

COUNTRY SYSTEMS
AND ENVIRONMENTAL
AND SOCIAL SAFEGUARDS
IN DEVELOPMENT FINANCE
INSTITUTIONS: **ASSESSMENT
OF THE BRAZILIAN SYSTEM
AND WAYS FORWARD FOR
THE NEW DEVELOPMENT BANK**

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Country Systems and Environmental and Social Safeguards in Development Finance Institutions: Assessment of the Brazilian System and Ways Forward for the New Development Bank

Conectas Human Rights

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Conectas Human Rights

Conectas was founded in 2001 as a collective effort of professionals, academics and activists. Based in Brazil, we operate across the Global South landscape to monitor and mobilise international human rights agendas. The Development and Socio-environmental Rights program seeks State and corporations' accountability for violations of human and environmental rights resulting from large-scale economic activities.

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Abstract

This report discusses the use of country systems by Development Finance Institutions (DFIs), focusing on social and environmental systems. It presents a brief history of the emergence of the country systems approach and the building of a global consensus on the need for greater use of country systems, within an agenda of development effectiveness.

The study compares the country systems approach in social and environmental safeguards of seven DFIs: six multilateral banks and a national development bank. For each of the analysed institutions, the study sought to unravel their commitment to make greater use of country systems for the assessment and mitigation of social and environmental impacts, as well as the objectives, governance and instruments for the integration and strengthening of such systems. The study also focuses on the system of a specific country: Brazil. The current status of Brazilian social and environmental governance was assessed based on five case studies, encompassing different types of projects in the energy and transportation/logistics sectors. The analysis comprises rules, policies and practices applicable to each case.

Lastly, following the lead of the young institution set up by the BRICS, the New Development Bank (NDB), the study discusses challenges and opportunities for greater use of country systems by the entity and how it could improve the design and implementation of innovative solutions for the strengthening of social and environmental country systems under a South-South Cooperation (SSC) perspective.

The analyses concluded that initiatives aiming at the use and strengthening of social and environmental country systems by DFIs have yielded unsatisfactory results due to the presence of four big challenges: i) Inadequacies between the planning/financial instruments and the measures for the strengthening of national systems; ii) Limitations in the process for dealing with setbacks in the national system; iii) Failures in the methodologies for measuring the benefits and results of the use of country systems; and iv) Incoherencies and additional risks in situations in which there are financial intermediaries.

The biggest challenge for the NDB is to not confine itself in a restrictive view of its own potential role, as a development partner, of ensuring a high level of social and environmental protection, in proper balance with the principles of sovereignty and horizontality. In this sense, the unique characteristics of NDB, such as its “lean” policy framework and its commitment to sovereignty, are, at the same time, points of concern and a unique opportunity for the development of innovative methods and instruments for the assessment of the capacity of clients to abide by their own commitments, and to put in motion effective solutions to overcome weaknesses in order to enable a development based on projects capable of creating transformational changes and that are truly sustainable.

Keywords: country systems; development effectiveness; development finance; New Development Bank - NDB; infrastructure.

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Nathalie Beghin (Inesc) carefully reviewed an early draft and shared meaningful reflections on the experience of Brazilian civil society with the monitoring of IFIs and the political implications of the use of country systems approach. Brent Millikan (International Rivers) contributed to the design of the research questions and was fundamental for the framing of the problem and of proposals of innovative solutions. Laura Waisbich has generously shared a little of her cutting-edge knowledge on South–South Cooperation and international politics. Paulo Esteves (BRICS Policy Center) has wholeheartedly accepted to write the presentation to this report.

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All the remaining errors and omissions are solely attributable to Conectas Human Rights.

List of Acronyms

ABEMA - Brazilian Association of State Environmental Entities	LI - Installation License
ADB - Asian Development Bank	LO - Operating License
AIDB - Inter-American Development Bank	LP - Previous Licence
AIIB - Asian Infrastructure Investment Bank	MDB - Multilateral Development Banks
Atradius DSB - Atradius Dutch State Business	NCB - National Competitive Bidding
BNDES - Brazilian National Bank for Economic and Social Development	NCP - National Contact Point
BRICS - Brazil, Russia, India, China and South Africa	NDB - New Development Bank
CAF - Development Bank of Latin America	NGO - Non-Governmental Organization
CIEL - Center for International and Environmental Law	ODA - Official Development Assistance
CIPS - Suape Industrial Port Complex	OECD - Organization for Economic Cooperation and Development
CNDH - National Commission for Human Rights	OPCS - Operations Policy and Country Services
CONAMA - National Environment Council	PAC - Brazilian Growth Acceleration Programme
DFI - Development Finance Institutions	PCN - National Contact Point
DPL - Development Policy Loan	PNPCT - National Policy for the Sustainable Development of Traditional Peoples and Communities
ECA - Child and Adolescent Statute	PPI - Program of Partnerships and Investments
EIA - Environmental Impact Assessment	PPP - Public-Private Partnerships
ESF - Environmental and Social Framework	RAS - Simplified Environmental Report
E&S - Environmental and Social	RUCs - Collective Urban Resettlements
FPIC - Free, prior and Informed Consent	SEM DPL - Programmatic Development Policy Loan for Sustainable Environmental Management
FUNAI - National Indian Foundation	SEMACE - Superintendence from the State of Ceará
IBAMA - Brazilian Institute of Environment and Renewable Natural Resources	SNUC - National System of Conservation Units
ICB - International Competitive Bidding	SSC - South-South Cooperation
IDB - Inter-American Development Bank	UNCTAD - United Nations Conference on Global Trade and Development Partnership for Effective Development Co-operation
IEG - Independent Evaluation Group	
ILO - International Labor Organization	
INESC - Institute for Socioeconomic Studies	
IPHAN - National Historic and Artistic Heritage Institute	
LAI - Freedom of Information Law	

Preface

Paulo Esteves, Associate Professor IRI/PUC-Rio, Director – BRICS Policy Center,
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► **“Country Systems” at the center of transformations of international development finance**

The study “Country systems and socioenvironmental safeguards in development finance institutions: assessment of the Brazilian system and ways forward for the New Development Bank” is an important stepping stone in the understanding of the evolution of mechanisms of development finance and its socio-environmental impacts. Through this study, Conectas gives an important contribution both to the analysis of the impacts of multilateral development banks and to the strengthening of civil society organizations working on this agenda.

During the 2000s, the emergence of new agents in the field of cooperation and development finance significantly changed the practices of development institutions (Development Banks – national, regional and multilateral – and cooperation agencies). Emerging economies offered at the same time alternatives and opportunities for players involved in development finance – particularly those engaged with infrastructure investment. In fact, many middle-income countries formed what has become known as the “missing middle”; a set of countries marked by significant infrastructure gaps, without access to concessional lending sources, and not necessarily willing to surrender to conditionalities throughout the lifecycle of credit operations of traditional Multilateral Development Banks (MDBs). These countries have become an important market for MDBs such as the New Development Bank (NDB) or the Asian Infrastructure Investment Bank (AIIB), but also for well-established banks, such as the Development Bank of Latin America (CAF). The demand of middle-income countries has been, to a large extent, met by emerging countries themselves, either through their national development banks or through multilateral institutions to which they became members.

The effects of the renewed impetus of new development finance actors is not restricted to middle income countries. Throughout the 2000’s, traditional donors did not avoid criticisms, nor avoided expressing their concerns related to the social and environmental impacts of countries such as China, India or Brazil. Although those concerns were often reasoned, traditional donors clearly sought to fit developing countries into their regulatory frameworks. In any case, as the proverb says, if you cannot beat them, join them. The 2009 crisis was the occasion in which traditional and developing actors converged.

Infrastructure investment became a critical element for countries to recover from the financial crisis in 2009. They were a significant part of the stimulus package and also a central topic of the negotiations in international fora, such as the G20, the World Economic Forum and the BRICS. The key issue was not only the counter-cyclical stimulus, but also the long term engagement of both traditional development agents and the private sector in development finance in general and in infrastructure investment in middle income countries.

The convergence between developing and developed countries was evident in the social and environmental safeguards policies that development banks adopted, but it also goes beyond. The publication of the new development institutions' safeguards policies was followed by the revision of such policies by the World Bank.

Although in terms of the amount of resources, the World Bank is now less important than, for example, the China Development Bank, it is still a reference for addressing the externalities resulting from development finance. Despite their differences in scope, one point brought together the World Bank and the new development institutions: the use of domestic systems for social and environmental protection, the so called country system approach. As the study by Conectas reports (Part II), the World Bank's initiatives towards the intensive use of country systems refers back to 2004 and points out important changes in its practices. There are at least two interpretations of the consensus surrounding country systems. The first one affirms that the measure consists in an effort to guarantee local ownership and to strengthen national institutions. The World Bank and the so called traditional donors would be closer to the practices adopted by developing countries who then proclaimed the respect to their sovereignty and the non-intervention in domestic affairs. The other interpretation points towards another direction: both the World Bank and traditional donors would be positioning themselves to compete with developing countries in development financing, especially in infrastructure projects in peripheral areas of the international system. An analysis of the context in which the decision for the emphasis in country systems is inserted appears to point towards this second direction.

In 2015, six multilateral development banks published the report "From Billions to Trillions: transforming development finance". The document may be considered a landmark in the new wave of reforms oriented to the market in the Global South. After the awakening of the financial crisis and the confrontation with the increasing Chinese presence in the developing world, the document started to open a new path to western financial agents. The mobilization of private investment was the path adopted to promote development and to address the challenges of the post-2015 agenda. The document established a new logic according to which the realization of the Sustainable Development Goals, the implementation of the Paris Agreement and of the African Union 2063 Agenda required the return of the private sector to the center of development

finance. From Washington to Brussels, from New York to Beijing, we can listen to the formula: if we need to increase the investments, we need to concentrate in the mobilization of the private sector. Reciting the same prescription in every situation, in every meeting, is what converts a logic into a self-evident narrative or, if we want, into a mantra. "From billions to trillions" became a mantra that we must confront if we want to understand the centrality of country systems. The rationale underlying such mantra encompasses three steps:

A. Mismatch between supply and demand. Over the last decade, a consensus around the deep gap in infrastructure has been established. In 2010, the World Economic Forum launched its agenda on "Positive Infrastructure", self-proclaimed as a "framework to revitalize global economy". Since then, policy-makers, private enterprises, international consultancies and many scholars have been emphasizing the mismatch between supply and demand: while investment in infrastructure is falling behind, there is a significant amount of outstanding capital, especially in developed countries. As pointed by a recent study by McKinsey, there is an annual US\$ 1 trillion gap in infrastructure investment:

"Years of chronic underinvestment in critical areas such as transportation, water treatment, and power grids are now catching up with countries around the world, as is resource misallocation in many past projects. If these gaps continue to grow, they could erode future growth potential and productivity. At the same time, there is plenty of liquidity in markets, with investors seeking stable long-term returns. It is therefore critical to get finance flowing into urgently needed projects. "

B. De-risking of private investment: The reason underlying the mismatch between supply and demand is attributed to the risks of infrastructure projects. Although associated with particular traces of the sector, such as increased costs, the main concerns refer to political or socio-environmental issues: regulation, political contestation, forced displacement and resettlement. Therefore, de-risking in two different fronts is a condition to attract the private sector: financialization and de-regulation, or flexibilization. Establishing infrastructure funds (public or private, but mainly both) is a trend that goes beyond financing specific infrastructure projects. Such funds constitute today a market in itself, mobilizing sovereign wealth funds, pension funds, private assets, insurance companies and so on. Although the financialization of the infrastructure sector is a way of reducing investment risks, it may not be enough to address such risks, especially in middle income countries. This is where the problem of regulation kicks in. In order to face this problem, the World Bank presented a solution that it entitles as "cascade approach". It is a decision-making process to mobilize public or concessional finance to support the private sector. The process (i) prioritizes solutions to the private sector whenever possible; (ii) supports regulatory reforms whenever possible; and (iii)

promotes blended finance and offers guarantees to markets of greater risks (including through the use of financial resources coming from Official Development Assistance).

C. Focus on Country Systems. As documented by various studies, the country system approach is now widespread. As indicated by the study elaborated by Conectas, country systems are used mainly in relation to social and environmental norms and policies. In addition, this approach also applies to public financial management. Therefore, national regulation (or other socio-environmental protection systems and financial management frameworks) has become the point of intersection between the cascade approach and the country systems, and is now under significant pressure from national and international actors interested in attracting investment. On one hand, the cascade approach turns social and environmental safeguards into an additional risk, indicating deregulation or flexibilization (seen as risk reduction), in order to attract private investment. On the other hand, focus on country systems emphasizes the centrality of national regulation and domestic public policies, creating a renewed space for review and flexibilization not only of environmental regulation, but also of financial management procedures that include procurement, taxes, and profit remittance.

Therefore, country systems are at the center of a renewed strategy on development finance, which puts at risk environmental safeguards that have been developed during the last three decades. In the name of implementing the Sustainable Development Goals (2030 Agenda, 2063 Agenda, Paris Agreement), this strategy risks accelerating processes that worsen life conditions at the periphery of the international system. The study “Country systems and socioenvironmental safeguards in development finance institutions: assessment of the Brazilian system and ways forward for the NDB” presents not only a description of bank policies on the use of country systems, but also its effects on Brazil through the analysis of a series of infrastructure projects in the country. In the context of multiplying flexibilization policies, studies such as this are urgent and necessary.

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3. McKinsey. Bridging the Global Infrastructure Gap. 2016.

4. To an excellent analysis of the “cascade approach”, see Nancy Alexander (2018). The Hijacking of Global Financial Governance? Available at <https://us.boell.org/2018/04/23/hijacking-global-financial-governance>. Accessed on 30 april 2018.

5. Paulo Esteves, Geovana Zoccal Gomes & Gabriel Torres. (2016) Os Novos Bancos Multilaterais de Desenvolvimento e as Salvaguardas Socioambientais [The New Multilateral Development Banks and Socio-Environmental Safeguards]. BPC Policy Brief, V. 6. N. 03. Rio de Janeiro: BRICS Policy Center; Cyril Prinsloo (2017). Informing the approach of multilateral development banks to use of country systems. Johannesburg: SAIIA.

Executive Summary

The international community has built, over the last two decades, a legal and institutional architecture to accommodate new views, principles, terminologies, practices and goals on the best way to do development cooperation. Underlying this framework is the need to improve quality - and not only the quantity - of development finance flows. In such context, a stronger use of country systems emerges as a core element, due to its potential to create more ownership, aligning effectiveness, agility and long-term results. Country systems may be understood as national arrangements and procedures for public financial management, procurement, audit, monitoring and evaluation, and social and environmental procedures.³

The emergence and gradual consolidation of South-South Cooperation, including the creation of new multilateral institutions of financing for development, such as the New Development Bank (NDB) and the Asian Infrastructure Investment Bank (AIIB), provides a new momentum to the commitment to make stronger use of country systems.

This study explores the history, the challenges and the opportunities for a greater use of country systems by development finance institutions (DFIs) in social and environmental safeguards. Such safeguards encompass, for the purposes of this study,

the rules, procedures, institutions, implementation agencies and international standards incorporated by the recipient country and which are relevant for the assessment, prevention, mitigation and remediation of social and environmental impacts, including impacts on human rights.

The commitment to stronger use of country systems stems from the recognition that developing countries have promoted significant advancements in their capacities, governance and implementation of development projects and programs, and also from the idea that development will be more effective if the countries assume ownership over the development process.

The use of national systems is fraught, however, with challenges. How is the equivalence between national and the institutional standards assessed? What are the tools for filling the gaps? How is transparency of assessment criteria ensured? What are the monitoring mechanisms? What are the appropriate cooperation instruments for the strengthening of national systems beyond a specific project? What are the remedies available for situations in which a country system is weakened in the course of a project or program? What are the appropriate indicators to measure the success or the failures of this approach?

In this sense, this study, in addition to making a brief historical summary, provides a comparative analysis of the approach to country systems by seven development finance institutions. The study also performs a critical assessment of the system of rules, policies and social and environmental institutions of Brazil. The actual performance of the Brazilian social and environmental system is assessed through five case studies of energy infrastructure and logistics projects.

The report outlines ways forward to the NDB, established by the BRICS in 2015 with the purpose of mobilizing resources to finance infrastructure and sustainable development in emerging and developing countries. From the outset, the BRICS, and, later on, NDB itself, showed interest in the use of national systems as a guiding principle for the new institution's activities. Although the NDB is clearly not a pioneer in the approach, it has given several signs of its intent of championing and integrating such approach in a more integrated manner and in a scale that could take it to another level.⁴

This report lays out proposals for an innovative, effective and legitimate role of the NDB in the strengthening of institutional capacities of development partners, ensuring a high level of protection to human and environmental rights while simultaneously guaranteeing the efficiency in the use of resources.

► **Brazil: governance of the social environmental system in five infrastructure cases**

Although the policies of DFIs (mainly the multilateral banks) contain criteria and procedures to assess country systems in practice, and not only the formal existence of laws and regulations, such assessment often excludes quite relevant aspects of the practical effectiveness of a domestic social and environmental system. They also tend to underestimate the real likelihood of rules being ineffective and to overestimate public agencies' capacity to enforce them.

For this reason it is important that the methodology for the assessment of a country's practical performance of its own environmental and social systems take into consideration actual situations. In this sense, the current status of the social and environmental governance in Brazil is assessed through five case studies, selected on the basis of the diversity of projects in the energy and transportation/logistics sectors. The assessment includes rules, policies and practices applicable to each one.

The cases demonstrate that there are some persistent problems - both regarding rights at risk and gaps in the protection systems. In particular, the sharp vulnerability of indigenous peoples and traditional communities within the context of infrastructure megaprojects, as well as violations arising out of

failures in the national system dedicated to their protection. Problems with environmental licensing, such as the poor quality and incompleteness of impact assessment studies, and the recourse to legally questionable techni-

ques, such as the fragmentation of the licensing process to minimize the total impact of the project on the territory, are also recurrent issues. In addition, mitigation and compensation measures fail systematically.

► Table I
Recurrent problems in energy infrastructure and logistics projects in Brazil

	Belo Monte Hydroelectric Plant	Suape Complex	Ferrogirão	Teles Pires Hydroelectric Plant	Aracati Wind Farm
Environmental licensing failures	●	●	●	●	●
Problems in the assessment of cumulative and synergistic impacts	●	●	●	●	●
Impacts on Environmental Conservation Units	●	●	●		
Free, prior and informed consultation	●	●	●	●	
Problems in resettlement	●	●			●
Violation of territorial rights of Indigenous Peoples and traditional communities	●	●		●	
Violations of children's and adolescents' rights	●	●			
Denial of the right to access to information	●	●	●	●	●
Violation of the right to participation	●	●	●	●	●
Barriers to the access to justice	●	●		●	
Inappropriate PPPs framework			●		
Negative effects on the climate changes	●	●	●	●	
Other violations of human rights	●	●	●	●	●

Source: Prepared by the authors.

► Challenges for a stronger use of country systems

In addition to the comparative analysis of the country systems approaches of six multilateral development banks - World Bank, Asian Development Bank (ADB), Inter-American Development Bank (IDB), Development Bank for Latin America (CAF), Asian Infrastructure Investment Bank (AIIB) and New Development Bank (NDB) - and a national development bank - BNDES - two case studies illustrated the barriers for the practical operationalization of the use of country systems approach. The first one, a programmatic loan ("DPL") extended by the World Bank to Brazil in 2010, reveals the limitations of initiatives that aim to strengthen country systems in the area of social and environmental safeguards. The second one, the BNDES financing of the Villa Tunari-San Ignacio de Moxos highway ("TIPNIS Park"), in Bolivia, illustrates the adverse effects of overly lax approaches to the use of national and local systems. Both cases led to improvements in the policies and procedures of the two institutions and served to expand the practical knowledge on what works and what doesn't work in the use of country systems, thus enabling new reforms.

Based on the policies and practices of the seven analyzed institutions of financing for development, on the assessment of the Brazilian social and environmental system

applied to five energy and logistic infrastructure projects, and on both mentioned case studies, the paper identified five big challenges for a larger use of national systems in development finance:

- **Misalignment between the planning and financial instruments and the measures for strengthening national systems:** There is a mismatch between the principles and objectives of the institutions regarding the use of country systems and the planning and financial instruments, which affects the analysis of national frameworks for the purposes of determination of equivalence with institutional safeguards, as well as the design of gap-filling and strengthening measures through programmatic loans, technical assistance or contractual conditions in specific projects. The analyses showed that an instrument such as the country partnership strategy may expose a view on the critical points and the opportunities for improvement that does not necessarily reflect the learnings drawn from actual cases, mainly in high-impact projects of infrastructure.

- **Limitations of the remediation processes in cases of retrocession in the domestic system:** The procedures to deal with changes - and cases of setbacks - in country systems are quite homogenous among the analyzed institutions and, as a whole, they are not sufficiently equipped with mechanisms to tackle

the dynamism with which the rules and practices are changed in a national context. The Brazilian case reveals that country systems may be weakened in several ways, not only by legal or regulatory reforms, but also through a deliberate choice to "dry out" the capacity of the social environmental agencies, rendering the normative commands ineffective. The procedures fail to contemplate the role of civil society in the communication of regressive measures that could amount to a violation of the commitment to maintain the "equivalence" of the national system.

- **Failures in the methodologies to measure benefits and results of the use of country systems:** The analysis of country systems' pilots in social and environmental safeguards of the World Bank showed that permanent improvements to the national safeguards system of borrowing countries did not happen as expected. In programmatic loans, such as the SEM DPL to Brazil, there was disagreement among the parties on the role of the loan in the improvement of the social and environmental governance. Without long-term improvements, the trade-offs between short-term risks and long-term benefits in the use country systems use are exacerbated, discouraging the parties (recipient and provider) to engage in this approach.

- **Inconsistencies and additional risks in cases in which there are financial intermediaries:**

The channeling of funds through national institutions, such as national development banks, could have positive effects, to the extent they might better navigate domestic rules and practices. But the social and environmental policies and practices of local agents also have their own weaknesses. With the right instruments, such weaknesses can be addressed. However, the cases show that the multilateral institutions fail in their due diligence of financial intermediaries' E&S frameworks, creating additional risks and impacts. In the same sense, practice shows that the use of intermediaries tends to hinder the access to information and the involvement of civil society.

- **Vulnerability of rights in projects with a "national priority" stamp:** The case studies show that recurrent failures in the Brazilian system of social and environmental protection are related to the absence of monitoring of human rights standards. More than just a distance from best available practices of E&S management, there is enough evidence of flexibilization of individual and collective rights. For instance, while public hearings are often held within the licensing process, the right to free, prior and informed consent and consultation is systematically neglected. The absence of a rights-based approach is particularly relevant in projects labelled as national priorities - in such cases, even the judiciary tends to act under self-restraint, limiting its role as an instance capable of giving proper remedy.

► Lessons learned and the path forward for the NDB

The lessons from the benchmark study and from the reality of infrastructure projects in Brazil are applicable, first and foremost, to the operations of DFIs in countries at a similar stage of economic development and a similar framework of social and environmental rules and institutions as that of the largest Latin-American country. Many of the lessons, however, could apply to developing countries in general. In any case, attention to the local context is essential since there is no one-size-fits-all solution.

- **The sustainability of infrastructure projects is not guaranteed even when the national system is advanced:** The Brazilian case studies demonstrate that a restrictive view could be a source of risks. Even in an upper medium-income country with a relatively well-developed social and environmental system (at least in terms of legal framework), there are many governance failures and gaps that hinder the effectiveness of laws and regulations. This leads to unsustainable infrastructure investments, with projects that only go forward at the expense of the proper respect to the environmental licensing process or the communities' right to consultation and participation. In such circumstances, a strong perception emerges that the laws and institutions responsible for their enforcement are selective.

- **Social and environmental governance needs to be seen in all its complexity:** Assessments of country systems should thus take into account the level of institutional development, the mechanisms for civil society participation, the degree of access to information, the soundness of the legal, regulatory and policy frameworks, the level of enforcement of environmental standards and the E&S management capacity of the public sector. They should also look further to consider access to justice, the right to freedom of expression and demonstration and many others that may be restricted to open legal and political avenues for the implementation of large infrastructure projects.

- **Compliance and prompt corrective actions and mechanisms are important:** The effectiveness of the E&S management depends on the existence of prompt corrective mechanisms capable of adapting the protection system to the challenges posed by each project. Such instruments must offer solutions to problems arising from the implementation of preventive and mitigating measures (including complaints about lack of implementation), the emergence of unanticipated impacts, the adaptation to new circumstances (such as the installation of another project in the same region or area of influence) and the settlement of conflicts. Although the need for continuous monitoring and grievance mechanisms is already known, the Brazilian case shows that the relevance of such

mechanisms stands out in a context in which the national system is relatively advanced, but marked by governance failures and problems of implementation. The mismatches between projects' schedule of execution and the E&S action plans cause harms that could be preventable. These are exacerbated by the absence of extrajudicial mechanisms and obstacles for access to justice.

- **Absence of a rights-based approach:** The logic of country systems could help in overcoming such challenge, by strengthening institutions dedicated to the protection of rights to ensure the effectiveness of internationally established commitments on human rights. However, the analysis of the DFIs policies indicates that this has not been the case, and is worth of attention the lack of a grammar on rights and the absence of expected outcomes that reflect a holistic view of development.

