1, Agenda Item 21, at 8, U.N. Doc. A/CONF. 151/26 (Vol. I) (1992) (declaring how the right to development must be fulfilled).

56. *See id.* at 10 (declaring that each person shall have access to environmental information and the opportunity to be a part of the decision-making process).

57. *See id.* at 12 (declaring that indigenous people and local communities have a vital role due to their knowledge and customs, and that the state should encourage their participation).

58. *See WCD REPORT*, *supra* note 1, at 202.

59. *See id.* at 206.

contested.”<sup>60</sup>

The WCD offers seven strategic priorities and policy principles to effectuate its assessing rights and risk approach to negotiated decision-making. The WCD has twenty-six guidelines that further develop these seven strategic priorities. These strategic priorities and guidelines together help define a participatory decision-making process for both water and energy policy making and project design, implementation and operation.

The seven strategic priorities are:

**GAINING PUBLIC ACCEPTANCE:** First, this requires a process for identifying the stakeholders in each decision, policy or project that is based on “recognizing rights, addressing risks, and safeguarding the entitlements of all groups of affected people, particularly indigenous and tribal peoples, women and other vulnerable groups.”<sup>61</sup> Second, it requires decision-making procedures that allow for informed participation by all stakeholders in the decision and that result in demonstrated public acceptance of key decisions.<sup>62</sup> This means that all stakeholders must negotiate key decisions regarding water and energy resources. This includes the need for the prior, informed consent of indigenous peoples for all actions that affect their interests.<sup>63</sup>

**COMPREHENSIVE OPTIONS ASSESSMENT:** First, this means that governments and international development organizations must base the choice of water and energy policy and project options on a “comprehensive and participatory assessment of the full range of [available] policy, institutional, and technical options.”<sup>64</sup> Thus, governments and development organizations should undertake

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60. *See id.* at 206-7.

61. *See id.* at 215.

62. *See id.* (describing the kinds of decision-making processes and mechanisms utilized).

63. *See* I.L.O. Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 16, 28 I.L.M. 1382, 1387-88 (stating that where informed consent is not possible, appropriate procedures established by national law and regulation, providing the opportunity for representation of those concerned apply).

64. *See* WCD REPORT, *supra* note 1, at 221.



impact studies at both a strategic level before making water and energy policy and at the project level. Second, this means that the impact studies must address environmental, social, health, and cultural heritage issues. Third, “in the assessment process, social and environmental aspects [must] have the same significance as economic and financial factors.”<sup>65</sup>

**ADDRESSING EXISTING DAMS:** This priority recognizes that the context within which dams operate can change. Changes take place in priorities in water use, land use, technology, and policy. It therefore imposes on societies the responsibility to review and, if necessary, alter the operations of reservoirs to optimize the benefits of existing dams. This includes ensuring that dam operating rules and procedures adequately address all social and environmental issues.<sup>66</sup>

**SUSTAINING RIVERS AND LIVELIHOODS:** The WCD premises this priority on the importance of rivers and their watersheds to life and the livelihood of local communities.<sup>67</sup> It underscores the need for decision-makers to prioritize the “avoidance of impacts, followed by the minimization and mitigation of harm to the health and integrity of . . . river system[s].”<sup>68</sup> To do this, it is important that those contemplating dam projects undertake baseline ecosystem surveys before beginning the decision-making process.

**RECOGNIZING ENTITLEMENTS AND SHARING BENEFITS:** This priority is intended to ensure that all stakeholders share in the benefits of the project and that dam project sponsors not deprive them of their entitlements. It requires governments or others sponsoring a dam to identify all those whose rights the proposed project affects and ensure that they are able to participate in the planning, design, construction, and operation of the dam. In other words, policy and project sponsors need to ensure that they understand the risks to baseline social conditions before making any decisions. Further, it requires that all people whose rights may be at

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65. *Id.*

66. *See id.* at 225-233 (insisting that opportunities to improve the environmental and social performance of dams be taken).

67. *See id.* at 234 (referring to rivers and watersheds as “the biological engines of the planet”).

