

The Brazilian Safeguard Regime, Its Application, and Recommendations for the Future¹

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March 2012

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¹ This paper was funded by the World Resources Institute with the generous support of the C.S. Mott Foundation and is one in a series of papers examining social and environmental safeguards in international development finance.

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Acknowledgements

I would like to thank the following individuals for their important contributions that inform this article: Amy Shannon, Athena Ballesteros, Brent Millikan, Catarina Freitas, Emily Norford, Florence Daviet, Gaia Larsen, Márcia Leal, Márcio Costa, Maria Helena de Oliveira, Océlio Munhoz, Oriana Rey Tanaka, Pedro Bara Neto, Renata Peregrino de Brito, Roberto Smeraldi, Sergio Weguelin, Telma Monteiro, Vince McElhinny and Zachary Hurwitz. In particular, I would like to thank Kirk Herbertson for the revision of this article and his general support.

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Executive Summary

As international institutions make investments in the Global South, they increasingly rely on countries' own safeguard regimes to prevent and mitigate human rights violations and environmental damage. Brazil is one example of a country that is presumed to have a strong safeguard regime. In principle, major infrastructure projects in Brazil must meet several human rights, environmental, and social safeguards to be viable. These safeguards include a complex web of domestic legislation, international agreements, voluntary standards, and bank policies.

The study of two emblematic cases from recent years — the Rio Madeira and the Belo Monte dams — demonstrates the difficulties of implementing these safeguards in practice. Such projects appear to be implemented outside of Brazil's safeguard regime composed of democratically established, applicable international agreements and domestic norms, rules, laws, procedures, voluntary commitments and the corresponding institutional apparatus. These cases point to a practice that is incompatible with the existing rule of law, respect of democratic institutions and sound administrative practice. Therefore, in order to be effective, Brazil's safeguard regime requires improvements on various levels.

The first chapter of this paper on safeguards and their application offers a conceptual framework that includes definitions of safeguards, safeguard frameworks and a safeguard regime. Building on that, it provides examples of safeguard frameworks and country systems. The second chapter introduces the safeguard regime in Brazil. The third chapter presents a selection of emblematic cases. The performance of Brazil's safeguard regime in these cases will be analysed in chapter four. Chapter five draws key lessons and conclusions.

Building on that, the last chapter of this paper presents recommendations that are intended to enhance the effectiveness of development finance. In addition to general recommendations, the paper includes specific recommendations to strengthen the institutional framework, implementation, enforcement and supervision of existing safeguards. The ultimate goal of this paper is to improve Brazil's safeguard regime and provide lessons learned for the international development community in the growing use of country systems.

Introduction

Internationally, the World Bank's³ environmental and social safeguard policies are a cornerstone of its support to sustainable poverty reduction. The objective of these policies is to prevent and mitigate undue harm to people and their environment in the development process. These policies provide guidelines for bank and borrower staff in the identification, preparation, and implementation of programs and projects.⁴

Dramatic experiences in various countries, including the Polonoroeste Program experience in the Brazilian Amazon, propelled the development of World Bank safeguards in the 1980s. For the next few decades, the World Bank applied its safeguards to its loans with mixed success.

In recent years, the partnership between Brazil and the World Bank has changed. Brazil now is a net donor to International Financial Institutions (IFIs), has increased its ownership stake in some of them, and — alongside its economic, financial and political ascension — has gained more clout and power in the international development community. Due to elements like these and the related evolutions such as the growing appetite for “country systems” approaches internationally, Brazil will increasingly rely on its own country system for environmental and social safeguards when seeking international financing.

The World Bank believes that the use of country systems — that is, the country's legal and institutional framework, consisting of its national, sub-national, or sectoral implementing institutions and applicable laws, regulations, rules, and procedures — has significant potential to improve development impact.⁵ So far, the World Bank and other IFIs have begun to rely on the country systems of borrower governments as an alternative to the traditional safeguards used by IFIs.⁶ While it seems plausible to expect that international agreements, domestic legislation and policies of development banks converge at least partly, the crux is often their effective application. In keeping with this line of reasoning, this paper presents key elements of Brazil's current *de facto* country system and examines case studies that focus on the actual application of Brazil's country system in crucial projects carried out domestically.

³ In this paper, the term “World Bank” is used as shorthand for the World Bank Group, with emphasis on the International Bank for Reconstruction and Development (IBRD).

⁴ World Bank website, “Safeguard Policies,”

<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html>.

⁵ World Bank (2005), “Expanding the use of country systems in Bank-supported operations : issues and proposals,”

http://www-wds.worldbank.org/external/default/main?pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64187510&searchMenuPK=64187283&siteName=WDS&entityID=000012009_20050407110752.

⁶ The Bank Information Center (BIC) and The Center for International Environmental Law offer a critical discussion of this subject: <http://www.bicusa.org/en/Article.1775.aspx>.

1. On Safeguards and Safeguard Regimes

1.1 Conceptual framework

The approach to safeguards and safeguard regimes has evolved over time and varies from one international financial institution to the next. Moreover, development banks—such as Brazil’s national development bank BNDES—that formerly focused on domestic investments have transformed into important and complex international actors that surpass national boundaries in all but name. The extension of their scope of work and the changing expectations of society create the need for development banks to adapt their safeguards to the new circumstances.

In the context of Brazil, the most important development financiers are local institutions such as BNDES. As such, these banks’ safeguard frameworks depend closely on Brazil’s national laws, policies and institutional framework.

We therefore define “safeguard” as an official instrument (usually in the form of a policy or guideline) designed to manage the environmental, social and human rights risks and related impacts of a financial institution. The full set of safeguards, accompanying procedures, decision making structure and institutional departments and units required to implement the safeguards in effect is defined as the “safeguard framework” of a financial institution. The broader system of policies, laws, and institutions that might make up a nation’s environmental and human protections is referred to as the “national safeguard regime” or country system.⁷ Safeguard regimes and safeguard frameworks of public financial institutions are thought to be compatible and synergistic.

This paper adopts the following approach: we consider a safeguard to exist when the policy of a public financial institution explicitly refers to the “full respect of the law” or equivalent⁸, and the domestic law (made up of the federal constitution, the body of law themselves, and relevant decrees etc.) requires specific safeguard related measures such as “culturally appropriate consultations.”

Finally, in addition to relying on safeguards, both countries and financial institutions should proactively explore opportunities for the promotion of environmentally sound and socially just investments in existing or new markets.⁹ The concept of safeguards is a more passive one geared towards preventing, minimizing, mitigating and compensating adverse impacts. In line with this traditional approach to safeguards, the definitions above focus on investment related risks and their management rather than opportunities.

⁷ We build on the notion of “regime” introduced by Stephen Krasner in his article “Structural Causes and Regime Consequences: Regimes as Intervening Variables”, in which Krasner defines a regime as “institutions possessing norms, decision rules, and procedures which facilitate a convergence of expectations.”

⁸ Real world examples include the second and fourth general principle of BNDES operations, presented in chapter 2.2.

⁹ An idea promoted by Roberto Smeraldi of Amigos da Terra – Amazônia Brasileira.

1.2 Examples of safeguard frameworks and country systems

Given the differences among international financial institutions, it is futile to point to a single “best practice” safeguard standard. Likewise, there is no consensus on what international best practices are for safeguards. There is a growing body of international environmental and human rights standards from which one can derive best practice examples. Yet as the recent example on the strengthening of the human rights performance of the business sector—coordinated by the UN Secretary-General’s Special Representative for Business and Human Rights, Professor John Ruggie—shows, it is challenging to articulate and operationalize relevant standards.

There is a real need for appropriate contributions to relevant standards in the realm of development finance. Luckily, there are a few encouraging examples. The new performance standards and sustainability framework of the International Finance Corporation (IFC)—the private sector lending arm of the World Bank Group—resulted from extensive stakeholder consultations and recognize the need to address human rights and the environment. IFC staff will be working over the next few years to help operationalize this into language that is meaningful for bankers.

The basic message here is that the definition, operationalization and implementation of safeguards is worth the while, for this increases the legitimacy and effectiveness of development finance. What is no longer an option, on the other hand, is top-down rule-making combined with questionable implementation, lack of accountability and transparency, as portrayed in some development banks that have lost the trust and understanding of their stakeholders.

2. The Safeguard Regime in Brazil

To discuss how safeguards are dealt with in Brazil today, this section firstly presents highlights of the current Brazilian safeguard regime.¹⁰ We then introduce the safeguard framework of BNDES, Brazil’s most important development financier and—as we shall see later—the main investor in the dams that are analysed in this study. The combination of national and institution specific elements provides insight into the architecture and content of the current country system in Brazil. This, in turn, sheds light on how this country system works in practice, as a dynamic interplay between rules, institutions and real world challenges.

2.1 Key elements of the Brazilian safeguard regime

Legislation and agreements provide the general contents of Brazil’s safeguard regime. The safeguard regime also includes institutional safeguard frameworks such as the one of BNDES presented below. Moreover, there are a number of institutional frameworks and operating procedures that support the regime. Chief among them are the normative organ National Monetary Council that issues general directions for the smooth functioning of the financial

¹⁰ Other sources which are not presented here include, among others, federal law 11653/2008 on large scale projects and several temporary measures by means of which the government acts in the legislative sphere. Examples include MP 452, MP 511, and MP 526. Moreover, resolutions of the National Monetary Council are not systematically included.

system, and Brazil's Central Bank (BCB) that supervises the functioning of the national financial system in all its aspects, including safeguards.¹¹

Relevant constitutional provisions

Article 192 of the Federal Constitution of 1988 affirms that the national financial system¹² is grounded on two fundamental pillars, namely, the promotion of balanced development of the country and utility of collective interests. Among these collective interests—and especially relevant for the present investigation—is maintaining “an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life” as stipulated in Article 225 of the Constitution.¹³

Paragraph 1, IV, further provides that:

In order to ensure the effectiveness of this right, it is incumbent upon the Government to: demand, in the manner prescribed by law, for the installation of works and activities which may potentially cause significant degradation of the environment, a prior environmental impact study, which shall be made public.

Another constitutional norm that is worth pointing out in the present context is Article 231, which provides that “Indians shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy, it being incumbent upon the Union to demarcate them, protect and ensure respect for all of their property.”

Paragraphs 3 and 4, on the rights of indigenous peoples, further provide that:

Para. 3. Hydric resources, including energetic potentials, may only be exploited, and mineral riches in Indian land may only be prospected and mined with the authorization of the National Congress, after hearing the communities involved, and the participation in the results of such mining shall be ensured to them, as set forth by law.

Para. 4. The lands referred to in this article are inalienable and indisposible and the rights thereto are not subject to limitation.

National Environment Policy

For purposes of this paper, the most important features of the National Environment Policy (Law 6.938/1981) are Articles 3, 12 and 14. Art. 3(IV), which define the polluter as a physical or legal person, of public or civil law, responsible, *directly or indirectly*,¹⁴ for an activity that causes harm to the environment.

¹¹ While this is not the place to present all intervening institutions, more information on the general National Financial System is available at <http://www.bcb.gov.br/?SFNCOMP>.

¹² More information on the National Financial System is available at <http://www.bcb.gov.br/?SFN>.

¹³ Article 225: “All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations.”

¹⁴ Emphasis added.

According to Article 12, “Entities and organs that [receive] government financing or incentives condition the approval of projects entitled to such benefits to licensing, in terms of this Act, and compliance with the standards, criteria and standards issued by CONAMA¹⁵.”

Article 14, para. 1 provides that: “The polluter, independently of the existence of fault, is obliged to indemnify or repair the harms caused to the environment and to third parties affected by his activity.”

