

Challenges for the protection of the rights of communities impacted by infrastructure projects in Brazil: A preliminary analysis (Working Paper)

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Summary

The main purpose of this paper is to spell out the main challenges faced by three hydroelectric power plants in the Amazon - Jirau, Santo Antônio and Belo Monte- in preventing adverse impacts on local populations and in taking measures to remedy possible violations. The study focuses essentially on how decisions are taken in the planning, installation and construction phases of the large hydroelectric dams and how they influence the capacity of businesses to protect the rights of local communities.

Based on official documents and interviews¹ with relevant players and stakeholders, the research findings will allow us to make recommendations: to reform the environmental and social licensing process in the country, to make better use of human rights instruments and to introduce business practices in line with the UN Guiding Principles.

Background:

Brazil has put in recent years great emphasis on environmental protection by issuing a series of rules and guidelines. Among other mechanisms, it has created an independent government agency, the Brazilian Institute of Environment and Renewable Natural Resources, known under the acronym of IBAMA, which acts as the Ministry of Environment's administrative arm. Its institutional functions include the monitoring and

¹ The information presented are the result of 30 semi-structured interviews carried out in 2014 with different actors and stakeholders involved in environmental licensing of large-scale infrastructure projects (companies, banks, government, civil society). These interviews are part of a research held by the Fundação Getulio Vargas Center for Applied Legal Research on the challenges and opportunities for environmental licensing of large-scale projects in Brazil and coordinated by Flavia Scabin and the Nelson Novaes. I am grateful to Julia Cruz for her support in the analysis of the interviews.

control of the use of natural resources and of environmental licensing authorizations in cases of large-scale projects, such as the construction of hydroelectric plants.

In the absence of a legal framework for social and human rights pre-requisites, IBAMA's environmental licensing has been responsible to cover many of the socio-economic and juridical aspects related to the protection of local populations.

IBAMA's socio-economic activities are complemented by those carried out by FUNAI, the Brazilian National Indian Foundation, known as FUNAI (Fundação Nacional do Índio) in charge of the protection of indigenous rights. FUNAI has the duty to intervene in any licensing process that affects indigenous communities and lands, to assess and mitigate external impacts on indigenous cultural and natural environment.

Despite these provisions, evidences show that in many cases of large infrastructure projects have had adverse impacts on local communities. In a study carried out by the Special Committee of the Council for the Defence of the Human Person in 2007 on "Those Affected by Dams" in seven hydroelectric plants, serious right abuses were pointed out. These include the lack of participation of those affected by the project; disrespect of the cultural rights of indigenous people, *quilombolas* and traditional communities; omission on the particular needs of vulnerable social groups such as elderly people and children; and inadequate working conditions.

International human rights law imposes obligations on states to respect, protect and fulfil the rights of people exposed to the impacts of major infrastructure projects, whether these impacts stem from the acts and omissions of state agents or those of third parties (private investors, contractors etc.). These obligations comprise state duties to put into place an effective domestic legal framework to prevent human rights violations, and to provide effective redress to those harmed by the project. They have been specified in the case law of international human rights courts as well the UN Guiding Principles on Business and Human Rights (UNGPs), endorsed by 193 countries at the Human Rights Council in June 2011.

The first pillar of the UNGPs is dedicated to the "state duty to respect human rights", which comprises the whole spectrum of human rights obligations under international law (respect, protect and fulfil). A number of requirements stipulated by the UN

Guiding Principles derivative of international human rights law are of direct relevance to Brazil's conduct in relation to the dam construction projects. The Commentary to Foundational Principle 1 provides that states "have a duty to protect and promote the rule of law, including by taking measures to ensure equality before the law, fairness in its application, and by providing for adequate accountability, legal certainty and procedural and legal transparency".

We have chosen to look into the situation of three hydroelectric power plant under construction to have better understanding of the persistence of abuses in the new international legal framework.

Some information about the hydroelectric power plants

The **Santo Antônio Hydroelectric Plant**² located on the Madeira River, 7 kilometres from the city of Porto Velho, in the Brazilian state of Rondônia, started operating on March 30, 2012 with 26 turbines that generates 1853,74 MW. It will be completed in November 2016, operating with 50 turbines that will generate 3568 MW, enough energy to supply power consumption for more than 45 million people. Santo Antônio Energia, a consortium of state-controlled firms and big Brazilian construction companies, runs the Santo Antônio Hydroelectric Plant and is the second largest private company of the electric sector of Brazil.

