

Consensus Building

4.1 *Improving negotiation practice*

There are negotiations underway in many parts of the world regarding the management of water resources. These cover allocation decisions as well as the measures that ought to be taken to ensure water quality and availability. Unfortunately, many of these negotiations have not produced fair, efficient, stable or wise agreements.⁴⁷ In part, this is because multi-party, multi-issue negotiations, especially those in which scientific and technical uncertainty levels are high, are inherently difficult. It is also because many of the stakeholders and officials involved have not embraced 'best negotiation practices' in the design of their deliberations. This chapter provides advice to the parties involved in on-going water negotiations regarding possible ways of shifting from the hard-bargaining techniques that characterize most (unproductive) negotiations to a consensus-building approach that is likely to be more effective.

To achieve best practice, six key questions need to be addressed:

- 1) Why is it so hard to reach equitable and sustainable water agreements?
- 2) What strategies are available to stakeholders and administrators involved in water disputes?
- 3) When and how should the consensus-building approach be used to make decisions, fashion agreements and implement partnerships?
- 4) When and how should facilitation or mediation (i.e., the services of 'professional neutrals') be used?
- 5) What can be done to hold negotiators to the commitments they make?
- 6) How should organizations involved in water negotiations go about building their negotiating capabilities over time?

4.2 *Why the usual approach to water negotiation often fails*

Multi-party negotiations in the public arena, within countries or between countries, often fail because the wrong parties are at the table, the process of negotiation is poorly designed and managed, or agreements do not incorporate an adaptive approach to resource management that can respond to changing conditions and scientific uncertainty.

When only high-level elected and appointed officials and not the full range of (self-selected) stakeholder representatives are at the table, negotiations are likely to overlook important information or forego the legitimacy necessary for effective implementation. In an effort to increase the 'manageability' of negotiation processes, public officials often limit the number of parties involved. However, if only a 'blue ribbon committee' of officials is selected, the membership may be insufficient to give adequate attention to the full range of scientific and technical considerations and on-the-ground experience. And, if only technocrats (i.e., appointed technical officials) are involved, agreements are likely to be insufficiently responsive to political or local considerations. Stakeholders, including advocacy groups, community representatives, business leaders, and independent scientific experts all have specialized or 'indigenous' knowledge as well as political sensitivities that are needed

to shape agreements and policies in an appropriately balanced fashion. In addition, unless the full range of relevant stakeholders is represented in developing water agreements, implementation can be much more costly and more difficult, as reluctant or unhappy groups dig in their heels and try to block implementation or keep raising objections to what has already been decided (for example, see Case 4.2 on the Florida Everglades). Only when all the relevant parties have been directly involved will the resulting agreements tap the appropriate knowledge and gain sufficient political credibility to ensure voluntary compliance.

*“MULTI-PARTY NEGOTIATIONS IN THE PUBLIC ARENA OFTEN FAIL
BECAUSE THE WRONG PARTIES ARE AT THE TABLE”*

Most water negotiations consider one issue at a time. This can be a mistake. Often, it is only possible to get agreement when trades across issues occur. That is, unless each group knows that its interests will be served on the issues it deems most important, it is unlikely to respond favourably to requests from other negotiators, even on issues it considers less important. Thus, trading is the key to creating value in negotiations.⁴⁸

Negotiating agendas should be set in a way that guarantees all participants that issues of greatest concern to them will be addressed as part of a package. This will not happen if negotiating fora only take up the most pressing political concern of the day, the most visible resource management emergency, or whatever issue is of greatest concern to the most politically powerful members of the group. The full array of concerns of the whole group needs to be considered together. The group as a whole needs to be involved in shaping a long-term agenda (and sticking to it) and negotiations concerning one issue should not be concluded until a full package of issues has been explored. Taking one issue at a time, as opposed to looking at the connections among issues or trying to ‘nest’ issues in an interlocking fashion usually yields sub-optimal agreements (or no agreement at all), as illustrated by Case 4.1 on the Danube Basin in Europe.

*Case 4.1: Determining the agenda for negotiations on a sustainable water
management agreement in the Danube Basin*⁴⁹

In the mid-1980s the Danube countries began cooperating to develop a legal basis for joint water management. This culminated in the 1994 Danube River Protection Convention (DRPC).⁵⁰ The legacy of mistrust from the Cold War and negotiators’ desire to formulate a workable consensual agreement in a reasonable time led to a narrowing of the scope of the agreement. The parties decided to focus on the environmental aspects of water management and issues not addressed by existing agreements, and exclude those issues that were especially contentious or which did not affect the entire basin.

Although successful in many ways, conflicting visions about how the river should be used were not resolved. These differences contributed to the Danube’s inclusion in the 2007 WWF list of the World’s Top 10 Rivers at Risk due to risks posed by navigation infrastructure.⁵¹ For example, coordination under the International Commission for the Protection of the Danube River (ICPDR, responsible for implementing the 1994 DRPC) could lead to activities directed at floodplain restoration and protection of fish spawning habitat in the same place where cooperation under the separate and older Danube Commission⁵² aims to improve the river for navigation, requiring deepening and widening of the river banks. Both of these potential uses are not possible at the same time and in the same location. As a result, some development projects, such as the Bystroe channel through the Danube Delta, have become framed as issues of economic development versus environmental protection. Without a process for developing an integrated vision of the Danube that includes all relevant

participants and addresses all critical issues, these kinds of disputes will escalate as riparians are unable to link issues and create value through trades across their preferences.

The riparians are now in the process of addressing these limitations to cooperation. For example, through ICPDR involvement, the discussion on the Bystroe canal development was broadened to include other participants and issue areas. A multi-stakeholder forum has been created in which national governments can meet together with NGOs to conduct research, share data and develop a shared vision for management of the Delta. Similarly, a forum for cooperation in the international Sava sub-basin has been created under the ICPDR umbrella that enables participants to address a broader array of issues, including navigation, in parallel with sustainable water use. At the basin scale, the ICPDR is trying to address this issue through increased cooperation with the Danube Commission.

Such efforts and the dedicated fora now engage a larger number of stakeholders on a broader range of issues. NGOs can become official observers to the ICPDR and provide input into policy making. For example, the Danube Environment Forum is an observer and coordinates public participation in environmental decision making and sustainable development in the basin. Taken together, this enlarged group of participants works as ambassadors for the process and as intermediaries between the international forum and their governments or organizations, engaging and informing a broadened group of stakeholders on a wide variety of issues.