- **The NDB will be confronted with particular challenges as it puts into practice its vision around country systems:** NDB's distinctive characteristics may create additional obstacles to the effectiveness of its own country systems approach. Among them are the "lean" social and environmental policy framework, whose lack of detailed standards could hinder the identification of reference points (benchmarks) for the equivalence tests, and the institution's core commitment to sovereignty and horizontality, which may create deadlocks

for the adoption of necessary gap-filling measures. Such unique features constitute both points of concern and opportunities, depending on the appetite of NDB to adopt additional mechanisms.

► Recommendations

NDB may deploy a range of tools to improve the experience of use of country systems, aligning with national and international rules on environmental and human rights. Solutions can include the use of technology, the organizational structures at the national level (country offices) and the carrying out of joint assessments with partner countries in a horizontal fashion. In addition to such measures, the following recommendations are highlighted:

- **A robust, consistent and integrated country systems approach:** in order to ensure the strategic and operational alignment across all dimensions of DFIs operations, including country strategies, operational policies and instruments of financial support. An integrated approach would necessarily require an assessment and appropriate treatment of issues such as citizens' participation, access to justice, transparency standards of public agencies, environmental rules, responsibility of the private sector and the social and environmental governance (effective oversight capacities, powers to enforce sanctions etc.).

• **Human rights due diligence:** to ensure that E&S harms are prevented and/or mitigated, and that potential impacts on human and environmental rights are monitored, reported and remedied. The first step of the due diligence process, the human rights impact assessment, could draw from the joint assessment conducted by the multilateral bank, the state and other stakeholders, prior to the implementation of specific projects, aiming at emphasizing the areas in which the bank could cooperate - in a horizontal manner, free of conditionalities - with its clients to strengthen the existing rules, procedures and policies relevant to its mandate.⁵

• **Strengthen the capacities of local actors:** including by encouraging the adoption of policies and processes and through the provision of institutional and financial resources. In addition to state agencies, the strategy should target the private sector and, in particular, civil society.⁶ Communities and NGOs must have access to technical capacity-building and be empowered with information on projects and processes, as well as the tools to effectively influence decision-making, implementation, communication and assessment processes.

Introduction

Introduction

Development cooperation (multilateral and bilateral) has been historically characterized by a relationship between donors and recipients in which the latter should adjust to the former's rules and procedures. In the position of debtors, the recipient countries borrow funds from development finance institutions (DFIs). In these arrangements, they usually assume the obligation of complying with strict policies on a host of issues, such as the acquisition of goods and services (procurement), accounting, selection of consultants and the prevention and mitigation of social and environmental impacts. If recipients fail to comply with such commitments, they subject themselves to contractual sanctions, such as early payment of the debt, fines and even termination of the agreement.⁷

The traditional justification for the imposition of unilateral conditions to loans is the low level of development of borrowers' legal and regulatory framework, their low institutional capacities and the imperative of safeguarding the resources operated by the institutions against mismanagement and corruption. However, this approach has caused unintended consequences, such as duplication of tasks, overlaps in controls and the ineffectiveness of projects and programs.

Practical analyses of development cooperation have demonstrated that in order to be more effective, providers should be more deferential towards national development priorities and strategies. Furthermore, the achievement of better outcomes should necessarily be premised on the strengthening of the country's institutions, as well as its governance structures and institutional capacities.

To incorporate the widely shared commitment of ensuring greater country ownership over their own development strategies and priorities, the international community built a political and legal framework that reorganized the governance among the actors and established the foundations for the concretization of new development goals. At the center of this new agenda is the commitment to strengthening the domestic systems, and, as a consequence, to make more use of them. Country systems may be understood as national arrangements and procedures for public financial management, procurement, audit, monitoring and evaluation, and social and environmental procedures.⁸

The commitment to strengthen the use of country systems draws from the recognition that developing countries have promoted meaningful improvements in their capacities, in the go-

vernance and in the implementation of development projects and programs, as well as the idea that the achievement of enduring and long-term results is a shared responsibility among donors and recipients – or, in the new terminology, among development partners.

However, the use of national systems involves a number of challenges. How is the equivalence between national and the institutional standards assessed? What are the tools for filling the gaps? How is transparency of assessment criteria ensured? What are the monitoring mechanisms? What are the appropriate cooperation instruments for the strengthening of national systems beyond a specific project? What are the remedies available for situations in which a country system is weakened in the course of a project or program? What are the appropriate indicators to measure the success or the failures of this approach?

This report suggests ways to improve the country systems approach by development finance institutions (DFIs) in social and environmental safeguards. Such safeguards cover, for the purposes of this study, the rules, procedures, institutions, implementation agencies and international standards assumed by the recipient country, and which are relevant for the assessment, prevention, mitigation and remediation of social and environmental impacts, including impacts on human rights.

To achieve this objective, the study carries out a comparative analysis of the country systems approach of seven development banks (six institutions multilateral and one national development finance institution) and a critical assessment of the system of rules, policies and social and environmental institutions of Brazil, which are relevant in the context of the designing and implementation of energy and transportation/logistics infrastructure projects. The objective is to contribute to the debate on the use of country systems, pointing out risks and opportunities, in addition to the possibilities of improvement of the governance underlying the use of national systems.

This publication began to take shape in the process of observation of the birth and consolidation of one of the newest multilateral institutions dedicated to financing for development, the New Development Bank (NDB). The NDB was set up by the BRICS (Brazil, Russia, India, China and South Africa) countries in 2015 with the purpose of mobilizing resources for infrastructure and sustainable development in developing and emerging countries. From the outset, the BRICS, and, later on, NDB itself, showed interest in the use of national systems as a guiding principle for the new institution's activities. Although the NDB is clearly not the pioneer in the approach, it has given several signs of its intent of incorporating such approach in a more integrated manner and in a scale that would take it to another level.⁹

NDB's distinctive characteristics may create additional obstacles to the effectiveness of its own country systems approach. Among them are the “lean” social and environmental policy framework, whose lack of detailed standards could hinder the identification of reference points (benchmarks) for the equivalence tests, and the institution’s core commitment to sovereignty and horizontality, which may create deadlocks for the adoption of necessary gap-filling measures. Such unique features constitute both points of concern and opportunities, depending on the appetite of NDB to adopt additional mechanisms. Therefore, a unique opportunity emerges for the proposal of truly sustainable ways based on the best available knowledge and on the existing good practices.

Although the NDB is in a clear process of consolidation and scaling up of its activities, it still is a young institution. Taking advantage of this opportunity, this report suggests mechanisms for an innovative, effective and legitimate role by the NDB in the strengthening of countries’ institutional capacities, one which is designed to ensure a high level of protection of human and environmental rights, while simultaneously guaranteeing the efficiency in the use of resources.

One of the main challenges is how to reorganize the debate on how development finance should be done in the 21st century under fresh perspectives, which take into consideration relevant changes the world has undergone over the last decades, as well as the political, economic and social dynamics that explain the increasing multipolarity of the current global order. The proposed way is not blind to the asymmetric relationships have historically shaped development cooperation, marked by unilateral conditionalities imposed on one of the parties (usually, the developing country).¹⁰ However, there is a need to align the efforts to increment the speed of projects’ disbursements with the guarantee that this will not come at the cost of sacrificing sustainable development and human rights. It is important to highlight that most countries have adhered to the main universal and regional instruments on environmental and human rights’ protection. Sidelining the obligations contained in such instruments would run contrary to the stated goal of the use country systems, which features as one of the main objectives for the achievement of long-lasting results beyond specific projects. Indeed, the strengthening of country systems has been listed as one of the core principles for a sustainable infrastructure assessment framework, thus it occupies a central role in the design and implementation of transformational projects.¹¹

In addition to this introduction, the conclusions and the recommendations, this study is divided in four parts.

Part I presents the historical background of the consolidation of the commitment to a greater use of country systems by DFIs. It explains how the use of country systems came to occupy a prominent place among the elements of the "development effectiveness agenda", which gained institutional and legal density after the Monterrey Consensus (2002). It also discusses country systems in light of South-South Cooperation (SSC) principles and practices, a modality of cooperation between Southern countries anchored in political commitments to non-intervention in national affairs, respect to sovereignty and mutual benefits.

Part II describes the country systems approach of six multilateral development banks - World Bank (International Bank for Reconstruction and Development - IBRD), Asian Development Bank (ADB), Inter-American Development Bank (IDB), Development Bank for Latin America (CAF), Asian Infrastructure Investment Bank (AIIB) and the New Development Bank (NDB) - and a national development bank, the Brazilian National Bank for Economic and Social Development (BNDES).

Part III focuses on the country system of a specific country, Brazil. The analysis investigates the current status of the country's social and environmental governance based on five case studies, selected on the basis of different types of projects in the energy and transportation/logistics sectors. It analyzes rules, policies and practices relevant in the context of each project. As discussed in the chapter, the cases point to recurrent problems, concerning both threats to rights and gaps in the protection systems. The acute vulnerability of indigenous peoples and traditional communities within the context of infrastructure megaprojects lead the analysis to constantly focus on these groups' rights - as well as violations arising out of failures in the national system dedicated to their protection. Problems with environmental licensing, notably the low quality and/or insufficiency of impact assessment studies, and the ineffectiveness of prevention, mitigation and compensation measures, are also recurrent problems.

Part IV presents, initially, a critical perspective about the accumulated experiences of DFIs use and strengthening of country systems, which is based on the conclusions of the own internal oversight bodies of the institutions, the views of civil society actors and two case studies. The first one is a programmatic loan of the World Bank ("Development Policy Loan") to Brazil, and the second one discusses a loan from the BNDES to the TIPNIS Park highway, in Bolivia. Next, it indicates ways forward for the NDB based on the experiences and lessons learned. Some recommendations are made for an innovative role of the NDB, taking into consideration its unique position as symbol of the deep changes in development cooperation in the 21st century.

Part I
Country systems:
the building
of a consensus



Background

In the decades following the reconstruction of the post-War global governance, development cooperation experienced a series of changes, among which one of the most important has been the proliferation of bilateral and multilateral agencies for the promotion of development, as well as the entry of new and powerful private players and non-governmental and not-for-profit organizations (NGOs). The diversity of players that coexist in the development field carried a promise of faster achievement of the internationally agreed development goals.

However, this phenomenon also gave rise to an unintended fragmentation, with concrete implications for the countries, mainly those that were mostly in need of external aid. The lack of uniformity in the requirements pertaining to the approval, monitoring and assessment of projects and programs overwhelmed national institutions. Donors' control procedures have increased bureaucracy and duplication of efforts, and caused recipient countries to dedicate considerable part of their resources (human, financial, technical etc.) only to grasp with the requirements and to adjust accountability practices to meet the particularities of each individual donor. In addition, while some countries had to meet multiple donors' demands, others were "forgotten" by cooperation agencies.¹²

In such a fragmented landscape, development aid outcomes turned out to be disappointing, despite the fact that the volume of finance flows experienced a rising trajectory since the approval of the Millennium Development Goals (2015).

The studies applied to the practice of the development showed that an increasing volume would not yield better outcomes. To be more effective, development cooperation would have to shift its attitude towards national development priorities and strategies. Better developmental outcomes would require strengthening the institutions of the recipient country, as well as its governance structures and institutional capacities.

► The development effectiveness agenda

To address the challenge of improving quality - and not only quantity - of development aid, the international community has established, over the last two decades, a new "global partnership for development" for the attainment of solutions for the increasing complexity of development cooperation.¹³

Under an agenda spurred by the desire to make development more effective (see Box I below), a new legal and institutional architecture was assembled to accommodate new views, principles, terminologies, practices and goals on how development cooperation should be done. A series of paradigmatic agreements, which attained the status of "consensus", spelled out the necessary measures to facilitate political dialogue and promote a harmonization of the practices.¹⁴

The main instruments under such framework are: the final text of the 1st International Conference on Financing for Development of Monterrey (2002), the Paris Declaration on Development Effectiveness (2005), the Accra Agenda for Action (2008) and the Busan Partnership for Effective Development Cooperation (2011). Recently, the principles and goals outlined in the documents of the previous stages were reaffirmed, together with the addition of new components, by the Addis Ababa Action Agenda (2015), resulting from the 3rd Conference on Financing for Development, held in the city of Addis Ababa, Ethiopia, in 2015. This conference established the mechanisms for the financing of the ambitious 2030 Agenda, which launched the Sustainable Development Goals (SDG), a set of seventeen (17) goals with 169 targets aiming at the improvement of the well-being of the present and future generations, in fields such as education, health, public safety, gender equality, decent work conditions, nutrition, access to justice, infrastructure, preservation of marine and river ecosystems and climate change.¹⁵

Such instruments laid down the fundamental principles for a more effective development: ownership; policy alignment and use of national systems; coordination amongst donors; mutual accountability; and transparency. In addition, they are anchored in the principle of solidarity, which unfolds in three key elements: i) achievement of common goals; ii) equality, and iii) reciprocity of duties and obligations.¹⁶

The Paris Declaration, for instance, provides commitments for the harmonization of development aid practices, local ownership of the development process, and a greater use of country systems. The Accra Agenda for Action, which aimed at deepening the implementation of the Paris consensus, articulated three thematic guiding principles for the development of initiatives: i) ownership; ii) inclusive partnership, and iii) delivery of better outcomes. At the center of such measures lies the commitment to build capacities, guaranteed countries' right to determine their own future and choose priorities according to their own interests and development strategies.¹⁷

► **Box I:**

The Development Aid Effectiveness Agenda

The Monterrey Consensus (2002), deemed as the "modern genesis of the development aid effectiveness agenda"¹⁸, set the stepping stones for the development of subsequent agreements which elaborated on, and deepened, the agreed measures to achieve a more effective aid. The many consensus and action plans, from Monterrey to Addis Ababa, outlined the following key components of the development aid effectiveness agenda:

1. Harmonization of policies and practices: uniformization and convergence in standards applicable to fields such as control of good management of the use of resources and social and environmental procedures.

2. Untying of aid: untying the financial support to the requirement that the recipient purchases goods and services from the provider, or of a limited number of previously selected agents.

3. Use of national systems: use of the arrangements, rules, institutions and national policies, and not only the standards of the providers.

4. Ownership: recipient countries must have control over their future and their development strategies and priorities must be respected.

5. Measurement and improvement of outcomes: measure the effectiveness through the results, based on mutually agreed upon indicators.

Source: Williams-Elegbe (2017).

As Box I shows, the use of country systems is a key component of the development aid effectiveness agenda. A more systematic use of country systems can thus be regarded as a corollary of the ownership principle and of the commitment towards the building and/or strengthening of local capacities. In fact, once realized that duplicated controls are inefficient and ineffective - not rarely conflicting with each other - and their negative effects on national-level accountability, a greater use of country systems emerged as an alternative to encourage players to make the transition to lesser dependence on donors' development mechanisms, while at the same time providing stimulus for the creation of tools to strengthen local capacities.

A definition of country systems describes them as "national arrangements and procedures regarding public financial management, public contracts, audit, monitoring and assessment, and social and environmental procedures".¹⁹ According to Williams-Elegbe²⁰, the instruments of the aid effectiveness agenda - from Monterrey to Busan - relied on the use of country systems because of their potential to provide recipient countries with support for the development of their national systems (in public financial management, bidding processes, social and environmental standards, etc.), thus improving development outcomes.

► **The emergence and consolidation of South-South Cooperation**

In parallel with the rebuilding of the international architecture for development cooperation as previously described, another phenomenon has contributed to the rewriting of the premises and goals that guide the cooperation amongst countries, with a concrete effect over the debate on the use of country systems. Such phenomenon is the consolidation of a cooperation framework among Southern countries, usually referred to as South-South Cooperation (SSC).

SSC historical roots date back to the Bandung Conference (1955), when countries of the "global periphery" gathered to articulate common strategies for international action, which would be based on values such as the non-interference with internal affairs and the need for developing horizontal relationships among developing countries, based on the idea of reciprocity.²¹ After that foundational moment, the Buenos Aires Conference (1978) represented another historic moment in the institutionalization of SSC practices. The Buenos Aires Action Plan, a result of the discussions held in such conference, develops the concept of technical cooperation based on reciprocity and horizontality, two of the cornerstones of this modality of cooperation.²²

The Declaration on the Right to Development, approved by the UN General Assembly in 1986, represents another important milestone to understand the construction of the international framework on South-South Cooperation. In its international dimension, the right to develop-

ment establishes that states must adopt measures – individually and collectively – to create an environment that allows, in the international and national plans, the full achievement of the right to development.²² The right to development inserted an ethical and solidary dimension to international cooperation, which would be later instrumentalized by the developing countries with the purpose of strengthening the legal regime of development cooperation, which features the previously discussed Monterrey (2002) and Paris (2005) consensus. Under this new framework, cooperation is carried out under the notion of "shared responsibilities", in the sense that developing countries recognize their primary role in the development process, but retaining the right to demand that transparency and accountability principles are also applied to providers (whether they are governments or international financial institutions).²⁴

According to the Nairobi outcome document of the High-level United Nations Conference on South-South Cooperation (2009), SSC may be deemed as a "common endeavour of peoples and countries of the South, born out of shared experiences and sympathies, based on their common objectives and solidarity, and guided by, inter alia, the principles of respect for national sovereignty and ownership, free from any conditionalities".²⁵

In the literature, SSC has been conceptualized as:

*A wide range of interactions that include the alignment of positions in multi-lateral spaces for negotiation, the promotion of South-South trade, the establishment of political coalitions and networks, the building of regional spaces of integration, the extension of external financing in more favorable conditions, the development of human and institutional capacities (scientific, technological and technical) and responses to crisis situations.*²⁶

SSC thus works as a legal and institutional framework within which Southern countries develop cooperation policies, plans, programs and actions in thematic agendas as diverse as health, agriculture, education, research and technology, and finance. SSC is not completely isolated from the "traditional" development cooperation. In fact, the concept of triangular cooperation seeks to describe the interrelations between both modalities of cooperation.²⁷ However, SSC implications to development cooperation go beyond the mere symbolism, to encompass material, ontological and normative aspects.²⁸

Some elements differentiate South-South Cooperation from the "traditional" North-South cooperation. Firstly, South-South Cooperation gained institutional and normative substance

through political agreements outside the "Official Development Assistance" (ODA) framework. ODA is disciplined by the Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD). As discussed earlier, the Bandung and Buenos Aires conferences were two of the emblematic moments for the development and consolidation of coalitions composed of peripheral and "non-aligned" countries. In spite of their subordinated condition, these countries were able to articulate their demands before supranational institutions of global governance.

Furthermore, since it is based upon the principles of sovereignty, non-intervention with national affairs and mutual benefits, SSC reassigns meanings to deeply rooted concepts underlying development cooperation. Among them, the rejection of political, economic and democratic conditionalities attached to development assistance²⁹ and the reinterpretation of the costs and benefits of tied aid.

In summary, the rebuilding of a legal and political framework on development cooperation at the turn of the millennium, together with the rise of South-South Cooperation, gradually shifted the dynamics between providers and recipients from a verticalized and highly asymmetric approach to a new consensus that prescribes the use of laws, rules, institutions, national, subnational and sectorial procedures as a prerequisite for an effective development. In such context, a stronger use of country not only promises greater ownership and efficiency, but also holds itself as a key factor to drive greater accountability, as it submits the use of resources to the checks and balances of the recipient country, such as in the cases of legislative approval and scrutiny over the appropriation bills proposed by the Executive Branch.³⁰

Initial reservations against a stronger use of country system, such as the risk of mismanagement due to corruption and the potential obstacles for quick remediation, did not prevent donors, recipients and all "development partners" from concentrating their efforts and resources to pave the way for a transition towards the "full" use of national systems, or at least to significantly increase their use.

It is in such context that the multilateral development banks (MDBs), supported by a growing number of country systems' implementation and measurement methodologies, and led by the World Bank, started their pilot projects of use of country systems in fields deemed essential for better development effectiveness: public financial management, national competitive bidding, social and environmental safeguards, international competitive bidding and the selection of consultancies.³¹

Part II
Multilateral and
national development
banks approaches

2

Country systems in Multilateral Development Banks (MDBs)

► World Bank

The World Bank is an important producer and spreader of rules on development finance. Throughout its history, its operational policies have progressively become recognized as good practice in domains such as the financial, accounting and social and environmental management of projects and programs.

With the declared intent of increasing the impact on the development (in terms of efficiency, quality and punctuality), increasing the ownership by the country on development programs and projects, facilitating the harmonization and simplifying and reducing costs³², the Bank introduced, in 2004, proposals open to public consultation on the transition to the use of country systems. The World Bank introduced the logics of country system in the fields of financial management (accounting, financial reports, audit) and national competitive bidding (NCB). Next, the institution engaged a pilot for contracting of goods and services (2008–2011) in International Competitive Bidding (ICB) and international consultancies' selection. The declared reasons for the use of country systems in procurement of goods and services (biddings) comprised: i) local ownership; ii) harmonization of development assistance flows; and iii) cost reduction.³³

Regarding the social and environmental safeguards, the World Bank started a two-year pilot project of national systems in 2005³⁴, for the circumstances in which they were considered equivalent to the Bank's applicable safeguard policies chart, and in which the practices, capacity and implementation history of the country were seen as satisfactory, according to the institution's rules and policies. Following the announcement, organizations of civil society and representatives of the private sector raised questions and concerns, some of which were afterwards corroborated by audits and reviews of the institution itself, as it is further discussed. The objections included:

- Risk of the existing standards of the World Bank to be demoted ("race to the bottom");
- Shifting of financial and administrative burdens to the recipient countries, in opposition to the cost reduction for the bank itself;

- Loosening of the anti-corruption controls and incentive to resources misuse;
- Discouragement to the participation of private partners in the contracts.

The bank defined E&S country system, in one of its documents, as "aspects of the country's policy, legal and institutional framework, including its national, subnational, or sectoral implementing institutions and applicable laws, regulations, rules and procedures, and implementation capacity, which are relevant to the environmental and social risks and impacts of the project".³⁵

Despite criticisms, the World Bank proceeded with 12 pilot projects in 9 countries: Romania, Bhutan, Ghana, Jamaica, Tunisia, India, South Africa, Uganda and Morocco. Against the allegation that the country system approach would result in projects subject to more fragile social and environmental safeguards, the World Bank argued that such risks would be netted out by benefits arising from the strengthening of laws, policies, rules and procedures of a country and implementation of local capacities.³⁶

The country system pilot in social and environmental safeguards was structured on three basic stages under equivalence and acceptability tests³⁷:

- | | | |
|--|---|--|
| <p>1. Assessment of the country's safeguard systems relevant to determine the equivalence, understood as the capacity of achieving the goals of applicable operational policies and the strict adherence to the standards defined therein³⁸;</p> | <p>2. Review of the implementation practices of the relevant institutions of the country and their history and capacity of applying such procedures in practice;</p> | <p>3. Gap filling in laws, regulations, rules and procedures, as well as in the practical implementation, by means of formal agreements reflected on the project documentation and contracts.</p> |
|--|---|--|
-

In January 2008, the Board of Directors of the Bank approved the proposal of gradually shifting the use of country system at the project level for subnational and national levels, extending the comprehensiveness to all vehicles and quasi-governmental agencies involved with the implementation of projects.³⁹ In this stage, the Bank would conduct a Safeguard Diagnosis Review with the purpose of verifying the equivalence and acceptability. But the equivalence test in this case differs from the one performed in the project, because it aims only at assessing whether the social and environmental sa-

safeguards systems of the borrowing country achieve the goals and adhere to the principles of applicable operational policies. That is, the assessment of the consistency between the bank's safeguards and the country system at national level does not take into consideration each standard contained in the safeguard policies, but only a wide alignment of goals and principles ("material consistency"). The acceptability analysis is restricted, however, to the operational policies that passed the equivalence test.

In August 2016, after a long process that counted on hundreds of consultations around the world, the World Bank finished the review of its social and environmental safeguards. The update of the policies would be, in the bank's view, a response to the new and different development demands and challenges that emerged over time. Among them, the challenge of promoting a greater harmonization with the practices of similar institutions and of incorporating new practices to a reality in which borrowing countries became more experienced and capable of dealing with development challenges.⁴⁰ Such goals are quite synergistic with the key principles and goals of the previously discussed "new global partnership for development".

In World Bank's own view, the updated framework distributes, in a more coherent way, the obligations among the bank and the clients and promotes advancements regarding transparency, discrimination, social inclusion, public participation and accountability.⁴¹ Civil society organizations, on the other hand, have demonstrated a certain degree of skepticism towards the reach of such goals, mainly due to the absence of a solid commitment by the bank to respect human rights, without which there are no guarantees that the projects will in fact comply with the non-discrimination and accountability standards.

Under the justification of promoting greater rationalization, the new social and environmental framework condensed in a unique document all operational policies effective up to then regarding social and environmental matters. In this sense, it is important to notice that the commitment to a larger use of the social and environmental system of the borrowing country in the assessment, development and implementation of projects appears as a requisite to be observed by the bank itself in project finance and in the assessment and management of risks and social and environmental impacts. The use of country system, under the new framework, shall be bilaterally discussed in such circumstances, provided that there is the possibility of addressing the risks and impacts of the project, and allowing the project to achieve goals in a manner that is more "materially consistent" with bank's own social and environmental standards.⁴²

According to the new framework, the areas in need of strengthening may be approached through specific projects or through wider interventions and strategies aimed at strengthening the country's institutions.⁴³ The Bank may perform a diagnosis of the national system upon the borrower's request, which does not bind future investment decisions, but may serve as a

basis for strengthening actions, capacity building and use of the national framework in specific projects⁴⁴ When the bank identifies points in need of improvement or gaps, it states that it shall work with the borrowing country to identify and agree on specific actions and measures to approach such gaps and strengthen the country system. These commitments are then integrated into the Environmental and Social Commitment Plan.⁴⁵

► **Inter-American Development Bank (IDB)**

IDB's policies and corporate view present a quite strategic conception about the use and strengthening of country systems in social and environmental safeguards. Such approach manifests itself at different planning and action levels.