In this context, it is important to highlight that an extra-judicial notification letter sent by civil society organizations (CSOs) in 2010 to the potential financiers of the Belo Monte dam, including BNDES, reminds them that: “rather than simply require the presentation of a formal document, this apparatus aims at avoiding financing of socioenvironmentally unviable projects. In accordance with the national environment policy, the financier of projects and activities that cause environmental damage cooperates with or even co-authors such damage, and will therefore be liable... especially because in environmental matters, the responsibility for the damage is objective.”¹⁶ A follow up notification to the same banks reiterated this and other messages in November 2011.¹⁷

Environmental Crimes Law

The Environmental Crimes Law (Law 9605/98) brought several devices with direct impact on the consideration of environmental responsibility of banks, especially articles 2 - 4. This law provides for criminal and administrative penalties derived from conduct and activities harmful to the environment.

Green Protocol

In 2010, the Ministry of Environment, the Central Bank of Brazil, Treasury, the Brazilian Federation of Banks Febraban, and the public banks BNDES, Caixa Econômica Federal, Banco do Brasil, Banco da Amazônia began an effort to turn the previously ailing¹⁸ voluntary standard “Green Protocol” (Protocolo Verde) into a blueprint of a future common stance and action on the subject of banks, social and environmental questions. Therefore, they created a “bank forum on socioenvironmental responsibility” (*fórum dos bancos pela responsabilidade socioambiental*) as a consultative body in the realm of the two relevant “Green Protocols”: the one on public banks and the one on private banks (a related idea is to merge and unify them).

¹⁵ CONAMA is a deliberative organ under the responsibility of the Ministry of the Environment, established through the National Policy on the Environment (law 6.938/1981).

¹⁶ In this context, “objective” has the meaning “independent of fault.”

¹⁷ “Notificações enviadas aos bancos sobre Belo Monte”. Available at: http://ef.amazonia.org.br/index.cfm?fuseaction=guiaDetalhes&id=397933&tipo=6&cat_id=157&subcat_id=552.

¹⁸ On the situation of the Green Protocol up to 2010, see e.g.: “O Protocolo Verde tem futuro?” Available at: <http://ef.amazonia.org.br/index.cfm?fuseaction=noticia&id=362956>.

The second of the Protocol's five principles is most relevant for the purpose of the present paper. Based on the national environment policy, it asks banks to:

- Consider socioenvironmental impacts and costs not only in asset management but also in client and project risk analyses,
- Condition financing upon the existence of relevant environmental licenses,
- Incorporate socioenvironmental criteria in credit analyses,
- Conduct socioenvironmental analyses of clients whose activities require environmental licensing and/or represent significant adverse social impacts, and
- Jointly develop and apply socioenvironmental performance standards by the productive sector in order to support evaluation of projects that cause medium and high negative impacts.

International agreements

Brazil is party to a wide array of international agreements, some of which address crucial themes and contents of safeguard regimes. These contents are implemented through the domestic legislation presented above. Rather than developing the content of international treaties, conventions, and declarations separately, the following table presents the correspondence of selected safeguard themes in Brazilian domestic legislation.

Table 1: Selection of relevant safeguard themes and their correspondence with domestic law and obligations under international law

Safeguard theme	Selected relevant international conventions and declarations of which Brazil is party	Examples of correspondence in local law
Impact assessment	Rio Declaration, Principle 17	CONAMA Resolution 1/86
Consultation and broad community support	American Convention on Human Rights, ILO Convention 169, Universal Declaration on Indigenous Peoples	Art. 231 § 3 of the federal constitution on consultation of indigenous peoples Art. 3 of CONAMA Resolution 237/1997 requires public consultation for activities with potential significant environmental harm
Involuntary resettlement	Universal Declaration on Indigenous Peoples	Art. 231 of the federal constitution
Precautionary Principle	Rio Declaration, Convention on Biological Diversity ¹⁹ , UNFCCC ²⁰	Decree 2.519 of 1998; Legislative decree 1 of 3 February 1994

¹⁹ Signed on 5 June 1992 and promulgated by Decree 2.519 of 16 March 1998.

²⁰ Signed on 9 May 1992 and ratified by the national congress by means of legislative decree 1 of 3 February 1994.

On the whole, Brazil's domestic legal/regulatory framework is relatively advanced and includes important principles that are not found in IFI safeguards, such as "objective liability".²¹ In cases of environmental damages, many provisions of the country system could be considered equivalent with World Bank safeguards.

2.2 BNDES safeguard framework

The BNDES safeguard framework is nested in the Brazil's safeguard regime, whose key elements are presented above. As such, and in keeping with its own principles presented below, BNDES must follow compulsory legislation in Brazil. Moreover, it has also voluntarily committed to the Green Protocol. In addition, BNDES has its own safeguard framework that applies to the entire BNDES system.²²

BNDES revised and extended its safeguard framework in 2010. In contrast to relevant practices of IFIs such as the World Bank Group, however, this revision was carried out without public consultation. The latest version of its framework entered into force in November 2010, and its key contents are presented below. According to the World Bank Development Policy Loan I conditions report (12/15/10), this social and environmental responsibility and governance "strengthens the links among BNDES social, environmental and corporate responsibility policies, aligning them with the BNDES Corporative Plan for 2009-2014."

While a prior, less comprehensive framework applied to the Rio Madeira design phase, the new one is in force today and applies to all operations, including Rio Madeira and Belo Monte. As such, the implementation of the Rio Madeira and Belo Monte operations must follow these policies and national legislation.

*Social and Environmental Responsibility Policy of the BNDES System*²³

On 9 November 2010, the BNDES board established the Social and Environmental Responsibility Policy of the BNDES System by means of Resolution 2023/2010. It reaffirms the commitment of the Bank to the sustainable development of the country. The document sets forth principles and guidelines for developing and implementing sustainable policies and practices. The following principles guide the operations of the BNDES:

- Promotion of development in an integrated conception that includes economic, social and environmental aspects;
- Respect for human rights as well as combating and opposing all practices that involve any kind of discrimination or violation of rights;
- Ethics and transparency as the pillars of relations with all stakeholders, ensuring dialogue and accounting for its decisions and efforts;
- Proactive operations aligned with Brazilian standards and public policies, while respecting international norms of behavior.

²¹ Law 6.938/81, Art. 14: § 1º - [...] The polluter, independently of the existence of fault, is obliged to indemnify or repair the harms caused to the environment and to third parties affected by his activity.

²² http://www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Institucional/Social_and_Environmental_Responsibility.

²³ Ibid.

These principles are very meaningful in their own right. Furthermore, from a conceptual point of view, the principles illustrate how an institution's safeguard framework interweaves and complements a country's broader safeguard regime.

Socioenvironmental Policy of the BNDES System

In line with the above principles, the BNDES board approved the Socioenvironmental Policy of the BNDES system on 16 November 2010, by means of Resolution 2025/2010. This policy applies to the entire BNDES system and entered into force the same day as a replacement for the previous "environmental policy." The content of the new policy is available online.²⁴ Its five sections present the objective, guidelines, policy instruments, operating procedures and related norms. Highlights of the Policy include the following:

Objective

The policy's main objective consists of: "Fostering sustainable development, proactively and in all the projects supported...focusing on the integration of economic, social, environmental and regional aspects."

Guidelines

The guidelines place the work of the BNDES within the scope of its Social and Environmental Policy. Among others, they include:

- To act in accordance with the current public policies and legislations, in particular with provisions in the National Environmental Policy;²⁵
- To deem the approach to social and environmental dimensions a strategic issue in the analysis of financial assistance, in the management of assets and in the analysis of risk to beneficiaries and undertakings;
- To continuously develop and improve methodologies and analytical, monitoring and assessment tools, incorporating social and environmental criteria;
- To monitor the employment impacts of undertakings and consider the policies of the BNDES System related to human rights and to the protection of people with disabilities;
- To foster and guide the adoption of efforts to prevent and mitigate social impact and unsuitable environments;
- To continuously expand and update information on the patterns of impact and socioenvironmental, energy and greenhouse gas emissions performance in key economic sectors, as well as on the evolution of different technological paths and innovations;
- To continuously expand and update knowledge concerning sustainable development as well as social and environmental responsibility while sharing information and

²⁴http://www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Institucional/Social_and_Environmental_Responsibility/environmental_policy.html.

²⁵ The resolution on the adoption of the Policy refers explicitly to Law 6938/81 and distinguishes between elements of it that apply directly to BNDES and others that apply indirectly, among them the environmental licensing process, impact assessment, environmental quality standards, ecological zoning and the national environmental information system.

experiences with beneficiaries, financial institutions and other organizations, seeking dialogue and fostering the integration of efforts to strengthen the approach to social and environmental dimensions as a strategic issue.

Policy Instruments

The BNDES provides the following tools to implement and pursue the goals of its socioenvironmental policy:

- Products, lines, programs and reimbursable and non-reimbursable funds for financial support for initiatives and investments in the Environment and Social and Regional Development;
- Sector resolutions, specific policies and other regulations;
- Internal socioenvironmental guides, assessment methodologies of beneficiaries, assessment of credit risk and monitoring and impact assessment of projects supported;²⁶
- Internal procedures for risk assessment and for social and environmental analysis of beneficiaries and undertakings seeking financial support.

Operating Procedures²⁷

Importantly, BNDES also defines the operating procedures with respect to granting financial support:

- To grant financial assistance, the following are respected: applicable legislation; the beneficiary's policy of social and environmental responsibility; environmental compliance; environmental risk of the undertaking, in addition to social and environmental practices that raise the level of competitiveness of organizations and economic sectors and contribute to the improvement of social and environmental factors, not only of undertakings, but also of the country.
- Based on this analysis, the Bank may, for example, recommend the project be revised; offer resources to strengthen mitigation measures; stimulate the social and environmental investments by the beneficiaries with internal (employees and supply chain) or external (local development, society and environment) focus; and even refuse financial support due to non-compliance or social and environmental risks.

²⁶ Details (in Portuguese) available on:

http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/Apoio_Financeiro/Políticas_Transversais/Política_Socioambiental/analise_ambiental.html.

²⁷ Further aspects of the operating procedures that are especially relevant for the Rio Madeira and Belo Monte cases are explained in Section 2.1 of this paper. The most comprehensive presentation of the operating procedures is available in Portuguese at the following page:

http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/BNDES_Transparente/Responsabilidade_Social_e_Ambiental/Política_Socioambiental/analise_ambiental.html.

Risk categorization

Based on their risk profile, the Santo Antonio and Jirau dams on the Rio Madeira and Belo Monte on the Xingu River are part of the most stringent environmental category A, which is defined as “Activity intrinsically related to risks of significant environmental impacts or regional reach. Licensing requires impact studies, preventive and mitigating measures.”²⁸

Monitoring of operations

In the monitoring phase of the operation, the following shall be recorded:

- The tax, social security and environment compliance of the beneficiary and the enterprise;
- Compliance with any mitigation measures, obligations of behavior adjustment terms and conditions of the contract or the environmental licenses, if applicable;
- The monitoring of social and environmental indicators for the continuous evaluation of the beneficiary and the project, if applicable;
- The presentation of the operating license of the project, if applicable.

In addition to the safeguard framework above, guidelines for the electricity sector are in preparation, yet not public. Once ready, they will be geared to improve best practices, without adding further stringent requirements to the BNDES framework.

3. Presenting Emblematic Cases

This paper examines the components of Brazil’s safeguard regime—such as the regulations, policies and institutions mentioned above—with actual real world cases to show how it actually works in practice. The cases in this study are the Rio Madeira Complex and the Belo Monte Dam, for each of them presents a number of lessons for safeguards. The following chapter analyses elements of the safeguard regime in light of these same cases.