Water negotiations actually become harder than they need to be when they are framed in zero-sum (win-lose) terms: either one side gets the water it wants or some other party does. This is especially true when convenors do not pay enough attention to getting the right parties to the table, structuring agendas and ground rules properly, and ensuring effective meeting facilitation. In such cases, negotiators may be unable to create 'value' by, for example, linking issues together. If negotiations are framed as choices between 'the environment' winning and sacrificing economic development; or, agreeing to grow the economy while environmental and health concerns are set aside, they will surely become win-lose battles. Groups with the greater political clout will try to piece together a winning majority, while the weaker parties get little or nothing.

*“WATER NEGOTIATIONS ACTUALLY BECOME HARDER THAN THEY
NEED TO BE WHEN THEY ARE FRAMED IN ZERO-SUM
(WIN-LOSE) TERMS”*

Opportunities to create mutual gain, that is, to create value by managing common pool resources to the advantage of all, require an entirely different approach. This is as true at the local level as it is internationally. Indeed, when sovereign nations are at the table and the only option is voluntary agreement (because no sovereign nation can be forced to accept terms it finds objectionable), agreements must meet the concerns of all sides or countries will not agree to be bound by them.⁵³ Similarly, in sub-national negotiations involving different kinds of water actors, all stakeholders need to feel their interests have been addressed. Although the process may be arduous, unless each party feels that at least some of its concerns are met, they will not sign an agreement.

Most water negotiations often pit parties against each other as if there is no way that all can or will gain by managing shared water resources effectively. But mutual gains are, in fact, available if commitments are made to give parties what they want and need (i.e., that meet their interests). For example, through agreements to adopt water conservation measures now, all parties will have more water to meet their (growing) needs in the future. Or, upstream riparians may need a promise that food produced with the water flowing downstream will be available to them before they agree to a deal that lets more water flow to downstream parties. Or, the pricing of water purchased by downstream users may need to go up to ensure upstream parties that they can earn enough to meet all their needs. Water negotiations that aren't focused on such exchanges are likely to fail. Even weak

parties when pushed by politically powerful parties trying to exploit shared water resources unfairly, will find a way to push back. Often, they form coalitions with the political opponents of the most powerful party. Water negotiations that deteriorate into political battles over unrelated matters are also likely to fail.

Likewise, water negotiations that focus solely on who wants what and are not informed by credible scientific and technical analysis or local empirical knowledge will fall short. Information is needed to make considered decisions. If the group hasn't laid out a careful joint fact-finding process in advance of decision making, it is not likely to have the data it needs when decisions must be made. Agreement may be reached, but commitments will quickly erode when it becomes clear that assumptions about how much water will be available or how ecological systems will respond are wrong. Only by setting a systematic agenda, and developing an accompanying data-gathering plan, will informed trades across issues be possible. And, as noted above, only trades across issues can create value; that is, offer an incentive to each party to accept less than its ideal outcome on one issue in exchange for getting what is most important to that party on some other related issue(s).

"INFORMATION IS NEEDED TO MAKE CONSIDERED DECISIONS"

Most negotiation fora don't adopt even the simplest ground rules. Or, if they do, they don't enforce them. For example, if parties are not asked to come 'prepared' and 'ready to commit' (i.e., to have reviewed draft documents with their internal constituencies well ahead of scheduled meetings), negotiations can stretch out interminably. Many negotiation sessions are often given over to speech making rather than to effective problem solving. Written ground rules regarding how meetings will be run are essential and ought to be approved by all parties before any negotiations begin.

Individuals assigned to chair or moderate meetings are often unskilled in the techniques of facilitation. And, rather than pass the baton to someone better able to manage difficult conversations, these same individuals are inclined to hold on to power, thereby undermining the group's effectiveness. Even the obvious need to agree on who will prepare a written summary of each negotiation session is often overlooked. This means that each participant generates his or her own record of what was said, and who promised what. Unless the group develops a 'single text' to which they are all committed, confusion is sure to emerge. What is reported back to constituents needs to accurately reflect what was discussed and what was agreed, even if that is not flattering to all the group representatives.

"A HARD-BARGAINING APPROACH MAY LEAD TO DECISIONS IN THE SHORT TERM, BUT OFTEN PRODUCES LONG-TERM RESULTS THAT ALL PARTIES FIND UNSATISFACTORY"

Thus, a hard-bargaining approach which limits the number of parties involved, addresses only a narrow set of issues (usually one at a time), treats each decision as a formal zero-sum political bargaining game (emphasizing political wins and losses at the expense of collaborative inquiry), may lead to decisions in the short term, but often produces long-term results that all parties find unsatisfactory. In contrast, a consensus-building approach provides tools for overcoming these limitations (Table 4.1).

Table 4.1: Overcoming the limitations of hard bargaining

Limitations of hard bargaining	Merits of consensus building
Wrong parties at the table.	Stakeholders identified through situation assessment or self-selection.
Agenda too narrow and focused on positions – single issues create a win-lose (zero-sum) situation.	Mutual gains created by focusing on interests and trading across multiple issues.
Poor facilitation and management can pit parties against each other and cause negotiations to be inconclusive, or reach unworkable decisions.	A neutral facilitator guides the process to jointly develop the agenda, set ground rules, generate and assess options, and use a single text to reach a workable agreement.
Decisions often taken without credible (or trusted) information.	Joint fact finding and analysis of scientific data and empirical knowledge informs the negotiation.
Objectives are to ‘win as much as possible’ and reach agreement.	Objectives are to reach a mutually acceptable agreement that all parties can and will implement.

4.3 The consensus-building approach

There is nothing to stop water negotiators from adopting a better approach – one that ensures that all the relevant stakeholders are at the table, that negotiations are managed in a problem-solving (or value-creating) fashion, and that the parties commit to workable and adaptable agreements. Someone in a leadership role within the negotiating group must suggest that something besides the hard-bargaining approach is possible. Others within the group need to understand at least enough about the alternative approach to negotiation to know that they need not give up power if they agree to operate in a consensus-building fashion. The group as a whole needs to commit sufficient time and resources to allow a more effective negotiation process to succeed.