68. *See id.*

risk are able to conclude mutually agreed and legally enforceable mitigation, resettlement, and development entitlements with the other relevant stakeholders in the project. Dam project sponsors must pay particular attention in this regard to ensure that adversely affected people are “first among the beneficiaries of the project.”<sup>69</sup>

ENSURING COMPLIANCE:<sup>70</sup> Public confidence in the project will only exist if governments, developers, regulators, and operators all comply with their obligations.<sup>71</sup> This suggests that the plans for each project should include a compliance plan. This plan should spell out how those planning and building the dam will achieve compliance and how the parties will enforce the compliance plan. Possible mechanisms for ensuring compliance with all project related commitments include independent review panels for social and environmental matters, and performance bonds and trust funds to support compliance with project related social and environmental commitments.

SHARING RIVERS FOR PEACE, DEVELOPMENT, AND SECURITY: Transboundary rivers can be a source of tension between countries. This priority suggests that one way to overcome this problem is for the affected states to shift their focus “from the narrow approach of allocating a finite resource to the sharing of rivers and their associated benefits.”<sup>72</sup> This approach is also consistent with the principles of equitable and reasonable use, no significant harm, and the prior sharing of information that are embodied in recent international water law instruments.<sup>73</sup>

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69. *See id.* at 240.

70. *See* WCD REPORT, *supra* note 1, at 244 (requiring commitments for the planning, implementation, and operation of dams to be met).

71. *See id.*

72. *Id.* at 251.

73. *See, e.g.,* Convention on Non-Navigable Uses of International Watercourses, Apr. 11, 1997, arts. 5-9, at 1997 WL 434401 (declaring that watercourses shall be used to attain optimal utilization; States shall participate in use and protection of watercourses; riparian states can make reasonable and equitable use of international watercourses; appropriate measures shall be taken to prevent significant harm to other watercourse States; and watercourse States shall regularly exchange information on the condition of the watercourse); Helsinki Rules on the Uses of Waters of International Rivers, August 1966, ch. 2, at

Combined, these principles offer a new approach to decision-making that is dramatically different from the traditional approach in water and energy management. This new approach seeks to have decisions regarding dams emerge from a bottom-up process as opposed to the top-down process traditionally utilized in dam building. It also seeks to treat dams holistically and to incorporate all elements of the project within the decision-making process. The traditional approach, on the other hand, seeks to limit decision-making criteria to technical, economic, and financial issues.

## B. THE WCD'S LESSONS FOR THE BROADER DEBATE ON DEVELOPMENT DECISION-MAKING

The WCD offers both procedural and substantive lessons to the protagonists in the broader debate about development decision-making. These lessons are discussed below.

### *1. Procedural*

The first lesson is drawn from the participatory way in which the WCD was formed, gathered its information, and prepared its recommendations. This participatory process offers a model that can be used to try and resolve disputes over other complex issues such as diverse as mining and natural resource projects, genetically modified foods, and structural adjustment policies. The WCD approach begins with inviting representatives of all relevant stakeholders to a meeting to determine the mandate for a commission that is selected to be both credible to all stakeholders and representative of them. The dam project sponsors then invite the stakeholders to contribute to the development of a detailed knowledge base. This knowledge base provides the generally acceptable hard factual data that is necessary for resolving key issues pertaining to the subject matter being studied. A participatory approach to information gathering makes it more likely that all participants in the dispute will treat the commission's findings and recommendations with respect. This appears to have occurred with the WCD report, which people,

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[http://www.internationalwaterlaw.org/IntlDocs/Helsinki\\_Rules.htm](http://www.internationalwaterlaw.org/IntlDocs/Helsinki_Rules.htm) (listing the factors to be considered in determining what is a reasonable and equitable use of watercourses).

groups, and institutions with widely divergent views have endorsed.<sup>74</sup>

Second, the WCD, whose ability to produce a consensus document owes a great deal to its transparent and participatory decision-making process, demonstrates the importance of democratic decision-making. In so doing, it implicitly highlights the problems in the current top-down decision-making practices that most transnational corporations, government agencies, and international organizations like the WTO, World Bank, and IMF follow.

