



Innovation Brief

on International Development Services

Dealing with Increasing Water Conflicts through Alternative Dispute Resolution

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The problem

In the Euphrates river basin, Syria and Iraq have lost water to Turkey after its massive Southeast Anatolia Development project upstream.

Although Israel and Jordan have an initial agreement for using water from the Jordan River, Lebanon, Syria and Palestine have been left out of any agreements. In western India violent riots break out when water is delivered late or polluted by tanker trucks. In the Sindh in southern Pakistan, protests are increasing due to loss of water to dams and barrages built upstream in the Indus river basin. Water in the Colorado River in the USA and Yellow River in China does not reach the sea during large parts of the year. Cities and industry, small and large, are taking away more and more water that was previously used for agriculture and the environment. Farmers, keepers of fish ponds, and rural households face competition over increasingly unpredictable and dwindling amounts of water.

Rising urbanization, denser populations, diversifying economies, multiplying uses of water, global climate change, rising competition for water, and rising water scarcity are all making water conflicts become increasingly pervasive, frequent and intense. The greater the scarcity of water and the severity and frequency of conflicts, the more important it becomes to resolve conflicts quickly. Whether “water wars” or disputes between farmers, conflicts erupt from disturbances caused by rising competition for ever scarcer supplies of water.

The Challenge

But how can increasingly frequent water conflicts be resolved quickly and fairly? Courts and the judicial

systems in many less developed countries are already over-loaded with cases (mainly in urban areas). Courts often lack expertise in water disputes and they may be too slow and unreliable.

The Innovation: Alternative Dispute Resolution for Water

Alternative Dispute Resolution (ADR) is a less formal, less costly, and more participatory process for resolving disputes than is adjudication through formal legal channels. It has the advantages of being flexible, voluntary, and under partial control of stakeholders. It tends to push disputants into becoming partners in creating solutions.

Dispute resolution methods range from those where the disputant parties are full participants (in direct negotiation) to those where technical or legal professionals represent disputants (arbitration and courts, see Figure 1). Normally, the time and costs involved in litigation and formal court-administered justice is high. It tends to be much less for mediation and negotiation. Stakeholder participation is relatively high for negotiation and mediation and is low for arbitration and litigation.

Negotiations and mediation are normally “interest-based processes”, which means that disputes are resolved based on the underlying interests and motivations of disputants. Disputes handled through arbitration and courts normally focus on rights and positions of disputants. Accelerating changes in demographics, climate, institutions and economies make rights-based systems less relevant because of their inherently conservative nature. In developing countries that are undergoing rapid change but where rule of law is still weak or corrupt, even though

laws multiply they may still mean little if they are not known by the population and are not enforced. In

such cases it may be more effective to build rules incrementally between stakeholders.



Figure 1 Dispute Prevention and Resolution

The figure shows a continuum from prevention of disputes—by making rules and agreements among stakeholders—to negotiations, mediation, arbitration, and the formal legal system of courts and judges. In general, the higher you go in this continuum the higher are the time and costs involved and the lesser is the amount of stakeholder participation.

Prevention

Disputes are like grass fires—easy to handle when they are still small but hard to deal with when they become serious. This is why prevention should assume high priority in dispute resolution strategies. Disputes can be prevented by building into the beginning of projects and development strategies, through stakeholder workshops, defining common goals and procedures, creating a team or partners, and making partnership agreements, rules and sanctions. Conciliation with the help of a third party can establish favourable communications, common understandings, trust between parties, and cooperative problem solving. An example is a workshop to identify what a river basin will be like in 15 years time if no changes are made in how it is managed. Discussion could then move toward finding pro-active solutions. (see Table 1)

Negotiation

Negotiation is a process where stakeholders involved in a dispute or problem that requires agreement meet to discuss their views and options and forge an agreement. A neutral party may provide an evaluation of positions between parties to clarify

the strengths and weaknesses of parties involved in a dispute. A dispute panel with a third party may be set up to clarify misconceptions, resolve disagreements over facts or issues and fill in gaps in information. Facilitators may be involved in the early phase of negotiations to help get the process right and assist with negotiated rulemaking.

Fact-finding is the use of third parties to determine the real facts in a situation and possibly offer recommendations for solutions. A peer review is a method to solve problems where one party takes, early on, a dispute to a board, committee or panel of experts for their review and recommendations. An ombudsman may be appointed to hear complaints, find facts, interview parties, and counsel, conciliate, mediate, and make recommendations. Cooperative problem-solving normally does not use a third party and is based upon an agreement between parties that they will collaborate to find resolution rather than compete. It is used early on before relations have become hardened between parties.

There are two approaches to negotiation. The first is a zero sum game. In **positional bargaining** the goal of one party is to win as much as possible. A win for one side means a loss for the other. Concessions are a sign of weakness. One's own side must be hard and on the offensive. The two parties start with their respective ideal solutions and work downwards to a solution acceptable to both sides. This could be applied for all kinds of disputes, such as over-extraction of water from an aquifer to pollution by tanners of a river course used by farmers and

fishermen. In **interest-based bargaining** both parties agree to collaborate in defining the problem, identifying their interests and moving toward a mutually generated solution. The parties relate to one another more like partners than disputants.