Consensus building is an approach to negotiation that empowers those most concerned about equity while simultaneously responding to the most politically powerful parties’ concerns about preserving their prerogatives. This is accomplished by agreeing in the first instance to seek unanimity but settle for overwhelming agreement, as long as every effort has been made to meet the interests of those who express concerns about a nearly final agreement.⁵⁴

Although there are significant differences between local, national and international water negotiations, especially as different regulatory and legal regimes apply, participants in all situations will benefit from using a consensus decision rule. Those parties who are politically less powerful are assured that their interests will be addressed, that they will not be forced to accept something they oppose (the way they might if a majority voting rule were in effect), and that even the most powerful parties at the table have agreed to make a good-faith effort to address their concerns. At the same time, the most politically powerful parties must be assured that they will have the equiva-

lent of a veto as long as they make every effort to meet the interests of all the other parties at the table. Under a majority-rule voting system, the interests of a minority are not protected. Fifty-one percent of the group can force the remaining 49 percent to accept their will. A consensus-building approach, however, protects the minority by avoiding votes and ensuring that the group as a whole accepts responsibility for doing everything it can to meet the interests of all the parties involved. The presence of an experienced and impartial facilitator can be reassuring in this regard. The facilitator (or mediator or moderator, as he or she is sometimes called) holds the parties accountable to their consensus-building commitments.

“A CONSENSUS-BUILDING APPROACH PROTECTS THE MINORITY”

Consensus building can be an especially effective tool for producing fairer and more effective water agreements because this requires both a commitment to take science and empirical knowledge seriously as well as a focus on achieving political accord. Managing for sustainability requires striking a balance between science, local knowledge and politics as well as formulating agreements among contending parties (who must commit to adapting their institutional behaviour). Seeking to build consensus means seeking voluntary agreement (i.e., there is no vote that can force the minority to accept something it does not want). Consensus building is therefore much more likely to produce lasting results that encourage individuals, groups and communities to live up to their commitments. In a consensus-building process that has incorporated joint fact finding and an agenda developed by the group as a whole, it is much more likely that scientific and empirical knowledge will be given its due. A powerful majority cannot force its political preferences on a minority and overlook what the technical or local empirical evidence suggests.

There are six steps in the consensus-building process,⁵⁵ as shown in Figure 4.1.

Figure 4.1: Six steps in the consensus-building process⁵⁶



4.3.1 Convening – getting the right parties to the table

Successful water negotiations hinge on getting the right parties to the table. Most of the time, in the conventional hard-bargaining mode, a convening agency assembles the parties it feels ought to be involved. Consensus building, by contrast, usually begins with the preparation of a situation or con-

flict assessment by a professional neutral – someone who is mutually acceptable and who has no stake in the outcome of the negotiation – to identify which stakeholders should be invited to engage. Participant selection for negotiations or other dialogues depends in part on their intended purpose and format:

- When the purpose is to build relationships, share information, clarify areas of agreement and disagreement or to identify possible policy options to recommend to decision makers, participants ought to be selected who can speak primarily on the basis of their personal knowledge and skill.
- When the objective is to plan what should be addressed in negotiations, frame the agenda, or generate an agreement through a consensus-building process, then participants ought to have the capacity to make a commitment (i.e., speak for a certain group) or significantly influence the commitment of a particular constituency.

“SUCCESSFUL WATER NEGOTIATIONS HINGE ON GETTING THE RIGHT PARTIES TO THE TABLE”

However, even when the purpose of a dialogue is known, it is not always obvious who should participate in a negotiation. For example, in the Danube negotiations different countries participated in developing two multinational treaties. Countries that were historically on the main stem of the river participated in the 1948 Belgrade Convention focusing on navigation, which is implemented by the Danube Commission, whereas the Danube River Protection Convention, which came into force in 1998, takes a whole-of-basin approach and involves countries with more than 2000 km² in the river basin and the European Union as contracting parties.

Selecting the right participants determines not only if an agreement can be reached, but whether it will be implemented. This is apparent in negotiations within countries, such as early negotiations concerning the management of Florida’s Everglades in Case 4.2 in which key water users, such as the sugar industry, and interest groups, such as environmental groups, were not included and subsequently blocked the implementation of the initial agreement.

Case 4.2: A consensus-building process for the restoration of South Florida’s Everglades⁵⁷

Natural water flows in the Everglades wetlands of Florida, USA have been altered by federal projects designed to control flooding and drain the land in order to make it suitable for agriculture, such as sugar production, and urban development. Agreements on how to restore ecosystem health that did not respond to the interests of key stakeholders, such as the sugar industry, Native Americans and environmental groups, were delayed by litigation. This led the Florida State government to convene the Governor’s Commission for a Sustainable South Florida in 1994.

The Governor’s office worked with State agencies to identify potential participants and a Chair, a former Speaker for the State Legislature. They identified key stakeholder groups and effective representatives. Commissioners included over 40 representatives from public interest, environmental, economic and business groups, Native American tribes, and county, city, State and regional agencies. The Chair was assisted by a team of professional neutrals. The broad scope of the mandate – to look at sustainable development, both in its spatial and issue breadth, and stakeholder diversity – was used to move stakeholders beyond disagreements that had prevented agreement in the past on water quality issues. The Commission made an effort to seek consensus from the non-voting participants from the Federal government and also directly cooperated with a parallel Task Force of government agencies. According to State law, the deliberations were open to the public.

This meant that members of the public could attend all meetings and provide input through public comment periods, including sub-committees and ad hoc meetings convened to address difficult issues. Interested parties who were not Commissioners could also become members of working sub-committees and some were explicitly invited to do so.

Although the Chair was appointed by the Governor's initial planning group, the Commissioners accepted his legitimacy based on his impartiality in conducting the meetings. He was accepted because he ensured that all stakeholders were heard, designated representatives from a wide spectrum of interests to lead sub-groups, listened attentively, and demonstrated a sincere commitment to the group and to reaching consensus.

The Chair and facilitators conducted a conflict assessment, but it was ultimately the Commission that decided what issues should be on its agenda, and when and how to divide into smaller sub-committees. The group was able to agree that South Florida was currently 'not sustainable'. It developed a common vision of what long-term sustainability in the Everglades could mean and agreed that the water management regime would have to be modified to get to what they envisioned. Sub-committees worked on specific issues, presented drafts to the plenary of its in-progress document highlighting recommendations as well as topics on which its members still disagreed.

The Commission convened scientific advisory sub-committees to address controversial technical issues, especially matters about which there was considerable uncertainty. Membership was open to anyone who was interested and a report was prepared for the plenary to use. Some uncertainties could not be resolved and the Commission decided to move ahead with an adaptive management approach, establishing a monitoring programme and evaluating contingent options.