In realizing the strategic goals of its corporate mission, the IDB states that the environmental issue is transversally included in planning activities and in the definition of country strategies. According to the bank, the inclusion of the environment as one of the key issues reflects the priority given to it in the realization of its mandate, together with poverty reduction and social development.⁴⁶ It happened during the process of its Eighth General Capital Increase, in 1994.

At the level of operational policies, IDB's Environment and Safeguards Compliance Policy (2005) has specific provisions established to ensure compliance with the mission outlined in the strategic plan, including actions that are synergistic with the idea of improving national systems with the purpose of increasing its use and effectiveness, such as: (i) strengthening of legal and regulatory benchmarks related to the environment; (ii) strengthening environmental oversight agencies; (iii) improvement of the environmental quality of the operations financed by the Bank; (iv) addressing transparency issues and access to environmental information and consultation to the interested parties; (viii) guarantees of quality control and performance of environmental impact assessments (EIA); and (ix) promotion of environmental education and training.⁴⁷

A country's environmental analysis generates relevant information and provides support to the development of programmatic documents.⁴⁸ The analysis must have a strategic character and focus on sectors and fields widely relevant for the relationship between the Bank and the country.⁴⁹ Moreover, the environmental analysis takes into consideration several relevant aspects, including the environmental governance status, which encompasses the level of institutional development; the participation of civil society; the access to information; the legitimacy of the legal, regulatory, and policy frameworks; the level of enforcement and compliance with the environmental standards; and the environmental management capacity of public authorities.⁵⁰

► Definition of Country Environmental Analysis by IDB⁵¹

Analysis at the strategic level focused on establishing environmental priorities to guide its effective integration to decisive areas for social and economic development, as well as improvements in the relevant environmental management areas. It may occur through fast and focused assessments or through more complete procedures, with well-developed consultations.

When working in partnership with a country, the IDB discusses forms of approaching, in an intersectoral manner, the main environmental issues, including the social aspects related to the environmental analysis.⁵² Thus, it is expected that the possibility of use of country systems is increased from the beginning of the preparation of the country strategy, under guidelines such as the flexibility and a strategic and process-oriented view (not an end in itself).⁵³ The opportunities for use of national systems are, however, subject to the institution's risk management framework, which include sectoral risks (sensitive sectors, such as infrastructure, extractives, oil and gas), policy risks (inappropriate policy framework, such as ineffective legislation), and governance risks (low capacities, absence of surveillance, corruption etc.).⁵⁴

The use of national systems is explicitly listed as a possible environmental risk. IDB's policies have, thus, specific guidelines to guide the use of country systems. According to an internal directive⁵⁵, national systems should be adopted when the bank determines that the systems of the borrowing country are equivalent or superior to the bank requirements. Such equivalence shall be analyzed in accordance with each one of the safeguards applicable to the selected operation. The Bank shall be responsible for determining such equivalence and its acceptability, and for monitoring compliance with the policy.⁵⁶

It is important to emphasize that IDB's national systems strategy includes the "fiduciary" systems of financial management, the procurement of goods and services (biddings) and the systems of "effectiveness of the development" of planning, monitoring and assessment, and environmental and social safeguards. In its Ninth Capital Increase, IDB committed to make a larger use of country systems. In 2009, the IDB's Board of Directors approved a country system strategy that is based on two principles: (i) distinction between the focus on "strengthening" the national systems and the "use" of such systems, giving priority to activities performed with the purpose of increasing the use of such systems in projects financed by the Bank; and (ii) the main components of complex systems are disaggregated, reinforced and separately monitored.⁵⁷

► Definition and procedures for the implementation of country systems in the IDB.

IDB defines safeguard national systems as the "set of laws, regulations, institutions and procedures that the countries currently apply as a part of their environmental management".⁵⁸ The use of the national systems is subject to the following procedure:⁵⁹

- | | | |
|---|---|--|
| 1. Eligibility criteria:
Firstly, only B and C category projects are eligible. The use is restricted to specific and individual operations. In all the cases, the recipient must request the substitution of specific safeguards. | 2. Equivalence analysis:
a country system is considered equivalent in a specific safeguard if it complies with the goals and adheres to the operational principles of this safeguard. In this stage, the emphasis is put on legal instruments, such as laws, regulations and surveillance procedures; | 3. Acceptability analysis:
it focuses on the practical application, track record and capacity of the institutions to put in practice, enforce, and apply operative principles of the concerned safeguards. |
|---|---|--|

Going beyond the environmental analysis, IDB has also committed to support the financing of environmental management operations and to provide technical assistance to borrowing countries. The goals of this support are, among others, the improvement of the governability, the development of policies and institutional capacity-building in environmental matters. The activities subject to financing include improvements in the environmental legislation and regulation, strengthening of institutions, and environmental training, education and governability in all levels.⁶⁰ The financial instruments for such operations encompass loans to the public sector, specific funds of environmental mandate, funds for technical assistance aimed at the creation of "public regional goods", financing to the private sector, non-reimbursable technical cooperation, and co-financing with other donors.⁶¹

As tools for monitoring the "transversality" of the environmental issues, IDB restates the need for developing indicators capable of capturing the continuous adherence to the sustainable development goals. Such tools would have special application to the activity of country environmental analysis, to capture relevant changes. In this regard, IDB's Environment Strategy

envisages that special attention must be paid to the assessment of the environmental capacity and governance of the country, encompassing, for instance, the degree of institutional development, participation of civil society, access to information, adequacy of legal and regulatory regimes, the surveillance on the compliance with and observance of environmental standards and the capacity of the public sector in terms of environmental management.⁶² Within the scope of specific projects, the reports of conclusion of the projects must contain a synthesis of the lessons learned with their practical experience.⁶³ Therefore, IDB commits to developing methodologies by means of collaborations among internal departments.

If, during the execution of the project, there is a reduction of the equivalence and acceptability criteria in a manner that is incompatible with the contractual requirements – due, for instance, to amendments to the applicable national laws, to a loosening in the environmental regulation or to a decrease in the capacity of the responsible institutions –, such circumstances may constitute a reason to contractual termination and to adopt the IDB's procedures that are applicable to such situations.⁶⁴ On the other hand, the borrower may request a review of the equivalence and acceptability analysis, if it understands that there has been positive alterations. In such events, it is subject to the analysis of the Board of Directors.⁶⁵

► Asian Development Bank (ADB)

A few years after the beginning of the World Bank pilot, the Asian Development Bank (ADB) also adopted a benchmark for the use of national systems, in which the "equivalence" and the "acceptability" at the national, subnational, sectorial or agency level to work with the borrowers would be assessed. The fundamental framework is the Safeguard Policy of 2009⁶⁶, which updated the existing framework in a way similar to what the World Bank did in 2016, in terms of condensing all policies in a single document. In the new policy, ADB acknowledged the strengthening of country systems' safeguards as a goal in itself, so that they could achieve the reference standards established by the good international practices.⁶⁷

The ADB defines country systems as policies, practices, normative frameworks, and institutions that a country has in order to prevent, minimize or mitigate the potential adverse human rights and environmental impacts of development activities.⁶⁸ The bank views the country system as a way to reduce transaction costs, improve the ownership and help to guarantee the development activities' long-term sustainability.⁶⁹

The ADB discloses relevant information on its country system approach. According to the information that is available to the public, the bank actively promotes discussions about the

subject and provides technical assistance to the countries in order to strengthen their national systems. Regarding this last activity, ADB reports to have disbursed USD 38.185 million to effectively strengthen and implement the country systems since the approval of the safeguards policy in 2009, encompassing twenty-seven (27) projects. In practice, the World Bank also provides a series of services to the countries that could be framed as aiming to improve country systems, notably by Development Policy Loans - DPLs. However, it was not possible to find compiled information on the grant of financing and technical assistance with the purpose of strengthening the member countries' country system.

Within the scope of this last activity, ADB approved and implemented a project that resulted in the preparation of a methodology to assess the national systems.⁷⁰ The methodology was built as from dialogue sessions with development partners (that is, the borrowing countries) and other institutions of financing for development (such as the World Bank), the analysis on the systems of some countries, the preparation of case studies and consultations with other interested parties (such as civil society).

► **Development Bank of Latin America (CAF)**

The social and environmental management of the Development Bank of Latin America (originally, Andean Development Corporation) is based in country systems. In this sense, the key goals of its environmental strategy are to generate and to permanently improve spaces and processes that guarantee a responsible environmental and social management, and to provide support to shareholding countries in the conservation and sustainable use of its natural resources and ecosystems.⁷¹ In order to operationalize such goals, it was created the Operations Environmental and Social Management System, based on environmental and social analyses and on a set of safeguards.

In 2010, CAF published the Environmental Strategy⁷² that gave details of fourteen safeguards, which were comprehensive, not much specific, more similar to principles than to the safeguards of other multilateral banks. Among them, safeguard 1, which determined the compliance with the national legislation,⁷³ and safeguard 4, which aimed at strengthening national institutions, were particularly important.⁷⁴ The document continued the approach historically used by the bank, which had attracted a series of criticisms from civil society. In fact, the main advantage of CAF over other multilateral banks (especially the World Bank and the IDB) was identified as the agility of its procedures and the flexibility of its requirements, characteristics attributed to the absence of strong social and environmental policies.⁷⁵

► **Technical assistance for the strengthening of country systems: ADB's experience with two regional projects.**

ADB informs the execution of at least two projects of technical assistance for strengthening of social and environmental safeguards in the countries.

The "Strengthening Country Safeguard Systems" (TA 6285) Project was in force between 2005 and 2010, and allocated USD 1.5 million to the preparation of case studies, analysis and consultations for the identification of normative, political and institutional gaps, as well as improvement opportunities. The goal was to improve the capacity of countries to develop, implement and apply environmental and social safeguards through strengthened national systems, in the long term. One of the results of the project was the report on the Philippines environmental safeguards system, prepared in partnership with the World Bank. Another one was the development of methodologies for the development of country systems.

The "Strengthening and Use of Country Safeguard Systems" (TA 7566) Project, which was in force between 2010 and 2017, allocated USD 10 million to the strengthening and effective implementation of country safeguard systems. It included the areas of capacity building, environmental sustainability, social development and regional cooperation and integration. The project involved the performance of internal consultations, workshops, trainings, creation, exchange and dissemination of knowledge and coordination initiatives with financing agencies. 29 subprojects were approved, the activities of which encompassed several actions, such as the preparation of assessments, the evaluation of institutional capacities, the performance of trainings and workshops and the preparation of guidelines, manuals and rules, as well as the review of legislations. By means of such projects, it was possible (i) to assess the gaps in the normative frameworks or in the implementation capacity, and recommend measures to fulfill such gaps; (ii) to prepare manuals and guidelines for governmental agencies and project implementation units; and (iii) to conduct the training activities.

Thus, although the bank's mission and public statements emphasized the sustainability of its operations, the *modus operandi* regarding the management of social and environmental impacts consisted in an implicit trust in the borrower, combined with the delegation of responsibility for the matter.⁷⁶ In fact, notwithstanding the existence of gaps in Latin-American country systems, an analysis of 22 projects financed by CAF up to 2008 demonstrated that only in two projects the national institutional capacity was deemed of concern (indicating the need for strengthening measures) and that in such cases the actions of building of local capacity were insufficient.⁷⁷ In addition to such context, there was the absence of clear transparency policies, access to information, participation and monitoring.⁷⁸

Over the last years, a change of attitude could be identified, which appears to indicate a transition of the total shifting of responsibility towards a framework that combines international social and environmental management criteria regarding national systems.⁷⁹ In fact, the Social and Environmental Safeguards published by CAF in 2016 are more detailed and accurate, indicating criteria and paths to its implementation.⁸⁰ Although there is still deference to local rules and methods, instruments and quality criteria were defined.⁸¹ What also calls the attention is the express reference to human rights.⁸² It is necessary, now, to analyze how such changes have exerted (or not) positive impacts on the prevention, mitigation, and remediation to violations of human and environmental rights within the scope of the financed projects.

CAF also develops, together with shareholding countries, programs specialized in environment (especially regarding climate change), supporting local, regional and national initiatives. The bank aims at contributing "to strengthening the environmental sector in shareholder countries through investments in this sector's operations, and granting loans and non-reimbursable technical assistance for several environmental projects."⁸³

► Asian Infrastructure Investment Bank (AIIB)

AIIB adopted a combination of safeguards and national system approach, combining a more "traditional" social and environmental framework with the intent of making use of the national systems whenever possible.⁸⁴

For AIIB, the client's environmental and social management system includes aspects of the political, legal and institutional benchmark of the country in which the project is located, which are relevant to its environmental and social risks and impacts. It includes national, subnational, sectorial or corporate implementation institutions; applicable laws, regulations, rules and procedures; and the implementation capacity; as well as the international agreements to which

the member is a party (our emphasis).⁸⁵ It can be seen, thus, that AIIB includes two elements that are not explicitly treated in many of the other institutions: the political frameworks and corporate practices and the international treaties.

Along the same lines of all other institutions, AIIB may make use of selected parts of the country's national system, emphasizing that the bank keeps its surveillance role in the implementation of the projects.⁸⁶

Interestingly, AIIB expressly states that the use of the client's system does not prevent the access of the affected interested parties to the complaint mechanisms of the projects or to the bank's oversight and compliance mechanism.⁸⁷ In the history of use of country systems by the World Bank, one of the main concerns raised by civil society was precisely the creation of barriers to the access of communities to its Inspection Panel.

In AIIB's approach to country systems, the client's environmental and social management systems may be used in the whole project or just in part of it. For such, AIIB states that it shall review the client's social and environmental systems which are relevant to the project, including its scope and efficacy. The Bank shall also analyze the performance of the client's systems in terms of environmental and social development. Upon the assessment of the effective performance of the country system, AIIB states that it takes into consideration the client's implementation practices, capacity and commitment.

The "material compatibility" and practical performance of the country systems review is performed jointly with the client and the parties interested in the project. The result of the assessment is disclosed together with other documents of the project, such as the preliminary reports of social and environmental assessment, social and environmental management plans, resettlement plans and indigenous peoples plans. The disclosure should occur before the project assessment stage or as early as possible.⁸⁸

The client is required to notify AIIB in the case of any material changes in the national social and environmental systems that may adversely affect the project. If the bank determines that a change is not materially consistent with the purposes of its social and environmental policy, it may adopt measures to guarantee compatibility, such as requiring reviews, as well as apply contractual measures to remedy the situation.⁸⁹

► New Development Bank (NDB)

According to NDB five-year Strategy (2017–2021), the "new" manner through which the institution will do development finance includes a set of innovations in three fields: 1) Partnerships, 2) Instruments and Projects, and 3) Approaches. Regarding partnerships, the bank presents a view on the "bank-client" relationship visibly influenced by principles of South-South Cooperation, such as the horizontality and the non-conditionality.⁹⁰ In this sense, NDB commits to enter into relationships respecting the sovereignty of the countries and their development strategies.

The Strategy also reflects essential components not only of South-South Cooperation, but also of the "consensus" on development aid, such as need for guaranteeing ownership. NDB states that the projects shall be well-succeeded "when the borrowing countries are responsible for their own development way."⁹¹

When referring to national systems as a central component of its partnership approach, NDB declares an intention of working together with national institutions and using the "borrowing country legislation, regulations and oversight procedures".⁹² According to NDB, the use of country systems aims at helping the achievement of two interrelated goals: i) protection against the undue use of resources of the project and negative impacts on the environment and on vulnerable groups, and ii) strengthening of local structures.⁹³ NDB views the national systems as "the best way to strengthen a country's own capacity and achieve better long-term development results."⁹⁴

In its environmental & social framework, NDB lists the use of country systems as one of the core principles on which the bank aims at building its policies, procedures and operational standards. According to the framework, NDB shall promote the use of national and corporate systems in the management of environmental and social risks, and also help to strengthen even more (sic) the country systems by means of activities of support to the public and private sector, including (i) privileging the use of the country systems, with the appropriate support, in the operational level, since it also promotes more ownership and accountability; (ii) strictly coordinating its actions with other multilateral bodies, development banks, international financial institutions and core experts; and (iii) keeping an approach based on the risk and focused on results by means of measures aligned with the fundamental principles.⁹⁵ The bank states that it shall review the environmental and social due diligence, such as the elements that integrate its assessment to ensure the consistency in the use of national and corporate systems with the fundamental principles and main requirements of its social and environmental framework.⁹⁶

NDB Strategy states that, similarly to other institutions, it will conduct an assessment (diagnosis) of member countries' systems. However, NDB has not, until the completion of this report (May/2018), disclosed such assessments to the public, in spite of the approval of more than a dozen of projects in the five founding countries.

NDB has yet to develop a comprehensive strategy for achieving this goal strengthening of national systems. According to its Strategy, it will develop a policy for provision of technical assistance to the countries⁹⁷, which may be an instrument of support to the strengthening of capacities. In its E&S framework, NDB commits to work with the client to strengthen country systems and to provide assistance during the implementation of the projects, in addition to providing support to increase the monitoring and oversight, if necessary.⁹⁸

Country systems in national development banks: the BNDES case

Founded in 1952, the Brazilian National Development Bank (BNDES) is the country's main long-term financing mechanism. It plays a key role in providing financial support to exports, technological innovation, industry, infrastructure and modernization of the government administration. Since 2000, BNDES has been performing an expressive number of disbursements in infrastructure megaprojects carried out by Brazilian companies in Brazil and abroad.

Specifically regarding the support to foreign trade, the Bank of Brazil occupied a prominent place up to the end of the 1990's. As from then, BNDES gradually became the main instrument of the financing policy for the internationalization of Brazilian companies. The bank itself opened representation offices and subsidiaries in Montevideo, London and Johannesburg. The purpose of such units was, respectively, to increase the contribution of funds to the regional integration, expand the fundraising in foreign markets, and expand the relationship with local institutions, as well as deepen the knowledge about the African continent.⁹⁹

The scaling up of BNDES' international operations was based on legal reforms to its statute, which allowed it, among other actions, (i) to finance and promote the export of products and services, including installation services, encompassing the expenses incurred abroad, associated with the export, and (ii) to contract technical studies and provide technical and financial support, including non-reimbursable, for the structuring of projects that promote the economic and social development of the country or its integration to Latin America.¹⁰⁰

In this context, the Latin American and African markets have been the main targets of Brazil's foreign policy and the country's largest contractors have been privileged in the internationalization operations.¹⁰¹ Between 1998 and 2015, the export of goods and services of Brazilian engineering and civil construction companies received the support of USD 15.2 billion from BNDES. The highway, bridges, and urban road systems construction projects constitute the largest investments of the projects portfolio over the three continental regions (Latin America, Caribbean and Africa).

Although BNDES' international investments reflect a promising scenario of expansion of Brazilian companies in emerging countries in the Global South, they have been also triggering conflicts and social and environmental impacts of different kinds and proportions in the regions where the projects are installed. Thus, the increasing flow of investments (both direct

and indirect) of goods and services, especially those related to large scale infrastructures, has been causing a context of territory expropriation and violations that directly reflect on the basic housing conditions, health, life and human rights of the affected population. The large projects, mainly those that intensively use natural resources, are notably built in territories with important biodiversity stocks and their areas are occupied, in general, by different community groups, mainly indigenous, traditional and peasant communities, the survival of which depends on the combination of small scale activities, mainly related to subsistence, and on the natural resources existing therein.

In other aspects concerning failures in the prevention, management and reparation of social and environmental impacts, many of the international investments aimed at infrastructure projects have also featured in the of Car Wash Operation (Operação Lava Jato) investigations on corruption schemes in several areas of operation of the Brazilian State as an economic actor. In general, corruption and violation of human rights are interconnected phenomena, because companies that fail to prevent corruption usually present low controls to avoid and deal with social and environmental and human rights impacts.

Once the external observers, driven by the rapid increase in allocated resources, became interested in BNDES' policies and procedures for social and environmental analysis of projects abroad, the lack of transparency and insufficiency of criteria and contractual and compliance mechanisms became evident. According to a study by Conectas (2014), the social and environmental analysis for projects abroad was not publicly accessible at the time. The study shed light on such procedures by requesting information to the bank itself. According to the clarifications provided, the social and environmental risk analysis occurs prior to the project's approval. BNDES also adopts safeguard measures by requiring an external legal advisory opinion, inserting contractual clauses and requiring the entrepreneur to sign a declaration of compliance.¹⁰²

However, the lessons accumulated from cases such as the Villa Tunari-San Ignacio de Mojos highway ("TIPNIS") - discussed later - revealed that, in practice, BNDES operated under a logic, albeit implicit, of high degree of permissiveness towards the local arrangements and institutions - that is, domestic systems. After several projects marked by controversies, BNDES reviewed some of its positioning and assumed new and significant commitments in 2015. According to the updated policy, BNDES commits to disclose synthesized information (extracts) from the social and environmental impacts assessment, as well as to improve the social and environmental analysis procedures, including by monitoring the execution and contracting of independent audits.¹⁰³

The formalization and standardization of processes that had already been sparsely tested in the portfolio of international projects was a step forward, but in practice, BNDES has yet to take effective steps to ensure the active transparency of information related to social and environmental management of projects financed abroad. The passive transparency still encounters obstacles that are incompatible with a commitment to the wide dissemination of social and environmental information, such as the allegation of banking and commercial secrecy. Anti-corruption operations investigating illegal contracts between the government and contractors have considerably reduced the export credit for engineering goods and services.¹⁰⁴ This is one of the reasons alleged by the BNDES to explain why the policy's component regarding the export has not been fulfilled. However, BNDES has explicitly opted for not applying the new policy to the projects' stock.

Part III
Brazilian domestic
system: a case-based
approach

3

The current status of social and environmental governance for large infrastructure projects in the energy and transportation sectors in Brazil: Five case studies

The country systems approach is based on the use of national social and environmental protection systems, including rules (laws, regulations, guidelines) and the governance systems that operate, implement and audit them. Therefore, concrete experience with national systems is a fundamental source of information regarding their ability to protect social and environmental rights. This section addresses this issue based on five case studies, including different project modalities within the transport/logistics and energy sectors.

The case studies analyze systems and rules related to:

- Environmental rights;
- Traditional communities rights;
- Land management and territorial rights;
- Free, prior and informed consultation and consent;
- Environmental impact assessment;
- Participation, transparency and access to information;
- Public-private partnerships
- Climate change.

Among these themes, this section presents the most salient aspects of each project. The objective is to identify recurrent failures and gaps in the domestic system, in order to indicate aspects that require strengthening actions. The analysis also illustrates the real functioning of the Brazilian social and environmental framework: it is a complex system, embedded and dependent on broader issues, such as access to justice and the capacity of administrative bodies.

► Belo Monte Hydroelectric Power Plant

Background

The Belo Monte Power Plant is the third largest hydroelectric plant in the world. It is located on the Xingu River, in the State of Pará. The first plans for the hydroelectric exploitation of the region date from the military regime: In 1975, a group of engineers was formed to map its electric potential, concluding that five dams could be built in the Xingu.¹⁰⁵ The project, however, generated intense opposition from local communities, leading the World Bank – which had initially considered financing the dam – to declare that it would not support the project. In face of growing opposition to the plant and of the lack of resources to build it, the dam ceased to be a priority for the Brazilian State.

An energy crisis in the 2000s radically altered this scenario. Belo Monte started once again to be considered as a strategic project in the quest for national energy supply increase, and its construction as a condition for developing Brazil.¹⁰⁶ Despite significant opposition from civil society and local communities, Congress authorized construction in 2004¹⁰⁷, with virtually no debate.¹⁰⁸ Even before completion of the social and environmental feasibility studies, Belo Monte occupied a prominent position in the Growth Acceleration Program, a governmental initiative to improve Brazilian infrastructure. In 2010, a consortium led by the state-owned company Chesf won the concession auction, It would later build and operate the plant under the name Norte Energia S.A.¹⁰⁹ In 2012, BNDES announced that it would provide a loan of more than 22 billion Reais to finance the project, the largest in its history.¹¹⁰

The plant construction began soon after the auction. Energy production began in 2016, and the construction is currently in its final stages. Full operation is expected for 2019.

According to its environmental impact assessment, Belo Monte's influence area is inhabited by more than three hundred thousand people, including ten indigenous communities.¹¹¹ Among the numerous environmental, economic and social impacts of the plant, most of the damage is related to population increase, displacement of affected individuals, and radical changes in traditional forms of life.

Population Influx

Population growth has led to increased vulnerability within local communities, as well as over crowded public services. During the construction's peak, it employed about twenty-five thousand workers, and the population of the Altamira municipality rose from one hundred thousand to one hundred and forty thousand inhabitants in just three years.¹¹² On the one hand, the population growth increased demand for public services. On the other hand, the cost of living in the region rose – as well as the wages offered by the private sector – but the wages offered by the public power remained the same. Therefore, many public servants left their jobs to work on the construction. As a result, in a region where there had already been serious gaps in public services, demand increased while the capacity to satisfy it decreased, leading to a chaos in public safety, health, education, sanitation, among other strategic areas.