The Rio Madeira and Belo Monte dams are main energy generation projects in the economic growth agenda of subsequent Brazilian governments. Moreover, the Rio Madeira dams are part of a regional integration process in South America, an example where social and economic needs and interests meet regional and global politics (regional integration, South-South cooperation and Brazil’s increasing aspirations on the international level). The Belo Monte dam is a highly complex and controversial project, and is due to become the world’s third largest dam. Moreover, considering that that Brazil’s energy expansion plan includes 30 new dams by 2020²⁹ alone, it is worth concentrating our attention on this sector.

²⁸ Ibid.

²⁹ National energy expansion plan (PDE 2020), tables 48 and 49.

3.1 The Rio Madeira and Belo Monte dams, IIRSA and PAC

While the Belo Monte dam on the Xingu River is a purely domestic project, the Rio Madeira complex is the cornerstone of the Brazil-Bolivia-Peru Initiative for the Integration of South American Infrastructure, or IIRSA. IIRSA is a blueprint for 335 large-scale infrastructure projects being proposed by the governments of South America, and supported by the Inter-American Development Bank (IDB), the Andean Development Corporation (CAF), and BNDES.

In January 2007 the Rio Madeira project was included as the crown jewel of the first Accelerated Growth Program (PAC 1 in Portuguese)—an ambitious Brazilian Federal Government plan to invest more than BRL 900 billion (US\$ 500 billion) between 2007 and 2010, in more than 2000 infrastructure development projects. A second PAC³⁰ covers the period starting in 2011 with Belo Monte as its crown jewel. In addition to illustrating the importance of the project for the Brazilian Government, this inclusion aided the Rio Madeira dam projects in being treated as a government priority.

3.2 The dams in the context of energy planning and the national industrial development strategy

Currently, hydropower accounts for three quarters of the country's installed electrical energy capacity, and is expected to account for 67% in 2020. In absolute terms, hydropower is expected to increase by 38.8% in the same time span, and to reach this goal, 30 new dams are already included in the latest ten year energy expansion plan,³¹ developed and adapted yearly by the public energy research enterprise EPE on behalf of the Ministry of Mines and Energy (MME). Clearly, dam building continues its importance, which underpins the relevance of the case studies chosen in this paper. In comparison, wind power currently accounts for 0.7% and is expected to increase to 10% by 2020.

Hydropower is treated as renewable energy that is worth promoting, notwithstanding critical evidence to the contrary,³² and without due regard to its direct and indirect negative social and environmental impacts. Moreover, with its ten year focus, the expansion plans do not account for expected reductions in the generation capacity of Amazon dams due to climate change and altered rainfall patterns which will affect the lifespans of dams that are already being built and planned. According to a comprehensive study on economy and climate change in Brazil,³³ the expected related losses are roughly 30%, which further undermines the promotion of dams as part of the solution to climate change problems. Critics point to an array of other problems of the ten-year expansion plan.³⁴

³⁰ More about the energy related aspects of the Accelerated Growth Programs (PAC 1 and 2) is available at <http://www.brasil.gov.br/pac/o-pac/pac-energia>.

³¹ Plano Decenal de Expansão de Energia (PDE) 2020, Ministry of Mines and Energy, available at <http://www.epe.gov.br/PDEE/Forms/EPEEstudo.aspx>.

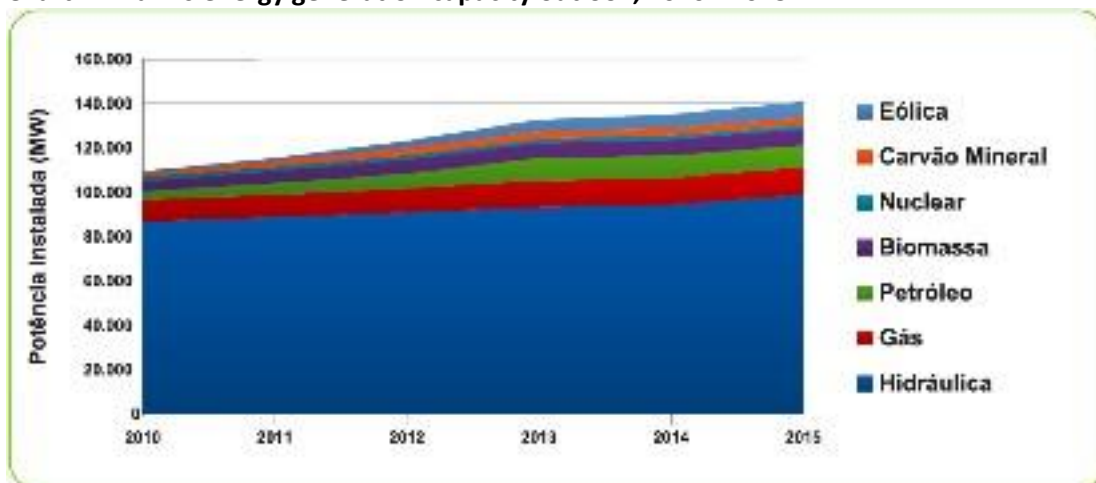
³² E.g. "Hidrelétricas poluem quatro vezes mais que o estimado, diz estudo", available at: <http://www.ecoagencia.com.br/?open=noticias&id=VZISXRIVONIUsFTXmWhN2aKVVVB1TP>

³³ Available at <http://www.economiadoclima.org.br/files/biblioteca/Executive%20Summary.pdf>. (Executive Summary in English available at: <http://www.economiadoclima.org.br/files/biblioteca/Executive%20Summary.pdf>).

³⁴ E.g. Roberto Smeraldi: "Meus chutes, aguardando o planejamento". Available at <http://pib.socioambiental.org/en/noticias?id=104441>.

The energy expansion plan links with and ties into the general multi-year plan “Plano Mais Brasil” or “PPA”³⁵ of the Federal Government. PPA is the government’s investment master plan, foreseeing R\$ 5.4 trillion between 2012 and 2015 across 45 thematic programs with 491 goals that should continue Brazil’s economic growth. An important focus of the PPA is on infrastructure investment to overcome “bottlenecks for the productive sector that could derail the support of growth—especially in the energy, road transport, railway, port, airport and storing condition sectors.”³⁶ In this regard, the latest draft of the 2012-2015 plan foresees the following evolution of the capacity of the energy matrix, based on the 2010 energy expansion plan (see Chart 1).

Chart 1: Brazil’s energy generation capacity outlook, 2010 - 2015



[Translation of text in the graph: Installed Capacity (MW); Wind; Coal; Nuclear; Biomass; Oil; Gas; Hydropower]

3.3 The importance of the Rio Madeira and Belo Monte dams for the Brazilian Government

While ideas for the construction of dams on the Madeira and the Xingu have been around for a long time, the actual Madeira project comprising the Santo Antonio and Jirau dams gained force in the aftermath of major blackouts that occurred in 2001 and 2002. Successive governments insist that major hydropower projects such as the Rio Madeira and Belo Monte complexes are essential to supply the energy demand of Brazil’s growth oriented economy. Other sources³⁷ link the re-emergence of the Rio Madeira project to the fact that Odebrecht, one of the leading infrastructure constructing companies and today the developer of the Santo Antonio dam, was one of the main financiers of Mr Lula’s 2002 presidential campaign. Upon taking office, President Lula vowed to reintegrate energy planning into the federal administration. Interviewees for this paper observed that the project gained support in 2005 when Dilma Rousseff took the Rio Madeira project with her when she left the Ministry of Mines and Energy and took office as the presidential Chief of Staff. At the time, Mr Lula was looking for an emblematic giant project to become a concrete legacy of his first term in office. As the transposition of the São Francisco River lost

³⁵ Available at: <http://www.planejamento.gov.br/noticia.asp?p=not&cod=7571&cat=155&sec=10>.

³⁶ Plano Mais Brasil p. 23, free translation.

³⁷ Aguas Turvas, p. 7.

some of its popular appeal due to a hunger strike of the local bishop, interviewees indicate that Rio Madeira was chosen as substitute.³⁸

Later on, the president repeatedly vested his personal identity and presidential legitimacy in the defense of the Rio Madeira dams, thus adding a symbolic dimension. This stance is not dissimilar to the role his successor currently embodies in the case of Belo Monte. Thus, an infrastructure project would turn into a question of personal credibility, which adds to replacing the necessary public debate from one based on objective analysis and balanced arguments to a polarized one in which personalities and world views clash in a dichotomist manner.

Various interviewees that contributed to this paper agreed that the ultimate decision to go ahead with the project came from the President's office and does not rely on sound grounding. Once the decision was taken, obstacles along the way, such as those presented in the analytical part of this paper, would be removed or steamrolled. If correct, this would suggest that the specific decision by the Government of Brazil and its agencies to construct the Rio Madeira Complex was made independently of relevant international law, international best practice including consultation with potentially affected neighbouring countries, and Brazil's environmental and social safeguard regime.

3.4 Short facts and figures about the dams

*The Rio Madeira Dams: Santo Antonio and Jirau*³⁹

Located in the state of Rondonia, Brazil, the Madeira River is the principal tributary of the Amazon River, with its basin covering about one-quarter of the Brazilian Amazon and reaching into Bolivia.⁴⁰ The Madeira River project consists of two huge hydroelectric dams: Santo Antonio (projected cost US\$ 4.35 billion, current estimate US\$ 6.7 billion, installed generating capacity 3,150 MW)⁴¹ and Jirau (projected cost US\$ 4.55 billion, installed capacity 3,300 MW).

Initially planned as a combined project to be carried out by one only consortium, the two Madeira dams were auctioned to two different consortiums, MESA or SAESA for Santo Antonio, and ESBR for Jirau. The construction company Odebrecht leads SAESA, and the energy provider GDF Suez leads ESBR.

³⁸ Source: Interview with Roberto Smeraldi.

³⁹ The following section draws heavily on the BankTrack dodgy deal page on Rio Madeira http://www.banktrack.org/show/dodgydeals/rio_madeira_dam_project. While having contributed to the page myself, I would like to give credit to other contributors, especially from International Rivers, who prepared a substantial part of the BankTrack "dodgy deal" profile.

⁴⁰ Interesting footage about the Madeira River and the Rio Madeira complex include the WWF production "The Madeira River: Life Before the Dams": <http://schools.rainforestsos.org/free-resources/rainforest-multimedia/videos#other> and the International Rivers video "Rio Madeira Vivo", available here: <http://www.youtube.com/watch?v=jDLFWVmzQnI&feature=related>.

⁴¹ For more information, please visit http://www.bndes.gov.br/SiteBNDDES/bndes/bndes_pt/Institucional/Sala_de_Imprensa/Noticias/2008/20081218_not232_08.html.

The construction of the Santo Antonio and Jirau dams may be complemented by two additional dams on tributaries of Rio Madeira: the binational Guajará Mirim dam on Rio Mamoré along the Brazilian-Bolivian border and the Cachuela Esperanza dam on Rio Beni in Bolivia. In the original plans of the project sponsors, these dams would be equipped with a system of locks. Thus, in addition to producing hydropower, the conjunction of these dams would open a 4,200 km industrial waterway, primarily for the transport of commodities such as soybeans, timber, and minerals across the continent to Atlantic ports. Later on, the system of locks was removed from the actual construction plans (at least for the time being) and the dams in Bolivia follow their own planning logic with certain differences in comparison to the Rio Madeira projects.