The facilitators introduced a single text technique and prioritization processes that helped the Commission negotiate a final Initial Report. After a year and a half of meetings, the Commission unanimously adopted this report. Afterwards, the Commission continued cooperating with federal agencies to develop a Comprehensive Ecosystem Restoration Plan (CERP) and identify how to prioritize and fund projects. At the end of the Commission's mandate, representatives from both environmental interests and the sugar industry lobbied the government to implement CERP. In the end, the Commission's recommendations were incorporated into CERP and into new legislation. Relationships built through participation in the Commission are still generally good and stakeholders continue to be involved in public participation efforts linked to CERP implementation.

Deciding whose interests should be considered can also extend to parties who do not currently wish to participate but who may have an interest in joining cooperative efforts in the future. In Case 4.5 on the Mekong River Basin, the four countries in the lower part of the basin – Cambodia, Lao PDR, Viet Nam and Thailand – negotiated the 1995 Mekong Agreement on water management. This treaty could be relevant for the entire basin and accommodate the interests of non-participating countries in the upper part of the basin, China and Myanmar, should they wish to join in the future. One participant observed:

'When we started the negotiations of the 1995 Mekong Agreement in early 1993, all four countries concurred that the contents of the agreement should be as equally fair and applicable to all riparians, even though two were not participating....Everyone acknowledged that planning and implementing sustainable development could only be successfully undertaken if you took into consideration the entire basin area and impacts, even though the two upper riparians were not members. It was discussed and well understood that those two countries could participate in the MRC,⁵⁸ and the 1995 Mekong Agreement made provision for their eventually joining the MRC.⁵⁹

The negotiating countries strove to make the Agreement inclusive by basing it on universally acceptable principles of international law and placing no prejudice on other riparians not party to the original agreement.⁶⁰ Similarly in the Volta Basin, the Code of Conduct signed by Burkina Faso

and Ghana includes explicit provisions to promote its adoption by other riparian states (see Case 5.3 in Chapter 5).

An assessment for the purpose of bringing the right parties to the table can be prepared as follows:

1. At the behest of a preliminary set of parties (the convenors of the negotiation), a neutral facilitator contacts various 'circles' of potential stakeholders to interview them on a confidential and not-for-attribution basis. In the first circle are the obvious players who have expressed an interest in being involved. When the facilitator interviews these individuals, he or she asks for their recommendations regarding other possible stakeholder groups to interview. This leads to a second, larger circle of contacts. The convenor also publicizes the fact that the assessment is underway. Groups that want to step forward can contact the facilitator directly. This group constitutes the third circle.
2. Based on all these interviews, the facilitator maps the situation, preparing a report identifying the most important categories of stakeholders and highlighting their key concerns. This is done without quoting any individual. This 'map' is sent to everyone interviewed so they can ascertain whether the issues they raised are adequately addressed.
3. Once all the parties have responded, the facilitator proposes a design for the consensus-building process based on the results of the assessment. That is, the facilitator proposes a list of the stakeholder groups that should be invited to caucus and select a representative to be part of the negotiations. In addition, the process design includes a proposed agenda, ground rules, work plan (including joint fact-finding priorities), and a budget. This, too, is sent to everyone interviewed for their comments.
4. Based on their reactions the facilitator either recommends that a consensus-building process (that the group has designed) proceed or not. At this point, the decision to go ahead is up to the convenor(s).

“ONCE THE PARTIES ARE AT THE TABLE IN CONSENSUS-BUILDING MODE, IT IS ESSENTIAL THEY REVIEW, FACE-TO-FACE, WHAT THEIR ROLES AND RESPONSIBILITIES WILL BE”

4.3.2 Clarifying responsibilities – roles, agenda, ground rules

Once the parties are at the table in consensus-building mode, it is essential they review, face-to-face, what their roles and responsibilities will be. The group as a whole, when it assembles for the first time, must approve the selection of the facilitator or chair as well as the agenda, work plan, budget, ground rules and joint fact-finding procedures. Despite any individual biases, facilitators should be able to provide impartial assistance to participants. If participants have persistent concerns about the neutral's impartiality, they should be able to engage a different facilitator.

For example, the Executive Agent of the Secretariat facilitated interactions between participants of the Interim Mekong Committee. However, some of the riparians became convinced that he and the Secretariat had lost their neutrality. They therefore excluded the Secretariat from negotiations toward a new agreement. Instead, UNDP took a more active role, assuming the Secretariat's facilitating role, convening a new meeting and eventually contracting with an acceptable mediator. Because they were perceived as neutral by all parties, UNDP and the mediator were able to move the discussion beyond a cooperation impasse and then through negotiations towards a new agreement that would address the parties' critical issues.

The group may ask the facilitator to prepare meeting summaries or designate one of its members to do so. They may select a group leader or chair to represent the process to the world at large, although this task is sometimes assigned to the facilitator. Finally, before they begin, they may decide that some category of stakeholders is inadequately represented and agree to reach out to additional individuals or groups to augment the parties at the negotiation table. For groups that have limited experience in negotiations, the facilitator, or another third party, may build their capacity to prepare for and engage in the process, as seen in Case 4.3 in Peru.

Case 4.3: Joint design of the negotiation process between BHP Billiton and affected communities over the Tintaya mine, Peru

A conflict between BHP Billiton and communities living near the Tintaya mine in Peru has centred on control and management of natural resources (expropriation of land), social and economic impact on communities (human rights violations, inadequate economic opportunities) and environmental impacts (to water and land). A series of dialogues was undertaken between 2001 and 2004 to bring the key parties together to negotiate the resolution of long-standing grievances and develop a more constructive relationship between communities and the mining company. In addition to representatives of the mining company and five neighbouring communities, the multi-stakeholder process involved national and international NGOs (National and Regional Coordinating Committees of Communities Affected by Mining (CONACAMI and CORECAMI Cusco), CooperAccion, Oxfam America and the Oxfam-Community Aid Abroad Mining Ombudsman's Office in Australia) who helped to facilitate the process and strengthen the capacity of the indigenous communities to adequately prepare for and engage in the negotiations.

The MSP involved a series of stages to jointly develop the agenda and inclusive process for the negotiations, build trust, undertake joint studies to build shared understanding of the grievances, and negotiate a set of commitments.