## 2. *Substantive*

The findings of the WCD convincingly demonstrate that by failing to give equal attention to the social and environmental consequences of their proposed actions, traditional dam decision-makers systematically underestimate the social and environmental costs and overestimate the benefit of their proposed decisions. Given the universally recognized importance of these social and environmental issues, this is convincing evidence that the traditional view is no longer a viable approach to development decision-making in the case of dams. It also suggests that any new approach to decision-making will only be able to command universal respect if it accords social and environmental factors the same weight it gives to technical and financial factors. These findings are also applicable to development decision-making for other types of policies and projects that are like dams in the sense that they have significant social and environmental impacts – for example, natural resource extraction projects, large manufacturing ventures, physical infrastructure projects, and international monetary and trade policies.

Second, the fact that the WCD was able to produce a consensus report even though its members represented a broad spectrum of opponents and proponents of dams, demonstrates that many key elements of the modern view of development decision-making, at least in principle, are acceptable to a wide spectrum of opinion.

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74. See WCD, *Reactions to the Final Report*, at <http://www.dams.org/report/reaction.htm> (last visited June 6, 2001) (indicating that international organizations such as the International Commission on Large Dams and the International Rivers Network endorse the WCD report with varying degrees of enthusiasm).

These elements include the importance of information disclosure, participatory decision-making, clear procedures for holding decision-makers accountable, options assessments, and incorporation of social and environmental factors into development decision-making with the same status as technical and financial factors.

It is important to note that the WCD model is too new for us to know if this agreement will extend to the implementation of the recommendations. It is already clear that the implementation of the WCD's proposed decision-making framework will be very difficult. Some key actors, such as the World Bank, have refused to be bound by the Report's recommendations, and others have argued that the proposals are too time-consuming, expensive and unpredictable. In fact, while progress is being made towards this goal,<sup>75</sup> it is not clear that anyone—governments, international organizations, contractors, private financial institutions, or NGOs—knows how to effectively implement the WCD's guidelines in all cases where they might be applicable. There are very few examples of participatory decision-making processes for large projects or policies that leave all participants feeling that project sponsors treated them fairly. One positive example is the budget making process followed by the city government in Porto Allegro, Brazil.<sup>76</sup>

### III. SOME KEY UNRESOLVED ISSUES ARISING FROM THE WCD REPORT THAT ARE RELEVANT TO THE DEBATE OVER DEVELOPMENT DECISION-MAKING

The WCD Report was only intended to provide guidance. The WCD did not design it to provide a comprehensive blueprint that

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75. The experience of the Chad-Cameroon pipeline is particularly interesting in this regard. See *supra* note 15. See also, e.g., I.F.C., INVESTING IN PEOPLE: SUSTAINING COMMUNITIES THROUGH IMPROVED BUSINESS PRACTICES (2000).

76. See Naomi Klein, *A Fete for the End of the End of History: When Activists Converged on Porto Alegre, Brazil, For the 'Counter-Davos,' Democracy was in, While Corporations, Elitism, and U.S. Imperialism Were Out*, NATION, Mar. 19, 2001, at 2001 WL 2132361 (noting that the city of Porto Alegre has become a showcase of participatory democracy around the world because the city government gives residents a direct say in decisions about the municipal budget).

governments and international development organizations could immediately implement for decision-making in water and energy management. Consequently, the report raises a number of important issues that it does not seek to resolve. These unresolved issues are relevant both to future debates over dams and to the broader debate over development decision-making. Four of the most pertinent issues are discussed below.

#### A. THE OLD DECISION-MAKING ORDER IS DYING, BUT THE NEW ORDER IS HAVING A HARD TIME BEING BORN

The WCD Report eloquently demonstrates that the traditional view of development decision-making is no longer a feasible basis for decision-making. It makes clear that the costs of making development decisions in isolation from their social, environmental, political, and cultural implications are unacceptably high.

This suggests that the traditional approach to development decision-making is no longer viable and that we are irrevocably involved in a process of evolution from the traditional view to a new approach to development decision-making. Consequently, we are involved in a difficult debate to determine the standards and procedures that will shape a new approach to development decision-making that is broadly acceptable to all interested parties. In this transition period, it is extremely difficult to make important development decisions without precipitating conflict leading to unexpected costs, sub-optimal decisions, or the failure to act at all.