In addition to engineering challenges, the Rio Madeira dam projects have encountered serious problems in a wide range of areas spanning from human rights, social, biodiversity and environmental problems to violations of legal frameworks, doubts about the economic and financial viability of the project and questions related to the appropriate use of public funds.⁴² Moreover, the dam complex is already causing transboundary impacts on Bolivia and Peru (e.g. negative impacts on ictiofauna and related fishery on Rio Madeira, reservoirs that may impact Bolivian territory).⁴³

Just to mention a few safeguard related issues, a report by Plataforma Dhesca⁴⁴ concluded that the Rio Madeira complex violated the following human rights:

- Right of self-determination of peoples and sovereignty of countries,
- Rights to information and participation,
- Right to a balanced environment and biodiversity protection,
- Rights of indigenous peoples and traditional communities,
- Rights to health, food security, work, access to land and adequate housing.

Facts and figures published in a newspaper article in March 2011⁴⁵ illustrate some of the social and human rights problems induced by the construction of the dams, which started in the second half of 2008. Between 2008 and 2010, the population of the municipality of Porto Velho (part of the federal state of Rondonia), where the dams are located, increased 12.5%, not least due to the creation of a dam construction workforce of 37,000, mainly consisting of men coming from other federal states.

According to prosecutor Aluildo de Oliveira Leite who monitored the construction, the social impacts of the construction have been “undersized.” The foreseen extension of Porto Velho’s main hospital has not been completed on time. The state and federal prosecutors called upon the state and municipal government to reduce the “alarming prostitution and drug trafficking.”

⁴² An extensive list of resources on these subjects, collected by civil society organizations, is available at: <http://ef.amazonia.org.br/index.cfm?fuseaction=noticia&id=341090>.

⁴³ See <http://www.amazonia.org.br/arquivos/352125.pdf>. According to independent studies quoted by WWF in its video “The Madeira River,” the actual size of the reservoir may be more than twice the size mentioned in the environmental impact assessment.

⁴⁴ Marijane Lisboa and Juliana Neves Barros. Violações de Direitos Humanos Ambientais no Complexo Rio Madeira.

⁴⁵ For example, see <http://www.imagemnews.com/noticias.asp?cd=11273>.

The number of murders increased 44% between 2008 and 2010. At the level of the federal state of Rondonia, over the same period, abuse or sexual exploration of children and adolescents increased 18% and the number of rapes a staggering 76.5%. According to Raiclin Silva of the child protection court,⁴⁶ the areas close to the construction sites of the dams, which formerly had a very marginal contribution to the numbers of minors rescued, now account for half of the cases.

The same article quotes the Jirau consortium Energia Sustentável as saying that the compensation for Jirau foresees the transfer of R\$ 156 million to the state government and city hall. The Santo Antônio Energia consortium said it transferred funds to the state public safety organ.

*The Belo Monte Dam*⁴⁷

The Belo Monte Dam on the Xingu River in Pará State (Brazil) is currently the largest dam project under consideration anywhere on the planet, and will be the world's third largest in installed generating capacity when built. Belo Monte is highly complex—the project includes two dams, canals, two reservoirs, and an extensive system of dikes, some big enough to qualify themselves as large dams.

To build Belo Monte, more earth would have to be dug than was moved to build the Panama Canal. The sheer enormity of the project means that an area of more than 1,500 square kilometers would be devastated, resulting in the forced displacement of 20,000 to 40,000 people, and grave impacts to the land and livelihood of 800 indigenous peoples and thousands of riverine and urban families.

Belo Monte is one of the world's most controversial dams. Indigenous peoples and social movements in the region have fought its construction for more than 20 years. In July 2009, a delegation of groups opposing the dam met with Brazil's President Lula, who said he would review the project and promised "no one is going to shove this project down anyone's throats."⁴⁸

On 1 June 2011, the Brazilian government approved an Installation License for Belo Monte. The environmental agency IBAMA approved the Installation License, even though project developer Norte Energia (75% owned by the government) had not fulfilled the 40 social-environmental prerequisites to the project that were mandated in 2010. Among other things, 100,000 people are expected to move into the region over the next three years, which is expected to lead to grave social impacts similar to those mentioned above in the case of Rio Madeira.⁴⁹

⁴⁶ Juizado da Infância (in Portuguese).

⁴⁷ The following section draws heavily on the BankTrack dodgy deal page on Belo Monte http://www.banktrack.org/show/dodgydeals/belo_monte_dam_project. While having contributed to the page myself, I would like to give credit to other contributors, especially from International Rivers, who prepared a substantial part of the BankTrack "dodgy deal" profile.

⁴⁸ <http://pagina22.com.br/index.php/2011/04/goela-abaixo>.

⁴⁹ First indicators include the fact that sexual violence against children and adolescents in the region of Altamira is rising: "Com Belo Monte, violência sexual contra criança e adolescente cresce 138%". Available at <http://www.xinguvivo.org.br/2011/10/11/com-belo-monte-violencia-sexual-contra-crianca-e-adolescente-cresce-138>.

BNDES has pledged to fund at least 80% of the project costs (current estimate R\$ 26 billion), and the remaining 20% is likely to be financed by the Norte Energia consortium. Norte Energia is led by the Brazilian federal utility holding group Eletrobras, through three branches: Eletronorte (19.98%), Eletrobras (15%), and the subsidiary Chesf (15%). The financial viability of the project is questionable.⁵⁰

3.5 Investments in the dams

The realization of large-scale infrastructure projects depends on the availability of financing. This part of the paper identifies the financiers of the Rio Madeira dams and looks at the available information regarding the financing of the Belo Monte dam. Similarities between the two projects could suggest possible patterns in the financing of large scale infrastructure financing in Brazil.

The financiers of the Rio Madeira Complex and the Belo Monte Dam

In the financing of Rio Madeira, BNDES played a pivotal role, both through direct operations under its full responsibility and through indirect operations. In the latter, BNDES transfers funds to commercial banks, public or private agencies mentioned in the table below (called “financial intermediaries”), and these intermediaries are responsible for reviewing and approving credit and the definition of collateral. BNDES has exclusive responsibility solely for direct operations, yet supervises the operations of financial intermediaries who assume their part of the credit risk of indirect operations.⁵¹ The intermediaries are also responsible for the verification of the social and environmental regularity of their client, the project and the respect of related social and environmental norms, in line with the guidelines of the Socioenvironmental Policy of BNDES.⁵² Moreover, it is salient that all the financial intermediary banks involved in the Rio Madeira dams are signatories of the Equator Principles.⁵³

The Belo Monte project is expected to follow a similar structure, with direct and indirect financial support.⁵⁴ This practice diversifies the credit risk among the financiers of the project, and BNDES effectively benefits from the project and risk assessments carried out by the financial intermediaries for their part of the loan. Even if the credit risk can be divided, however, the reputational risks are integral for all financiers involved in a project.

⁵⁰ See Mega-Projeto, Mega-Riscos, p. 36 f.

⁵¹ See section 2.4.1 of the BNDES Socioenvironmental Policy for further details. Its content in Portuguese is available here: http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Navegacao_Suplementar/Perfil/Instituicao_Financeira_Credenciada.

⁵² Section 2.4.2 of the BNDES Socioenvironmental Policy. Reference (in Portuguese): http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/Apoio_Financeiro/Políticas_Transversais/Política_Socioambiental/analise_ambiental.html.

⁵³ See <http://www.equator-principles.com/index.php/members-reporting>. While some of these banks joined the Equator Principles after agreeing to cofinance the dams, they were already bound to respect the Equator Principles on the basis of a separate agreement that the loan syndicate had signed to that effect.

⁵⁴ BNDES Conditions for Financial Support of Belo Monte Project (in Portuguese): http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Areas_de_Atualizacao/Infraestrutura/Energia_Eletrica/belo_monte.html.

Table 2: Overview of financiers of the Santo Antonio, Jirau, and Belo Monte dams

Development banks and constitutional development funds	Santo Antonio	Jirau	Belo Monte ⁵⁵
<i>Brazilian financial institutions</i>			
BNDES⁵⁶	Finances directly and provides indirect financing through other financial institutions	Finances directly and provides indirect financing through other financial institutions	Operates bridge loan and negotiates R\$ 26.5 bn project loan
BASA⁵⁷	Operates constitutional development fund FNO and operates a part of BNDES indirect loans	No financing	TBD
BNB	Operates a part of BNDES indirect loans	Operates a part of BNDES indirect loans	TBD
FNO (operated by BASA)	Operated through own funds	No financing	TBD
<i>BNDES financing operated through intermediary banks</i>			
Banco do Brasil	Operates a part of BNDES indirect loans	Lead arranger, operates a part of BNDES indirect loans	Bridge loan approved, pledged to finance bulk of costs
Caixa Econômica Federal	Operates a part of BNDES indirect loans	Operates a part of BNDES indirect loans	TBD
Bradesco	Operates a part of BNDES indirect loans	Operates a part of BNDES indirect loans	TBD
Itaú	Operates a part of BNDES indirect loans	Operates a part of BNDES indirect loans	TBD
Santander⁵⁸	Lead arranger, operates a part of BNDES indirect loans	No financing	TBD
Banco Espírito Santo Investimentos	Operates a part of BNDES indirect loans	No financing	TBD
<i>International financial institutions</i>			
IBRD⁵⁹	No direct financing	No direct financing	TBD
IFC	No financing	No financing	Will not finance
IDB⁶⁰	No financing	No financing	TBD

⁵⁵ The Belo Monte financing structure is still being defined. This column reflects the status of publicly available information.

⁵⁶ BNDES usually provides part of its financing directly, and operates another part of funding through the FINEM product lines. In the case of power generation facilities, the following FINEM line applies: http://www.bndes.gov.br/SiteBNDES/bndes/bndes_pt/Institucional/Apoio_Financeiro/Produtos/FINEM/energia_eletrica_geracao.html.

⁵⁷ BASA has a double role in the financing of Santo Antonio: it operates the constitutional development fund FNO and acts as intermediary bank of BNDES financing.

⁵⁸ Santander is the lead arranger for the Santo Antônio financing. In addition to loans, Santander used to own 9.98% of the Santo Antonio consortium MESA through the investment fund “Amazônia Energia” it set up with Banif Investmen Bank. Between 2009 and 2010, Santander sold its stakes in two operations to the investment fund FI-FGTS.

⁵⁹ In 2010, IBRD made a US\$ 1.3bn loan to Brazil’s treasury under a Sustainable Environmental Management Development Policy Loan (SEM DPL). Treasury passed the money on to BNDES. It is unclear if BNDES, in turn, uses part of that sum to finance Belo Monte.

⁶⁰ IDB backed issuance of debentures for infrastructure development by the construction company Odebrecht. While Odebrecht has a key stake in the construction consortium of Santo Antonio, we have no information as to if and to what extent the capital corresponding to these debentures has been employed in Santo Antonio.

Role of multilateral development banks

It appears that no multilateral development banks finance any of these dams directly.⁶¹ Hence, their safeguards do not apply directly. Interviewees for this research suggested that multilateral development banks may have faced concerns with the reputational risks of investing in Amazon infrastructure projects based on past controversies, and with the likelihood that the projects would not have been able to meet the banks' existing safeguard policies. Other institutional reasons may have also applied. However, some of the multilateral development banks may have an indirect involvement in the financing of the projects. In these arrangements, under current bank policies, the safeguards do not apply.⁶²

Banks' equity ownership in the projects

With the financing structure of the Rio Madeira and Belo Monte dams established, let us now turn our focus on the actual owners of the special purpose vehicles that were created to construct the dams.