A draft agreement was written by a core committee representing all stakeholders and validated and amended through workshops with a wide number of representatives of the communities, company and NGOs where it was reviewed line by line. The final text was presented and approved in general assemblies in each of the five communities and signed by all parties.

The agreement addressed all grievances: it compensated community members with land (above and beyond what had been appropriated) together with technical assistance to help develop new livelihood opportunities; it formed an environmental oversight programme where community members played a key role in on-going monitoring of the company's compliance with measures to reduce or mitigate environmental impacts; it formed a working group to oversee the company's compliance with compensating confirmed victims of human rights violations and for assessing new allegations; it outlined steps to create and fund sustainable development plans to support medium and long-term development in affected communities; and committed the company to secure prior informed consent for future mining activities on new land.

A multi-stakeholder Coordination and Follow-Up Committee was given the responsibility to implement and oversee the agreement. All parties committed to continue to use the dialogue tables to address and resolve emerging difficulties. The participants acknowledged that while the dialogues and resulting agreement had greatly transformed the relationships amongst the previously conflicting parties, a true collaborative relationship depends on the effective and timely implementation of commitments and on-going engagement to resolve emerging issues. Achieving this transformation will require constant efforts to overcome the asymmetries of power that characterize relations between corporations and communities.

Consensus-building efforts only make sense if the participants involved make an on-going effort to stay in touch with the constituencies they ostensibly represent. For some groups this is easy – they have well established internal communication mechanisms. For other groups, it is much harder. This

is especially true for an *ad hoc* network of individuals or organizations cobbled together for the purpose of participating in a consensus-building effort. Such groups may need help from the facilitator to establish channels for regular interaction. The participants are often asked to initial the ground rules spelling out the obligations of participants to maintain contact with the 'constituencies' they are expected to speak 'for' or speak 'like'.

4.3.3 *Deliberating – joint investigations, discussions, learning*

Because many water ecosystems are complex and it may be difficult to assess current conditions, much less develop a shared vision for how they should function, negotiating parties typically engage in joint fact finding to inform their discussions. If participants know they want to cooperate but are unwilling to enter into negotiations towards an official agreement because they do not have enough information, they may start by creating mechanisms to collect data jointly.

“NEGOTIATING PARTIES TYPICALLY ENGAGE IN JOINT FACT FINDING TO INFORM THEIR DISCUSSIONS”

The data-gathering activities of the Danube countries in the mid-1980s and of the Mekong Committee, mostly in the 1960s–1980s, show how countries can learn to work together at a technical level. In Case 4.3, community groups and NGOs worked with the mining company to define and undertake joint fact finding on key issues, prior to negotiating the action required. Similarly in Nepal, representatives from both pro- and anti-dam groups undertook a series of studies to jointly investigate the state of Nepal's hydropower experience as an initial step to developing a set of country-specific guidelines based on the WCD report. The experience of working collectively, as well as the data collected, can build confidence that an agreement can be reached that will protect participants' interests.

If participants can officially agree on common principles, they may decide to postpone technical matters for later official implementing agencies to handle. The Danube nations decided on this approach, initially creating a framework agreement and leaving specific water quality standards to be dealt with on the agenda of the commission they established, the ICPDR. In this case, parties may need to establish data-collecting mechanisms that will provide joint information to inform subsequent decisions. So-called 'third parties' can play an important role in financing these mechanisms and building needed technical and professional capacity. However, as the Danube riparians learned before they generated joint official data, unless all participants agree on how data are to be gathered, the information generated may not be accepted and useful later.

Participants may also be able to incorporate joint fact finding into on-going consensus-building negotiations. As described in the Mekong case, third parties can also help keep negotiations moving forward. When the four negotiating states reached an 'impasse' UNDP sponsored an informal consultation that led to each country reiterating its interest in cooperating. UNDP's active involvement by convening meetings, funding the Senior Advisor (neutral) and covering the costs of national delegates' participation was critical in moving the negotiations towards their eventual success in drafting a framework agreement.

As in the Florida Everglades case, with the help of a neutral facilitator, the group might begin by reviewing the interests of each of the stakeholder groups. Together, the stakeholders then usually decide what kinds of data are relevant and needed. Stakeholders work together to design studies and strategies for obtaining data, analyzing them, and creating forecasts that can inform consensus decisions. In order to meet the needs of different kinds of stakeholders, data often take a variety

of forms, such as technical studies from numerous disciplines as well as local or indigenous knowledge (i.e., things that people living in an area know that experts from outside might miss entirely). Consensus-building groups sometimes agree to invite a range of outside experts to present technical briefings, often highlighting disagreements about methods or assumptions. Technical sub-committees may be assigned to produce background reports for the group. Panels of experts may be assigned to help bring some members of the group up-to-speed on various technical considerations.

Once fact finding has been completed, the group typically engages in a brainstorming process. Informed by the results of joint fact finding, the goal is to invent options and packages that respond to the concerns of all the parties. Various tools can be used to assist participants in assessing options and reaching decision, as illustrated in Case 4.4 on water-use planning in British Columbia, Canada. Based on full group discussions as well as caucuses of various kinds, the neutral prepares a negotiating text that the group can review line by line. For some negotiations, this can involve simultaneous review of texts in multiple languages. Sometimes, if the group is large, there are on-line decision-making aids that can be used to clarify possible choices and the ways in which different participants rate them. Similarly, web-based tools can be used to allow participants to interact between meetings with their constituents and share detailed reactions to complex negotiating texts.

*“THE GOAL IS TO INVENT OPTIONS AND PACKAGES THAT
RESPOND TO THE CONCERNS OF ALL THE PARTIES”*

*Case 4.4: Structured decision making in water-use planning in British Columbia,
Canada*⁶¹

The structured decision-making process of British Columbia's Water-Use Planning initiative highlights how a deliberative process can unfold and depicts some of the group decision-making tools available. BC Hydro, regulators and a wide range of stakeholders, including local citizens, aboriginal representatives, environmental interests, resource users, governments and regulatory agencies, worked to identify specific issues for joint fact finding through technical sub-committees. Together, the group created a road map for a process through which they could voice and examine claims, explore trade-offs and the implications of alternatives, and search for new mutually acceptable alternatives.