The current situation, however, is not only costly but it is untenable. Too many people live in absolute poverty and lack access to safe sources of running water, housing, primary health care, and education; and our environment is under too much stress. These problems must be addressed, which means that decisions about development need to be made and implemented. Consequently, all sides to the broader debate about development decision-making have an interest in resolving the current impasse.

While the need to resolve the debate is clear, it is not so easily achieved. Fortunately, the WCD gives us some guidance in this regard. The WCD precedent suggests that success is more likely if the parties agree to focus on discrete problems that can be studied

through a multi-stakeholder, participatory process, managed by a small group of technically proficient and politically skilled independent experts. Based on this study, these experts can offer new approaches to old problems. Hopefully, over time this case-by-case approach will provide us with sufficient information and knowledge to develop a more generally acceptable approach to development decision-making.

#### B. IT'S GREAT TO KNOW THE IDEAL, BUT WHAT IS THE MINIMUM ACCEPTABLE STANDARD?

The WCD's proposed new framework for decision-making has achieved two important things. First, it demonstrates that it is possible to design an operationally useful decision-making process, consistent with the contention that the social, environmental, cultural, and political aspects of development are so completely intertwined with the economic aspects that decision-makers must treat them holistically. Second, it indicates that it is possible for the various different stakeholders in a contentious development debate to agree on what principles should underlie a tenable approach to development decision-making.

This suggests that the next task is the challenge of implementation. The WCD's proposal, in fact, is a description of an ideal decision-making framework. It does not address many of the concrete problems that decision-makers are likely to face in implementing this proposal. For example, it does not discuss how decision-makers can decide what is enough consultation, especially if there are some recalcitrant stakeholders who refuse to compromise or to accept third party dispute settlement. It also does not discuss how decision-makers can know if they are allocating an acceptable proportion of their budget and human resources to these consultations. The WCD also does not give any guidance for determining what constitutes an adequate budgetary allocation for either strategic or project level options assessments, particularly in relation to the overall budget for the proposed sector or project level activity.

This suggests that there is an urgent need to conduct research on these issues and to empirically test different methods for implementing the proposal. One of the most pressing issues is

developing the minimum acceptable standards for development decision-making. To put it another way: how much deviation from the WCD ideal is acceptable, or what constitutes “substantial compliance” with its guidelines and criteria? These minimum standards are needed to guide the empirical testing that must take place if we are to learn how to make the WCD proposal operational. They are also necessary to guide the transition process that must be undertaken if we are to move from the current problematic state of development decision-making to a decision-making process that will lead to socially and environmentally sustainable development.

The WCD report seems to suggest that the “floor” in its approach is that no acceptable decision-making process should allow projects to take place if they would result in uncompensated losses to some people or in the violation of other human rights.

### C. WHAT ABOUT THE VICTIMS?

According to the WCD, dam construction has forced between forty to eighty million people to resettle. This estimate does not include those who have suffered losses because of dam related structures, such as power houses, access roads or canals, nor those who live upstream or downstream from the dam and have suffered losses due to changes in the river flow. Many of these people have never received appropriate compensation for the loss of their property, livelihoods, or cultural heritage or for the environmental, social, and health injuries they have suffered. In many cases, these people are suffering on-going injuries. Currently, dams “in the pipeline” threaten many others with similar injuries.

The WCD’s new framework for decision-making implicitly highlights the failure of past decision-makers to adequately protect these people’s rights in their development decisions. It also raises the issue of whether those who decided to build dams owe these victims compensation for the injuries they have suffered. The importance of this issue is likely to grow as these people and their advocates learn about the opportunities that are now available to protect their interests. Similarly, the debate will grow as the victims of dam projects realize that current dam project sponsors are providing those adversely affected by new projects with greater compensation and



more opportunities for protections than past decision-makers offered or delivered. In fact, the demands from these victims for reparations are already beginning.<sup>77</sup>

The case for compensating these victims is morally very strong. However, it is legally problematic. In many cases, it is unclear who exactly caused the injury and should be held legally liable. In other cases, no obvious forum exists in which to bring the action. The victims' advocates will need to conduct legal research to resolve these issues so that the problem of compensating the victims in a fair and balanced manner is fairly resolved. If this does not happen, it is likely the issue will continue to grow as a political problem that states, international financial institutions, and corporations may be forced to address on an ad hoc basis.