It appears that BNDES—the main financier of the dams—is not a direct shareholder of the dam consortiums.⁶³ However, BNDES holds substantial shareholdings in Eletrobras and the major construction companies that promote and partially own the dams, both directly and through its equity branch BNDESPar. In the case of Eletrobras, for instance, BNDES and BNDESPar hold a combined 22.13% of the total capital of Eletrobras.⁶⁴ Santander sold its 10% stake of the consortium that owns Santo Antonio to the investment fund of FGTS, a workers' guarantee fund that is managed by Caixa Economica Federal, another public Bank. Moreover, large Brazilian pension funds pertaining to state owned or state controlled companies such as Previ (Banco do Brasil), Petros (Petrobras) and Funcef (Caixa Economica Federal) hold further large amounts of shares in the Rio Madeira and Belo Monte dams. In this way, it appears that public development banks such as BNDES and BASA and pension funds of public or mixed companies finance and own the lion's share of the Rio Madeira dams. This is a telling example of how intertwined big capital is in Brazil. A researcher dubs this characteristic "*capitalismo de laços*" (approximately translated into 'intertwined capitalism')⁶⁵.

Whatever the initial reasons underpinning the decision to build the Rio Madeira and Belo Monte dams, once the president of Brazil decided to support them, the state machinery appears to have been deployed to build the dams against all odds. Subsequently, the "if"-question made way for the question about "how" to realize the dams. The directly affected population and Brazil's public at large, public prosecutors and civil society organizations alike are questioning this practice, as the direct protests, campaigns, news articles and legal actions on the Rio Madeira and Belo Monte dams demonstrate.

⁶¹ Please see Annex 2 for more details on this subject.

⁶² For more details on this subject, please refer to Annex 2.

⁶³ The composition of the consortiums that own Santo Antonio and Jirau can be found here:

http://www.banktrack.org/show/dodgydeals/rio_madeira_dam_project; the composition of the Belo Monte consortium is available at: http://www.banktrack.org/show/dodgydeals/belo_monte_dam_project.

⁶⁴ See <http://oglobo.globo.com/economia/bndes-atinge-participacao-de-2213-na-eletoabras-2802852>.

⁶⁵ Sérgio G. Lazzarini: *Capitalismo de Laços*.

4. Performance of Brazil's Safeguard Regime in Selected Cases

4.1 Introduction

As documented above, human rights, social and environmental issues have arisen in both the Rio Madeira and Belo Monte projects. In this chapter, we examine selected prima facie evidence of breaches of applicable safeguards. Preference is given to legal actions, because the existence of legal actions points to the seriousness, legitimacy and solid underpinning of the issues at stake. Most of the issues emerge as risks, i.e. before adverse impacts materialize, but continue to be relevant throughout the implementation of the projects.

After an introduction, selected safeguard themes are addressed (environmental licensing, public support, and resettlement). Based on an analysis of multiple legal actions brought forward, another section presents observations on the performance of the domestic judicial system and its effectiveness in enforcing safeguards. The final section links the safeguard issues back to the role of financiers.

As we saw above, virtually the entire financing of the construction consortiums in Rio Madeira (and most probably Belo Monte) stems from local Brazilian sources. The national safeguard regime of Brazil apply to all these sources. In addition, commitments made by individual banks under voluntary initiatives such as the Green Protocol or the Equator Principles apply. Moreover, institution specific safeguards apply.

By design, safeguards have a preventive character, i.e. they are primarily intended to prevent harm from taking place. While this chapter puts emphasis on the performance of the safeguard regime in terms of prevention, it also looks at examples of minimization, mitigation and compensation practices.

Eligible legal actions for review under this section include those that were filed on grounds of alleged breaches of social and environmental safeguards. The subject matter “social and environmental safeguards” and the nexus between the entities and the selected dam projects are the main criteria for the selection of legal actions. In this context it is worth remembering that according to the principle of “objective responsibility” under Brazilian law, if adverse impacts occur then all entities involved, directly or indirectly, can be held liable for these impacts independently of the question of fault.⁶⁶ This includes both actions against financial institutions as well as actions against other entities related to the Rio Madeira and Belo Monte cases.

The apparent safeguard violations in the investments by public and private banks in these dams translated into a number of demands for fact-finding and investigation promoted by civil society organizations and by public prosecutors. Moreover, considering that legal actions are only actionable when there are impacts, certain initial actions aiming to prevent adverse impacts were made extrajudicially. With regard to banks, we would like to point out the following examples.

⁶⁶ See chapter 2 for more details.

In the case of Rio Madeira:

- Extrajudicial notification letters by civil society members to financiers;
- Public investigation by the public prosecutors.

In the case of Belo Monte:

- Notification letters by civil society members (in two instances) to potential financiers;⁶⁷
- Request for analysis submitted by the public prosecutors to the Central Bank in its capacity as supervisor of the national financial system to investigate the adequacy of BNDES financing of Belo Monte with the applicable safeguard regime.⁶⁸

Let us now turn to the question of how these applicable safeguards performed in the cases of the Rio Madeira and Belo Monte dams. The first section addresses issues related to environmental licensing. The second section addresses the issue of participation and broad community support. The third section briefly looks at other selected issues.

4.2 Performance of the safeguard regime with regard to impact assessment and environmental licensing

The licensing process in Brazil is made up of three stages (preliminary license, installation license and operation license). The installation license authorizes the construction work to begin. While State Agencies for the Environment run certain licensing processes, big infrastructure projects that impact more than one federal state are carried out by Ibama, the Brazilian Institute of Environment and Natural Resources. Ibama is linked to the Ministry of the Environment.⁶⁹

Given that financiers routinely use the mere existence of environmental licenses to justify their financial support of projects, it is important to illustrate some of the most notorious problems relating to environmental licensing in Brazil. João Akiro Omoto, Public Prosecutor, presented the public prosecutors' view on environmental licensing at a public hearing on environmental licensing at the house of representatives in 2007.⁷⁰ The following section summarizes deficiencies he pointed out and illustrates them with concrete examples of Santo Antonio, Jirau and Belo Monte.

Licensing process based on inadequate methodology

We presented Art. 225, para. 1, IV of the Federal Constitution of 1988 as part of the Brazil's safeguard regime. This article requires a prior environmental impact study for the installation of works and activities which may potentially cause significant degradation of the environment. The methodology used in the licensing process is that of environmental

⁶⁷ First notification: March 2010; second notification: November 2011. Further information is available at

<http://www.xinguvivo.org.br/2011/11/07/bancos-recebem-notificacao-sobre-riscos-de-envolvimento-com-belo-monte/>

⁶⁸ See <http://www.prpa.mpf.gov.br/news/2011/mpf-requisita-fiscalizacao-do-banco-central-no-bndes-por-causa-de-belo-monte>. The result of this investigation is due in February 2012.

⁶⁹ See <http://www.ibama.gov.br/licenciamento>.

⁷⁰ João Akiro Omoto, "O Licenciamento Ambiental na visão do Ministério Público Federal," 2007.

impact assessment (EIA). Critics argue that EIAs are too limited in comparison to the issues at stake in large-scale infrastructure projects. And indeed, the principle is very clear: Resolution 1/86 of the National Council on the Environment CONAMA—one of the main references that guide Ibama’s work—requires among others that the geographic reference of such an environmental impact assessment be the basin in which the project is located.

“Strategic environmental assessments” are the most widely accepted tool for assessing impacts on a basin-wide level. The need to carry out strategic environmental assessments was aired during the deliberation stage, but in the end, only a limited EIA was conducted. It was carried out by Leme Engenharia, a subsidiary of GDF Suez who in turn is the majority shareholder of the Jirau consortium ESBR. The EIA was commissioned by the Brazilian construction company Odebrecht and the state-owned energy company Furnas, both important shareholders of the Santo Antonio consortium. Critics say there is a conflict of interest and consider the resulting environmental impact report flawed.⁷¹ A civil society publication found 30 flaws in the EIA.⁷²

In the case of the Madeira River, its basin spans a region of one million square kilometers. Instead, the area studied as part of the EIA was roughly 5,000 square kilometers. The failure to assess the full extent of the impacts is seen by most observers as the single most important, fatal and irreversible failure of the Rio Madeira dam complex.

As a consequence of this crass mismatch, transboundary impacts of the dams on Bolivia and Peru were not analysed and a host of indirect impacts were not on the radar of the impact assessment. In stark contrast to the narrow Brazilian approach, and in order to include indirect impacts in the planning, the Bolivian government opted for a strategic environmental assessment of the sphere of influence of the future dams it plans.

Limited scope of the impact assessment

In the case of the Rio Madeira complex, the transmission lines used to transport the energy from the dams to the main national grid were dismembered from the rest of the projects and treated in isolation, while in reality one cannot exist without the other. Critics argued that the impact assessment should have examined all of the cumulative impacts of the projects as a whole, rather than focusing on parts.

Process related deficiencies

The process of environmental licensing of the Jirau and Santo Antonio dams was extremely turbulent and marked by political pressure. Certain directors and decision makers of IBAMA handed out licenses that disregarded reports of IBAMA’s own technical staff, while those who refused to grant licenses that were not in keeping with the technical analysis of IBAMA’s specialized staff subsequently left the agency or were removed.

⁷¹“Complementações às respostas dadas pela ESBR em 22/01/10”. Available at: <http://www.amazonia.org.br/arquivos/352125.pdf>.

⁷² Amigos da Terra – Amazônia Brasileira and International Rivers Network: 30 Falhas no EIA-RIMA do Rio Madeira, <http://www.amazonia.org.br/arquivos/226345.pdf>.

For example, IBAMA's technical staff pointed to the lack of assessment of regional environmental impacts, including those in Bolivia and Peru,⁷³ and therefore recommended not to issue a license. Nevertheless, the dams were eventually licensed. Additionally, according to an analysis⁷⁴ carried out by Amigos da Terra–Amazônia Brasileira and Kanindé, there are other contentious issues in the case of the Rio Madeira licenses, such as the lack of authorization by National Congress to take advantage of water resources on indigenous land, required by Art. 231, para. 3 of the Federal Constitution and the absence of proof of compliance with conditions of preliminary license before the installation license was granted.

The case of Belo Monte is similar in terms of violations and legal actions. Currently,⁷⁵ seven of the thirteen legal actions that have been filed by the federal prosecutors of Pará focus on the subject of environmental licensing.

The above review suggests that the existence of a license is necessary but not always sufficient to decide that a given project passed the test of its environmental viability. In this respect, banks that use the existence of a license as a sufficient condition to grant financing are well advised to review this practice and instead come up with independent assessments to ensure compliance with relevant safeguards. However tempting, banks should not delegate their responsibilities under Brazilian law to the licensing organ IBAMA.

4.3 Performance of the safeguard regime with regard to participation and broad community support

Two recurrent features in infrastructure projects in Brazil are disputes over public consultation processes in general, and the lack of free, prior and informed consent of affected indigenous peoples in particular. The failure to properly consult indigenous peoples, and obtain their consent is a breach of the provisions of a series of applicable instruments and best practices: the American Convention on Human Rights, Article 6 of Convention 169 of the International Labor Organization, Article 8 (j) of the UN Convention on Biological Diversity, to which Brazil is a party; The Akwe: Kon guidelines (published by the Secretariat of the UN Convention on Biological Diversity); and Articles 19 and 32 of the UN Declaration on the Rights of Indigenous Peoples.

The example of Belo Monte

In the case of Belo Monte, two of the thirteen legal actions that have been filed by the federal prosecutors of Pará so far relate to public consultation. The specific question of the consultation of indigenous peoples has become so contentious that the public prosecutors recently asked the federal supreme court to decide on the issue.⁷⁶ According to the Belo Monte construction consortium Norte Energia, “[the Belo Monte dam project] has been accompanied, since its beginning, by Ibama, with the support of the National Indian

⁷³ IBAMA Report 014/2007 – COHID/CGENE/DILIC dated 21 March 2007.

⁷⁴ See <http://www.amazonia.org.br/arquivos/352125.pdf>.