They were helped by specific decision-making tools: (1) objective hierarchies enabled all participants to contribute to identifying priorities and establishing criteria for evaluating alternatives; (2) influence diagrams helped participants use different techniques to explore the consequences of various alternatives, and to identify areas where mutually compatible gains were possible and where trade-offs remained; (3) ranking and weighting of trade-offs brought out value-based differences among stakeholders. Through this process, participants developed water-use recommendations that were linked to mechanisms for implementation. Finally, the process followed through with monitoring, capacity building, and a review of on-going policies to continue social learning and adaptive water management.

4.3.4 Deciding – negotiating fairer and effective agreements

Complex water negotiations may take months or even years to resolve. Consensus building works best when a group sets an agenda (and a timetable) and sticks with it. A large group might schedule monthly meetings for six or eight months after an organizational session (at which the agenda and timetable were approved) and before a final meeting to sign an agreed-upon text. Between monthly meetings, sub-committees or caucuses might convene with the assistance of a facilitator to prepare

statements or reports for the full group. Building in sufficient time is essential to create the space for mutual gains to be identified and trading across preferences to occur, as seen in Case 4.5 on the Mekong Agreement.

“COMPLEX WATER NEGOTIATIONS MAY TAKE MONTHS OR EVEN YEARS TO RESOLVE”

*Case 4.5: Trading across preferences in the Mekong River Basin*⁶²

In the Mekong negotiations, the four lower riparians reached an agreement for sustainable water resource use and development, and established the Mekong River Commission (MRC). In the context of other articles in the 1995 Mekong Agreement, they agreed to a package including the principle of reasonable and equitable utilization (Article 5). In particular, the countries wanted a flexible agreement that could adapt to future conditions but be specific enough to ensure that their interests were met on each one's priority concerns.

Thailand, initially concerned that other countries might try to veto proposed developments, advanced the position that each riparian should unilaterally be able to use tributary waters within its territory without the approval of the other riparians. Viet Nam, in agreement with Cambodia and Laos, was very concerned about maintaining flow levels in the mainstream during the dry season and advanced the position that the use of water from the mainstream should be agreed upon by a joint technical committee before any water was diverted. In negotiations, Viet Nam suggested '...expressly recognizing that such consultation is not a right of veto by any riparian' in subsequent iterations of the text for Article 5. Although this wording was eventually deemed unnecessary, it was an effort to address Thailand's concern through reassurances that none of the principles of cooperation would be used to veto any country's reasonable use of its rightful share of Mekong waters. The countries tentatively agreed in principle on the requirements for water use during the wet season in the tributaries and the mainstream, pending resolution of conditions on water use from the mainstream during the dry season. Article 6 of the Agreement details requirements for maintaining base flows on the mainstream, including during the dry season. In Article 26 the negotiating parties address the institutional framework and specify how the MRC Joint Committee would develop Rules for Water Utilization and Inter-Basin Diversions. The Rules include assurances that notification of proposed uses will provide sufficient time for planning before the onset of the dry season. They also stipulate improved monitoring through hydrological stations and mechanisms for monitoring intra-basin use and inter-basin diversions from the mainstream.

These points can be considered part of the package that made Article 5, including conditions for water use from the mainstream during the dry season, acceptable to the parties. The package the countries eventually accepted builds on differences in the location (tributary or mainstream), kind of use (inter- or intra-basin), timing (wet or dry season) and type of procedural requirements (ranging from notification to prior consultation to specific agreement). While requiring agreement only for inter-basin dry season diversions, the text also incorporates flexibility into the agreement by creating a provision under which the MRC Joint Committee can unanimously decide such agreement is not necessary. Although these details represent significant movement on the part of all parties from their initial positions, taken together they met each party's issues of greatest concern. This is the kind of trading across preferences that can create value for negotiating parties.

At various stages, the facilitator might take 'straw votes' to test levels of support or opposition to particular ideas or packages. But no one should be asked to commit to anything until a full text of an agreement has been distributed and each representative can check back with his or her constituents (in whatever way makes sense for that group). When it appears that an agreement has general support, the facilitator will ask, 'Who can't live with this package?' At that point, those who object

are usually asked to suggest 'improvements' that will make the package acceptable to them without making it worse for anyone who is already on board. Note that the facilitator does not ask whether everyone 'is in favour of the agreement'. When asked whether they can 'live with' the agreement each participant is being asked to compare the package to no agreement at all,⁶³ Once a draft agreement is formulated, each participant in a consensus-building process expects the others to check with all relevant stakeholders to be sure that they can, indeed, live with what is being proposed. Then, the negotiating group should come together one last time to 'ratify' the written agreement they have developed, often signing a statement committing the participants, if not their constituents, to work on behalf of the agreement and to support it publicly. In the case of binding international agreements, there are established procedures for signature and ratification.

When an authority, such as a regulatory agency or government body retains the right, indeed, the responsibility to make a final decision regarding negotiations, it is often necessary to submit what has been worked out in an *ad hoc* forum to formal administrative review. At that time, the informally negotiated agreement is presented to the relevant decision makers as a proposal for their consideration, (the neutral may present the agreement on behalf of the full group), not as a final decision. Participants may be asked to testify at follow-up hearings. An inclusive consensus-building process can generate proposals that decision makers can act on with confidence that their decision and later implementation will be supported by all relevant parties. Alternatively, decision makers usually feel obliged to offer convincing reasons should they have chosen to depart from the participants' proposal.

Before they are done, participants typically spell out the steps they think will be involved in implementing an informally negotiated agreement. The goal in a consensus-building process is to design 'nearly self-enforcing agreements'.⁶⁴ Ideally, a negotiated agreement will include a variety of contingent commitments that specify what the group's preference is under various sets of future circumstances. This is a way of dealing with scientific or political uncertainty. The negotiated agreement also ought to include a dispute-resolution clause. That is, for agreements to be nearly self-enforcing, provisions should be included that spell out how one party can raise concerns if it thinks that the others are not doing what they promised or, for whatever reason, it no longer feels it can complete all the tasks it promised to complete. Before the whole agreement unravels, the facilitator may be called upon to reassemble the original participants and try to work out a modified set of commitments.