Such impacts had been predicted by the studies carried out before the plant was implemented, so that Norte Energia was obliged to adopt measures to improve public services. However, these measures were continually postponed, and many materialized only when the population peak had already passed.¹¹³ Even when implemented, the measures proved insufficient and/or ineffective in many sectors, such as public safety – in 2017, Altamira was the most violent municipality in Brazil.¹¹⁴

These failures have significantly impacted women. In fact, there have been increases in cases of teenage pregnancy, domestic violence, sexual exploitation of girls, and trafficked women. In addition, lack of public services increases demand for domestic caretaking, a workload that is disproportionately bore by women. At the same time, Norte Energia did not recognize informal economic activities commonly exercised by females, a discriminatory process that resulted in gender disparities in compensation. Thus, the increase in the domestic workload occurred at the same time as an uncompensated reduction of revenues.

Displacement

Alongside the population influx, the region also witnessed another type of migratory dynamics: The involuntary displacement of people who lived in areas designated for flooding. More than five thousand families were registered for relocation, many of which were directed to Collective Urban Resettlements (RUCs). Although Norte Energia reported that the RUCs brought gains in terms of housing quality and safety and hygiene standards, those affected were frustrated with the gap between the company's promises and reality.¹¹⁵ Contrary to what had been

promised, the new neighborhoods were distant from original housing locations, and many were poorly served by public services, especially transportation.¹¹⁶ In addition, some households had structural deficiencies, and many people – especially women¹¹⁷ – were not compensated for the loss of economic activities due to displacement.¹¹⁸

On the other hand, the plant worsened the housing conditions of many families that were not registered for relocation. Some of them were not registered because the impact of the plant on their housing was indirect (resulting, for example, of higher real estate prices). Others were not registered because the company did not recognize that their residences were in a flood area. These non-registered families began to live under increasingly precarious conditions, usually in informal settlements. Such is the case of Independente I, a stilt neighborhood where 62 families live under constant risk of disease due to standing water and garbage accumulating under their houses (water used to run until the plant was built). In 2018, nearly seven years after construction began, the Public Prosecutor's Office demanded that Norte Energia relocate the residents of this neighborhood.

Loss of traditional ways of life

Rapid environmental and social transformations in the region have led Indigenous and Riverine communities to abandon some of their cultural practices, including traditional means of subsistence and nutritional habits. These sudden changes had grave consequences: For example, the number of undernourished Indigenous children grew from 62.8/1000 to 143.3/1000 in just two years.¹¹⁹ In addition, the National Human Rights Council has documented that the plant increased the pressure of extractive industries on Indigenous lands, and exposed communities to alcoholism, prostitution, drugs and sexually transmitted diseases.¹²⁰

Although the total dimension of the plant's impacts is not yet known, the region is already suffering the consequences of a new project: the gold mine known as Belo Sun, which the Canadian company Belo Sun Mining Corp. intends to build just 13 km downstream from the Belo Monte dam. If the project is authorized, the mining company will explore the region's mineral potential for eight years, after which it will leave two piles of sterile material, measuring about 200 meters each, in the middle of the Amazon rainforest and on the banks of the Xingu River.¹²¹ Besides the environmental damage, there would be a new population influx in the region, and communities already impacted by the plant would suffer once again with changes in their territory and their traditional ways of life. Although the mine's license is currently suspended by court order, Belo Sun Mining Corp. announced it was resorting to all legal remedies to reverse the ruling.¹²²

Environmental licensing is one of the main impact management systems in Brazil. It was established by the National Environmental Policy Act (Law No. 6938/1981) with the objective of matching the country's social and economic development with environmental preservation.¹²³ It is an administrative process that seeks to identify, prevent, mitigate and remedy the impacts of projects and activities on the environment.

The entrepreneur is responsible for initiating the licensing process, as well as conducting impact assessments and implementing prevention and mitigation measures. Based on such assessments, the licensing entity¹²⁴ may or may not approve the license, usually submitting it to conditioning measures. In order to allow continuous monitoring at each stage of a project, licensing of high impact projects requires three licenses (Preliminary License, Installation License and Operation License).

Although the licensing procedure has been developed as an environmental management mechanism, it is also a tool for preventing and mitigating other types of impact, including social, cultural, economic, and human rights issues. Thus, the licensing agency has an environmental focus, but institutions such as FUNAI (protection of Indigenous rights) and IPHAN (protection of historical heritage) also participate in the process.

Despite its undeniable importance, Brazilian environmental licensing is criticized both by the business sector (which considers the procedure slow and bureaucratic) and by communities impacted by infrastructure projects (which do not consider the procedure sufficiently effective for the protection of rights). In a research aimed at mapping and contributing to this debate, the World Bank identified a series of limitations and challenges for the Brazilian licensing system, summarized by the table below:

Problems of Brazilian environmental licensing (World Bank, 2008)¹²⁵
Lack of adequate Government planning
Lack of clarity about which authority has jurisdiction to issue licenses
Delays in issuing the reference terms for environmental impact assessments
Poor quality of the studies submitted by entrepreneurs
Inconsistent evaluation of the impact assessments by the licensing agency
Lack of an adequate system for conflict resolution
Lack of clear rules for social compensation
Lack of professionals specialized in social impacts within IBAMA

The problems identified by the World Bank converge with challenges outlined by national institutions. The Brazilian Association of State Environmental Entities (ABEMA) produced a study demonstrating the need to incorporate issues left to be managed by the environmental licensing procedure into earlier government planning, that is, “into the decision making stage of government plans and programs, therefore, prior to the decision to implement large projects, with public consultation, in strategic sectors such as energy, mining and infrastructure”.¹²⁶ Like the World Bank, ABEMA also pointed out that conflicts of jurisdiction and lack of normative clarity jeopardize the ability of the licensing procedure to achieve its objectives.¹²⁷ In the same direction, the Brazilian Association for Impact Assessment argued that the environmental dimension is insufficiently incorporated to other planning instruments, and that the country needs stronger mechanisms for social participation and social impact assessment.¹²⁸

The Public Prosecutor’s Office Institute for Higher Education, in turn, focused on a specific problem: The poor quality of impact assessments, which generates problems throughout the whole licensing procedure. After a systematic analysis of the experience of the members of the 4th Coordination and Review Chamber of the Public Prosecutor’s Office (dedicated to Environment and Cultural Heritage), the research concluded that the improvement of environmental impact assessments depends on the adoption of the measures listed in the following table:

Measures required to improve quality of the environmental impact assessments in Brazil (ESMPU, 2004)¹²⁹
Considering the environmental aspects of public policies since the planning stage
Providing sufficient time for developing impact assessments
Greater interdisciplinarity of impact assessments
Greater investment in elaborating a diagnosis and a social analysis for each territory
Creating mechanisms that enable the licensing agency to access information from other government institutions
More rigorously examining impact assessments
Developing a public database, enabling dissemination of and access to knowledge produced within impact assessments
Strengthening rights-based participation procedures in all stages of assessment preparation and evaluation

In Belo Monte, the environmental license was at the center of the controversy over the plant’s implementation. The Preliminary License was granted in 2010¹³⁰, including a robust set of social and environmental conditions that included preparatory measures (aimed at preparing the region for the population influx) and an Environmental Basic Project (containing measures to prevent, mitigate and compensate the impacts that had been identified in the environmental

impact assessment). Both the proactive actions and the measures required by the Environmental Basic Project were constantly postponed, so that the impacts of the plant began before implementation of these actions.¹³¹

In 2011, despite these delays, IBAMA granted the Installation License (LI) to Belo Monte. Many conditions of this new license were mere repetitions of measures which had already been required by the Preliminary License, and which the entrepreneur had not yet fulfilled. Likewise, in 2015, when the Operating License (LO) was granted, the LI conditions that had not been fulfilled yet were transferred to the LO. This continued postponement of the social and environmental management measures allowed the construction of the plant to proceed without full implementation of measures designed to prevent, mitigate and compensate its impacts. In other words, the construction schedule was detached from the social and environmental management schedule, impairing the effectiveness of the latter.

The Brazilian Electricity Regulatory Agency attributed licensing delays to the “low technical quality of projects aimed at mitigating and compensating impacts, measures lacking practice-oriented details, and delays in the beginning of preparatory actions”.¹³² Therefore, standard failures of the Brazilian environmental licensing procedure – such as the poor quality of the assessments and the insufficient incorporation of the social dimension – were present in the case of Belo Monte. These issues were aggravated by IBAMA’s lack of technical and institutional capacity to closely and continuously monitor the project (even considering its high visibility), and the lack of participative inspections that allowed the community to be effectively involved in monitoring the entrepreneur’s obligations.¹³³

As a consequence, the impacts described in section 4.1.1, although predicted, were not adequately addressed, resulting in violations of human and environmental rights.

Rights of Indigenous and Traditional Peoples

In Brazil, the rights of Indigenous peoples are protected by the Federal Constitution, by the international human rights treaties ratified by Brazil, by the infra-constitutional legislation and by regulatory standards. Among other guarantees, indigenous peoples’ have a right to the lands they traditionally occupy¹³⁴; the right to maintain their own culture¹³⁵; and the right to a free, prior and informed consent.¹³⁶ Belo Monte caused tensions and violations related to each of these rights, as described below.

Consultation and free, prior and informed consent

The right to free, prior and informed consent relates to the State's duty to consult traditional communities whenever it implements measures (including norms, projects, policies and plans) affecting traditional populations. The consultation process must have occurred before the decision-making stage and in good faith, in a culturally appropriate manner, after information on the project is made accessible in proper language and format. In the case of infrastructure ventures that cause the displacement of traditional populations or that produce impacts of high magnitude, the State has the duty not only to consult the community, but to obtain its consent to the project. This right is established by ILO Convention 169, ratified by Brazil in 2004¹³⁷, and by the consistent jurisprudence of the Inter-American Court of Human Rights, whose contentious jurisdiction was recognized by Brazil in 2002.¹³⁸ Although Brazil has not yet operationalized Convention 169 through specific regulation, Brazilian courts have consistently declared that the duty to consult traditional communities impacted by large development projects does not depend on additional regulation.¹³⁹

Failure to consult Indigenous communities affected by Belo Monte was a prominent issue in judicial disputes involving the plant. Besides internal actions, the matter reached the Inter-American Commission on Human Rights. Initially, the Commission issued a precautionary measure requiring Brazil to paralyze construction of the plant until a consultation process had been carried out in accordance with the international commitments made by Brazil.¹⁴⁰ However, the precautionary measure provoked a strong reaction from the Brazilian State, including withholding funding for the organization, aggressive official pronouncements by the Ministry of Foreign Affairs, and the withdrawal of the candidacy of a former Minister of State for a position in the Commission. A few weeks later, the Commission decided to review its position, backtracking in relation to construction halting, and determining that it would analyze the issue of consultation together with the merits of the petition. The case is still pending decision.

Right to land

The right of Indigenous communities to the lands they traditionally occupy is protected by the Federal Constitution¹⁴¹ and by international treaties ratified by Brazil, including the American Convention on Human Rights¹⁴² and the Convention 169 of the International Labor Organization.¹⁴³ In Brazil, the entity responsible for Indigenous lands is the National Indian Foundation, responsible for delimiting, demarcating, regulating, registering, monitoring and inspecting these territories. Within the scope of infrastructure projects licensed by federal agencies,

FUNAI is in charge of acting as an intervening agent in licensing processes that potentially produce direct or indirect effects on Indigenous lands. Therefore, the agency has the opportunity to express its views on the project and to make recommendations, including on specific measures related to the protection of Indigenous lands.¹⁴⁴

The area influenced by Belo Monte covers ten Indigenous lands. One of the main damages suffered by these communities was increased territorial pressure for illegal exploitation of their lands by third parties. The Social and Environmental Institute, a Brazilian NGO, has documented growth of illegal hunting activities, as well as increased land occupation (TIs Arara, Koatinemo and Ituna/Itatá); increase of irregular commercial fishing (TIs Trincheira, Bacajá, Paquiçamba and Arara da Volta Grande do Xingu); the advance of roads and wood extraction (TIs Cachoeira Seca, Paquiçamba, Arara, Trincheira Bacajá, Xipaya and Kuruaya); and the increase of mineral mining activities (Xipaya, Kuruaya and Arara TIs).¹⁴⁵

In order to respond to these threats to the Indigenous territory, FUNAI acted as an intervenient in different stages of the licensing process. Nevertheless, this performance was marked by failures that made the management of impacts on Indigenous peoples not only insufficient, ineffective and late, but even harmful.

See, for example, the findings of the Federal Judge of 1st Instance of the Judicial Section of Pará, held in 2017 within the scope of the public civil action proposed by the Federal Public Prosecutor's Office:

“The emergency plan was not totally fulfilled, which is why the obligations therein were extinguished, and why FUNAI created new obligations. In short, it is as if the entrepreneur, in addition to failing to meet the conditions required in its licenses, still got an extra period to comply with them, differing from what had been planned by FUNAI. All without receiving any penalty from the entities in charge of monitoring compliance (Funai and IBAMA), given the damage caused to the Indigenous communities and their lands due to their omission.”

Regarding the omission of the state agencies, the judge of law added that “there is no plausible justification for the fact that neither FUNAI nor IBAMA have acted more strictly in respect to the protection of Indigenous lands”.¹⁴⁶

FUNAI's omission is not particular to the circumstances of the Belo Monte case. On the contrary, it reflects systemic failures of the Brazilian social and environmental management process. FUNAI, as well as other rights protection agencies, lacks normative competence, sanc-

tioning power, and sufficient institutional capacity to act effectively within the environmental licensing procedure. As a result, prevention, mitigation and compensation measures required by FUNAI are not monitored and enforced by anyone.¹⁴⁷

Such failures led to a continuous cycle: Norte Energia did not fully implement measures to protect Indigenous territories, so the construction and operation of the plant had a strong impact on these lands and communities. Such changes made the initial measures irrelevant, and it thus became necessary to review the plans. However, new measures tended to enter into a new cycle of delays, gaps and non-implementation.¹⁴⁸

In this context, the company adopted continuous emergency plans to address the impacts of its activities on Indigenous people. The main one was a system of purchase and direct provision of material resources to the communities. However, the sudden possibility of access to consumer goods also generated damages. For example, many communities abandoned traditional agricultural practices and nutritional habits in favor of processed food. This sudden nutritional change has led to a significant increase in child malnutrition, leading one quarter of Indigenous children to malnutrition.¹⁴⁹ In addition, the company was accused of favoring private interests, co-opting leadership, and generating fragmentation of villages and communities.¹⁵⁰

Right to culture

Indigenous communities have the constitutional right to maintain their culture, ways of life and traditional practices, a right deeply related to the special connection between Indigenous communities and the lands they traditionally occupy. Consequently, the protection of the cultural rights of Indigenous communities is also related to norms on traditional land.

Therefore, the changes in the territory caused by Belo Monte, as well as the failures in the prevention system, mitigation and compensation of these impacts, had effects not only on the right to land, but also on a series of other related rights. For example, although the dam did not cause direct flooding of Indigenous lands, there are communities living downstream from the plant, where the river flow has been significantly reduced. The changes in the river prevent the practice of traditional fishing and transportation, and also affect leisure activities, cultural practices and religious rites.

Riverine communities

Brazilian law and international norms not only protect Indigenous peoples, but also other traditional populations, such as the Quilombola and Caiçara communities, for example. According to the National Policy for the Sustainable Development of Traditional Peoples and Communities (PNPCT), these groups are defined as “culturally differentiated groups that recognize themselves as such, that have their own forms of social organization that occupy and use territories and natural resources as a condition for its cultural, social, religious, ancestral and economic reproduction, using knowledge, innovations and practices generated and transmitted by tradition”.¹⁵¹

Convergently, Convention 169 also defines traditional communities based on the criterion of self-recognition.¹⁵² From an international perspective, Indigenous peoples and other traditional communities have access to the same rights, including the right to community property.

PNPCT recognizes the special relationship of communities with their traditional lands, ensuring their right to access the territory and the resources necessary for their physical, cultural, and economic reproduction. In this context, the policy establishes as one of its objectives the protection of the rights of traditional communities in face of major projects and enterprises, given the specific forms that they affect traditional communities.

In the influence area of Belo Monte, there are riverine communities and traditional groups whose physical and cultural survival is connected to the Xingu River. Despite national and international protections to traditional peoples, these populations were initially bypassed by the social and environmental impact management process. Although riverine families were included in resettlement programs and other actions, such measures did not address the specificities of riverines as a traditional community.

As documented by the Social and Environmental Institute, the impact assessments did not include adequate diagnosis of impacts over Riverine populations. Therefore, there were no mitigation and compensation measures for damages resulting from their specific needs and rights.¹⁵³ As a result, riverine families were resettled far from the river, and the organization of new neighborhoods did not take into account kinship. Given the distance from the river and the dissolution of community ties, a process of cultural loss began to take place. At the same time, the resettlement registration process was unfit to the riverine culture, harming the possibility of compensation for damages suffered.¹⁵⁴

Currently, the Riverine People Council, an entity constituted to represent and organize the interests of the communities, has made progress in enforcing the rights of the displaced groups

- including the return of some families to the river. Still, the case of Belo Monte raises concerns about the ability of the Brazilian country system to protect the rights of traditional non-indigenous communities in the context of infrastructure projects.

Displacement

The right to housing is guaranteed by Article 6th of the Brazilian Federal Constitution, as well as by Article 11 of the International Covenant on Economic, Social and Cultural Rights.¹⁵⁵ While these rules do not guarantee that individuals will not be displaced by development projects, they impose procedural conditions and limits on resettlement.¹⁵⁶ That is, as clarified by the Secretariat for Human Rights of the Presidency of the Republic, the right to housing reflects on “how these projects are conceived, developed and implemented”.¹⁵⁷

Such limits and conditions are determined by specific sectoral rules and regulations.¹⁵⁸ In the case of Belo Monte, Decree No. 7.342/2010 established the procedures to be followed for registering the population affected by hydroelectric power plants.¹⁵⁹ In accordance with such norm, Norte Energia created a socioeconomic registry in order to identify those affected and to determine compensation measures. In addition to the displaced individuals, the rule also defines as ‘affected’ people who suffered impacts related to income generation and ways of life.

However, the registry faced problems related both to formulation and application, leading to individual and collective limitations.¹⁶⁰ Contrary to Brazilian rules and international good practice, the impacted population did not have access to accurate information about the process, and there was no possibility of effective participation. Likewise, as previously mentioned, the displacement did not contemplate the specificities of traditional communities.

In addition to these comprehensive problems, there were also recurrent failures in registering individuals. As the company did not provide effective complaint mechanisms, many resorted to the public defender’s office to question such failures. The most recurrent problems were the undue exclusion of affected individuals from the registry, the insufficiency of reparations, and - in 18% of the cases represented by the public defender’s office - the absence of any type of compensation.¹⁶¹

The Brazilian Constitution establishes that the protection of children and adolescents is a duty of the family, the State and society, and that their rights are absolute priority.¹⁶² In order to detail and operationalize this constitutional norm, Brazil has adopted a general law, the Child and Adolescent Statute (ECA)¹⁶³, and structured a system formed by Child and Adolescent Rights Councils, a fund, and specialized agencies in the three levels of the federation, in the Judiciary, in the Public Defender's Office, and in the Public Prosecutor's Office. In particular, the Guardianship Council plays a central role, as a local body composed of members elected by the community, whose mission is to supervise and support the enforcement of rights provided by the ECA.

In the influence area of Belo Monte, the rights of children and adolescents were jeopardized by two converging factors. On the one hand, the people influx and the sudden change in ways of life have increased the vulnerability of children and adolescents to violence, sexual exploitation, substance abuse, and other risk situations. On the other hand, the supply of jobs and the rising cost of living have attracted many people to jobs in the private sector - including young people who have left school in order to work¹⁶⁴, as well as former social workers and other professionals who used to work in the child protection system. In face of the increase in demand and the decrease of staff, the protection system was no longer able to carry out preventive activities and continuous monitoring, focusing mainly on responding to complaints and cases of abuse.

The result was an increase of risk situations for children and adolescents to a degree that exceeded the population growth rate several times, as shown in the table below:

Comparative table: Number of appointments made by the Guardianship Council of Altamira (Oliveira, 2014)¹⁶⁵					
Type of appointments	2008	2009	2010	2011	2012
Prostitution, rape and sexual abuse	12	29	43	75	169
Mistreatment	-	32	44	81	201
Teenage pregnancy	28	33	7	26	36
Drug and Alcohol abuse	11	-	4	69	129
Criminal offenses	-	19	77	93	118
Family conflicts	94	85	83	149	374

Among the forms of abuse, it is important to highlight the increase in sexual exploitation of children and adolescents. The issue gained notoriety in 2013 when a 16-year-old girl fled an establishment called Boate Xingu and reported that she and 17 other women had been kept in conditions analogous to slavery.¹⁶⁶ The group had been subjected to human trafficking: after being recruited through false promises in the state of Santa Catarina, these women were forced into prostitution under conditions that they had not agreed to, contracted increasing debts with the nightclub owners, and were prevented from leaving the place.

Boate Xingu was just one of several prostitution places that came with the power plant, and the sexual exploitation of children and adolescents was a widespread problem.¹⁶⁷ Several factors indicate the relation between the phenomenon and Belo Monte: the nightclubs were located in easily accessible places for power plant workers, buyers of sexual services were employees of Norte Energia, brothels advertised on the construction site, food vouchers provided by Norte Energia were accepted as a form of payment, and the peak of the demand for sexual services matched the company's paydays.¹⁶⁸ Nonetheless, the Brazilian State focused its efforts on establishing individual criminal responsibility of nightclub owners, and failed to address the problem more systematically. Therefore, although there have been some criminal convictions following the national news on the Boate Xingu case, no measures have been established to address the root causes of the violations. On the other hand, a coalition of civil society stakeholders entered into an extrajudicial agreement with Norte Energia and managed to implement a prevention program in partnership with the company.

Cumulative and synergistic impacts

Within the scope of the environmental licensing process, companies must consider cumulative and synergistic impacts.¹⁶⁹ That is, the environmental impact assessment must examine the extent to which the proposed project, when combined with other enterprises, will produce effects that would not exist if it were the only project at a given locality.

In the case of Belo Monte, the analysis of cumulative and synergic impacts gains special relevance due to the possible installation of another project in the Volta Grande do Xingu region. As previously mentioned, the Canadian company Belo Sun plans to build and operate a gold mine using the "open pit" method, only 13 km downstream from the Belo Monte dam.

If it is allowed to proceed, the Belo Sun mine will have numerous environmental consequences. Mining would involve the constant use of explosives and harmful materials, such as cyani-

de, in the heart of the Amazon and on the banks of the Xingu River. In addition, the mine would require the construction of a tailings dam similar to the Fundão Dam, whose disruption gave rise to one of the biggest environmental catastrophes in the Brazilian history. After eight years of mining exploration, Belo Sun would terminate its operation and leave behind two piles of sterile material, measuring about two hundred meters each.¹⁷⁰

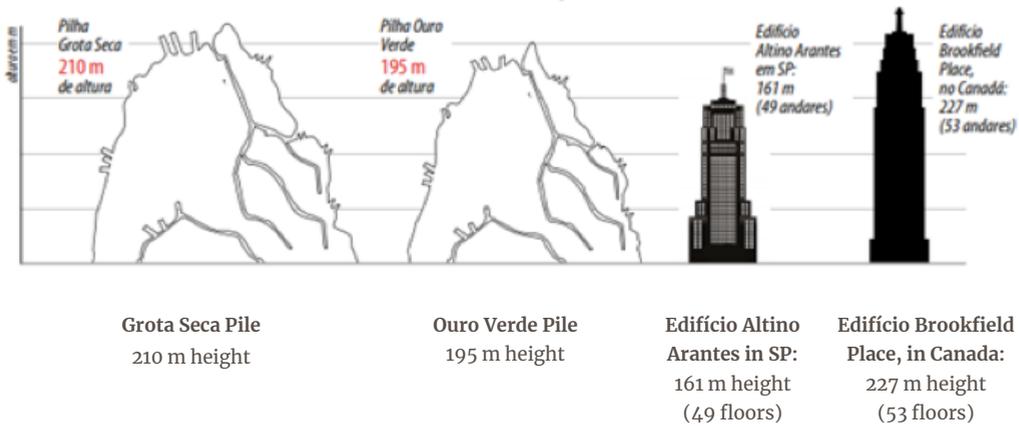


Image: stacks of sterile material that would result from the Belo Sun operation¹⁷¹

In addition to these environmental risks, Belo Sun would bring a new population influx to the region, which is populated by communities already impacted by Belo Monte. In face of this situation, the National Human Rights Council visited the site and found that a series of measures that had been required to mitigate and compensate Belo Monte’s impacts had not yet been completed, including a sewage system for Vila da Ressaca (settlement that would receive the greater impacts of the mine), stable supply of drinking water to local residents, the functioning of the territorial protection bases of the Paquiçamba Indigenous Land, and the land regularization of impacted Indigenous lands.¹⁷²

In short, the communities in Volta Grande do Xingu were affected by Belo Monte, the social and environmental management measures of this project have not been concluded and, before it is possible to assess the complete extension of Belo Monte’s damage, a new extraction project is already being planned. On the other hand, Belo Sun is already indicating it would repeat failures of Belo Monte: the impact assessment underestimated negative effects, disregarding the rights of traditional communities, and there was no free, prior and informed consent procedure. Furthermore, despite the existence of an express normative requirement, the mine’s preliminary and installation licenses were approved without full consideration of the cumulative and synergistic impacts of the mine and the power plant. These failures led the Judiciary to suspend Belo Sun’s licenses.¹⁷³

Even with the suspension, the mere perspective of the mine has already generated grave social conflicts. Human rights and environmental defenders who oppose the mine face continuous episodes of harassment. They also face serious threats, which have led some defenders to flee the region in order to protect themselves. Therefore, they were removed from their work as defenders of human and environmental rights, as well as from their families and forms of subsistence. Despite the risks, the defenders did not wish to be included in the Brazilian defender protection program, which they considered to be ineffective.