The **Jirau Hydropower Plant**³, also located on the Madeira River in Rondônia state, consists of 2 hydroelectric powerhouses built on each margin of the river. Each one is equipped with 2 assembly areas of 50 generating units. When completed, it will generate 2184,6 MW on average, enough to supply electricity to more than 10 million homes. Energia Sustentável do Brasil, a consortium of state-controlled firms and multinational companies, runs the Jirau Hydropower Plant.

² *Generation*. Available at <http://www.santoantonioenergia.com.br/en/energia/energiat/> Accessed in 06.02.2014. *Usina inicia geração de energia*. Available at <http://www.santoantonioenergia.com.br/usina-inicia-geracao-de-energia/> Accessed in 06.02.2014.

³ *Enhanced engineering ensures greater energy efficiency for Brazil*. Available at <http://www.energiasustentaveldobrasil.com.br/caracteristicas.asp?lg=2> Accessed in 06.02.2014.

The Belo Monte Dam Complex⁴ is located 3000 kilometres deep in the Amazon basin, on the Xingu River, in the city of Altamira, in the Brazilian state of Pará. When completed, it will be the world's third largest hydroelectric dam, behind China's Three Gorges and Itaipu, on the border between Brazil and Paraguay. Norte Energia, a consortium of state-controlled firms and pension funds, runs the enterprise. It is collaborating with a second consortium that comprises Brazil's big construction companies, such as Camargo Corrêa and Odebrecht.

Planning, Installation and Construction of Power Plants: Main Challenges

Stage 1. Planning and bid requirements

The environmental licensing (*licenciamento ambiental*) in Brazil has an elaborate code of pre-requisites that need to be fulfilled by any project or activity causing impact on the environment or using natural resources. It has two main goals: the first is to guarantee that the implementation of a chosen project is carried out with minimum adverse impact on the environment and on local populations, and the other is to put in place mitigation and compensation plans that correspond to the interventions (CONAMA n° 237/1997).

The licensing procedure consists of three successive phases where the condition for the access to the new phase is the fulfilment of requirements foreseen in the previous phase. The first one, the Preliminary License (*licença prévia*) attests the project environmental viability and establishes the social and environmental conditions that must be fulfilled for its installations. Second, the Installation License authorizes the construction works to begin and establishes conditions for the management and transparency of the impacts caused by each intervention. Third, the Operational License authorizes the project to begin functioning after verifying the compliance with the two previous licenses.

⁴ *The Belo Monte Dam Complex*. Available at <http://norteenergiasa.com.br/site/ingles/belo-monte/> Accessed in 06.02.2014. *Dams in the Amazon: The rights and wrongs of Belo Monte*. Available at <http://www.economist.com/news/americas/21577073-having-spent-heavily-make-worlds-third-biggest-hydroelectric-project-greener-brazil> Accessed in 06.02.2014.

In the case of hydroelectric power plants, decisions taken at an early stage of planning determine some of the potential human rights impacts of future actions. These include land acquisition, forced eviction and/or displacement of local communities, resettlement policies and compensations.

As the three power plants located in the Amazon are part of a Federal Government program known as PAC (Program of Acceleration of Growth), it was to be expected that special measures would be taken to commit public and private businesses to prevent adverse effects on local communities and to devise special measures to remedy rights violations.

The UN Guiding Principle 4 spells out clearly the State responsibility in such cases: “States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies including, where appropriate, by requiring human rights due diligence”

However, no effective preventive measures were taken by the government to meet their obligations as neither the auction notice nor the concession contract included provisions for human rights protection and for the remedy of potential abuses. Several factors contributed to this situation:

- **The public procurement process focuses on economic efficiency of the project, without taking into consideration the necessary investments for the control and mitigation of impacts.** Where the minimum price is stipulated as the only criterion for selection in the auction notice, companies are driven to underestimate operation costs related to the compensation of social and environmental impacts, according to many of the interviewees. Others feel that the analysis of large projects, especially those that are part of the PAC, are political. Some even claim that many steps of the licensing procedure are "skipped" in order to fulfil the agenda of the government and businesses involved, because of the need to complete their projects in the shortest possible time.