"THE GOAL IN A CONSENSUS-BUILDING PROCESS IS TO DESIGN 'NEARLY SELF-ENFORCING AGREEMENTS'"

4.3.5 Implementing agreements – holding parties to their commitment

By the time a negotiated agreement is signed (and before it is sent to a formal convening agency if required for final action) participants ought to have discussed how they expect it to be implemented. As in the Danube and Nigeria cases, participants may want to create carefully calibrated monitoring strategies (see Case 4.6) and develop regular schedules for reporting and meeting to share and evaluate results. Data that are collected, shared, analyzed and compiled through a transparent process are more likely to be accepted and considered legitimate. Regular meetings provide an opportunity for participants to reconvene and reconsider their agreement as well as any contingent provisions that are relevant in light of new data or changes in the basin. Sharing and discussing monitoring results can also build participants' confidence that others are meeting their obligations. When participants are unable to meet their obligations despite good-faith efforts, it may be necessary to make financial

or technical support available. At a minimum, participants should make plans for on-going communication, cooperation and coordination. In some cases, this will involve creating some permanent body to assist the parties to the agreement.

*“BY THE TIME A NEGOTIATED AGREEMENT IS SIGNED ...
PARTICIPANTS OUGHT TO HAVE DISCUSSED HOW THEY EXPECT IT
TO BE IMPLEMENTED”*

Case 4.6: Implementation considerations of the Komadugu Yobe Basin Water Charter in Nigeria⁶⁵

Nigeria has developed a Water Charter through a participatory process for the Komadugu Yobe Basin (KYB), a sub-basin of the international Lake Chad Basin.⁶⁶ The Water Charter specifically addresses the roles of different stakeholders in implementing the agreement as well as future mechanisms for cooperation among them. These include regular meetings, details about procedures for cooperating, and obligations for monitoring. The Charter includes institutional mechanisms for implementation that include the kinds of management bodies that are needed, their mandate and rules about their membership. It also details arrangements for funding implementation and how those funds will be administered. In the event of a dispute, the Charter specifies that the signatories (six Nigerian states and the federal government) first try to resolve their differences amicably amongst themselves. If they cannot, they are committed to refer their dispute to either the National Council of States or the Supreme Court of Nigeria, depending on whether the disagreement is between States or between a State and the federal government. Recognizing the international nature of the basin, the Charter refers disputes between the federal government and other riparian nations to the dispute-settlement mechanisms in the Nigeria-Niger Joint Commission and the Lake Chad Basin Commission Convention.

4.3.6 Organizational learning – adaptive management and building capacity

While most efforts to negotiate specific agreements end with the step listed above, on-going advisory committees or certain negotiating fora may convene on a continuing basis, via an assigned or created implementing organization. This is the case in the Mekong where the parties did not want a static agreement or formula for dividing water resources. Instead, the Mekong River Commission created a process that enables the parties to make water-sharing decisions based on changing conditions. The 1995 Mekong Agreement stipulates that the Rules (or Procedures) for Water Utilization may change based on hydrological conditions, such as drought, flooding, or water surpluses during the dry season:

The idea and expectations were to provide a broad and flexible framework of principles, objectives and institutional structure so that as different issues took on priority, the Council, [Joint Committee (JC)] and Secretariat could adjust and adapt to the new needs. That is why the agreement calls for rules or procedures by the Council and JC and allows for rule/procedure making by them so that they don't have to go back and get government approval or amend the agreement.

The Danube countries built similar flexibility for technical working groups and rule making into their framework agreement for sustainable and equitable water management.



Photo 4.1 Fishing in the Hadeja-Nguru wetlands. Wetland restoration is supported by the Komadugu Yobe Trust Fund as part of the Catchment Management Plan negotiated by stakeholders (Nigeria).

“ON-GOING ADVISORY COMMITTEES OR CERTAIN NEGOTIATING FORA MAY CONVENE ON A CONTINUING BASIS”

The wish to create an adaptive institutional framework that can address future issues that are not yet clear relies heavily on monitoring that provides data to on-going planning and decision-making meetings in which future policies can be revised. Participants in the Everglades negotiations decided to proceed in a step-wise manner and to view each policy intervention as an experiment that would provide information to inform subsequent actions. They therefore collaboratively developed a schedule and prioritized projects for incremental implementation. In this way the parties have recognized the scientific uncertainty about ecosystem dynamics, acknowledging that they didn't know what would happen as the ecosystem moved back to more natural hydrological conditions. Due to the spatial and temporal scales and complexity of the Everglades, scientists and resource managers have not been able to fully implement field experiments. Nevertheless, they have pursued an adaptive management strategy characterized by a focus on the learning process through monitoring and use of models to test scenarios that inform on-going decision making.

When this is the case, it is also important for all the stakeholders involved to spend at least some time together reflecting on how their negotiations have worked out and what they should learn from their experience, including from instances when consensus-building efforts fall short of expectation or meet serious barriers (see Box 4.1). This kind of social learning or capacity building is sometimes supplemented with further training in the techniques of group decision making. It would be a pity not to do everything possible to help each group improve its efforts if it is going to engage in on-going problem solving. All too often though, *ad hoc* negotiations, even those undertaken by advisory committees that will continue to interact, are seen as independent episodes and the opportunities for organizational development are lost.⁶⁷

Box 4.1: Beware the pitfalls of adhocacy

The potential downside of consensus building is quite visible, especially where many agencies commit to 'collaborate' in a consensus-building style, but then violate the most important precepts of collaborative problem solving.

First, convenors sometimes 'hand pick' the stakeholder representatives they want at the table; i.e., rather than relying on a situation or conflict assessment prepared by a neutral, some convenors select the representatives they prefer.

Second, they do not always rely on professional neutrals to manage the consensus-building process; or if they do, the convenors independently select a facilitator without giving the participants a hand in selecting a facilitator they prefer (or giving the parties control over the continued payment of the neutral).

Third, some agencies focus on discussion rather than the preparation of a written agreement that all sides can endorse and sign. Thus, there is dialogue but no clear consensus generated by the stakeholders involved and no commitment to implement what has been negotiated.

A process that violates these fundamental precepts of best practice is seriously flawed. It may be more 'participatory' than traditional hard bargaining, and it may include more extensive and transparent deliberations than many win-lose negotiations conducted behind closed doors by a handful of stakeholders, but it does not meet the minimum standards of consensus building. In these instances, consensus building is used as a smokescreen, giving traditional hard-bargaining approaches the appearance of being more collaborative. There is a range of negotiating strategies available in water negotiations, extending from hard bargaining among a small group, to somewhat more participatory and transparent dialogue that ends with a vote in which the majority decides what will happen or the imposition of a decision by the agency-in-charge, to a consensus-building process that is more inclusive and aims to achieve a workable agreement through joint fact finding, facilitated problem solving and the techniques of consensus building.