Access to justice

The previous sections discussed failures and shortcomings of impact assessment procedures, as well as of implementation of licensing conditions. In face of the lack of effective private and/or administrative means to question these problems, affected communities and civil society organizations frequently seek courts of law.

In the case of Belo Monte, this was a recurring strategy. In fact, litigation was necessary for Norte Energia to recognize the mandatory nature of several licensing conditions (including the Surveillance and Land Monitoring Plan and the relocation of part of the Indigenous Juruena community).¹⁷⁴ However, even with the intervention of the justice system, rights protection measures have not always been timely.¹⁷⁵

An analysis of litigation related to Belo Monte shows that most lawsuits questioned irregularities in the licensing procedure (mainly, failures in social participation mechanisms, poor quality of impact assessments and feasibility studies, and non-compliance with licensing conditions).¹⁷⁶ On the one hand, these lawsuits document the failures of licensing as an instrument to protect rights and manage socio-environmental impact. On the other hand, they are also a result of the inexistence of administrative means to incorporate the demands of affected communities, receive complaints, and solve problems.

However, in the Judiciary, individuals and communities affected by Belo Monte faced new obstacles. Particularly, claims against large scale infrastructure projects are hampered by a legal instrument called “stay of preliminary order”.¹⁷⁷ It is a procedural mechanism created to protect the public interest in cases where a judicial decision causes “serious damage to public order, health, safety and public economy”.¹⁷⁸ If granted, it suspends the effects of the judicial decision until the case has no further possibility of appeal (*trânsito em julgado*)¹⁷⁹

The possibility of using the stay of preliminary order created a pattern followed by most of the lawsuits related to Belo Monte.¹⁸⁰ The Federal Public Prosecutor's Office filed a lawsuit questioning environmental licensing failures, demonstrating that these problems led to violations of the rights of local populations (in Brazil, Public Prosecutors are independent from the Executive branch). At first, district judges granted the Public Prosecutor's request, suspending the environmental license and, sometimes, ordering Norte Energia to stop construction works. Then, the government filed a stay of preliminary order (or another appeal) against that decision. In all cases where the government filed a stay of preliminary order regarding Belo Monte, the Judiciary suspended the effects of decisions contrary to the plant. After such decision, the action could only produce practical consequences when it came to an end (that is, when it became final).

In practice, this means that the Judiciary distanced itself from rights protection in the context of Belo Monte. Due to the slowness of the Brazilian justice system, the stay of preliminary order meant that most lawsuits had no consequences until years after the violations occurred, when the plant had already become a reality, and the prevention of impacts was no longer possible.

Summary Table

The main violations, gaps and problems in the Belo Monte case are summarized by the following table:

Summary Table: Violations, governance gaps, and social and environmental management problems in the Belo Monte case

Environmental licensing failures	Delays and non-implementation of licensing conditions
Problems in assessing cumulative and synergistic impacts	Disregard and/or understatement of impacts caused by other ventures and activities in the region, especially the Belo Sun mine
Environmental Conservation Units	Negative impacts on eleven conservation units, requiring intervention from the Public Prosecutor's Office to guarantee territorial compensation ¹⁸¹
Free, prior and informed consent	Failure to implement consent and consultation procedures in accordance with national and international rules
Problems in resettlement	Non-registration of people affected, negligence of traditional communities' particularities, and noncompliance with promises
Violation of IP land rights and traditional communities	Increase of territorial pressure on Indigenous lands, late implementation or non-implementation of licensing conditions
Violation of children and adolescents' rights	Absence of policies addressing the increased vulnerability of children and youth, resulting in cases of human trafficking and sexual exploitation, as well as other violations
Denial of the right of access to information	Transparency policies were not able to ensure that project data reached affected communities, especially regarding implementation of licensing conditions
Violation of the right to participation	Public hearings consisted merely on unilateral transmission of information, community demands were not incorporated into decision-making processes
Access to Justice barriers	Non-existence of non-judicial grievance mechanisms, suspension of the effects of judicial decisions until the damages were already consolidated (stay of preliminary order)
PPP framework inadequacy	
Negative effects on climate change	Increase in emissions resulting from deforestation and reservoir filling (although at lower rates than fossil fuels or hydroelectric plants that do not use the run-of-river method) ¹⁸²
Other human rights violations	Delays, non-compliance, or insufficiency of measures related to population influx, especially in the health, sanitation and public security sectors; Threats to human rights defenders

► Suape's Industrial Port Complex (CIPS)

Background

Suape is an industrial complex formed by over 100 companies, including ports, industries, power plants, and an oil refinery. Today, the complex occupies an area of approximately 13,500 ha in an estuary region at the south coast of Pernambuco. Before the complex's construction, it is estimated that more than 25 thousand people lived in that area, including quilombola communities, fishers, shellfish catchers, among other traditional groups, whose physical and cultural existence was connected to the area where they used to live.

Suape's construction started in 1978, and it has been growing ever since. Ongoing expansions combine infrastructure increment with incentives for new companies and industries to move their operations to the complex. It is managed by the state-owned company "SUAPE – Complexo Industrial Portuário", linked to the Economic Development Department of Pernambuco.¹⁸³

In an area where twenty-five thousand people used to live, there are only seven thousand today. Displacement of these communities did not respect the rights of the inhabitants. Some families were summarily expelled from their residences, with no type of compensation or option for reallocation. These groups moved to informal urban settlements or migrated to other regions. Another part of the local population was reallocated to houses built by CIPS; however, the houses have severe problems. For example, they have been built with materials and construction techniques unsuitable to the weather conditions of the region. In addition, these new neighbourhoods are incompatible with traditional practices of the relocated communities (especially practices that depend on space for small scale agriculture and/or on proximity to the sea), leading families to lose their means of subsistence, cultural habits, and community bonds. These changes have also been linked to deterioration of physical and mental health.¹⁸⁴

There are groups that resisted to such displacement. These families face increasing difficulties: they are not allowed to reform or even maintain their residences; report invasions, destruction, and robbery in their properties; and face mobility restrictions which prevent them from continuing their subsistence activities. Above all, the communities report the existence of a private militia linked to CIPS, which threatens those remaining in the territory and engages in violent activities intended to expel them from the region.¹⁸⁵

At the same time, the installation of the port caused substantial environmental changes, including deforestation, dredging, explosions, and construction of landfills and dams, which chan-

ged the hydric dynamics of the region. In particular, dredging turned the water turbid and reduced sunlight penetration, leading to a decrease in the photosynthesis capacity of algae, thus decreasing the level of water oxygenation. Furthermore, industry's waste also interferes with local ecosystems. As a result, seafood became scarce – damaging the subsistence of local communities, which was based on the consumption and sale of fish, shellfish, crustaceans, and mussel.¹⁸⁶

Environmental Conservation Units

The Brazilian constitution establishes the government duty to designate spaces for environmental protection.¹⁸⁷ This is done through the National System of Conservation Units (SNUC), which plans and manages areas designated to environmental preservation at the national, regional, and local level. Brazilian law establishes twelve types of conservation units, each with a specific purpose and corresponding rules.¹⁸⁸ Such types are divided in two main groups: full protection units, which allow only indirect use of their natural resources, and sustainable use units, which aim to “balance natural preservation with the sustainable use of part of the resources”¹⁸⁹. Brazilian law also establishes conservation areas in urban and rural regions through its Forest Code (permanent preservation areas and legal reserves).¹⁹⁰

There are four conservation units in the region of Suape: two state parks (Mata de Duas Lagoas and Mata do Zumbi)¹⁹¹, the Ecologic Station of Bitá e Utinga¹⁹², and the Area of Relevant Ecologic Interest of the Ipojuca–Merepe Rivers. In addition, according to CIPS, two new conservation units will be created in the near future. The company also reports it has implemented environmental restoration programs in forests and mangroves.¹⁹³ If all these areas are considered, CIPS reports that 59% of the territory belonging to the company is destined to environmental preservation.¹⁹⁴ Under Brazilian law, the company is required to compensate environmental damages by implementing actions aimed at preserving and restoring local ecosystems.¹⁹⁵ CIPS has also implemented environmental programs as a result of extrajudicial agreements between the company and environmental protection agencies.¹⁹⁶

However, the creation and monitoring of preservation areas has neglected the demands and rights of the local population. For example, a preservation park was created in a place inhabited by traditional communities, including by families that had already been relocated by previous processes of CIPS' expansion. Despite the consequences of the measure for local inhabitants, there were no consultation and participation procedures¹⁹⁷

In addition, the choice of which type of conservation unit would be created reveals the lack of concern with local communities. For example, there could have been a unit of the type “Reserve

of Sustainable Development", which aims to protect areas inhabited by traditional populations with sustainable systems of natural resource exploitation. The creation of this type of unit would have enabled local communities to continue occupying their traditional territories, in a way that is compatible with their culture and symbiotic with environmental preservation.¹⁹⁸ Nevertheless, state and entrepreneur opted for the creation of units in modalities that admit low human occupation or no occupation at all.

Finally, communities report that conservation units are managed in a way that counters the purpose of preserving the environment, as well as the interests of the local population. As documented by the NGO Forum Suape:

“the area known as “João Grande”, located at Engenho Ilha (is) an area of native woods, historically preserved and collectively used by the community, which harvests fruits such as cashew and guava, collects shellfish and fishes. Sustainable use of natural resources had been consolidated in the place. For years, the community itself has been responsible for preserving the environment [...]. The inhabitants of Engenho Ilha themselves made the environmental inspection, reprehending those that depredated the area.

The region has been studied as a possible site for a new Conservation Unit of the type Area of Relevant Ecologic Interest. This is part of the environmental compensation measures imposed upon CIPS due to the severe and irreversible environmental damages it has caused. One of the reasons for choosing this type of conservation unit was to ensure sustainable use of natural resources by the traditional community living near the site. However, approximately three years ago, Suape forbade landholders from Engenho Ilha of entering in the area, prohibiting them from continuing their extractive activities. Since the community itself was the main actor preserving the place, the result of such prohibition is the total abandonment of the region, which currently serves as a point of drug dealing, disposal of human corpses, and hiding of stolen cars.”¹⁹⁹

Therefore, not only the community is prevented from exercising its right to participate in planning and managing the conservation unit, but its expulsion from that place also damaged the environment and decreased possibilities of community development.

Cumulative and synergic impacts

As previously discussed, Brazilian law requires entrepreneurs that may cause damages to the environment to assess the impacts of their activities.²⁰⁰ Within these assessments, public and private entrepreneurs must consider the indirect, synergic, and cumulative effects of their activities.²⁰¹ According to IBAMA, synergic impacts are those which may potentialize or be potentialized by other activities, not necessarily associated to the same project.²⁰² Cumulative impacts consist in overlapping effects coming from different sources²⁰³

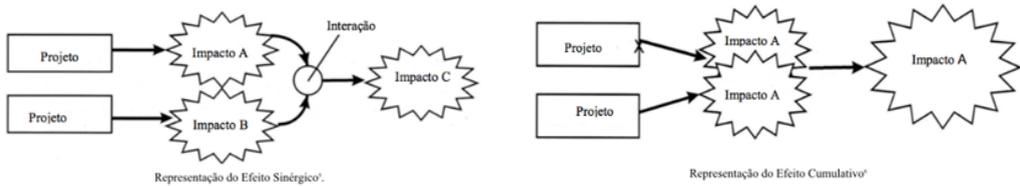


Image: representation of synergic and cumulative impacts²⁰⁴

For Suape, identification, prevention, mitigation, and compensation of cumulative and indirect impacts were especially relevant. CIPS stimulates and organizes the installation of companies in the region, which in a few decades turned the place into a business and industrial pole. To manage the impacts resulting from installation and operation of these activities, CIPS itself contracted impact assessments, as did the other companies installed in the complex. However, instead of considering cumulation and synergy of their effects, the companies used these factors to avoid taking responsibility for measures to protect human and environmental rights.²⁰⁵

An example of this practice is the Technical Evaluation of Environmental Impact for dredging services, elaborated in 2008. Such dredging had the purpose of deepening the access channel and the manoeuvre basins, as well as allowing activities related to the installation of equipment related to oil logistics. According to the local community, dredging caused environmental changes which hindered subsistence activities. Since multiple companies contributed to these effects, there should be a plan to identify, mitigate, and compensate the impacts resulting from the combination of their activities. Nevertheless, there was no such plan. As an example, an extract of the Technical Evaluation of Environmental Impact concludes:

“Regarding the other effects from dredging, such as suction of organisms and noise generation that may harm nektonic and planktonic organisms, they are also originated by ships, therefore making it difficult to define the responsibility of damages caused by each agent.”²⁰⁶

In face of dredging impacts on local communities and the lack of remediation measures, civil society organizations and representatives of the local population took the Suape case to the National Contact Points for the OECD Guidelines for Multinational Enterprises. Claims were submitted to PCNs from Brazil and the Netherlands, against the Dutch company Van Oord, the Dutch government export credit agency (Atradius DSB), and CIPS. Organizations alleged that the companies failed to comply with OECD Guidelines.²⁰⁷

The Dutch NCP analysed whether Dutch companies were responsible for failures in due diligence and social participation, concluding that failures may have occurred in the assessment of dredging impacts. The NCP also established that local communities were not able to significantly participate in the process. The procedure in Brazil is still pending, and therefore it is confidential.²⁰⁸

Right of Access to Information

Article 5 of the Brazilian constitution guarantees the right to access public information.²⁰⁹ Since 2011, this right is instrumentalized by law no. 12,527/2011 (Law of Access to Information, LAI), which establishes publicity should be the rule and confidentiality the exception. Thus, government agencies must actively disclose public interest data, and any person may request access to information that was not made available. LAI also determines clear procedures for information requests. Finally, the law establishes limited hypothesis for the information to be classified as confidential: this possibility exists only when publicity may place society or the State at risk.

In 2017, Conectas Human Rights used the LAI dispositions to request information related to impacts, damages, and violations attributable to CIPS. Notwithstanding the clarity of the law, the organization faced a series of problems: the company provided incomplete or contradictory information, denied requests without proper justification, and alleged that it was not the best agent to answer some of the requests. In order to obtain some of the requested documents, it was necessary to appeal up to the last administrative instance. However, even after Conectas obtained favourable decisions, Suape continued to deny the release of some documents, by classifying information as confidential. All requested documents related to social and environmental impacts. For example, Conectas requested access to an environmental audit. Although the company website says that it is a public audit, CIPS opted for requiring its classification as a confidential document.

Therefore, while the release of documents of public interest is ensured by Brazilian law, at Suape, access to data on environmental damages and rights violations required technical expertise on legal issues and administrative procedures, in addition to time and resources.

Summary Table

The main violations, gaps, and problems at Suape are summarized by the following table:

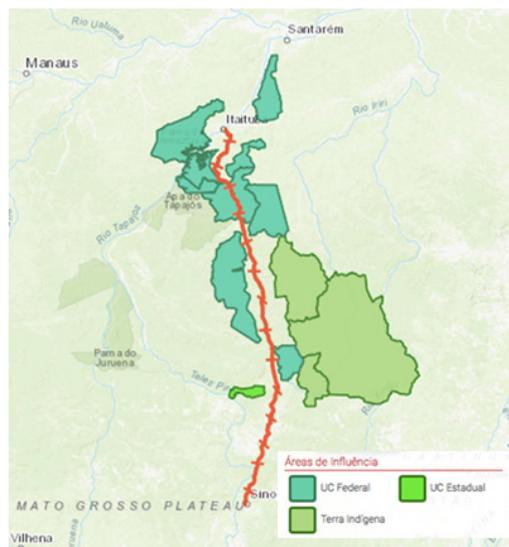
Summary Table: Violations, governance gaps, and social and environmental management problems in the Suape case	
Environmental licensing failures	Assessments undersized impacts, delays to implant impact management measures, lack of effective monitoring
Problems in assessing cumulative and synergistic impacts	Combination of impacts from over 100 companies operating in the place was not properly considered by the impact assessments, which generally followed a fragmented logic.
Environmental Conservation Units	Creation of Conservation Units was inefficient and incompatible way with the local context
Free, prior and informed consent	Failure to implement consent and consultation procedures in accordance with national and international rules
Problems in resettlement	Arbitrary displacement, negligence of specificities of traditional communities
Violation of IP land rights and traditional communities	Negligence of specificities of traditional communities within resettlement policies, decrease of means of subsistence due to environmental changes
Violation of children and adolescents' rights	Populational influx increased the vulnerability of children and teenagers, with no effective measures to fight sex exploitation and other violations of children's and adolescents' rights ²¹⁰
Denial of the right of access to information	Failure to actively publicize information, insufficient and incoherent answers to information requests, classification of social and environmental information as confidential
Violation of the right to participation	Non-existence of effective participation mechanisms
Access to Justice barriers	Lack of effective non-judicial mechanisms, barriers of resources, information, and distance to access the justice system
PPP framework inadequacy	
Negative effects on climate change	Exploitation of fossil fuels
Other human rights violations	Threats and violence against people resisting to displacement, harms to physical and mental health due to the loss of traditional means of life

► Ferrogrão

Background

EF-170, also known as Ferrogrão, is a railway project at planning stage. Its purpose is to connect grain-producer regions in the Central-West of Brazil to the port of Mirituba (state of Pará), as part of a logistic corridor that also includes the waterway of Tapajós and the Ports of Vila do Conde (state of Pará) and Santa Ana (state of Amapá). The project already has a viability study, and the government intends to submit it to the analysis of the Government Accountability Office in May 2018.²¹¹ Considering the time necessary for environmental licensing, the government estimates that construction may begin in 2020, operation is expected for 2025.²¹²

If it is built, the railway will run parallel to the highway BR 163, covering around 1000 kilometres in the states of Mato Grosso and Pará. This path passes inside and/or near Indigenous Lands and State and Federal Conservation Units, as illustrated by the figure below:



Map: Ferrogrão and protected areas²¹³

Similarly to what happened in the case of Belo Sun, although Ferrogrão is still in its planning stage, the mere perspective of its installation has already produced damages. The project intensified land conflicts, lead to a decrease of protected areas,²¹⁴ and increased illegal deforestation throughout the railway course.²¹⁵ If built, the railway will further increase pressure over environmental protection areas and/or regions occupied by traditional communities whose land recognition procedures are still pending (the indigenous peoples Ikpeng, Kawaiwete, and Kawaiwete claim lands in the region²¹⁶).

The Brazilian constitution establishes the population's right to participate in the decision making process. Generally, this occurs through electoral representation and engagement with mechanisms of direct political participation. In addition, communities have the specific right to access information on social and environmental changes which may affect them²¹⁷, as well as to be included in the decision-making process on policies, plans, and projects causing such changes. In the case of infrastructure projects, the participation of local populations occurs through public hearings within the environmental licensing process.²¹⁸ If the population affected is indigenous, the community will also have the constitutional right to be heard about the use of resources located at their lands.²¹⁹

International treaties ratified by Brazil also protect the right to participate²²⁰ in and access information²²¹ on public decisions that may cause social and environmental changes. According to the Inter-American Commission on Human Rights, the right of participation in the decision-making process is especially relevant in contexts where development activities affect human and environmental rights.²²² Public participation and access to environmental information are also established as rights by Principle 10 of the Rio Declaration and the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.²²³ Finally, as exposed in the previous sections, international human rights law determines that traditional communities have the right to free, prior, and informed consultation and consent.

Ferrogrão was planned without the effective participation of the population, and planning did not include consultation of indigenous and traditional peoples affected by the railway. Civil society organizations and representatives of indigenous peoples requested consultations to the federal government, which formally rejected the request.²²⁴ According to the Ministry of Transportation, the consultation is not mandatory, since Brazil did not yet regulate ILO Convention 169 and indigenous lands are located more than 10km away from the future railway.

The governmental reasoning contradicts Brazilian standards and national and international court rulings on the matter. Therefore, the Public Prosecutor's Office issued a recommendation requesting that the Brazilian Agency of Land Transportation "request and ensure the right to Free, Prior and Informed Consultation and Consent to the interested peoples, respecting internal and international standards, as well as existing consultation community protocols, as a previous and necessary condition for any administrative act potentially related to the railway construction"²²⁵.

In face of the manifestation from the Public Prosecutor's Office and the pressure from civil society, the government committed to implementing participation mechanisms and to carrying out consultations that comply with national and international standards.²²⁶ Nevertheless, few months later, the agency backtracked, alleging that it did not have the resources nor the time needed to consult the affected populations.²²⁷ Although the Ferrogrão planning process includes public hearings, these spaces are not sufficient to ensure effective exercise of participation right, since hearings carried-out until now have only had the purpose of unilaterally informing the population about the project.

Public-Private Partnerships

Ferrogrão is part of the Federal Government Program of Partnerships and Investments (PPI), an initiative to encourage partnerships between the public and private sectors directed at decreasing the infrastructure deficit in Brazil.²²⁸ The PPI establishes a governance structure dedicated to establishing and managing public-private partnerships (PPPs). It also determines that projects included in the PPI are national priorities,²²⁹ and that all agencies and government entities responsible for the 'liberation' of the venture have a duty to act in a coordinated, efficient, and fast way in order to 'release' it. The liberation obligation applies even to autonomous and independent government agencies, and includes "any licenses, authorizations, registrations, permits, rights to use or explore, special regimens and equivalent deeds, from regulatory, environmental, indigenous, urban, traffic, public heritage, hydrous, protection of cultural heritage, customs, mining, taxes, or of any other nature needed to install and operate the project."²³⁰

When establishing the government obligations to act quickly to release PPI projects, the PPI law suggests that protection of human and environmental rights are accessory procedures, which are not central to planning and decision-making on public-private partnerships. Indeed, the law establishes a detailed decision-making process in which the social and environmental dimension is not included.²³¹ Neither does the governance of the program ensure the participation of the interested parties, such as civil society organizations, impacted communities, and representatives from the private sector. By excluding these agents, the program creates a double risk: On one side, it may lead to the approval of projects with a high level of local opposition and, therefore, subjected to conflicts; at the same time, it may also lead to the approval of projects that are not attractive for the private sector.²³²

The analysis of the Ferrogrão case shows that the PPI neglects social and environmental issues in the decision-making process. Although regulation requires an environmental feasibility analysis (among other impact management measures)²³³, the railway feasibility studies did not properly analyse social and environmental risks, making it impossible to establish safeguards that may

prevent, mitigate, or compensate eventual violations of human and environmental rights. The way the government dealt with the consultation and engagement of affected communities, described in section 4.3.2, also shows that the protection to rights does not constitute a priority in relation to time and resources issues – not even in face of formal requirements from the Public Prosecutor’s Office.

Summary Table

The main violations, gaps, and problems faced in the Ferrogrão case may be summarized by the following table:

Summary Table: Violations, governance gaps, and social and environmental management problems in the Ferrogrão case	
Environmental licensing failures	Underestimated impacts
Problems in assessing cumulative and synergistic impacts	Impacts on regions already affected by BR 163 and other development projects were not properly considered
Environmental Conservation Units	The project led to review and reduction of preservation units, some of which had been created as a response to the impacts of BR 163 ¹
Free, prior and informed consent	Failure to implement consent and consultation procedures in accordance with national and international rules
Problems in resettlement	
Violation of IP land rights and traditional communities	
Violation of children and adolescents’ rights	
Denial of the right of access to information	Difficulties to access information on preliminary stages of the decision-making process
Violation of the right to participation	Inexistence of effective participation mechanisms that go beyond the unilateral transmission of information
Access to Justice barriers	
PPP framework inadequacy	Duty of promptness in the liberation of PPI projects, signs of social and environmental flexibilization, failure to incorporate human and environmental rights into the PPI’s governance
Negative effects on climate change	Deforestation in the railway influence area and its surroundings
Other human rights violations	

► Tele Pires Hydroelectric Power Plant

Background

The Tele Pires Hydroelectric Power Plant is located in the border between the states of Mato Grosso and Pará, in an affluent of River Tapajós, named River Teles Pires. Like Belo Monte, its construction has been considered by the Brazilian government since the military dictatorship. Only in the 2000's, however, the project became a priority. In 2010, the government held a concession auction. It was won by the Consortium Teles Pires Energia Eficiente, which became the Companhia Hidrelétrica Teles Pires S.A.²³⁵ Construction of the power plant started in 22 August 2011, only three days after the approval of its Installation License, and operations started in 2015.

Inventory Studies of the Hydrographic Basin of the Teles Pires River approved by the National Electricity Agency (ANEEL) in 2006 indicate that the Teles Pires power plant was the first of a set of six projects aimed at exploring the full electrical potential of the basin. The second power plant of the set was São Manoel, built approximately 40 kilometres away from Teles Pires. Although the auction of São Manuel was predicted for 2010, there was a three-years delay due to problems in the environmental licensing. Currently, São Manoel is already generating energy.