- **Absence of an overall strategic development plan.** Project-based environmental licensing that considers each case in isolation tends to be limited in scope, as it does not take into consideration wider issues linked to regional or national development, such as the country's energy matrix, regional transport investment or local development. This argument is recurrent in most interviews made with businesses and civil society organizations, and is shared by the Secretary of Strategic Matters of the President's Office in a document published in 2009⁵.
- **Lack of coordination among institutions.** The dialogue between IBAMA and FUNAI, as well as between them and other institutions is often flawed, because of the lack of an overall picture on environmental and social impacts caused by the construction of large infrastructure projects. Consequently, there is no full analysis of the effectiveness of measures undertaken to prevent, mitigate and remedy the negative impacts of these projects. This lack of coordination is observable also between the federal government and state or local government. Often, the federal environmental agency determines the fulfilment of infrastructure and sanitation requirements, for example, without consultation with local authorities on health, education and labour.
- **Poor quality of environmental impact studies.** Brazil has a wide variety of biomes and cultures in its territory, which entails complex analyses, especially in isolated regions such as the Amazon. The impact studies, which serve as parameters for compensation and mitigation measures, are done by the entrepreneurs who are themselves responsible for taking these measures. For this reason, most interviews questioned the trustworthiness of these studies.
- **Prevalence of political arguments in detriment to technical opinions.** In many cases political consideration prevail over technical opinions. As provided by law, technicians from the environmental licensing agency, IBAMA, are required to examine and approve the environmental studies provided by the entrepreneur.

⁵ According to the Secretary of Strategic Matters of the President's Office: "the absence of founding principles which make a balance between the ideal implementation for the environmental preservation and the necessity of economic development given the lack of application of an environmental strategy, results in in a distortion of the discussion, definition and decision on overall questions of environmental licensing". SEAE, "Licenciamento Ambiental: Documento para discussão: Diagnóstico", 2009

However, in many instances, the Board (*Conselho Superior*) of IBAMA gives the final approval without taking into consideration the technical decisions. In the case of Belo Monte, for example, the Board gave its approval to the impact study despite the fact that technicians pointed out that the studies presented were incomplete, as they left out the analysis of impacts on various local groups. Consequently, a civil public action was filed by the Ministério Público Federal against the person in charge at IBAMA at the time, who approved the studies presented by the entrepreneur in disagreement with the recommendations of the technicians of the Agency and without providing legal grounds to do it.

- **Lack of independence of the environmental control agencies.** IBAMA is under a severe political pressure; especially in infrastructure projects that are part the Brazil's Growth Acceleration Program (PAC). Therefore, their independence in giving technical advice and in monitoring compliance measures is being seriously questioned, especially by civil society organizations.
- **'Underestimation' of social aspects of environmental impacts.** IBAMA, the federal agency responsible for the licensing authorizations for most large-scale projects, does not have sufficient technical capacity and human resources to monitor impacts or the fulfilment of conditions imposed in the compensation plan. This shortcoming leads to the 'underestimation' of environmental impacts in general and in particular of social consequences linked to the construction of the plant. In this regard, a research conducted by the World Bank between 2006 and 2008 showed that only 20% of IBAMA's technicians in charge for impact studies are graduated in social studies, showing the lack of preparation of the agency to deal with social issues. This affects especially issues related to indigenous and traditional communities living in the areas where the hydroelectric plants are located in the Brazilian Amazon.
- **Lack of effective dialogue with local population.** Public hearings with affected communities, which should be part of the licensing process, are held only after decisions regarding social development issues have already been taken. A study of the electrical sector carried out by the World Bank between 2006 and 2008 shows

that on average the first public hearing held with the local population takes place some 852 days after the environment organ issues the Term of References to the contractor for his study of environmental impacts. About 100 days later, the preliminary licensing authorization (*licença previa*) is issued without analyzing or responding to the demands made by the community during the public hearings⁶.

All these elements show the failure of the Brazilian State in performing its 'Regulatory and Policy Functions' as provided by Principle 3 of UNGPs. There is a great need for Brazil to establish a more coherent policy "to ensure that governmental departments, agencies and other state-based institutions are aware of and observe the State's human rights obligations when fulfilling their respective mandates", as per principle 8. This principle calls on states to ensure policy coherence, both vertically (states having "the necessary policies, laws and processes to implement their international human rights law obligations") and horizontally (states "supporting and equipping departments and agencies ... to be informed of and act in a manner compatible with the governments' human rights obligations").