⁷⁵ Status as of November 2011.

⁷⁶ “Ministério Público vai recorrer ao STF para que índios sejam consultados sobre usina de Belo Monte”. Available at: <http://noticias.uol.com.br/politica/2011/11/09/ministerio-publico-vai-recorrer-ao-stf-para-que-indios-sejam-consultados-sobre-usina-de-belo-monte.jhtm>.

Foundation (Funai)⁷⁷, [and] has been conducted with the full agreement of the local population and the indigenous peoples of the region, for whom the fundamental rights, integral preservation of their territories and quality of life are guaranteed.” According to Sheila Juruna of the Movement Xingu Vivo Para Sempre, however, “the way our own government treated us is a shame, with continuous lies and and negating the dialogue with the affected communities.”⁷⁸ Supporting evidence abounds for the allegation that public consultations were not conducted properly. As illustrated by the video footage and testimonies available,⁷⁹ the consultations held were insufficient in number, located in locations where the majority of the affected population had scarce or no access, lacked appropriate prior information, and were based on an EIA that contained serious errors.

A group of civil society organizations filed a petition with the Inter-American Commission on Human Rights (IACHR) over flaws in the public consultation process related to the Belo Monte dam. In keeping with Art. 25 of its regulation, IACHR asked the Brazilian Government to suspend the licensing process, perform public consultations in compliance with its obligations under the American Convention on Human Rights, take urgent measures to protect the life and personal integrity of members of various local indigenous communities and especially isolated Indians, and take measures to prevent the dissemination of diseases.⁸⁰

This recommendation stirred major upheaval within the Brazilian Government and strained its relations with the Organization of American States. Brazil withdrew from the IACHR, suspended the nomination of its IACHR representative and did not disburse its contributions.⁸¹ In its reply of 25 April 2011, the Government of Brazil affirms, among others, that the dam is not located within demarcated indigenous territories. This does not mean there are no impacts on indigenous peoples and their way of life⁸², and the need for appropriate consultations remains. Later, IACHR modified its initial recommendation.

The example of Jirau

The construction of the dam started despite the existence of abundant information about the presence of highly vulnerable, uncontacted Indians. Even after the confirmation of the presence of groups of uncontacted Indians near the construction site, construction has continued at a rapid pace.

Furthermore, indigenous people living downstream rely on fish or lowland crops, which will be seriously affected by the dam. These people were excluded from the EIA and from appropriate consultations. Moreover, there is a lack of a prior assessment of the risks to local livelihoods caused by dam construction on river-dwelling communities residing on tributaries upstream, within the reservoir area and downstream from the Jirau dam.

⁷⁷ See <http://www.funai.gov.br>.

⁷⁸ See <http://g1.globo.com/economia/noticia/2011/10/rodovia-e-canteiro-de-obras-de-belo-monte-sao-liberados-diz-policia.html>.

⁷⁹ See <http://www.xinguvivo.org.br>. The site includes also useful sections on the various types of impacts of Belo Monte.

⁸⁰ IACHR, MC-382-10, dated 1 April 2011.

⁸¹ See <http://www1.folha.uol.com.br/fsp/mercado/me3004201117.htm>.

⁸² For instance, one of the frequently mentioned problems is that there will not be enough water flowing through the Big Bend of the Xingu, thus impacting the lives and subsistence of indigenous peoples.

An ad hoc alliance of civil society organizations brought these points to the attention of the promoters of the Jirau dam. In the case of Jirau, an exchange of correspondence with the CEO of GDF Suez, the majority shareholder of the Jirau construction consortium ESBR, developed each one of the points above and asked GDF Suez and the consortium to suspend its activities and investigate the violations and impacts.⁸³ The company did not follow suit, alleging—among other assertions—that the Brazilian President is in a privileged position to assess the situation, hence paying more respect to the de facto power balance than to the separation of powers and the rule of law.

Applicable instruments and best practices are ignored, and existing cases suggest a lack of broad community support. Thus, the current safeguard regime with regard to participation and broad community support does not seem to work satisfactorily. In recent years, public consultations over high impact projects like those above have been characterized by systematic disputes not only about the content of the projects but over the consultation process itself. The recurring impasses have become so prevalent that a new approach to the question is bitterly needed. The recommendation section contains suggestions for moving forward.

4.4 Performance of the safeguard regime in other selected issues

Impact on river dwellers

Adverse impacts on river dwellers and their livelihoods is another recurrent area of safeguard violations related to dam construction in Brazil. The Special Committee on dam affected people of the Council for the Defense of Human Rights, an organ linked to the Ministry of Justice, found in its studies that “the current pattern of deployment of dams has provided serious violations of human rights in a recurring manner, the consequences of which turn out to accentuate the already severe social inequalities, translating into situations of poverty and disruptions at the social, family and individual levels.”⁸⁴

The cases studied by the Council identified 16 rights that appear to be violated systematically,⁸⁵ namely:

- Right to information and participation;
- Right to freedom of assembly, association and expression;
- Right to work and a decent standard of living;
- Right to adequate housing;
- Right to education;
- Right to a healthy environment and health;
- Right to continuous improvement of living conditions;
- Right to fair compensation for losses;

⁸³ See <http://ef.amazonia.org.br/index.cfm?fuseaction=noticia&id=341090>.

⁸⁴ Conselho de Defesa dos Direitos da Pessoa Humana, Comissão Especial “Atingidos por Barragens”, Sumário executivo, available at http://www.direitoshumanos.gov.br/conselho/pessoa_humana/relatorios, p.7.

⁸⁵ Ibid., p.9.

- Right to fair trading, isonomic treatment, according to criteria transparent and collectively agreed;
- Freedom of movement;
- Right to traditional practices and ways of life, as well as the access and preservation of cultural goods, both material and immaterial;
- Right of indigenous peoples, *quilombolas* and traditional peoples;
- Right to special protection of vulnerable groups;
- Right of access to justice and the reasonable duration of judicial proceedings;
- Right to compensation for past losses;
- Right to protection of the family and the bonds of social solidarity and community.

The case of Jirau

On this backdrop, we elaborate on a few selected examples for illustrative purposes. In the case of Jirau, official numbers indicate impacts on 3,000 river dwellers. The Movement of Dam Affected People (MAB) points to the absence of registries on the exact number of families affected by the dam, and estimates that the number could reach 10,000 individuals.⁸⁶ Importantly, impacted river dwellers outside the area that was covered by the EIA, e.g. on Bolivian territory, are not eligible for compensation. Enersus, the dam construction consortium, offered houses to the people who were removed from the area that was recognized to be impacted. These houses appear to be inadequate.⁸⁷ Moreover, what affected people really need is a new livelihood, not just shelter, and no one provided for that. As far as we know, claims for adequate mitigation and compensation have not been met.

In conclusion, these systematic human rights violations indicate that Brazil's safeguard regime does not guarantee social safeguards. As one BNDES official explained, "We want the project to be implemented in the best possible way, including social and environmental programs, and have maintained close monitoring."⁸⁸ Clearly, there is room for improvement.

Transboundary impacts

While many of the observations above, e.g. those about the impacts of the Rio Madeira complex on river dwellers, also apply to neighbouring Peru and especially Bolivia, several impacts require specific attention.

As detailed above, there was a crass mismatch between the area studied in the EIA (roughly 5,000 square kilometers) and the area of the river basin that should have been studied (1 million square kilometers). Transboundary impacts of the dams on Bolivia and Peru were not analysed. According to independent Bolivian studies, impacts on the riverside population in Bolivia include extinction of fish species, public health issues and the possibility of rising river levels.

⁸⁶ MAB, p.2.

⁸⁷ See <http://www.mabnacional.org.br/multimedia/videos.html> for a video on the question.

⁸⁸ Excerpt from an interview with Márcia Leal of the Energy Department of BNDES.

Equally, a host of indirect impacts were not on the radar of the impact assessment. As a result, not only were these impacts not foreseen, but there was no way to deal with them adequately. Furthermore, river dwellers from Bolivia have no legal standing in Brazil to file lawsuits for the protection of the environment.

In other cases, such as the controversial export financing to the construction company OAS for the construction of TIPNIS highway in Bolivia, BNDES representatives informed that they followed the rules of the host country Bolivia. In one case, BNDES approved the financing for the project that was later suspended by the Bolivian government due to popular protests.⁸⁹

Furthermore, despite being the key development financier in South America, BNDES has no grievance mechanisms or inspection panel where transboundary concerns can be raised. Often, the public prosecutors are seen as a last port of call by those who seek protection. While being of utmost importance, the public prosecutors have limited effectiveness. Not only do they have limited capacity and means, but their effectiveness is also tributary to the performance of the courts, which is a challenge in its own right, as discussed in the next section.

4.5 The performance of courts in enforcing safeguards

In keeping with the definition offered in chapter 1, courts are seen as part of a country's safeguard regime. There is a growing body of cases in which public prosecutors and civil society use legal action to hold accountable the promoters of projects and government agencies that allegedly breach laws.

In the Rio Madeira projects, one can observe, for instance, that the CSO Amigos da Terra- Amazônia Brasileira filed four main legal actions on the flaws of environmental licensing: two on Santo Antonio and two on Jirau. The related lawsuits have continued, depending on the specific case, between two and four years without reaching any ruling. The slowness of the judicial process is a huge real world obstacle to the effective defense of safeguard standards. Also, requests for urgent actions based on the *periculum in mora* principle did not yield timely results. Moreover, legal actions by federal prosecutors and further CSOs have been facing similar challenges and shortcomings in the judicial process. In the case of Belo Monte, the federal prosecutors of Pará have filed thirteen legal actions so far,⁹⁰ and none has reached final ruling.

There are two types of concerns with the Brazilian courts' treatment of safeguard cases:

- On the procedural dimension, the judicial system tends to treat cases in a timeframe that is not compatible with the urgency of preventing damage (*periculum in mora*). There is a marked difference in the time it takes for a court to appreciate action brought forward to hold promoters of projects responsible (months or years)

⁸⁹ "BNDES assinou contrato para obra na Bolívia sem estudo ambiental". Available at: <http://www.valor.com.br/internacional/1025712/bndes-assinou-contrato-para-obra-na-bolivia-sem-estudo-ambiental>.

⁹⁰ Status: November 2011.

compared to the time it takes to rebut claims or overturn first instance rulings (hours or days).

- With regard to their content, despite having solid foundations, some of the cases are refuted in higher courts based on the ground that without these projects a state of emergency would befall Brazil and its economy.

These indicators could be interpreted in the sense that the judicial system may not be totally independent of interference from other branches of legitimate power.

4.6 Safeguards performance of financiers

In the cases examined, financiers play a significant role in ensuring that the projects go forward. The most important among them is BNDES. It granted financing in Rio Madeira, has made a first bridge loan for Belo Monte and pledged financing the bulk of the construction costs of Belo Monte. Yet clearly, the BNDES safeguards framework did not prevent the problems mentioned above from occurring in either of the cases. A BNDES reply in the case of Rio Madeira reveals something very interesting in this respect. When asked by the public prosecutors about BNDES' behavior in the case of Rio Madeira, the BNDES answer is as follows:

“With regard to the design of projects, it should be noted that the analysis of the operations [within BNDES] starts after the following steps have already been fulfilled: (a) selection of projects by the government agencies that plan the expansion of the electric sector (Ministry of Mines and Energy and EPE [the energy planning agency]), (b) approval of the basic projects by the Brazilian Electricity Regulatory Agency ANEEL (c) completion of the bidding, and (d) grant of the initial license.”⁹¹

While banks such as BNDES have an opportunity to provide input into Brazil's industrial policy, in which the energy question plays an essential role, they rightly argue that they are not responsible for the national energy planning. It is usually not the choice of technologies or a portfolio of project options that are submitted to the banks' appraisal, but rather single projects which the bank can accept to finance or refuse, at least in theory. In practical terms, some of these projects, as in the case of the Rio Madeira and Belo Monte dams, enjoy the explicit and specific support of the federal government, which appears to limit the realm of options available to financial institutions, especially that of public banks.