Construction of these two hydroelectric power plants required flooding the Sete Quedas waterfall, a place which had been central in the spirituality of indigenous communities inhabiting the region. Those rapids were a sacred place, and a founding element of immaterial culture for the indigenous peoples Kayabi and Munduruku.²³⁶ Due to this spiritual importance, the place held funerary urns, which were removed and stored by the company. Furthermore, Sete Quedas was a natural nursery for fish, and thus also important for the local ecosystem and the subsistence of traditional communities. These circumstances motivated FUNAI to position itself against the project. Notwithstanding, the environmental impact assessment of Teles Pires didn't even mention the destruction of Sete Quedas.²³⁷

Flooding of the rapids was combined with other impacts of the power plant over the river. Before Teles Pires, water was clean, and had high visibility. After the dam was built, indigenous communities and civil society organizations documented deterioration in water quality.²³⁸ As a consequence, indigenous peoples started to face troubles when finishing (especially to use traditional methods with bow and arrow). In addition, changes in water quality are associated to an increased health problems, such as diarrhea, vomit, gastrointestinal diseases, and skin rashes.

Additionally, hydrologic changes led to a decrease in fish quality and quantity. Thus, communities whose subsistence was based on fishery became more dependent on food bought in the city. The decrease of fishery also led several families to raise cattle as an alternative source of protein, resulting in deforestation.²³⁹

In 2017, impacts of power plants led a group from the indigenous community Munduruku to occupy the construction site of São Manoel, in order to protest against the destruction of sacred places, health deterioration, decrease in the number of fishes, and all other negative consequences of Teles Pires and São Manoel. The protest ended upon commitment-bearing by government agencies and companies, including a commitment to return funerary urns that were under possession of the Teles Pires consortium. Since the commitments were not met, and upon the approval of the São Manoel Operation License, 150 members of the community went back to the construction site aiming to claim their rights. The government responded to this protest violently, as documented by the NGO Teles Pires Forum:

“Instead of accepting the dialog, the answer from the Federal Government was sending the National Force for the site of São Manoel power plant, in order to restrain the indigenous mobilization, mostly comprised by women and children. According to the Movement Munduruku Iperegayu, which coordinated the mobilization, the National Force not only prohibited their rituals, but also used smoke grenades to repress the munduruku mobilization.”²⁴⁰

Therefore, violations stemming from social and environmental impacts of the power plant were combined with obstacles to exercise the right to freedom of speech and association.

Right to free, previous, and informed consultation

As exposed in section 4.1.3, the Brazilian legal order recognizes the right of traditional communities to be consulted in a free, previous, and informed way about plans, measures, and projects that may affect them. Therefore, indigenous populations impacted by the Teles Pires Power Plant should have had access to complete information on the hydroelectric and its impacts, before the decision on its installation was made. Also, they should have been consulted in good-will, with the aim of obtaining their consent to the project. On its turn, the entrepreneur should incorporate the communities' concerns on the process of implantation of the power plant and in the design and adoption of prevention, mitigation, and impacts compensation measures.

The company, however, did not consult the affected communities, leading the Public Prosecutor's Office to file a request for consultation before the Judiciary. MPF won in the district court level, as well as in the court of appeals, and the Brazilian Regional Court of the 1st Region reaffirmed the duty to ensure free, prior and informed consultation in accordance with the standards established by ILO Convention 169.²⁴¹ However, the decision did not produce immediate consequences, due to a stay of preliminary order, which suspended its effects until it became final and unappealable.²⁴²

Environmental licensing

Teles Pires licenses are a practical illustration of problems identified by different sectors of Brazilian society when analysing the Brazilian environmental licensing system.²⁴³ They also illustrate the repetition of several failures which had been present in Belo Monte and Suape, demonstrating the existence of a pattern of legal gaps and implantation problems.

The NGO Teles Pires Forum prepared a dossier documenting the main problems of the right protection system and of impact management procedures in the context of Teles Pires.²⁴⁴ Conclusions were the following:

Problems in planning, environmental licensing, and implantation of UHE Teles Pires (Teles Pires Forum, 2017)²⁴⁵
Chronical problems of undersized impacts and social and environmental risks, including the cumulative ones, in the preliminary phase of inventory studies of the Teles Pires sub-basin.
Lack of any process of free, prior, and informed consultation and consent with the indigenous populations.
Persistence of incomplete Environmental Impact Assessments on social and environmental impacts, including the cumulative ones, related to indigenous people and their territories.
IBAMA granted Previous Licences (LP), despite studies being incomplete, and against technical opinions from its team and intervening agencies (FUNAI, IPHAN).
IBAMA granted Installation Licenses (LI) before LP conditions had been fulfilled, emphasizing the lack of an executive plan for mitigating and compensating social and environmental impacts, which should be within the scope of the Environmental Basic Plan, duly analysed and approved by the competent agencies.
Lack of effective monitoring of impacts and of the effectiveness of licensing conditions
Operation Licences granted without full effective compliance with the conditions set in the Installation License, and without evaluation of their effectiveness to mitigate and compensate social and environmental impacts.

That is, similarly to the previous cases, there was a series of problems: initial studies under-sized the impacts and did not consider their cumulative effects; there were no free, prior, and informed consultation and consent procedures; specialized intervenient agencies were not capable of making and/or monitoring their requirements; and there was no timely compliance with measures aimed to prevent, mitigate, and compensate impacts. Although communities, civil society organizations, and the Public Prosecutor's Office also tried to question these failures in court, the instrument 'stay of preliminary order' made the decisions effectless until they became final and unappealable, which would only occur after damage consolidation.

In the specific cases of indigenous communities, Teles Pires was also similar to Belo Monte. In face of the failures described above, the capacity to manage impacts over traditional populations was specially compromised: the continuous delays in implanting the Indigenous Environmental Basic Plan lead to its almost full conversion in "lists of equipment, consumption material, and courses."²⁴⁶ On one hand, such measures were not oriented towards preventing impacts and protecting communities' traditional way of living, as required by law. On the other hand, they were perceived as insufficient to reach even the purposes for which they had been designed.

Summary Table

The main violations, gaps and problems in the Teles Pires case are summarized by the following table:

Summary Table: Violations, governance gaps, and social and environmental management problems in the Teles Pires case

Environmental licensing failures	Assessments undersized impacts, impact assessments were flawed, disregard for technical opinions from rights protection institutions, delays, and failures to meet licensing conditions.
Problems in assessing cumulative and synergistic impacts	Disregard and/or understatement of synergic impacts stemming from other dams planned for the basin
Environmental Conservation Units	
Free, prior and informed consent	Failure to implement consent and consultation procedures in accordance with national and international rules
Problems in resettlement	
Violation of IP land rights and traditional communities	Destruction of places with cultural and symbolic relevance, appropriation of funerary urns, loss of subsistence means due to environmental changes
Violation of children and adolescents' rights	
Denial of the right of access to information	Inexistence of effective mechanisms of active transparency
Violation of the right to participation	Communities affected were not allowed to participate in the decision-making process
Access to Justice barriers	Suspension of the effects of judicial decisions until the damages were already consolidated (stay of preliminary order)
PPP framework inadequacy	
Negative effects on climate change	Emissions stemming from deforestation and reservoir filling ²⁴⁷
Other human rights violations	Disproportional restrictions of the right to freedom of expression and to peaceful assembly of indigenous communities; Damages to health and limited access to water by the local population

► Wind Farm of Aracati

Background

Located in the coast of Ceará, the town of Aracati has approximately seventy thousand inhabitants. In 2008, the company Bons Ventos Geradora de Energia S/A started to install an wind farm in the municipality, comprised of three power plants: Bons Ventos (24 windmills), Enacel (15 windmills), and Canoa Quebrada (28 windmills).

The State Public Prosecutor's Office and the Brazilian Public Prosecutor's Office documented that installation of the towers destroyed archaeological sites, caused environmental damages, and created social problems for the region of Cumbe, where the power plants were installed²⁴⁸ The main environmental problems documented were the following:

Environmental impacts of the Wind Farm of Aracati (Public Prosecutor's Office, 2009) ²⁴⁹
Deforestation of fixed dunes
Burial of fixed dunes by the earthwork activities
Burial/grounding of interdune ponds
Cuts and landfills in fixed and movable dunes
Introduction of sedimentary material for soil impermeabilization and compaction
Constant noise
Erosion

Such environmental changes have led to a reduction in the population of fishes, birds, turtles, and other animals, directly interfering with the subsistence activities of fishers.²⁵⁰

Furthermore, areas occupied by windmills cannot be accessed by the local community, since the equipment poses safety risks. Therefore, places previously used by the population started to be exclusively destined to power generation. There was no compensation, however, for losses in fishing, shell-fishing collection, and leisure areas.²⁵¹ There are also reports of arbitrary destruction of houses,²⁵² with no payment of compensation nor a displacement plan, in a clear violation to national and international norms on adequate housing.

The local community also reported problems which are similar to other development projects. At the beginning of the plant's installation, the company created a great expectation regarding new job opportunities and income generation; however, job offers were just temporary, with a length of four months.²⁵³ Project installation also caused a population influx: the community, usually inhabited by six hundred people, started to deal with the daily circulation of fifteen hundred workers.²⁵⁴

Therefore, part of the local community started to oppose the wind farm, including by organizing demonstrations and blockages. In this context, one of the leaders of the movement suffered a kidnap attempt. In face of intimidations and threats, he distanced himself from the community and was included in the Brazilian government Human Rights Defensor's Protection Program.²⁵⁵

Standards regarding renewable energy

Brazil is a member state to the United Nations Framework Convention on Climate Change, committing itself to reduce from 36.1% to 38.9 of its emissions by 2020. With this purpose, in 2009, the Brazilian State adopted a National Politics on Climate Change,²⁵⁶ and the government elaborated sector plans for mitigation and adaptation.

Brazil has also ratified the Paris Agreement. The country established for itself the commitment that, in 2025, emissions of greenhouse effect gases will be 37% lower than 2005 levels.²⁵⁷ Meeting these commitments depends on high participation of renewable energies in the Brazilian power matrix. Accordingly, the Brazilian Company of Power Research projects the continuous expansion of wind power generation in the country²⁵⁸, a movement that has been led by the Northeast region.

To ensure the compatibility of the expansion of renewable energy sources with human and environmental rights, environmental norms rules adapt to the specificities of renewable sources of power, including wind power. Similarly, recent standards on the management of social and environmental impacts already consider and incorporate issues related to climate change.²⁵⁹ However, these normative changes were still in progress when during planning and construction of the Wind Farm of Aracati, with consequences for the social and environmental impacts management system, as provided by the next section.

Simplified environmental licensing

Energy generating plants with a small potential of environmental impact may be licensed through a simplified procedure, which is faster and requires only the submission of the Simplified Environmental Report (RAS).²⁶⁰ RAS regulation determines that it applies to wind farms and other alternative power sources with low potential of environmental impact.²⁶¹

In 2014, the National Environmental Council (CONAMA) issued regulation establishing criteria to determine whether each wind farm could be categorized as a low-impact project (and, therefore, entitled to simplified licensing), based on project size and location.²⁶² The norm established that wind farms installed in dunes (such as in Aracati) require a full environmental impact assessment, since the RAS is not sufficient to measure and manage its impacts.²⁶³ However, by the time Parque de Aracati was built, the State Environment Superintendence from the State of Ceará (SEMACE) licensed the project through simplified licensing procedures. The three plants were individually licensed, and the analyses were compartmentalized and fragmented.

The State and the Federal Public Prosecutor's Office considered that SEMACE's decision to be flawed, arguing that a full environmental impact assessment was necessary, and that the farm should be licensed as a unified project.²⁶⁴ For the Public Prosecutor's Office, the project's localization (which included an Area of Permanent Conservation, an Area of Environmental Conservation, and the Coastal Zone) justified elaboration of a full impact assessment.²⁶⁵ At first, a federal judge granted the Federal Public Prosecutor's Office, and ordered a halt to the plant's operation. However, final decisions found that the RAS was sufficient to lay the foundation for the environmental licensing procedure.²⁶⁶ On its sentence, the judge took into consideration the power demand of the country and the benefits of the so-called clean energy, determining that "inconveniences suffered by the local community, reported by MPF, are natural to any public interest project with similar nature and magnitude."²⁶⁷

Summary Table

The main violations, gaps and problems in the Aracati case are summarized by the following table:

Summary Table: Violations, governance gaps, and social and environmental management problems in the Aracati case	
Environmental licensing failures	Simplified process, insufficient impact assessments
Problems in assessing cumulative and synergistic impacts	Fragmentation of impact assessments, licenses, and licensing conditions
Environmental Conservation Units	
Free, prior and informed consent	
Problems in resettlement	Residents report have been expelled from recreational, work, and housing areas, with no resettlement policy
Violation of IP land rights and traditional communities	
Violation of children and adolescents' rights	
Denial of the right of access to information	Inexistence of effective mechanisms of active transparency
Violation of the right to participation	Communities affected were not allowed to participate in the decision-making process
Access to Justice barriers	
PPP framework inadequacy	
Negative effects on climate change	
Other human rights violations	Threats to opposers of the project

Part IV
Strengthening and
making greater use of
country systems: ways
forward for the NDB

4

Critical perspectives on the country systems approach in development finance institutions

To illustrate some of the challenges in the operationalization of the country systems approach in the context of development finance this Part is divided into two sections. Initially, two brief case studies are presented. The first one, a development policy loan (“DPL”) extended by the World Bank to Brazil in 2010, reveals the limitations of initiatives aimed to strengthen the country systems’ social and environmental safeguards. The second, BNDES’ financing to the highway Villa Tunari-San Ignacio de Moxos (“TIPNIS Park”), in Bolivia, illustrates the negative impacts of overly permissive uses of national and local systems. After the case studies, some reflections are made on the DFIs’ experience with the country systems, indicating paths for the NDB.

► World Bank: Development Policy Loan for Sustainable Environmental Management (Brazil)

In 2004, the World Bank created the so-called Development Policy Loans (“DPL”), through the merge of several instruments, such as Sectoral Adjustment Loans, Structural Adjustment Loans, among others.²⁶⁸ The DPL are development loans that finance comprehensive policy reforms, often through a direct budgetary support, instead of investments based on physical projects (e.g. hydroelectric, highways, airports, etc.). By the end of the tax year of 2016, the bank reported the existence of 702 DPLs, corresponding to approximately 25% (one fourth) of its investment portfolio, totalling USD 132 billion. Twenty-four DPLs were granted to Brazil in the period from 2005 to 2016, in a total amount of USD 11.6 billion.²⁶⁹

The First Programmatic Development Policy Loan for Sustainable Environmental Management (SEM DPL 1) was conceived as a programmatic series of two loans to the Brazilian Federal Government in a total of approximately USD 2 billion. The first loan, in the amount of USD 1.3 billion, the largest one under such modality by that time, was divided into two instalments of USD 800 million and USD 500 million. The loan was approved in March 2009, entered in force in June 2010, and disbursements occurred in June and December 2010. The second planned loan of the series, the SEM DPL 2, was not made due to the cancellation of the operation.

Initially, the programmatic loan would have as counterparty the BNDES, first as the major and then as a financial intermediate. The purpose was to increase public investments’ capacity

in infrastructure, in line with the Brazilian Growth Acceleration Programme (PAC), while also enhancing BNDES' environmental performance. However, in face of significant concerns by the World Bank's internal teams on BNDES' capacity to comply with the environmental safeguards, bids, and financial management, the Brazilian development bank was not considered eligible for a loan of such modality. The agreement was signed with the federal government, with the Ministry of the Environment and BNDES as the two main implementing agencies.²⁷⁰

The purpose of SEM DPL was (i) to improve the country's environmental management system, and (ii) to integrate the principles of environmentally sustainable development in the development agenda of key-sectors (management and conservation of natural resources, hydric resources, environmental management, environmental sanitation, renewable energies). Among the expected results were the increase in energy production through renewable sources, decrease of legal disputes on environmental licenses, reduction of GEE emissions and deforestation, as well as a remodelling of screening, approval, and monitoring processes for all BNDES' new projects.²⁷¹

By the end of disbursements, the project closing evaluation qualified the project performance as satisfactory, both regarding the results and the quality of the supervision undertaken by the borrowing institution.²⁷² However, the Independent Evaluation Group (IEG) of the World Bank itself adopted a more critical posture. For objective (I), the IEG evaluation was that the project performed in an "insufficient" level, while for objective (II), the conclusion was "not satisfactory".

Since the beginning, the IEG criticized the repeated changes in the operation design – including significant changes in the financing instrument, purposes, and implementing agencies – which, according to the entity, created problems for the project's logics, putting at risk the schedule, efficacy, and reputation of the World Bank.²⁷³

About the relationship between the resources the World Bank made available and the achieved results, IEG considered there are little evidence that the SEM DPL has contributed for the progresses, since the results were part of an environmental reform process that was in place for decades. IEG also stressed that programmatic loans should be incorporated to the general budget and not "stamped" for specific projects. However, on the contrary, the SEM DPL was used to increase BNDES disbursements' capacity in infrastructure projects with a problematic socio-environmental profile, such as Belo Monte Hydroelectric Power Plant.²⁷⁴

Echoing the critics that civil society organizations submitted to the World Bank before the beginning of the SEM DPL, IEG criticised the lack of a deeper analysis of the environmental and

social management system of BNDES. Civil society had already raised a concern on the detachment of BNDES from the most advanced sustainability practices in the financial sector, requiring public consultations to be carried out in order to provide subsidies to the creation of a social and environmental policy, one of the loans counterpart.²⁷⁵ IEG also criticised the project's monitoring and evaluation, which did not include the views from other stakeholders.

The Brazilian government, through the Department of International Affairs from the Ministry of Finances, strongly objected to the IEG's conclusions. In an official letter, the Brazilian government accused the department of performing an "incomplete, impartial, and sometimes biased evaluation of the recent evolutions in Brazil, as well as a lack of understanding on the context for implementing the SEM DPL."²⁷⁶ The World Bank management also registered a disagreement with factual issues involving implementation and evaluation of the SEM DPL.²⁷⁷

► **BNDES: Villa Tunari-San Ignacio de Moxos Highway - Parque TIPNIS (Bolivia)**

The project of the Villa Tunari – San Ignacio de Moxos highway, in Bolivia, consists of a road that would cut across the Indigenous Territory and the National Park Isiboro Sécore (TIPNIS), a protected area with a vast biodiversity occupied by indigenous peoples before the country was colonized. The construction of the highway in three sections was an old Bolivian project for interoceanic integration to make feasible the outflow of goods to the Asian continent. It gained force after a diplomatic agreement signed between the Brazilian and the Bolivian governments, through which BNDES would loan USD 332 million. The financial agreement between the bank and the Bolivian State was signed in April 2011, but it was cancelled in June 2012, after Bolivia approved the Law No. 180/2011²⁷⁸, designating the protected area of TPINIS as "intangible" (untouchable).

The TIPNIS highway project, since the beginning, was marked by controversies on corruption, social and environmental impacts, and complaints of human rights violations, including the lack of prior consultation to the 64 communities residing in the Indigenous Territory that would be directly affected by the construction of the second section of the road. The Confederation of Indigenous Peoples from Bolivia and other organization led movements that sparked several public protests uncovering the social, territorial, and environmental impacts, as well as human rights violations, including abuses, prisons, and violence suffered during the march against the project, which had taken place in 2011.²⁷⁹

The strong pressure of indigenous peoples living at Park TIPNIS was decisive to cancel the agreement between the BNDES and the Bolivian State. Nevertheless, the TIPNIS case uncovered

the gaps in BNDES' social and environmental due diligence for its international investments. Based on documents obtained with local authorities, as well as other documents accessed through the Brazilian access to information law, Conectas, in partnership with the British NGO Global Witness and the Bolivian NGO CEDLA, rebuilt the social and environmental analysis of the highway by the Brazilian development bank. The investigation revealed that BNDES failed to detect severe irregularities in the project's concession, and the grave social and environmental impacts and human rights violations, such as the lack of free, prior and informed consent of indigenous peoples. The organizations found that, among the multiple negative events involving the project, BNDES did not properly address with the following elements in its due diligence process²⁸⁰:

- Lack of consultation to TIPNIS indigenous communities, which were publicly against the highway project;
- The Bolivian Administrator of Roads' failure to perform an Environmental Impact Assessment in advance to the bidding process to build the highway;
- The poor quality of the Environmental Impact Assessment for the sections 1 and 3 of the highway, which does not sufficiently expose future and potential negative impacts of the highway construction, and which did not implement a meaningful consultation process with local communities, and which was also widely criticised by the environmental authority at the time;
- Practice of large-scale illegalities (sic) in the bidding process, as detailed in the official investigation by the Bolivian General Comptroller's Office, published in June 2010;
- Plausible evidences of human rights violations related to the demonstrations against the highway in August 2011.²⁸¹

Regarding the administrative irregularities, information showed that in 2007, the construction company OAS won a bid for a project estimated to cost USD 415 million, 80% of which would be financed by BNDES and the other 20% to be paid by Bolivia. One year after the project was awarded to OAS, the company was subject to criminal investigation for overpricing, illegalities, and irregularities in a "turnkey" type of contract.²⁸² The investigation showed that the company was exempted from developing an Environmental Impact Assessment (AIA), which is prerequisite for the bidding process of any construction in that country and which, in this case, was only made at a later stage.²⁸³

BNDES' decision to move forward with the financing of sections 1 and 3 (south and north of TIPNIS Park) called the attention of organizations, given the lack of a licence for section 2, central part, which would cross the indigenous territory. According to BNDES, the independent audit that was hired to analyse the environmental studies and the expiry dates of the licences declared there were no “non-conformities” with the Bolivian law. The bank also stated that it availed itself of all the precautionary measures to prevent the financing of sections without the necessary licences and impact mitigation measures. However, the civil society organizations found that BNDES' due diligence for international projects lacked criteria and minimum procedures to identify and deal with problems that the local authorities would not be capable of solving in a proper way. The case showed that the financing to export Brazilian goods and services by BNDES did not ensure the effectiveness of the guidelines of its own social and environmental policies, nor it was capable of ensuring the compliance with the legislation and environmental and social commitments of the importing country.

In 2015, BNDES included specific guidelines for exportation projects in its Social and Environmental Policy (post-shipment ExIm class). The bank succeeded in better regulating the process of evaluation of social and environmental compliance, explicitly providing for third-party audits, project monitoring, and disclosure of information through a social and environmental “statement”. In practice, however, implementation of such measures is not fully effective yet, including by the intensification of claims of corruption involving construction companies that received funds from the bank to the construction in neighbouring countries and in Africa, which led the bank to suspend part of the operations and even to cancel projects that had already started to be executed abroad.

► **Challenges for a stronger use of country systems**

The experience of implementing the country systems approach in DFIs reveals some successful cases, but also a dual failure. On the one hand, country systems remain widely underused, making such objective the least successful among those included in the agenda of aid development effectiveness.²⁸⁴ Only in exceptional circumstances the country systems are considered appropriate – or “equivalent” – and, therefore, adequate to replace the policies and procedures of DFIs themselves. On the other hand, in cases in which a greater use of the country systems was made, and/or country systems were strengthened, the results were often unsatisfactory, with cases in which resources intended to improve social and environmental management had results that were the opposite to those planned, aggravating a pre-existing context of weaknesses in normative frameworks and policies.

Nevertheless, the use of country systems to address social and environmental issues is growing, even though tortuously, to become a well-established strategic, practical and policy objective of DFIs. Proof of this is the inclusion of the country systems approach in the safeguard policies of both “traditional” and “new” banks. It is progressively becoming a standard approach at the policy level, even when there is not explicit recognition about this, as it is the case of BNDES.

Indeed, the transition for a greater use of the country systems in social and environmental safeguards is a reality, at least in the language of the institutional operational policies. A recent comparative analysis of the environmental and social safeguards of the NDB, the AIIB, and the World Bank concluded that “both in the attribution of responsibilities and in the use of national systems, social and environmental policies of the three banks are remarkably convergent”²⁸⁵ in the sense that they shift to the client the burden of compliance and rely extensively on the use of national systems to achieve social and environmental protection. The same analysis also identified that the limitations to operationalize the country systems approach are common to many actors. In the case of the three banks, the analysis noticed that the all the three policies lacked clear guidelines on how the national systems could be strengthened and in accordance to which standards²⁸⁶

Based on the experience of the analysed institutions and the case studies, it is possible to identify five major challenges for an effective implementation of the country systems approach in development finance, which certainly unfold into other challenges related to the normative framework, governance, and operational practice.

———— Misalignment between the planning and financial instruments and the measures for strengthening national systems

The first challenge is to ensure consistency in the integration of the country systems approach across different instruments of financial support for development projects and programs. This applies both to the analysis of the domestic framework, in the stage of determination of equivalence and acceptability, and to initiatives to strengthen and to fill gaps through programmatic loans, technical assistance or contractual provisions in specific projects.

The current limitations hinder greater adherence to country systems and the development of more effective solutions. In a 2010 review of the World Bank safeguards performance (i.e., prior to updating the current framework in 2016), the Independent Evaluation Group (IEG) noted that countries have not experienced significant benefits in using country systems, and that, thus, ownership was low.²⁸⁷

The IEG report on World Bank's pilots in country systems applied to social and environmental safeguards highlighted improvements that are needed, including: (a) articulating clear criteria and procedures for determining the acceptability of a country environmental and social systems and performance, (b) adopt country and/or sector-level approaches beyond project-level approaches, and (c) to guide the efforts of strengthening the capacity of national systems towards internationally agreed principles, outcomes and benchmarking, rather than equivalence/acceptability/gap filling. At that time, the study further recommended that the WB changed its approach from "using national systems" to "use and strengthen national systems".