Stage 2. Construction venue, infrastructure development, procurement and outsourcing activities

This is the stage where potential human rights impacts are more likely to occur and affect vulnerable groups. These include labor rights violations (such as poor working conditions, union intimidation); adverse effects on local services in neighboring communities; failure to provide adequate housing and living conditions for resettled populations. There is also the danger of grave violations by business partners operating within their sphere of influence, such as child labor and sexual exploitation.

In the most complex stage, corporations face the dual task of keeping to their schedule of activities and financial commitments, while at the same time, responding to legal and social obligations that are not always clearly spelled out in the planning prerequisites.

⁶World Bank, "Licenciamento Ambiental de Empreendimentos Hidrelétricos no Brasil", 2008.

Most of the challenges faced during the second stage of large dam projects derive from the shortcomings of the first one:

- **Lack of monitoring and enforcement.** As shown above, the environmental licensing procedures composed of three successive phases where the condition for the access to the new phase is the fulfilment of requirements foreseen in the previous phase, are often overlooked. The fact that licenses are awarded without proof of compliance with conditions laid down in the previous licensing authorization, make entrepreneurs aware that the capacity of the Agency to enforce the obligations imposed is low or lenient with the non-compliance. Moreover, another topic of concern in relation to compliance with conditions of environmental licensing is expressed by a civil society organization, Instituto Socio Ambiental (*Socio-Environmental Institute*), in a technical note on assessments made by IBAMA Technical Reports. According to their survey, Technical Reports do not take into account the quality of compensation measures or services provided by the company before authorizing for the renewal or issuance of a new license for the next phase. For example, if the company is asked to reallocate people displaced by the project, the agency only certifies that the amount of homes built is correct, but does not consider whether these homes are suitable for local cultural conditions of life. In the case of Belo Monte, many of the houses designed by companies in the reallocation plan of displaced communities were not suitable to accommodate the size of beds built with local materials nor for the typical way of life of families in this area.⁷
- **Overburden of local infrastructure and services.** Local governments in small towns are not equipped to deal with the impacts of large projects. For instance, in Jirau, Santo Antônio and Belo Monte, there was no prior investment in local communities capable of ensuring basic public policy in health, sanitation, housing

⁷ In accordance with ISA, *NOTA TÉCNICA: estado de cumprimento das condicionantes socioambientais da UHE Belo Monte*, 2013, Available at: http://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/nota_tecnica_final.pdf

and education to respond to the demand created by the influx of migrant workers. In the case of Belo Monte, for example, the peak of the project meant the influx of 20,000 male workers for a city of about 70,000 inhabitants. Measures to decrease the impact of the overcrowding are obviously necessary, particularly in the spheres of public health and sanitation. However, a report done by the Socio-environmental Institute (ISA) shows that the health infrastructure of the region of the Belo Monte dam remains unaltered and that all the sanitation provisions were delayed.

- **Lack of adequate working conditions and absence of leisure and cultural activities.** Many of the workers of large infrastructure projects in the Amazon are migrants from other regions and from former infrastructure projects. They are away from their families and are housed in isolated area in the middle of the forest, in dormitories with other 3 or 5 workers and have limited access to culture and leisure. This situation has been associated with the increasing number of cases of sexual exploitation, including sexual exploitation of children and adolescents, in the neighbouring cities.
- **Lack of clarity about the responsibilities of public and private stakeholders.** There is no clear policy definition on the responsibilities of business and government in relation to prevention and mitigation of impacts of infrastructure projects, on local communities or on ways to address the problems. The lack of clarity is increased by the fact that in all the three dams the State is at the same time the funder, the supervisor, and the controller of the consortium in charge of the construction.
- **Lack of mechanisms for dispute resolution within the licensing process.** There is no mechanism under Brazilian law for the settlement of disputes within the licensing process. This contributes to a high degree of judicialization of cases related to the quality and effectiveness of the remedy measures required from the company in relation to environmental and social impacts.
- **Lack of access to justice in cases of human rights violations.** In many of these cases, Courts has refrained from taking decisions regarding business responsibilities, based on the argument that all matters related to the federal government's Growth

Acceleration Program, known as “PAC” (the construction of the Dams of Belo Monte, Jirau and Santo Antonio are part of the mega-projects of this Program) should be of the concern of the Executive.