In the implementation phase of the Rio Madeira dams, BNDES applied no process or system to prevent or appropriately mitigate environmental damage and social harm provoked by the projects. When asked about this, BNDES representatives acknowledged the legitimacy of diverse “viewpoints and perceptions that arise over certain issues”, but pointed to the courts as the appropriate theatre to deal with claims, adding that BNDES would follow relevant court rulings. The department of BNDES responsible for energy projects informs that they treat the environment as one of the various dimensions that needs caution, not

⁹¹ Author's translation. Source: BNDES Nota AIE/DEENE number 47, dated 24 September 2010 (annex to Ofício 1120/2010 of BNDES GP, dated 30 September 2010). Please note that “initial license” translates as “Licença prévia” in Portuguese. It is the first of three necessary environmental licenses.

more nor less than others.⁹² This attitude suggests a lack of appreciation of the irreversible nature of many of the issues at stake, and is insufficient to effectively uphold the safeguard commitments professed by BNDES or even the most rudimentary and fundamental general safeguard principles that apply to all financiers, especially the precautionary principle.

On adequacy of existing safeguards

At this stage, it is worth looking at the most relevant elements of the safeguard regime in conjunction. There is a whole chain of safeguards that fail individually and jointly: absence of strategic and encompassing environmental analysis, inappropriate project level impact assessment and reports, problems related to the environmental licensing process resulting in questionable licenses, the absence of questioning of government agencies whose actions and omissions are questionable, which results in breaches of financiers' own safeguards, absence of proactive supervision of environmental and social safeguards by the central bank, slowness of the judiciary process.

In this context, it may be valid to point out the federal government's role in many stages along the process, from national development strategies to the role of the executive branch in rule making (usually a prerogative of the legislative bodies) by means of "temporary" or "provisional measures"⁹³. For example, some of them raise the BNDES reference capital and hence its lending capacity, both in terms of total volume and in terms of maximum lending amount per project, to unprecedented levels that are commensurate with the requirements of Rio Madeira and Belo Monte.

5. Conclusion - Strengths and Weaknesses of Brazil's Safeguard Regime

Based on the Rio Madeira and Belo Monte cases and the review of applicable safeguards, this paper suggests that the applicable safeguard regime (including both safeguard contents and actual application thereof) has been ineffective at preventing harmful projects. Furthermore, the case of Rio Madeira shows that the existing safeguard regime did little to mitigate negative impacts, many of which are of indirect and irreversible nature. Possible reasons for this include the lack of capacity to implement existing safeguards, lack of supervision and enforcement of existing safeguards and incapacity to correct and remedy possible violations of them. Moreover, and of special relevance for indirect impacts and transnational impacts, the scope and reach of the projects and their impacts were defined too narrowly. As a consequence, indirect impacts and basin wide impacts (some of which go beyond the borders of Brazil's nation state) were insufficiently assessed or ignored altogether.

Notwithstanding the above conclusion, the actual written safeguards are far from being a disaster. As presented earlier, Brazil's safeguard regime contains many key elements, while lacking others, not least in the area of dispute settlement. The main problem, however, and current main challenge is to provide for the actual systematic application of the existing regime of norms, rules, laws, guidelines and decision making procedures.

⁹² Responses from other BNDES interviewees suggest there is no unanimity within BNDES regarding the appropriate procedure.

Given the lack of effectiveness of the existing local safeguard regime, another conclusion is that it might be premature to rely on a “country systems” approach as an alternative to relevant international safeguard frameworks.

In sum, we conclude that:

1. On paper, Brazil’s safeguard regime contains a number of important elements, while also needing improvements and complements. To name a few:
 - a. Fundamental rights are recognized and fundamental provisions are included.
 - b. Brazil’s legislation includes a system of “objective responsibility” that recognizes that all actors bear responsibility.
 - c. Development banks and agencies such as BNDES lack project level grievance mechanism (for both domestic and extraterritorial projects) and an institution-level dispute settlement mechanism.
2. In practice, Brazil’s safeguard regime underperforms dramatically:
 - a. It did not prevent irreversible and large scale direct and indirect adverse environmental and social impacts in any of the cases that were analysed.
 - b. Its performance in terms of minimization, mitigation and compensation of adverse social and environmental impacts is lackluster.
 - c. Courts’ enforcement of safeguards or remediation and correction of breaches does not exist or is not timely and thus ineffective.
 - d. BNDES as a whole fails to respect and protect/uphold applicable safeguards systematically. In the cases reviewed in this study, passive interpretation of safeguard provisions have induced breaches of its own safeguards and failed to uphold relevant legislation systematically. There is no indication of the existence or effectiveness of internal mechanisms to control and correct breaches of safeguards.
 - e. BNDES lacks well functioning, open relationships with the people and population it is designed to serve, which translates into frictions at every step of the way.
 - f. Banco Central, the competent supervisor of Brazil’s financial system, has not publicly questioned the behavior of financial institutions involved in the financing of the Rio Madeira dams, where numerous breaches of safeguards occurred. In the case of Belo Monte, the public prosecutors instigated Banco Central to investigate.⁹⁴

⁹⁴ See <http://www.prpa.mpf.gov.br/news/2011/mpf-requisita-fiscalizacao-do-banco-central-no-bndes-por-causa-de-belo-monte>. The result of this investigation is due in February 2012. See also chapter 4.1 above.

6. Recommendations

Although the present study is based on a limited sample of cases, complemented by studies and reports, it illustrates several important lessons for high risk development projects. Such projects appear to be implemented independently of their compliance with a safeguard regime composed of democratically established, applicable international agreements and domestic norms, rules, laws, procedures, voluntary commitments and the corresponding institutional apparatus. This points to a practice that is incompatible with the existing rule of law and respect of democratic institutions and sound administrative practice. Therefore, in order to be effective, Brazil's safeguard regime requires improvements on various levels.

6.1 General recommendations to improve Brazil's safeguard regime

Any safeguard regime needs to be recognized as legitimate, effective and efficient. To ensure that Brazil's country system provides reliable environmental and human rights protections, it is essential to guarantee the rule of law in Brazil in general, in all instances and across the whole array of institutions and actors involved in the definition, application and enforcement of safeguards.

It is vital for all development actors—public and private—to allow for and actively promote participatory democracy. The decision making cost is likely to increase, but this will be more than compensated by gains in project and development effectiveness, as well as increased legitimacy and accountability of all actors and actions involved in development finance. Transparency at all levels is a precondition for participatory democracy to work. It needs to go hand in hand with accountability. While most development actors would agree with the importance of these and other general principles, the crux lies in operationalizing, implementing and upholding them.

6.2 Improvements on specific safeguard themes

This section provides recommendations that were derived from the study of the cases presented above. Given the limited scope of the study, the aim is not to provide universal guidance on all themes, but rather concrete examples on how to improve specific shortcomings. At best, this may unlock the understanding that the government, project promoters, development financiers and legitimate stakeholders including citizens and civil society organisations can jointly improve the safeguard regime.

Participation and community support

The systematic impasse that occurs in consultations of high impact projects like those presented above has reached its limits. The time is ripe for the government of Brazil to promote a new approach that is perceived as more inclusive and legitimate. To name just a few building blocks:

Consultation needs to begin during planning, the development of options and related alternatives. The current environmental impact assessment model does not provide this necessary information at the appropriate level. Basin level assessments are required, and

relevant methodologies are available. They include strategic environmental assessments and cumulative impact assessments. All available relevant information must be made public in appropriate ways and language in order to reach all stakeholders in a timely manner.

Recent experience in Brazil suggests there is room for improvement in public participation and community support by means of carefully designed and implemented consultations that are extensive, sufficient, and independently verifiable both for specific projects and with regard to the development of safeguard policies.

Environmental licensing

These case studies highlight the need to reform and strengthen Brazil's environmental licensing process. Reform is currently underway. However, it is unilaterally focused on removing what are considered bottlenecks to swift licensing, and does not involve an inclusion of instruments and approaches that go beyond the single project focus, to include basin wide considerations and account prominently for indirect impacts of projects. Could IFIs realistically play a pro-sustainability role in this respect by means of financial support (such as development policy loans and technical assistance)? What would it take for Brazil's government to accept such an evolution? Interviewees suggest reforming the licensing process and reorienting it so as to prioritize indirect over direct impacts.

As shown above, the lack of requirements for strategic environmental assessments for projects with potentially high impacts is a paramount weakness in the Brazil country system. Strategic, indirect and cumulative assessments are urgently needed as new standard, even more so because environmental impact assessments are not the best instrument to do planning that goes beyond direct project impacts.

With regard to future projects, the recommendation is to define the area of analysis and impact appropriately (specifically taking into account indirect and basin wide impacts), carry out appropriate strategic environmental assessments and use their findings both for go/no-go decisions and at the implementation stage.

6.3 Strengthening institutional framework, implementation, enforcement and supervision of safeguards

Several institutions would benefit from capacity building with regard to safeguards and their effective implementation. Here below, we present key needs.

The role of courts

The present study suggests that the courts in Brazil do not perform well, measured in terms of their ability to uphold legislation, deter violations and right wrongs. Furthermore, the slowness of the judicial process is a huge real world obstacle to the effective defense of safeguard standards. As such, Brazil's safeguard regime is bereft of much needed effective and efficient checks and balances. Therefore, the enforcement mechanisms including the judiciary need strengthening.

Strengthening the public prosecutor function

Often, the public prosecutor functions as a last port of call by those threatened or impacted by adverse social and environmental impacts. While being of utmost importance, the capacity of public prosecutors is very limited. Consequently, the prosecutors function needs strengthening. An excellent starting point that is rooted in practical experience is the publication “28 Súmulas e demais conclusões adotadas,”⁹⁵ published by the Latin American Environmental Prosecutor’s Network.⁹⁶

Enable the Central Bank to effectively carry out its regulatory and supervisory mandate

The central bank recently increased efforts to improve its effectiveness. While this development is helpful, the central bank has not managed yet to systematically guarantee the full respect of the safeguards in place by the financial institutions it regulates and supervises. The mandate is clear, the gaps are known, and on this basis the necessary measures need to be taken.

Moreover, the institutions mentioned here are all pieces of the safeguard puzzle. Strengthening any of its elements and processes that bound them together will improve the performance of the entire safeguard regime as a whole.

6.4 Improving the BNDES safeguard framework

No economic sector in Brazil is fully developed without BNDES money. Whatever the direction of economic development in Brazil, BNDES will be its key driver. In this respect, the above cases and other recent ones⁹⁷ suggest that BNDES does not live up to its potential as development financier, investor and inducer of sustainability in Brazil and in other countries where the bank invests.

Expanding operations, expanding challenges

Considering the strengths and weaknesses of the current BNDES safeguard framework, BNDES could rethink and restructure its safeguard framework. What is the most appropriate definition and function of a safeguard nowadays? And what does it take for the safeguard framework to actually deliver as intended? BNDES is the uncontested leader in development finance in Brazil and increasingly beyond Brazil’s borders. While BNDES has been struggling for a long time to uphold its safeguard framework in domestic operations, its capacity to manage safeguard challenges has been completely outpaced by the growth of its portfolio.⁹⁸ Without even referring to the challenges that its investment arm BNDESPar or the Amazon

⁹⁵ Please visit <http://bit.ly/q6piT4>.