The IDB country systems' use assessment, undertaken on the occasion of its Ninth Capital Increase, listed as a critical point a greater coordination between areas responsible for validation and improvement of domestic systems.²⁸⁸ In this sense, the mainstreaming of country systems into social and environmental issues is important to ensure greater consistency in programs, partnership strategies and support instruments. On that aspect, the design of IDB's country system approach can be considered a positive model, despite the barriers that are still observed in its practical operationalization.

The measures identified by the IDB and the World Bank assessments are generally in line with this study's perception that a more coherent country system framework is needed. In addition, measures favoring coherence and the mainstreaming of the country systems approach would benefit from explicit provisions about civil society participation. It is important to incorporate participation not only at the project level, but also during policy design, assessment of domestic systems, decision-making on lending, and elaboration of strategies to strengthen domestic frameworks. In Brazil, there is a consistent record of civil society engagement with the IFIs agenda. For two decades, sixty organizations organized themselves through the Brazil Network on Multilateral Financial Institutions. This track record of continuous and coordinated action indicates that social participation processes would be valued and utilized, generating significant contributions to the country system approach. Likewise, country systems' mainstreaming would benefit from institutional spaces for social participation.

The programmatic lending is an example of an instrument that, if well designed, can help in the use of country systems in individual projects, such as infrastructure projects. Upon granting the SEM DPL to Brazil, in 2010, the Operational Policy 8.60, which governs this type of instrument, established that if the country's specific policies "are likely to have significant poverty and social consequences, especially on poor people and vulnerable groups" (Paragraph 10) or "are likely to cause significant effects on the country's environment, forests, and other natural resources" (Paragraph 11), the bank would assess whether the borrower has an on-site system to manage those risks, and if there are gaps noted in risk management, it should identify measures to meet them. With the approval of the new social-environmental framework in August 2016, the World Bank issued a new Policy for Development Policy Financing (OPS5.02-POL.105).

The new rule does not differ substantially from OP 8.60. For policies with an increased likelihood of significant effects, the Bank assesses in the Program Document the systems of member countries to reduce such adverse effects and improve its effects, based on relevant national or sectoral environmental analysis. If there are significant gaps in the analysis or deficiencies in these systems, the Bank describes in the program document how such gaps or failures would be addressed before or during program implementation, as appropriate.

The Brazil SEM DPL case reveals, however, that the social and environmental discipline of World Bank policy lending leaves space for borrowers to use its resources to finance projects that cause impacts, without adopting adequate mitigation measures or giving in exchange a satisfactory and long-lasting reinforcement of the social-environmental governance.

Moreover, there is a striking contradiction between the narrative on strengthening country systems - expressed, for example, in the Country Partnership Framework - and the reality of instruments that should materialize such aim - like the programmatic loans and project financing. This inconsistency has been criticized by civil society organizations during consultations about the 2018-2023 Country Partnership Framework for Brazil (CPF).²⁸⁹ The organizations welcomed the Bank's recognition that many problems in the Brazilian environmental licensing system resulted from failures in earlier stages of project preparation and territorial planning. However, they highlighted that the CPF did not present concrete strategies for overcoming such challenge - which could be, at least in part, attributed to policy initiatives that had been supported by the Bank, despite their misalignment with environmental and human rights norms.²⁹⁰

As in Brazil, in other countries where the World Bank sought to support the transition to a low-carbon economy through policy financing, the results were below expectations due to certain gaps. While they contributed to efforts to increase renewable energy supply, programmatic lending in countries such as Egypt, Indonesia, Peru and Mozambique generated subsidies for fossil fuels, increased forest vulnerability and weakened environmental governance.²⁹¹

Limitations of the remediation processes in cases of retrogression in the domestic system

Besides the need to calibrate the instruments to identify strengths and weaknesses of country systems and improve them, it is also necessary to consider that the regulatory framework of countries is not static. Currently, the threats of setbacks on social and environmental governance and rules in developing countries, and even among the most developed, are widely discussed.

In Brazil, as discussed in Part III of this study, the social and environmental field is currently under constant threats of retrocession, both in the regulatory and the public policy spheres. The recent period has been marked by legislative offensives against human and environmental rights, budget cuts to the Ministry of the Environment, reduction of the institutional capacity of Funai (Indigenous body), growth in deforestation rates, explosion of the rates of deaths in the rural area and of land conflicts throughout the country, as well as attacks against indigenous peoples.²⁹² The UN itself has expressed concern about the weakening of the level of protection, issuing warns about a possible violation of the obligation of non-retrocession under international law.²⁹³

In this scenario, the weakening of standards may not only materialize through a legal or regulatory reform, but through deliberate choice to “dry out” the capacity of social and environmental agencies, rendering normative commands inoperative.²⁹⁴ This is the case of the antislavery regulation in Brazil, formerly considered an international model, but now depleted by drastic budgetary cuts of the inspection agencies.²⁹⁵ As a result, the number of workers rescued in 2017 has fallen to the lowest level since 2004, with only 404 releases, from almost 6,000 in 2007. The number of inspections by the special groups in 2017 was 88, compared to a peak of 189 in 2013, a fall of 53%.²⁹⁶

Therefore, it is worrisome that the policies of institutions in general do not bring detail on the process to be followed in order to ascertain and deal with retrocessions. In the analyzed institutions, the criteria and procedures are similar. IDB claims it can take action if it notices changes in the applicable national laws, flexibilization of environmental regulation, or decline in the capacity of responsible institutions. The World Bank’s operational policy on country system use obliges the borrower to maintain equivalent social and environmental safeguards, as well as acceptable implementation practices, track records and capacities.²⁹⁷ The obligation to ensure equivalence of standards throughout the project cycle would be, as a consequence, an integral part of contractual obligations.²⁹⁸ In case of deterioration, the Bank states that contractual remedies apply, such as the termination of the agreement. AIIB commits the borrower to give notice of “material changes” in the framework that served as the basis for the assessment of equivalence with its social and environmental policy.²⁹⁹

But there is no mention, for example, of the critical role that civil society organizations could play in reporting retrocessions that could amount to a violation of the commitment to maintain the “equivalence” of the domestic framework. In current policies, the governments themselves are the main sources of information, which could represent a bias in the way changes are presented to DFIs.

Therefore, there is a window of opportunity for the development of more robust and participative tools capable of giving more promptness and precision to the assessments of domestic systems, to enhance tools of gap-filling, and to provide a more rigorous use of mechanisms aiming to maintain and improve regulatory frameworks and socio-environmental public policies.

At this point, a more cautious approach is recommended such as the one in the exposed by the IDB review regarding its own experience with country systems in 2009. It proposes to automatically renew the assessments for predefined periods of time, except in cases of manifest retrocessions. This option seems insufficient to deal with the dynamism with which socio-environmental rules and policies change following political realignments and economic pressures for a greater extraction of natural resources and the disorderly implementation of large infrastructure projects, as was clear in the Brazilian case.

Failures in the methodologies to measure benefits and results of the use of country systems

The second challenge is to build robust methodologies for assessing the results of initiatives aiming to improve country systems. In the case of the World Bank, independent civil society organizations' assessment of the implementation of country systems pilots in the 2000s pointed out, for example, that measures to complement and strengthen country systems did not involve socio-environmental legal and regulatory reforms. Consequently, the pilot would have failed to promote long-term improvements in the socio-environmental normative framework of the borrowing countries, which could be used for future projects, including those that are not financed by the World Bank.

As mentioned above, one of the expected results of the SEM DPL to Brazil was the improvement of BNDES' screening, approval, monitoring and evaluation criteria, which has had unsatisfactory result. In 2014, years after the termination of the loan, Conectas Human Rights published a report highlighting a number of shortcomings in the social and environmental assessment cycle of BNDES projects, including lack of transparency on social and environmental information, inadequacy of the instruments designed to verify the adherence of corporate clients to universal standards of social and environmental responsibility; weaknesses in monitoring mechanisms; and a complete absence of policies and standards on a variety of issues involving human rights impacts, such as indigenous peoples' rights to free, prior and informed consent (FPIC).³⁰² This last problem - the lack of human rights criteria in BNDES' financing - could not have been properly corrected by the World Bank, since the bank itself lacks an integrated human rights approach on its activities.³⁰³

► A critical view of the World Bank pilot of the country systems applied to social and environmental safeguards

The Center for International and Environmental Law (“CIEL”) reviewed the cases included in the pilot to understand whether the World Bank country system approach met three criteria: i) the approved social and environmental safeguards were equivalent, in terms of protection, to the World Bank policies; ii) the use of the country system facilitated long-term and binding legal improvements in the domestic framework of borrowing countries, which could be used for future projects; and iii) World Bank accountability before communities was as effective in the country system approach as in the traditional use of safeguards. The assessment concluded that the experiment presented “serious risks and uncertain benefits”.³⁰⁰ The following problems were identified:

- Critical components of a country’s system were left out, although essential to the good performance of other safeguards, such as freedom of the press, judicial independence and access to information;
- There have been no permanent improvements in the domestic safeguards system of borrowing countries;
- It provided an opportunity to weaken the existing safeguards by reducing the expected standard or upon “false equivalence”³⁰¹ between domestic standards and multilateral institution safeguards;
- Lack of transparency and accountability in the review of the domestic standards (laws, rules and institutions);
- Lack of clarity about the methodology for complementing and strengthening domestic systems;
- Lack of a timeline and a participatory monitoring system of gap filling measures;
- Barriers to the access to the World Bank’s accountability mechanism, the Inspection Panel, mainly due to the lack of clarity on the applicable standards, especially when an accurate description of the violated rule is an essential condition for the admissibility of complaints.

Source: CIEL (2008).

Based on ADB's assessment of their projects aimed at the development of country systems' assessment methodology, the following lessons were learned: (i) given the complexity of the assessment process, there is need to allocate adequate budget and time to conduct the assessment of the country system, (ii) in order to ensure a good assessment, governments and other stakeholders should understand and agree on their contributions, the scope of work and approach, and the expected outcomes, and (iii) the need to ensure that the level of detail of the measures to fill the recommended gaps is compatible with the intended use of the priority action plan.³⁰⁴

Inconsistencies and additional risks in cases in which there are financial intermediaries

The fourth challenge is to ensure the consistency in the application of the country system in cases involving financial intermediaries. The case study on the World Bank's SEM DPL for Brazil illustrates this problem. One of the pillars of the new BNDES environmental and social management system supported by SEM DPL should be the development of at least thirteen sectoral guidelines. Nevertheless, only four guidelines³⁰⁵ have already been developed and have left out critical sectors such as hydropower, forests, soy, water and sanitation. The SEM DPL Program document also prescribed that BNDES would apply its new policies to all its investments, including "indirect" investments financed through financial intermediaries, but the monitoring indicator for this policy area only covered direct investments, which are half of the bank's portfolio.³⁰⁶

The NDB, for example, extended a credit to BNDES as onlender worth US\$ 300 million for investments in renewable energy. According to the financing agreement between the two entities, BNDES is responsible for allocating this resource in sub-projects, as well as conducting the social and environmental analysis, in accordance with its own Socio-environmental Policy. In this case, NDB undertakes a review of the BNDES assessment. This arrangement, common in other multilateral financing institutions, is criticized as it hinders external control over the standards that are applicable to ensure projects' socio-environmental compliance. In the specific case of the "umbrella" loan between NDB and BNDES, NDB did not provide public information about the due diligence of the BNDES policy framework, despite the various concerns that have been about the limitations of BNDES criteria the Bank's criteria for transparency, as well as environmental and human rights standards.³⁰⁷

Vulnerability of rights in projects with a "national priority" stamp

The case studies show that recurrent failures in the Brazilian system of social and environmental protection are related to the absence of effective monitoring of human rights standards. More than just a distance from best available practices of E&S management, there is enough evidence of flexibilization of individual and collective rights. For instance, while public hearings are often held within the licensing process, the right to free, prior and informed consent and consultation is systematically neglected. The absence of a rights-based approach is particularly relevant in projects labelled as national priorities - in such cases, even the judiciary tends to act under self-restraint, limiting its role as an instance capable of ensuring proper remedy

Lessons learned and ways forward for the NDB

The lessons learned from the benchmark study and from the experience with infrastructure projects in Brazil are mainly useful to the operations of DFIs in countries that are at a stage of economic development and present socio-environmental normative frameworks and institutions that are similar to those in Brazil. However, there are lessons that could apply to all developing countries. In any case, there is no unique formula to the adoption of country systems by development banks, so it is critical to take into account the specifics of each country.

THE NDB WILL FACE PARTICULAR CHALLENGES WHEN REALIZING ITS VISION AROUND THE USE OF COUNTRY SYSTEMS:

NDB will likely face problems that are similar to those of other DFIs, but also others arising from its own organizational structure and political vision. In the case of the NDB, two of its distinctive features may create additional challenges to the effectiveness of its country systems approach.

FIRST, NDB'S E&S POLICY FRAMEWORK IS MORE GENERIC THAN THE AVERAGE WITHIN MULTILATERAL DEVELOPMENT BANKS (MDBS):

While the main MDBs have E&S policy frameworks covering a broad range of issues (assessment and monitoring of social and environmental impacts, involuntary resettlement, indigenous peoples' rights, cultural and historical heritage, biodiversity, water management, etc.), and that set out clear and detailed standards, the NDB framework is based on principles, with few standards that, up until now, have not been followed by any other public documents establishing operational guidance for the approval, contracting, monitoring and evaluation of a project. On the one hand, this is very much aligned with NDB's critical view of traditional safeguards. It sees them as having weaknesses, such as their narrow applicability (it only applies to projects funded by external entities), the impairment of a country's potential for development in accordance with its own priorities, and the failure to recognize the differences of each normative framework, as well as the difference between emerging and developing countries when it comes to their capacity to comply with the safeguards.³⁰⁸ But the lack of clear standards hinders the identification of benchmarks for equivalence tests.

**NDB REJECTS
CONDITIONALITIES:**

NDB shows a commitment towards the adoption of South-South Cooperation principles into its activities, including respect for countries' sovereignty and the refusal to impose conditionalities. The need to respect the sovereignty and the idea of horizontality in partnerships for development are legitimate values to be pursued by a "Global South" development bank. However, such a vision may create barriers for the adoption of actions that are needed to fill some gaps, within a systemic vision on socio-environmental governance, human rights, and balanced development, as well as for the exercise of contractual rights (e.g., penalties, fines, early termination, etc.) against measures of weakening and retrocession of the normative framework.

**NDB PARTICULAR
FEATURES ARE
ESPECIALLY
RELEVANT TO THE
ANALYSIS OF THE
CASE STUDY ON
THE BRAZILIAN
DOMESTIC SYSTEM:**

The case analysis allows the identification of a pattern of systematic failures in the socio-environmental management system marked by:

A lack of participation mechanisms and consultation procedures with traditional communities. The lack of meaningful consultation and participation not only violates nationally and internationally recognized rights, but also adversely affects the development of complete socio-environmental assessments and increases social conflicts, creating barriers to the implementation of a project.³⁰⁹

The poor quality of feasibility and environmental impact studies, which tend to underestimate social impacts and disregard traditional communities' specificities.³¹⁰ Given that prevention, mitigation, and compensation plans are based on these initial studies, the poor quality of socio-environmental assessments tends to undermine the entire impact management process.

The failure to effectively implement prevention, mitigation, and remedy measures. This issue is fundamentally linked to the operation of Brazilian oversight agencies tasked with protecting human rights and the environment. Representatives and organizations working with communities that have been affected by the analysed development projects report that, in practice, the enforcement of socio-environmental regulations in Brazil is not effective for two reasons: first, because of the lack of financial and human resources of such agencies; second, because these bodies may suffer from undue political influence from projects' sponsors.³¹¹

IN BRAZIL, AN EFFICIENT AND FAIR USE OF THE COUNTRY SYSTEMS APPROACH WOULD NECESSARILY NEED TO ADDRESS THESE CHALLENGES:

Therefore, it remains to be seen how NDB principles and policies would be converted into concrete actions to address these gaps, and whether the country systems approach would indeed be a tool equipped to deal with these problems without compromising the protection of rights.

LACK OF ACCESS TO JUSTICE IS A MAJOR CONCERN:

The Brazilian case studies demonstrate the lack of effective extrajudicial grievance and dispute resolution mechanisms to promptly and adequately respond to the problems faced by local communities. Even with a solid and independent judiciary, individuals and groups face multiple barriers to access justice. Such barriers include an arbitrary mechanism (“suspensão de segurança”) that negatively affects even the most exceptional judicial remedies, thus hindering measures that would prevent damage from happening or being aggravated.

COUNTRY SYSTEMS APPROACHES SHOULD BE GUIDED BY A SYSTEMIC VIEW THAT TAKES INTO ACCOUNT THE MULTIPLE DETERMINANT FACTORS FOR A SUSTAINABLE DEVELOPMENT:

Firstly, the assessment and improvement of a country’s E&S system requires a comprehensive and systemic view on the factors that affect the sustainability of infrastructure projects. The Brazilian case shows that even in a middle-income country with a relatively well-developed E&S normative framework, a narrow perspective is a source of risk. Brazil’s country system has several governance gaps that undermine the sustainability of infrastructure investments, with projects that just move forward at the expense of the environmental licensing procedure or the right of affected communities from participating and being consulted (or give consent). In such circumstances, there is a strong perception that the Brazilian legislation and the respective enforcement institutions are selective and lack coherence. The analysis of the country system must therefore take into account the level of institutional development; civil society participation; access to information; the standing of legal, regulatory and policy frameworks; the level of implementation and compliance with environmental standards; and the environmental management

capacity of public authorities. In addition, it should go even further to consider, for example, the access to justice, the right to freedom of expression and assembly, among other rights that may be restricted to enable a political and legal environment that is favorable to major - not rarely harmful - infrastructure projects.

**THE USE OF THE
COUNTRY SYSTEM IS
STILL PERMEATED BY
INDEFINITIONS:**

Whether in traditional institutions, such as the World Bank, or in new ones, such as NDB and AIIB, standards for equivalence and acceptability are marked by a high degree of uncertainty, since the language of safeguard policies is full of vague concepts, even in the case of detailed frameworks, such as the World Bank's.³¹² This obstacle became evident in projects that sought to further the assessment and implementation of the country systems approach. According to the Asian Development Bank, one of its technical assistance projects intended to strengthen domestic systems was delayed due to difficulties in initially identifying laws related to socio-environmental safeguards. In addition, time and resources were employed to compile the legislation and to update the data during the project implementation. Finally, throughout the implementation of the project, the benchmark criteria to the "equivalence assessment" changed from "good international practices" to the policy principles of the new Safeguards Policy that the bank approved in 2009, which led to further delays in the implementation.³¹³

**INDETERMINATIONS
AROUND THE USE
OF CORPORATE
SYSTEMS:**

NDB, as well as AIIB and other MDBs, intends to use corporate systems, meaning the private sector. However, there is little clarity on the methodologies to assess private clients' capacity to comply with universal standards of responsible business conduct (e.g. the Global Compact, ISO 26000 and the United Nations Guiding Principles on Business and Human Rights).³¹⁴

**► IDB and its environmental analysis:
A comprehensive view of country systems**

An example of a systemic approach to country systems is the IDB, whose environmental analysis considers several relevant aspects, including the environmental governance status, with elements that include the level of institutional development, civil society participation, access to information, the standing of the legal, regulatory and policy frameworks, the level of application and enforcement of environmental standards, as well as the environmental management capacity of public authorities. Its strengthening tools seek to address problems in these areas.

**► BNDES and the reverse path:
From sovereignty to the strengthening of its own policies**

BNDES, as a public national development bank with a legal regime linked to a specific jurisdiction, has followed quite the opposite path to those of multilateral institutions. In general, its performance outside of Brazil has been marked by an understanding, even implicit, of respect for the sovereignty of the recipient country and the use of domestic systems. The instruments for verifying the quality and robustness of previous impact studies and the effectiveness of mitigation measures employed by local authorities and implementers have been playing a minor role for a long time. But this behavior is gradually giving place to a more critical and careful posture, resulting from the bank's learning on how to operate in a socially and environmentally responsible manner in contexts that differ from those of its host country.

Recommendations

A ROBUST, CONSISTENT AND INTEGRATED COUNTRY SYSTEMS APPROACH:

The development of a robust, consistent, and integrated framework on country systems is essential to ensure strategic and operational coherence across all the dimensions of DFIs' activities - from the development of country strategies, to the establishment of operational policies and the design of innovative financial instruments. To be complete, a vision on country systems requires an adequate analysis of all issues that are sensitive for the sustainability of infrastructure and development projects, including the public participation in relevant decision-making processes, the access to justice, the context of respect for human rights (including freedom of expression and human rights defenders), the transparency of public agencies, a normative framework that ensures sustainable performance and accountability of the private sector, as well as socio-environmental governance (effective enforcement capacity, sanctions, etc.).

ALERT SYSTEMS FOR SETBACKS OR WEAKENING OF THE E&S FRAMEWORK:

Establish a platform for the identification of measures that imply, or that have the potential of causing, setbacks in the domestic system. Its development and implementation should take into account the views of civil society organizations, academia, think tanks, and especially of directly affected communities.

ALIGNMENT WITH INTERNATIONAL ENVIRONMENTAL AND HUMAN RIGHTS STANDARDS³¹⁵:

Measures for the strengthening and gap-filling should be mindful of states' obligations enshrined in incorporated international treaties and agreements. For instance, the Paris Agreement and the International Covenant on Economic, Social and Cultural Rights encompass almost all members of the new IFIs as States-Parties. This "bottom-up" construction would allow the development of robust policies aligned with domestic systems without compromising the principles of efficiency, horizontality and cooperation. In line with such frameworks, country systems assessment should be transparent, inclusive and meaningfully involve all the stakeholders, notably local communities.³¹⁶

HUMAN RIGHTS DUE DILIGENCE processes must be in place in order to ensure that adverse socio-environmental impacts are prevented and/or mitigated, and that eventual human rights violations are monitored, reported and addressed. The first stage of the due diligence is the human rights impact assessment, which can be based on a joint diagnosis carried out by the bank, the state and the stakeholders prior to the implementation of specific projects, in order to identify the areas in which the bank could cooperate - horizontally - with its clients

to strengthen existing rules, procedures, and policies relevant to its mandate.³¹⁷ Based on the assessment, and before each project implementation, the bank should map the national and international human rights standards applicable to the project, analyze the local context, and, with the participation of the affected communities, to identify the project's actual and potential impacts on human rights.³¹⁸ The identification of risks and potential violations should guide the adoption of strategies to prevent them. These strategies, in turn, should be integrated into the decision-making process of the operation itself, and include a wide range of options, implemented by different actors: it could be the suspension or cancellation of the project, or the rescaling to reduce impacts, including the adoption of strategies to maximize local development, strengthening the capacity of oversight agencies, addressing the root causes of human rights issues, and implementing measures specifically intended to address the identified impacts. In addition to improving the quality of the project and to adequating the Bank's activities to best practices in development and human rights, the results of each due diligence process should feed into future analysis, providing practical data on measures to strengthen the country system in a holistic manner.

STRENGTHEN THE CAPACITIES OF LOCAL ACTORS:

Infrastructure projects are often designed and implemented in contexts of serious political and economic power imbalances.³¹⁹ The NDB should take assertive measures to balance power asymmetries and to develop its own tools to overcome obstacles to the participation of the society in decision-making processes.³²⁰ Comprehensive local capacity building strategies should be adopted, which includes measures to encourage the adoption of policies and processes, as well as the provision of all the resources needed to build local capacity. State employees should not be the only audience of capacity building strategies, which should also include the private sector and, in particular, civil society organizations.³²¹ For that reason, it is necessary that representatives of the affected communities and non-governmental organizations have access to this technical training. Furthermore, it is also required that they have access to specific information on projects and processes, as well as the possibility of participating in decision-making, implementation, communication and evaluation spaces.

LOCAL OFFICES:³²²

the NDB (and other funding institutions) should take advantage of the structure of local offices, which have better capacity to account on and to operate in accordance with regional, national, and local contexts. Local offices also provide direct involvement with day-to-day activities, making problem resolution faster and smoother. Local teams must have both the technical capacity and the mandate to make the decisions that are required to meet this purpose, with robust accountability mechanisms.

USE OF TECHNOLOGY:³²³

The technology should be used as a tool to overcome information and distance obstacles. For instance, with regards to transparency, technology improves governance by providing forms of accessing information, including in live information, about plans, their enforcement and their impacts. Likewise, technology can also be used to collect and to enter data into the impact management systems. The participative monitoring of impact management plans can benefit from the use of easily accessible and publicly available applications. However, in order to be effective, these systems must always consider the particularities of their final recipients, including traditional communities. In this sense, solutions cannot neglect issues such as language, culture and accessibility; and considering these issues, sometimes the technology may not present the best or the only solution.

Conclusions

This study evidenced that a consensus around the need to make greater use and to strengthen country systems arose from the recognition that developing countries promoted significant advances in their capacities, governance, and in the implementation of development projects and programs, as well as from the idea that obtaining long-term results is a joint responsibility between donors and borrowers – or, as it currently refers, between development partners.

On the other hand, the use and the strengthening of country systems in development finance institutions is still marked by uncertainties, whether in traditional institutions, such as the World Bank, the IDB and the ADB, or in the new ones, such as the NDB and or AIIB. This high degree of uncertainty remains over the benchmark standards, since the safeguard policies language is full of open concepts, even in the case of detailed frameworks, such as the one of the World Bank.³²⁴ The methodologies for measuring benefits are undermined due to the lack of uniform criteria for assessing whether there has been real improvement of the national systems.