- **Assessment of Brazil’s failure to prevent and redress human rights violations committed in the course of the planning, installation and construction of the Belo Monte dam.** Having found Brazil’s domestic legal system insufficient to effectively protect their human rights during the construction of the Belo Monte Dam, various indigenous communities in the Xingu River Basin appealed to the Inter-American Commission on Human Rights (IACHR). On 1 April 2011, the IACHR granted precautionary measures⁸, requesting the State of Brazil to suspend the licensing process and stop any construction work pending the fulfilment of certain minimum conditions aimed at protecting the human rights of the indigenous communities against the impacts of the Belo Monte dam project. Many of the conditions imposed by the IACHR relate to concerns also identified in this report. According to the IACHR, Brazil was under an obligation to conduct consultations that are free, informed, of good faith, and culturally appropriate, with a view to reaching an agreement with the affected indigenous communities. This, in turn, presupposed that the communities were given advance access to the project’s Social and Environmental Impact Study. Brazil was further under an obligation to protect the life and physical integrity of the members of the indigenous people, including against the spread of diseases and epidemics derived from the massive influx of people as a consequence of the construction works. The Brazilian government disagreed with the measures recommended, choosing to withhold its dues to the Organization of American States (OAS) and to withdraw the candidacy of the former Human Rights Minister Paulo Vanucchi for a seat on the IACHR⁹. As a result of this political pressure, the IACHR modified the aim of the precautionary measures. In July 2011, the IACHR, dropping its request to suspend the licensing process, requested the State of

⁸ *PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil*. Available in: <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp> Accessed in 13.06.2014.

⁹ *Brazil's Belo Monte Dam Sacrificing the Amazon and its Peoples for Dirty Energy*. Available at <http://amazonwatch.org/work/belo-monte-dam> Accessed in 13.06.2014.

Brazil to take effective action to implement and execute the legal measures already in place, and to design and implement specific measures to mitigate the effects of the construction of Belo Monte on the territory and life of the indigenous communities. As concerns the protection of the right to health of the affected communities, the Commission called on Brazil to accelerate the finalisation and implementation of existing plans and programs to this regard. Finally, the IACHR requested Brazil to adopt effective measures to protect the communities' ancestral lands against intrusion and occupation by non-indigenous people and against the exploitation or deterioration of their natural resources.

- **Lack of liability of companies involved in violations of rights.** Much of the infrastructure projects are carried out in Brazil by a consortium of companies, which reinforces the effects of the 'corporate veil' as an obstacle to accountability of companies for human rights abuses. For example, in the case of Belo Monte, out of the 19 public civil actions filed by the Ministério Público Federal only 2 were filed against the constructions companies and 3 against the consortium that won the grant. The major part these public civil actions were filed against IBAMA. Besides, the legal liability regime applied by the courts depends on the identification of a causal link between the actions taken and the damage caused. Thus, many of the impacts resulting indirectly from company activities or from within its chain of production are not made accountable. In the Belo Monte case, for example, the court failed to hold companies accountable for cases of child prostitution because the brothel where the girls were found was a few meters away from the construction site. Yet it is well known that 43 brothels were established in the region since the beginning of the construction of the hydroelectric plant, because of the arrival of 20,000 workers without their families to the region.

Pillar three of the UNGPs deals with "Access to Remedy" and requires states to "take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such [human rights] abuses occur within their territory

and/or jurisdiction those affected have access to effective remedy” (Principle 25). Pursuant to the commentary to this principle,

[a]ccess to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms ... may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome”.



The operational principles relating to state-based judicial remedies elaborate on these requirements. At a more general level, the duty to provide for effective judicial remedies requires States to ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts; and that the provision of justice is not prevented by corruption of the judicial process, including the assertion of political and economic pressure that undermines the independence of the judiciary. At a more specific level, the commentary highlights the danger that certain groups including indigenous people “are excluded from the same level of legal protection of their human rights that applies to the wider population”. The UNGPs call upon states to pay particular attention to the rights and specific needs of such groups as concerns access to remedies, procedures, and outcomes.