The key question remains, is it possible to move in the direction of consensus building without shifting entirely away from the hard-bargaining approach? Or, is some participation by a limited set of stakeholders better than no participation at all? This is a choice that only those directly involved in each water negotiation must make. The barriers to consensus building, especially in places that have never operated in this way, can be substantial. The powerful parties will see any attempt to do things in a new and different way as a threat to their authority. They may misunderstand the role a neutral facilitator is supposed to play. The transparency and accountability that flow from joint fact finding may constitute a threat. And, finally, in many parts of the world short-term political concerns trump long-term considerations.

The argument is not that different from the debate over democratizing the operation of government in places that have traditionally been run autocratically. Is it better to have a 'little' democracy rather than none at all? Many believe that some participation of stakeholders in water negotiations is better than none at all. But those in positions of authority should not be permitted to claim that they are engaging in consensus building if they are not.

4.4 Advice to water agreement negotiators

For water negotiators who want to move away from traditional hard bargaining toward a consensus-building approach, there are a series of steps that can be taken. Each follows from the analysis above:

1) *Pay attention to process.*

- Although it may seem expedient to cut procedural corners, this often leads to delays or increased financial exposure caused by subsequent political and legal challenges or failed

implementation. By paying attention to the process of consultation, ensuring that the right parties are at the table in the first place (and are empowered to speak for their constituents), participants and decision-making authorities can generate fairer and more sustainable agreements that strike an effective balance between science and politics.

- Any decision about whether to adopt a consensus-building approach ought to be preceded by a situation or conflict assessment. An assessment maps out the stakeholders, their interests regarding the main issues, and may propose a design for the consensus-building process.
 - A consensus-building process should seek to offer parties with differing interests and values a chance to produce agreements that are better for all of them than their 'no-agreement' alternatives. Consensus is reached when 'joint gains' have been thoroughly explored, and explicit efforts have been made to meet the needs of all parties – though parties are never asked to give up pursuit of their own self-interest.
 - Consensus does not require unanimity, i.e., that all parties agree. It does, however, require that all parties will do their best to meet not only their own interests, but the interests of others as well.
- 2) *Commit to use neutral services. It is easier to hold parties to their agreements if the group as a whole has engaged the services of a neutral mediator/facilitator and adopted explicit ground rules.*
- A trained neutral, or mediator, is needed to manage group problem solving. The convenor or any other party with a stake in the outcome should not be in charge of the dialogue. There are a great many skilled professional neutrals operating around the world. Any negotiating group that wants a facilitator or mediator should be able to find someone qualified to assist.
 - One responsibility of a professional neutral is to remind the stakeholders throughout a consensus-building process of the procedural commitments they have voluntarily made. As an unbiased party, the neutral has the legitimacy to keep participants on track and discussions constructive. Indeed, the reason for asking participants to sign a set of ground rules they have helped to draft is to give the neutral the authority to act on the group's behalf to rein in any participants who fail to abide by the norms the group has established.
- 3) *Consensus building can only work when stakeholders self-identify and 'own' the design of the collaborative process. Expand the number of parties involved and find ways to include 'unofficials'.*
- Stakeholders need to be able to help design the process in which they will be involved so they are confident that it is in their interest to participate. At a minimum, the first time they meet face to face they should formally adopt ground rules and agree on an agenda and timetable. They can revise these as necessary throughout the process.
 - Unless all the key stakeholders support the results of a negotiation, implementation of common-pool resource agreements will be exceedingly difficult. Voluntary compliance reduces the difficulties of overseeing implementation, and 'compliance without enforcement' is much less expensive. The only way to get voluntary compliance is through direct participation by all relevant stakeholder groups. Some categories of stakeholders are best represented by individuals who have no other official responsibilities. This may mean that official representatives from one group will have to sit with individuals who don't have the same 'standing' as they do. Nevertheless, it is in everyone's interest to proceed in such a fashion.
- 4) *Share information about interests and look at packages of options to find ways to create mutual gains.*

Multi-issue, multi-party science-intensive negotiations are complex:

- Energy should be focused on sharing information about priorities and what each participant thinks are unacceptable outcomes.
- In order to be able to prioritize interests, participants need to be well prepared. They should know their 'Best Alternative to a Negotiated Agreement' (BATNA) and use it to evaluate all proposed agreements or packages generated by the group.
- By looking at packages of options covering all the issues in a negotiation, participants can offer to support something that they care less about, in exchange for 'getting' what they want on the issues they care most about. If possible, participants should look at several packages at the same time to understand why players prefer one package over another.

5) *Understand that any agreement will only be useful for a limited period and you will only get things partially right. It is almost always better to pursue an adaptive management approach in seeking to resolve water disputes or set water management policy, then to try to lay out a long-term comprehensive solution.*

- Support your arguments with the best data available. However, there is a lack of skill and knowledge to model most complex ecosystems with much precision. Thus, the assumptions upon which most negotiated water agreements are based are, at best, approximations.
- Given that the ability to model these systems is so limited, it makes sense to accept agreements as approximations and build into them contingent elements, provisions for on-going monitoring, and detailed arrangements for reconvening to update or fine-tune as new information becomes available.
- If contingent agreements are used, the parties need to have a clear understanding of how they will come into play at critical moments.

6) *Ask parties to sign the written agreement they have helped to craft.*

- The act of signing or ratifying a negotiated agreement is an important signal to the public that a legitimate accord has been reached.

7) *Don't neglect to link an informally negotiated agreement to whatever formal actions are needed by those in positions of authority to ensure its implementation.*

It is inappropriate to substitute adhocism for representative democracy. Nevertheless, consensus-building efforts can generate proposals that elected and appointed officials may prefer because all the relevant parties have clearly supported them. If negotiated agreements are ultimately brushed aside with little concern for the effort that has gone into generating them, it is highly unlikely that stakeholders will participate in such efforts in the future (or re-elect the public officials who act in such a cavalier fashion). Confidence in government will erode if those in positions of authority don't offer convincing reasons to explain why they have decided to set aside the consensus proposals that have been put before them.

8) *Commit to capacity building (and organizational development) over time.*

All too often, subsequent rounds of negotiations get increasingly difficult. This is usually because little or no effort is made to learn from what happens during earlier rounds or to make the necessary organizational development efforts required to enhance working relationships in the future.