In addition, the validation, complementation, and enhancement instruments lack consistency, which often results in conflicting efforts in this area. The analysis showed that an instrument such as the country partnership strategy may provide an insight into the critical points and opportunities for improvement that do not necessarily reflect the lessons learned from concrete cases, especially in high impact projects, such as large energy infrastructure and transport projects.

The rough terrain also includes the defense of the borrowing country's sovereignty leading to a permissive approach regarding human rights violations, as it seemed to be the BNDES position until the adoption of measures to guarantee the internal mechanisms of socio-environmental compliance. The case of TIPNIS highway showed that BNDES failed to take action to cover the omissions of local authorities and to address the human rights violations. Serious irregularities should have been taken into account by BNDES prior to the project's approval and during its implementation phase, in order to guide the bank in adopting effective measures in accordance with its own obligations as the project's financier.

Given the limitations of the existing assessment and strengthening tools, the use of country systems today is an initiative that still faces a series of trade-offs between short-term risks and long-term benefits.

In addition to the benefits of ownership and resource efficiency, usually evoked to justify the

adoption of the country system approach, policies that are adaptable to different national contexts provide the opportunity to develop socio-environmental safeguards based on an assessment of chronic problems and gaps. In the Brazilian case, a truly complementary management system for national institutions must start from recurrent failures – such as the lack of consultation and engagement, the ineffectiveness of conditioning mitigation, and the need for effective grievance mechanisms – to create mechanisms that offer effective solutions to protect vulnerable rights in each context. It is a horizontal solution, based on the particular experiences and challenges of each country, intended to achieve common standards and economic, social and environmental development, taking into account the history and aspirations of different countries.

This challenge demands the continuation of the discussion that stakeholders have already started on the role of the NBD as a development partner in developing innovative horizontal methods and instruments for assessing the customers' ability to maintain their own standards and commitments, and to set in motion effective solutions to overcome fragilities to enable a development based on transformative and truly sustainable projects.

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82. In verbis (non-official translation): “In summary, the PMAS must propose all the necessary measures to guarantee: a) That the emission of greenhouse gases is not increased significantly or unjustifiably, or that other factors that influence climate change are increased. b) Fair and equitable access of the population to the benefits of the project, in an inclusive manner. Their access to basic health services, drinking water and sanitation, energy, education, housing, safe and decent working conditions and the right to own land. c) That existing inequalities are not exacerbated, particularly those that harm marginalized or vulnerable groups. d) That human rights are respected or promoted. e) That does not affect public health. The program must have specific measures on information disclosure (communication) and relationship with the communities (interaction), as well as on the handling of complaints; the costs of this must also be specified.” CAF. Social and Environmental Safeguards. Sep. 2016 Pg 23. Our emphasis. Available at: <<https://www.caf.com/media/7834014/salvaguardas%20ambientales%20y%20sociales.pdf>>. Accessed on May 7, 2018.

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of the exporting company; the second one is used for the financing of the importer, with the company receiving bonds of the operation to be discounted in a determined accredited institution. Such facilities enable the companies to compete with larger terms, and, thus, with more attractive conditions for their buyers. The “after” facility is used in the support to engineering works abroad.

102. “The opinion shall contain information which, from the Bank’s point of view, is satisfactory and certifies compliance with all the environmental requirements of the destination country, notably the obtaining of the required permits and authorizations. In case of revocation or suspension of any governmental authorization, including those related to the socio-environmental legislation of the destination country, the agreements predicting such events as causes of contractual default, and the Bank may suspend the release of installments or pay the debt in advance. Finally, the financed company and, as the case may be, the importers must “attest that the project with the BNDES financial support complies with all applicable environmental rules in force in the respective country”. See: *Conectas Direitos Humanos. Desenvolvimento para as pessoas? O financiamento do BNDES e os direitos humanos, 2014*. Available at: <http://www.conectas.org/arquivos/editor/files/Conectas_BNDES%20e%20Direitos%20Humanos_Mio-lo_Final_COMPRIMIDO.pdf> - p. 61

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131. For a further analysis, see: ISA, *Dossiê Belo Monte: não há condições para a Licença de Operação*, 2015, available at <<https://www.socioambiental.org/sites/blog.socioambiental.org/files/dossie-belo-monte-site.pdf>>, access on May 2, 2018.
132. ISA, *Dossiê Belo Monte: não há condições para a Licença de Operação*, 2015, available at <<https://www.socioambiental.org/sites/blog.socioambiental.org/files/dossie-belo-monte-site.pdf>>, access on May 2, 2018. Pg. 48.
133. As required by one of the determinant measures of the LP, a Social Monitoring Forum was established in Belo Monte. However, the Forum was organized and controlled by Norte Energia. Therefore, the communities came to see it as an ineffective space to bring complaints and demands, and the Forum eventually emptied itself.
134. Federal Constitution, Article 231; American Convention on Human Rights, Article 21; Convention 169 of ILO, Article 14.
135. Federal Constitution, Article 231
136. International Labor Organization, Convention 169
137. Decree No. 5.051/ 2004.
138. Decree No. 4.463/ 2002.
139. ISA. *Direito à consulta e ao consentimento prévio, livre e informado de povos indígenas e tradicionais (presentation). Diálogos intersetoriais com EPE: direito de consulta e consentimento livre, prévio e informado: desafios para sua implementação no âmbito do setor elétrico brasileiro*. Rio de Janeiro (Sep. 20, 2017).
140. The Commission also demanded that Brazil adopt measures to protect the life and integrity of Indigenous communities' members of the Xingu river basin. American Convention on Human Rights. MC 382-2010.
141. Federal Constitution, Article 231

142. American Convention on Human Rights, Article 21. See: Interamerican Court on Human Rights. Caso de la Comunidad Mayagna (Sumo) Awas Tingni Vs. Nicaragua. Fondo, Reparaciones y Costas. Judgement of August 31, 2001. Series C No. 79. Par. 148. This is the first decision of the Interamerican Court on the recognition of Indigenous territorial law, based on an interpretation of the right of property, which, for Indigenous peoples, adds other characteristics and interrelates with other fundamental rights. As Nicaragua had neither laws nor a procedure for demarcation and titling of Indigenous lands, the Interamerican Court set a deadline for the State to adopt such laws and measures in order to guarantee the human rights of the Awas Tingni community. With the government's delay in implementing such decision, the Nicaraguan Supreme Court was upheld and found that the non-implementation of the Interamerican decision violated the Nicaraguan constitution and other laws. As a result, in 2003, the State of Nicaragua adopted a law establishing procedures for the demarcation of Indigenous lands.

143. International Labor Organization, Convention 169, Article 13

144. Interministerial Directive No. 60 / 2015, available at <http://portal.iphan.gov.br/uploads/legislacao/Portaria_Interministerial_60_de_24_de_marco_de_2015.pdf>, access on May 2, 2018

145. B. R. Garzon. O passivo das condicionantes indígenas de Belo Monte. Vozes do Xingu: collection of articles for the Belo Monte dossier, available at <<https://www.socioambiental.org/sites/blog.socioambiental.org/files/dossie-belo-monte-site.pdf>>, access on May 2, 2018. Pg. 45.

146. Public Civil Action No. 655-7B.2013.4.01.3903. Federal Court of 1st Instance - Judicial Section of Pará. 2017. Available at <<http://www.mpf.mp.br/pa/sala-de-imprensa/documentos/2017/sentenca-caso-protECAo-as-terras-indigenas-impactadas-por-belo-monte>>. Access on May 16, 2018

147. ISA. Dossie Belo Monte: não há condições para a Licença de Operação. 2015. Pg 50. Available at <<https://www.socioambiental.org/sites/blog.socioambiental.org/files/dossie-belo-monte-site.pdf>> Access on: May 3, 2018

148. See, for instance, the declaration of FUNAI itself: "The Plan has not been enforced, UHE Belo Monte is completing the cycle of the Deployment License and is on the way to the Operation License. The damages that should be prevented through the Emergency Plan for Land Protection are occurring continuously and there has been a considerable change in the spatial dynamics, so that the foreseen actions, in some cases, are no longer viable or capable, by themselves, to guarantee the protection of the lands, lacking in fact the methodology modification". FUNAI, Technical Opinion No. Q14/2015/CGMT- DPT-FUNAI-MJ apud, Public Civil Action No. 655-7B.2013.4.01.3903. Federal Court of 1st Instance - judicial section of Pará. 2017. Available at <<http://www.mpf.mp.br/pa/sala-de-imprensa/documentos/2017/sentenca-caso-protECAo-as-terras-indigenas-impactadas-por-belo-monte>>.

149. ISA, Dossiê Belo Monte: não há condições para a Licença de Operação, 2015, available at <<https://www.socioambiental.org/sites/blog.socioambiental.org/files/dossie-belo-monte-site.pdf>>, access on May 2, 2018.

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151. BRAZIL, Presidency of the Republic. Decree No. 6.040 / 2007, Article 3rd, I, d, 2007. Available at: <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/decreto/d6040.htm> Access on: May 3, 2018

152. ILO - International Labor Organization. Convention 169, Article 1.2, 2011 - Available at: <http://portal.iphan.gov.br/uploads/ckfinder/arquivos/Convencao_169_OIT.pdf> Access on: May 3, 2018

153. ISA, Dossiê Belo Monte: não há condições para a Licença de Operação, 2015, available at <<https://www.socioambiental.org/sites/blog.socioambiental.org/files/dossie-belo-monte-site.pdf>>, Access on May 2, 2018. Pg 15.

154. Part of the riverside culture is the maintenance of two residences, one on the islands or on the riverbank, the other in the city. Each residence fulfills its own role, both of which are required for the economic dynamics of families. However, when Norte Energia did the registration of the riverside people, the lack of adaptation of the questionnaires and preparation of the employees caused that many riverside people were directed to declare only one of these residences. Thus, they lost the possibility of compensation for the total extent of the damages suffered.

155. Ratified by Brazil and internalized by means of Decree No. 591 / 1992

156. Brazil. Secretariat for Human Rights of the Presidency of the Republic. Right to adequate housing. – Brasília: General Coordination of Education, in SDH/PR, Human Rights, National Secretariat for the Promotion and Protection of Human Rights, 2013. Available at: <<http://www.sdh.gov.br/assuntos/bibliotecavirtual/promocao-e-defesa/publicacoes-2013/pdfs/direito-a-moradia-adequada>>, access on May 2, 2018. Pg 17.

157. Ibid.

158. The Brazilian system for the protection of the rights of displaced persons also includes state regulations (such as State Law No. 7.192/2016-RJ and State Decree No. 51.595/2014-RS). Although not applicable to Belo Monte, they provide important interpretative parameters. Likewise, reference is made to Directive 317 of the Ministry of Cities, which provides for procedures and parameters applicable to the involuntary displacement in the context of works of the Growth Acceleration Program administered by the Ministry.

159. The article 6 of the aforementioned Decree restricts its application only to undertakings which environmental licensing starts in 2011. Thus, doubts could be raised regarding its applicability to the Belo Monte case. However, the controversy was eliminated by the entrepreneur itself, since the Basic Environmental Plan expressly determines that, as the registration of the population affected would occur after the effective date of the decree, the latter would be applied.

160. Scabin et al. A violação de direitos dos ribeirinhos no contexto Belo Monte e os processos de assistência jurídica na DPU em Altamira in Sociedade Brasileira para o Progresso da Ciência. A expulsão de ribeirinhos em Belo Monte: relatório da SBPC: Sônia Barbosa Magalhães, Manuela Carneiro da Cunha (Orgs.). – São Paulo: SBPC, 2017. Available at <<http://portal.sbpnet.org.br/livro/belomonte.pdf>>, access on May 2, 2018.

161. Ibid pg. 293.

162. Federal Constitution, Article 227.

163. Law No. 8.069/1990

164. Concerning the increase in school evasion, see: Câmara Técnica de Monitoramento das Condicionantes do Plano de Desenvolvimento Regional Sustentável do Xingu, Indicadores de Belo Monte: Um diálogo entre condicionantes do licenciamento ambiental e o desenvolvimento local, 2016, Available at: <<http://mediadrawer.gvces.com.br/publicacoes/original/indicadores-de-belo-monte-2016.pdf>>, Access on May 2, 2018. Pg. 173.

165. Assis Costa Oliveira, Consequências do neodesenvolvimentismo brasileiro para as políticas públicas de crianças e adolescentes: reflexões a partir da implantação da Usina de Belo Monte, Revista de Políticas Públicas, vol. 17, 2014, pg. 289.

166. Vilma de Aparecida Pinho & Assis Costa Oliveira, Relatório final do diagnóstico rápido participativo: enfrentamento da violência sexual contra crianças e adolescentes no município de Altamira, 2012, available at <<http://pair.ledes.net/gestor/titan.php?target=openFile&fileId=1000>>, access on May 2, 2018.

167. Ibid. pg 29

168. Ibid. pg 26

169. Resolution CONAMA 1/1986, Article 6, II

170. Fundação Rosa Luxemburgo, As Veias Abertas da Volta Grande do Xingu, Ponto de Debate, n. 16, Oct. 2017, available at <https://rosaluxspba.org/wp-content/uploads/2017/10/ponto_debate_16_web2.pdf>, access on May 2, 2018.

171. Ibid.

172. National Council for Human Rights. Report on the rights of the population affected by the implementation of the Belo Monte Hydroelectric Plant and Belo Sun Mining Company. December 2017. Available at <http://www.mdh.gov.br/sobre/participacao-social/cndh/relatorios/RelatriodeBeloMonteBeloSun_aprovadocomrevisaoDOPLEN-RIO.pdf/view>. Access on May 2, 2018.

173. Attorney-regional of the Republic of the 1st Region. TRF1 orders prior consultation with Indians affected by the Belo Sun mining company and confirms the licensing suspension (Dec 6. 2017), available at <<http://www.mpf.mp.br/regiao1/sala-de-imprensa/noticias-r1/trf1-ordena-consulta-previa-a-indigenas-afetados-pela-mine-radora-belo-sun-e-mantem-suspensao-do-licenciamento>>, access on May 2, 2018.

174. ISA, Dossiê Belo Monte: não há condições para a Licença de Operação, 2015, available at <<https://www.socioambiental.org/sites/blog.socioambiental.org/files/dossie-belo-monte-site.pdf>>, access on May 2, 2018.

175. For instance, in view of the non-implementation of the long-term mitigation measures of the Basic Environmental Plan - Indigenous Component, the Federal Public Prosecutor's Office required the signing of a commitment agreement regarding the matter. Even so, the signing and the beginning of the implementation of the plan occurred only three years after the initial deadline, during which communities used various strategies to pressure the entrepreneur, including the occupation of Norte Energia offices by 300 indigenous people.

176. Scabin et al. Judicialização de grandes empreendimentos no Brasil: uma visão sobre os impactos da instalação de usinas hidrelétricas em populações locais na Amazônia. R. Pós Ci. Soc. v.11, n.22, Jul./Dec., 2014

177. The safety suspension is regulated by the following ruling instruments: Law No. 7.347/1985; Law No. 8.437/1992; Law No. 9.407/1997; Law No. 12.016/2009

178. Law No. 8.437/1992, Article 4.

179. Ibid, Article 4, Paragraph 9th

180. Scabin et al. Judicialização de grandes empreendimentos no Brasil: uma visão sobre os impactos da instalação de usinas hidrelétricas em populações locais na Amazônia. R. Pós Ci. Soc. v.11, n.22, Jul/Dec. 2014

181. Public Prosecutor's Office of Pará. Justice decides that Belo Monte's compensation should stay in Xingu. April 6, 2016. Available at <<http://www.mpf.mp.br/pa/sala-de-imprensa/noticias-pa/justica-decide-que-compensacao-de-belo-monte-deve-ficar-no-xingu>>. Access on May 7, 2018.

182.

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183. Suape's Industrial Port Complex, O que é Suape, available at: <<http://www.suape.pe.gov.br/pt/institucional/o-que-e-suape>>, accessed on 2 May 2018.
184. Thais Lazzeri, Os caminhos sinuosos de Suape, Repórter Brasil (nov. 2017), available at <<http://reporterbrasil.org.br/2017/11/suape/>>, accessed on 2 May 2018.
185. See, for example: Fórum Suape, violência da milícia é uma constante em Suape (30 June 2016), available at <<http://forumsuape.ning.com/profiles/blogs/viol-ncia-da-mil-cia-uma-constante-em-suape-1>>, accessed on 2 May 2018.
186. Conectas Human Rights; Forum Suape. The Implantation of the Industrial Port Complex Governor Eraldo Gueiros (CIPS). Submission to the Universal Periodic Review of the United Nations Human Rights Council (Oct 2016), available at <[http://www.conectas.org/arquivos/editor/files/The%20Implantation%20of%20the%20Industrial%20Port%20Complex%20Governor%20Eraldo%20Gueiros%20\(CIPS\).pdf](http://www.conectas.org/arquivos/editor/files/The%20Implantation%20of%20the%20Industrial%20Port%20Complex%20Governor%20Eraldo%20Gueiros%20(CIPS).pdf)>, accessed on 2 May 2018.
187. Federal Constitution, article 225, § 1º, III
188. See more: Law no. 9,985 / 2000; Decree no. 4,340 / 2002; Decree no. 5,746 / 2006; Decree no. 5,758 / 2006.
189. Law no. 9,985 / 2000, article 7, § 2.
190. Law no. 12,651 / 2012, article 7, § 2.
191. Initially, the units were created as ecologic reserves, according to law no. 9,989/1987. In 2011, there was a re-classification.
192. Created by Decree no. 38,261/2012.
193. Suape's Industrial Port Complex, Restauração Florestal, available at <<http://www.suape.pe.gov.br/pt/meio-ambiente/gestao-ambiental/restauracao-ambiental/restauracao-florestal>>, accessed on 2 May 2018.
194. Suape's Industrial Port Complex, Desenvolvimento com Sustentabilidade, available at <<http://www.suape.pe.gov.br/pt/meio-ambiente/desenvolvimento-com-sustentabilidade>>, accessed on 2 May 2018.
195. Law no. 9,985, 2000, article 36; Decree no. 4,340/2002.
196. See, for example: Environment State Council of Pernambuco, Resolution CONSEMA no. 03/2010, available at <http://www.cprh.pe.gov.br/ARQUIVOS_ANEXO/Resolucao%20Consema%20003%20de%202010;141819;20100817.pdf>, accessed on 2 May 2018.
197. Conectas Human Rights; Forum Suape. The Implantation of the Industrial Port Complex Governor Eraldo Gueiros (CIPS). Submission to the Universal Periodic Review of the United Nations Human Rights Council (out. 2016), available at <[http://www.conectas.org/arquivos/editor/files/The%20Implantation%20of%20the%20Industrial%20Port%20Complex%20Governor%20Eraldo%20Gueiros%20\(CIPS\).pdf](http://www.conectas.org/arquivos/editor/files/The%20Implantation%20of%20the%20Industrial%20Port%20Complex%20Governor%20Eraldo%20Gueiros%20(CIPS).pdf)>, accessed on 2 May 2018.
198. F. Hadad, H. Altenfelder; M. Camargo, Legal opinion submitted to the course "Clínica de Direitos Humanos e Empresa da FGV Direito SP, 2017 (forthcoming).
199. Forum Suape. Fórum leva caso do Engenho Ilha ao Ministério Público Federal. Fórum em Ação – Informativo Mensal do Fórum Suape Espaço Socioambiental. Edition from August 2016 – no. 02. Available at < <https://fase.org>.

br/wp-content/uploads/2016/09/JORNAL-FORUM-EM-AÇÃO-AGOSTO-2016.pdf >, accessed on 2 May 2018.

200. Federal Constitution, article 225, § 1º, IV

201. Resolution CONAMA 01/1986, article 6, item II.

202. BRAZIL. Technical Note no. 10/2012 CGPEG/DILIC/IBAMA - Identificação e avaliação de impactos ambientais. Orientações metodológicas no âmbito do licenciamento ambiental dos empreendimentos marítimos de exploração e produção de petróleo e gás. Available at <<http://xa.yimg.com/kq/groups/18922045/1712909474/name/NTAIA.pdf>>, accessed on 2 May 2018.

203. Ibid.

204. L. L. Brito; N. M. F. Yoshino, Efeitos sinérgicos e cumulativos de impactos ambientais: uma análise do caso do Porto de Suape, trabalho apresentado à disciplina “Clínica de Direitos Humanos e Empresa da FGV Direito SP, 2017 (forthcoming).

205. Ibid.

206. Complexo Industrial e Portuário de Suape. Avaliação Técnica de Impacto Ambiental: Projeto para execução de serviços de dragagem para aprofundamento do canal de acesso e bacia de manobra, e para implantação do pier petroleiro, tubovia, sinalização, melhoramento da via de acesso ao píer petroleiro, prolongamento reforço externo do molhe principal. Recife, 2008 apud L. L. Brito; N. M. F. Yoshino, Efeitos sinérgicos e cumulativos de impactos ambientais: uma análise do caso do Porto de Suape, trabalho apresentado à disciplina “Clínica de Direitos Humanos e Empresa da FGV Direito SP, 2017 (forthcoming).

207. Conectas Direitos Humanos, Follow-up Report on the Recommendation of the UN Work Group for Human Rights and Companies to Brazil (forthcoming).

208. Ibid.

209. Federal Constitution, article 5th, XIV.

210. See, for example: Alencar Araujo, M.; Cavalcanti de Almeida, T. Impactos Sociais do Porto de Suape: o caso da exploração sexual na praia de Gaibu - PE. UFPB. Available at <http://biblioteca.virtual.ufpb.br/files/impactos_sociais_do_porto_de_suape_o_caso_da_exploraao_sexual_na_praia_de_gaibupe_1343833224.pdf>. Accessed on 7 May 2018.

211. André Borges, Governo tenta reduzir custo da Ferrogrão para R\$ 10 bilhões, O Estado de S.Paulo (24 April 2018), available at <<http://economia.estadao.com.br/noticias/geral,governo-tenta-reduzir-custo-da-ferrograo-para-r-10-bilhoes,70002282469>>, accessed on 2 May 2018.

212. Ibid.

213. Instituto Socioambiental, De Olho no Xingu, 2018. Available at: <[https://ox.socioambiental.org/infra?l=Ferrogrão+\(EF-170\)&l=BR-163&b=Topográfico&y=-6.5008991379959555&x=-53.83300781250001&z=6&t=0](https://ox.socioambiental.org/infra?l=Ferrogrão+(EF-170)&l=BR-163&b=Topográfico&y=-6.5008991379959555&x=-53.83300781250001&z=6&t=0)>, accessed on 2 May 2018.

214. In 2016, the federal government edited the Provisory Measures no. 756 and 758, which did not affect more than 100 thousand ha of the National Park of Jamanxim and reclassified almost five hundred Thousand ha of the National

Forest of Jamanxim as an Environmental Preservation Area (less restrictive class of the Preservation Unit, increasing the possibilities to explore the area and decreasing the protection to which it was submitted). According to the government, changes would be needed to install Ferrogrão. However, through parliamentary amendments, the National Congress multiplied the area that would be no longer protected, which led to Executive power to completely prohibit the conversion of measure no. 756 into a law. On its turn, measure no. 758 was also forbidden, but only partially. This way, it was converted into Law no. 13,452/2017, which changes the borders of the National Park of Jamanxim and created the Environmental Protection Area of Rio Branco. Furthermore, the executive power proposed the bill no. 8,107/2017, which would reduce even more the scope of the protection area of Jamanxim. If approved, the Bill may lead to the regularization of “illegal occupation of lands associated to grabbing and illegal activities of wood and mining extraction”, as clarified by the Kabu Institute. Representation to the 6th Chamber of the Prosecutor General of Brazil, (21 August 2017), available at <<https://drive.google.com/open?id=1gmCYRY55PjvFCXt7PHrT6ufWe6pUvk85>>, accessed on 2 May 2018.

215. Kabu Institute. Representation to the 6th Chamber of the Prosecutor General of Brazil, (21 August 2017), available at <<https://drive.google.com/open?id=1gmCYRY55PjvFCXt7PHrT6ufWe6pUvk85>>, accessed on 2 May 2018.

216. Socioambiental Institute, Xinguanos insistem em consulta antes da concessão da Ferrogrão (6 March 2018), available at: <<https://www.socioambiental.org/pt-br/noticias-socioambientais/xinguanos-insistem-em-consulta-antes-da-concessao-da-ferrograo>>, accessed on 2 May 2018.

217. Federal Constitution, article 225 § 1 IV.

218. Resolution CONAMA 01/86

219. Federal Constitution, article 231 § 3

220. American Convention on Human Rights, article 23; American Statement on Man Rights and Obligations, article XX.

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236. Forum Teles Pires, Barragens e Povos Indígenas no Rio Teles Pires: Características e Consequências de Atropelos no Planejamento, Licenciamento e Implantação das UHEs Teles Pires e São Manoel (9 June 2017), available at <https://www.internationalrivers.org/sites/default/files/attached-files/dossie_teles_pires_final_09jun2017_reduzido.pdf>, accessed on 2 May 2018. Pg 7.

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240. Fórum Teles Pires et al, Nota Pública sobre a violação de direitos indígenas na construção de hidrelétricas no Rio Teles Pires (9 March 2018).

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