⁹⁶ See <http://mpambiental.org/?lang=en>.

⁹⁷ A recent case concerns the BNDES support for a road construction in Bolivia: <http://ef.amazonia.org.br/index.cfm?fuseaction=noticia&id=395363>.

Another well-documented case concerns cattle in the Amazon, where BNDES financed and continues to invest billions of reais in a sector that represents approximately 50% of Brazil’s GHG emissions. Reference: “Time to pay the bill”, available at: http://www.amazonia.org.br/english/guia/detalhes.cfm?id=313449&tipo=6&cat_id=85&subcat_id=413.

⁹⁸ See Annex 1.

Fund face, BNDES remains unprepared for the safeguard challenges that it has faced in the Rio Madeira and Belo Monte projects.

Transparency, accountability, and participation

From a governance perspective, and in keeping with its third general principle on “ethics and transparency as the pillars of relations with all stakeholders, ensuring dialogue and accounting for its decisions and efforts,” the safeguard framework of BNDES merits a number of improvements. Building on the above, these include:

- Enhanced transparency and accountability mechanisms;
- A project level grievance mechanism (for both domestic and extraterritorial projects) and an institution-level dispute settlement mechanism. Both need to be legitimate, accessible to all affected parties, predictable, equitable, rights-compatible, and transparent;⁹⁹
- Systematic pro-active association of stakeholders in the development and review of safeguards;
- Development of sustainability oriented investment plans by means of association of stakeholders.

Embracing the stakeholder challenge

Relations between BNDES and its civil society stakeholders are strained and would benefit from a new approach. In this sense, it would be most helpful if BNDES recognized civil society organizations as legitimate stakeholders, and started proactively reaching out to them to jointly and systematically develop relationships that overcome mutual distrust. In the realm of standard setting, public consultation and participation would likely improve the development of BNDES safeguards and overall investment plans. With respect to implementation, increased accountability and systematic, continuous and transparent public information and participation, actively promoted by BNDES, could unlock a tremendous potential for BNDES. This would improve its legitimacy and demonstrate the efficient use of public funds in pursuit of its mission to promote the sustainable and competitive development of the Brazilian economy.

6.5 Recommendations for the international development community

As international financial institutions and donors explore ways to support Brazil’s path towards sustainable development, we recommend supporting Brazil’s key actors in the development of an appropriate safeguard regime and to actively scout for alternatives to the high impact development path. This regime should be highly effective and efficient in guaranteeing social and environmental rights, while preventing and adequately managing adverse social and environmental impacts. Currently, Brazil’s safeguard regime is not an effective alternative to international standards.

⁹⁹ As the UN Secretary-General’s Special Representative for Business and Human Rights John Ruggie highlights: “An effective grievance mechanism is part of the corporate responsibility to respect”. SRSG, “Protect, Respect and Remedy: a Framework for Business and Human Rights”, U.N. DOC. A/HRC/8/5, 7 April 2008, para. 93, p. 24.

Both countries and financial institutions need innovative plans to promote environmentally sound and socially just investments. This would complement the traditional focus on risks and their management with relevant opportunities.

The basic message here is that reform of Brazil's safeguard regime will yield effectiveness gains that make such reforms worthwhile. What is no longer an option, on the other hand, is top-down rule-making combined with questionable implementation, lack of accountability and transparency, as portrayed in some development banks that have lost the trust and understanding of their stakeholders.

As certain observers suggest, in such a complicated financing environment, a recognized global standard in the realm of large scale, infrastructure financing would be a breakthrough. Such a standard would respond to the de facto reality of a limited number of international players in the market of large scale projects, both on the side of banks and on the side of construction companies (and their value chains). Such a standard would create a level playing field for all involved in this market.

6.6 Final considerations

From a regional and international point of view, it is worth remembering that Brazil outweighs its neighbors in various dimensions of power. In this setting, too, the current safeguard regime merits improvement so that the future of the influence of Brazil and its national development bank BNDES beyond national borders, especially in terms of overseas development in South America, lusophone Africa and others, can be environmentally and socially sound and sustainable.

Due to the difficulties faced in the cases of Rio Madeira and especially Belo Monte, the Presidential Chief of Staff is said to have asked the ministries of mining and energy and the ministry of the environment to collaborate in the planning realm. Apparently, the scope of this collaboration involves shared gathering and systematization of information, and the planned dams on Rio Tapajós might be a first cast to test the usefulness of this joint approach.

Annex 1: About BNDES

The Brazilian Development Bank (BNDES), a federal public company linked to the Ministry of Development, Industry and Foreign Trade,¹⁰⁰ is the main financing agent for development in Brazil of long-term financing. Since its foundation, in 1952, the BNDES has been financing projects in the areas of agriculture, industry, infrastructure, commerce and services. Its investment arm BNDESPAR was established in 1982 and is a wholly owned subsidiary of BNDES. BNDESPAR operations are based on the strategic guidelines in conjunction with the BNDES and directed to support the process of capitalization and domestic companies. Besides BNDES Bank and BNDESPAR, BNDES also administers the Brazilian Climate Fund (initial yearly budget R\$ 200 million) and the Amazon Fund (initial yearly budget around R\$ 1 billion), which are financial instruments of the Brazilian Climate Change Plan, designed to support research and pilot actions to reduce deforestation on mitigation and adaptation to combat global warming.

The Bank offers several financial support mechanisms to Brazilian companies of all sizes as well as public administration entities, enabling investments in all economic sectors. BNDES is statutorily responsible for facilitating achievement of development goals, and its strategies reflect the forces that shape national economic and political power. It operates through direct and indirect lending, export promotion, capital investment, refundable and non-refundable grants.

No economic sector in Brazil is fully developed without BNDES money. Whatever the direction of economic development in Brazil, BNDES will be its key driver. In the 21st century, the BNDES aligns its operations with the reality of a globalized world and intensifies its efforts to take on roles and duties that surpass the borders of Brazil, in compliance with the increase of the international insertion of the country. Today, the Bank has offices in London and in Montevideo.

Besides its role in financing major hydroelectric facilities, road building, communications, ports and oil drilling in fragile biomes of Brazil, its financial upscaling has enabled BNDES to multiply its influence to other nations, where the bank has assumed an increasingly important role in the expansion of national companies that seek to diversify the sources of its resources on the international market.¹⁰¹ BNDES accompanies and enables Brazil's international economic ascension. Just to name a few, in South American and Luso-African nations, BNDES is financing Brazilian construction companies, Petrobras and private agribusiness enterprises. The investment arm BNDESPar holds direct investments in the cattle industry,¹⁰² and stimulated capital restructuring in Brazil and acquisitions in the North (e.g., Swift-Armour, Pilgrim's Pride, Smithfield Beef and Five Rivers, all now controlled by JBS USA).

¹⁰⁰ See <http://www.mdic.gov.br>.

¹⁰¹ BNDES gera polêmica com papel central na economia brasileira, diz 'FT'. Available at: <http://economia.estadao.com.br/noticias/economia,bndes-gera-polemica-com-papel-central-na-economia-brasileira-diz-ft,75912,0.htm>.

¹⁰² See Smeraldi and May (2009): Time to pay the bill. <http://www.amazonia.org.br/arquivos/313449.pdf>.

BNDES operations in 2010 of \$96.3 billion represent triple that of global World Bank lending. The distribution of the BNDES 2010 overall budget of R\$ 134.9 billion among sectors shows that 38.7% were allocated to infrastructure, 35.8% to industry, 19% to commerce and services and 6.5% to agriculture. However, the analysis that needs most attention is that 72% of BNDES disbursements are targeted to large companies. The amount of loans made to large companies is an example, according to the newspaper Folha de São Paulo, only 12 large companies concentrate 57% of all resources of the bank. This select group of companies includes Camargo Correa, Odebrecht, JBS, Vale, Petrobras and Eletrobras.

BNDES central role in Brazil's economy and beyond, and the end use of its subsidized investments with public funds, have faced controversy in recent years. BNDES continues to act as the lender of last resort for controversial "mega" infrastructure project finance and to invest heavily in sectors which—directly or indirectly—create problems such as deforestation and dislocation of traditional societies. Such lending contradicts its creation of the Amazon Fund with international donations aimed to explicitly mitigate deforestation and support Brazil's commitments to the goals of the climate accords. And BNDES has not signed the Equator Principles, which guide financial sector commitments to incorporate social and environmental criteria into project finance, although it administers IFC financing whose criteria underpin these Principles.

Annex 2: Multilateral Development Banks and the Rio Madeira Dams

It appears that no multilateral development banks financed any of these dams directly. Hence, their safeguards do not apply directly. Interviewees for this research suggested that multilateral development banks may have faced concerns with the reputational risks of investing in Amazon infrastructure projects (based on past controversies) and with the likelihood that the projects would not have been able to meet the requirements of the banks' existing safeguard framework. Other institutional reasons may have also applied. However, there are elements that suggest a possible indirect involvement of some of these banks in the financing of the projects. In these arrangements, under current bank policies, the safeguards do not apply.

World Bank

World Bank clients include federal and state governments, rather than companies or special purpose vehicles such as construction consortiums. Thus, there has not been any direct financing of the Rio Madeira or Belo Monte dams.

In 2010, the World Bank made a US\$ 1.3bn loan to Brazil's treasury under a Sustainable Environmental Management Development Policy Loan (SEM DPL).¹⁰³ Treasury passed the money on to BNDES, without being earmarked for any specific project.¹⁰⁴ As BNDES informs,¹⁰⁵ the money "complemented its disbursements." It is unclear if BNDES has used part of that loan to finance Belo Monte. In addition to the financial part of the SEM DPL, the World Bank has provided technical assistance to BNDES and other arms of the Brazilian government. This raises questions about the role that World Bank safeguards have (or should have) on the Bank's technical assistance activity, especially in the context of energy or infrastructure loans. This question could become part of future research.

Also, in 2004 the World Bank provided US\$ 12 million to Brazil's Mines and Energy Ministry (MME) as Energy Sector Technical Assistance Loan ESTAL. The objective of ESTAL was to provide sustainable implementation of the Government's ongoing energy sector reform program, through technical assistance in market development and regulation, electricity access and affordability for the poor, environmental management, long-term expansion planning, and institutional strengthening and coordination. At the time there was controversy surrounding the loan and its absence of transparency. Apparently, the project helped defining the localization of the Rio Madeira dams, included orientation about licensing of dams and environmental best practices. According to Bank Information Center and International Rivers, two thirds of the project volume is still undisbursed. A new loan from the World Bank to MME is now being developed, and it appears necessary that lessons from the past be included in its definition.

¹⁰³ A very helpful report on development policy loans, written by Vince McElhinny of Bank Information Center, is available at: <http://www.bicusa.org/en/Document.102815.aspx>.

¹⁰⁴ See "nenhum investimento ou destino específico" (IBRD letter to NGOs, dated 12 March 2009).

¹⁰⁵ BNDES Ofício No. 228/2011 – reply to Ofício No. 0021/2011/CaDIM/MPF of the Public Prosecutors, dated 14 February 2011.

IFC

Being the private sector arm of the World Bank Group, IFC would have been eligible to finance the Rio Madeira dams, but—according to IFC information—was not asked for financial support.

Inter-American Development Bank (IDB)

According to one source, IDB was approached to finance the Rio Madeira dams. Apparently, their country representative participated in a visit to Rondonia state. In the end, IDB did not finance any of the dams directly. However, IDB backed issuance of debentures for infrastructure development by the construction company Odebrecht. While Odebrecht has a key stake in the construction consortium of Santo Antonio, we have no information as to if and to what extent the capital corresponding to these debentures has been employed in Santo Antonio.

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