Positional bargaining resembles formal adjudication while interest-based bargaining is closer to what is

emphasized in ADR. Research has shown that when people feel that they have had some control over a solution, that their participation has been real, and that the process has been fair—they are more likely to accept and implement the agreed solution.

Table 1 Dispute Prevention and Resolution Methods

Characteristics		Methods				
		Prevention	Negotiation	Mediation	Arbitration	Adjudication
Voluntary/ Involuntary	Voluntary	Voluntary		Voluntary, but can be mandated	Voluntary unless based on contract	Involuntary
Binding/non- binding	Optional rules mitigate conflict	Agreement put into contract		Agreement put into contract	Mostly binding but with review	Binding but with access to appeal
Third party involved?	Normally not	No third party for negotiation		Parties select mediator/facilitator/ conciliator	Expert decision maker selected by parties	Court-imposed, non expert decision maker
Degree of formality	Low with simple rules	Low with little structure		Low but partly structured	Less formal than litigation, rules set by parties	Formal, structured with predetermined rules
Form of deliberation	Deliberation on preventive mechanisms	Flexible vetting of evidence, arguments & interests		Flexible vetting of evidence, arguments & interests	Each party may present arguments & proofs	Each party may present arguments & proofs
Outcome	Infrequent disputes	Mutually acceptable agreement sought		Mutually acceptable agreement sought	Decision by reason, precedent & compromise w/o opinion	Decision by reason & precedent; rarely compromise w/o opinion
Orientation	Future oriented	Future oriented		Future oriented	Past oriented	Past oriented
Private/public sector	Private	Private sector		Private sector, but may be mandated & regulated	Private sector, but may be mandated & regulated	Public sector
Speed to resolution		Moderate but variable		Moderate but variable	Relatively rapid	Variable but can be slow

Mediation

Mediation occurs when an impartial and neutral third party is appointed as a catalyst to help two or more parties in a typically volatile dispute to establish a productive dialogue and reach agreement. He or she may suggest alternative resolutions in order to expand the range of potential solutions for the dispute. Interest-based problem-solving is a method

that combines improving collaborative relations between parties with identifying acceptable solutions. The parties agree upon procedures, decision standards and criteria, brainstorm and bargain over alternative solutions. A mediator should have some expert knowledge about water, such as hydrology, water management, water quality or economics.

Arbitration

Arbitration is normally used when a quick settlement is desired and it is felt that the disputing parties are unable to reach agreement. In non-binding arbitration a dispute is presented to a neutral third party or panel that then issues a recommendation. The parties benefit from the expertise of the third party but still retain control over the decision. Binding arbitration is used when a dispute requires rapid and binding resolution that has the force of law but is not reviewable by the courts. A popular alternative, called **mediated arbitration** (or “med-arb”), uses a third party as mediator until the parties reach an impasse, after which the third party becomes an arbitrator with authority to issue a binding decision.

Mini trials are abbreviated and less formal “trials” where each party presents its cases before an expert, former judge or lawyer. Expertise means expertise about water conflicts and their implications. Presentations include the merits of each case from both a technical and legal standpoint. Mini trials are used to get consideration of cases before an influential panel, when issues are technical, when parties wish to retain some control over the dispute and when a real trial would be too long and costly.

Adjudication

The formal judicial system with courts, judges and lawyers is typically formal, lengthy, and costly. Its decisions are binding (with appeal) and are made by judges or juries that lack technical expertise. The purpose of ADR is to resolve disputes without having to go through formal adjudication.

Next Steps

Adopting Alternative Dispute Resolution for water conflicts may require the following initial steps.

1. Assessment of the need for ADR in the water sector of a particular country

This would include an assessment of the types and frequencies of water disputes, who is involved, costs involved and options for institutions and procedures. This could be done for selected basins, aquifers, irrigation systems, water supply systems, etc.

2. Pilot adoption of ADR at basin or administrative level

A pilot arrangement could be established in a river basin or bounded aquifer or at a provincial or national level. At least two dispute resolution centres or clinics are established and given training and temporary support by ADR experts. One outcome is a guide that relates which ADR methods are suited to different types of water disputes.

3. Pilot adoption of ADR at canal or local level

A pilot arrangement could be established at a branch or main canal level or a district or township. At this level a small team of people are trained to be mediators. They would conduct an inventory of water conflicts in the area and could develop and apply a strategy for settling disputes, relating pertinent ADR methods to different types of disputes.

4. Preparation of a long-term strategy

An assessment of pilot interventions could result in a plan for training, establishment of dispute resolution clinics, materials and funding to implement.

Euroconsult Mott MacDonald and its partners can help governments, stakeholders, donors and other technical assistance organizations to design and adopt effective measures to prevent or resolve water disputes ways that are timely, effective and fair. We are ready to support clients to design and implement practical solutions for addressing these problems.

You are welcome to contact us:

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