The significance of this issue should not be underestimated. The problems of victims of dams are conceptually the same as the problems of people who have suffered injuries from other infrastructure, mining and natural resource projects, and large commercial ventures of all sorts. There is no reason to assume that these victims will be any less determined to press their claims once they see how their counterparts are treated under new decision-making frameworks.

#### D. HOW DO WE REFORM INSTITUTIONS?

We have seen that the modern version of development decision-making and the WCD approach are both based on participatory and

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77. Demands have come from victims in Guatemala, Panama, and Chile. See *Chixoy Dam Affected People Seek Reparations* IRN UPDATE (Int'l Rivers Network, Berkeley, CA), Mar. 14, 2001 at <http://www.irn.org/dayofaction/2001/010314.chixoydoa.html> (reporting that victims in Guatemala are demanding reparations); *Princeton Report on World Bank: Chixoy Dam/ Rio Negro Massacres Reparations Campaigns*, DAM UPDATE (Rights Action, Guatemala), Mar. 2, 2001, at [http://www.rightsaction.org/urgent\\_com/c010301a.htm](http://www.rightsaction.org/urgent_com/c010301a.htm) (reviewing conflicting claims against World Bank for human rights violations in regard to the Chixoy Dam); see also Monti Aguirre, *Indigenous People Demand Reparations from Panama*, 16 WORLD RIVERS REV. 7 (2001) (reporting that victims from Panama are demanding reparations) (Mar. 1, 2001); E-mail from Barbara Rose Johnston, AAA Ombudsman to Meg Taylor, IFC Ombudsman on WCD (Feb. 7, 2001) (on file with author) (discussing the WCD and Chilean victims' demands for reparations).

bottom-up decision-making. These methods of decision-making are applicable to all development decision-makers. Thus, they apply to corporations, international organizations, governments, and to large non-governmental organizations. The current structures and operating principles of many of these institutions are not conducive to these new ways of decision-making. This suggests that a key issue for the future will be reforming these institutions to make their structures and operating principles more compatible with the new approach to development decision-making.

#### E. WHAT ROLE FOR LAWYERS?

Both the modern view of decision-making for development and the WCD proposal pose important challenges to lawyers. For these ideas to become operational and for the lessons learned from the WCD to be usefully applied, lawyers will be needed for a number of tasks. These include:

- Skilled legal negotiators and drafters will be needed to conclude negotiated agreements between development decision-makers and the other stakeholders in their decisions;
- The issue of victim compensation will require lawyers to identify forums and develop legal theories that these claimants can utilize to get relief;
- The issue of developing minimally acceptable standards of compliance with the proposed decision-making framework will require legal research and analysis of international human rights and environmental law, as well as skilled legal drafters; and
- The reform of institutions raises interesting issues of corporate governance, administrative procedure, and international law. These issues will need to be researched and proposals for reform will need to be analyzed for consistency with applicable legal principles.

#### CONCLUSION

The rapid changes that the world has undergone over the past few decades have destroyed confidence in the traditional approach to decision-making for development and rendered it non-viable. So far,

the international community has been unable to agree upon a new approach to development decision-making. The WCD's proposed new framework for decision-making for water and energy management establishes an important precedent for this broader debate. It suggests that it is possible to develop a new framework for development decision-making that is acceptable, at least in principle, to most stakeholders in the development decision-making debate. It also demonstrates that this new framework must incorporate many of the insights of the modern view of development decision-making. Finally, the WCD proposal challenges all interested parties, including lawyers, to work to overcome the problems involved in implementing the WCD's proposed new framework for decision-making and to adapt its lessons to the design of a new framework for all development decision-making.