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**Consultation and public participation in environmental
licensing of development projects in Brazil**

Nelson N., PEDROSO-JUNIOR* ; Flávia S., SCABIN; & Julia, CRUZ

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Review and Discussion Paper
Effective Participation of Civil Society and Vulnerable Groups

Abstract

Recently, the Inter American Commission of Human Rights of the Organization of American States granted Precautionary Measures on behalf of affected indigenous groups against Belo Monte, the world's third largest hydropower plant under construction in the Brazilian Amazon, due to lack of effective participation. Likewise, there are many examples of infrastructure projects being implemented in Brazil without effective mechanisms of consultation and public participation capable of ensuring the rights of local communities. In Brazil, environmental licensing covers a range of tools that seeks to prevent, mitigate and compensate the impacts caused by development projects. The guarantee of transparency and participation, including the obligation of public hearings with local communities, is required to ensure the legitimacy of the process.

Based on interviews with stakeholders, the present study points out the perception that public hearings have not been an efficient instrument for the purposes granted by law, due to its delayed performance and its inability to incorporate social demands.

In relation to indigenous peoples, the UN Declaration on Rights of Indigenous Peoples reinforces the relevance of prior consultation with indigenous populations, especially regarding large-scale projects and obligates States to obtain their free and informed consent. The ILO Convention 169 extends this obligation to traditional populations. Although the Convention 169 has been ratified by Brazil and internalized by domestic law, its regulation is still being outlined.

In conclusion, efficient consultation and public participation during the licensing process must be extended to impacted local communities as a whole, as well as redesigned to provide effective answers to the demands and expectations that emerge in these contexts.

* Center for Applied Legal Research - Fundação Getúlio Vargas; Tel: +5511 3799-2107; e-mail: ; Address: Rua Rocha, 220 - Conj. 11 - 01330-000 - São Paulo - SP

1. Introduction

In April 2011, the Inter-American Commission on Human Rights of the Organization of American States issued a Precautionary Measure (Precautionary Measure 382/2010) against Belo Monte Hydroelectric Power Plant, the third largest hydroelectric plant in the world regarding generating capacity. The Measure was issued on behalf of the indigenous communities settled in Volta Grande do Xingú as a consequence of the lack of public consultation and participation in the licensing of the project. It required the Brazilian government to discontinue the environmental licensing process and halt construction until the realization of a consultation process with the indigenous communities, ensuring appropriate previous access to the Environmental Impact Assessment (EIA) in their language.

The Brazilian government did not comply with the recommendation and adopted strong arguments against the Inter-American Human Rights System. In July of the same year, the Commission modified the recommendation, including more specific issues (for instance, completion of the demarcation processes and fulfillment of other recommendations made by Brazil's National Indian Foundation - FUNAI), but removing the requirements regarding the suspension of the licensing process as well as the interruption of construction. Moreover, the Commission decided that the debate on prior consultation and informed consent is a matter of merit, which must be analyzed at the appropriate procedural time, since it is not within the scope of analysis of the Precautionary Measure.

Likewise, there are many other examples of infrastructure projects being implemented in the country, which show the poor efficiency of mechanisms of consultation and public participation as instruments to ensure the rights of local communities in the licensing process.

In Brazil, the environmental license is an administrative procedure required for the implementation, expansion, and operation of projects that potentially cause environmental degradation. It aims to prevent environmental damage, which means not only choosing the intervention that would assure less adverse impact, but also adopting mitigating and compensation measures. In order to achieve this aim, a close working relation is crucial between environmental protection agencies and entrepreneurs, as well as with other public bodies, financial entities and civil society. This is essential to reach a diagnosis able to measure correctly the project impacts. Furthermore, in conjunction with the three-phase licensing system adopted in the country (divided into preliminary license, installation license, and operational license), this dialogue allows for the monitoring of expected impacts and the follow up on mitigation and compensation measures. In terms of procedure, transparency and participation are basic conditions of the project legitimacy

Therefore, it is necessary to guarantee that the participation mechanisms established by law are functioning, and that environmental licensing can incorporate effective forms of public participation. Based on this premise, the aim of this paper is to explore the ways in which participation has been taking place in large infrastructure projects in Brazil, identify the challenges, and define alternatives to overcome them.

To deal with these issues, the first part of the text is dedicated to mapping the norms related to public consultation and participation within the environmental licensing procedure of large infrastructure projects in Brazil. The study looks into federal and state norms, as the licenses processes of these projects may happen within the municipal, state or federal scope. To understand how public consultation and participation have been applied and how the process is perceived by distinct stakeholders, interviews[†] and surveys[‡] were carried out with representatives of public, business and civil society sectors.

2. The Mechanisms of Public Consultation and Participation for Environmental Licensing

The environmental licensing procedure for large infrastructure projects in Brazil require the preparation of an Environmental Impact Assessment, which may be submitted to public consultation and participation, in accordance with several regulations, the main ones being the CONAMA (National Council for the Environment) Resolutions 01/86 and 237/97.

The mechanisms of public consultation and participation include information requests, consultations and public hearings. These mechanisms are facilitated by the transparency of the process, in accordance with the compulsory disclosure of environmental impact studies, as per CONAMA Resolution 01/86, and through the guarantee to accessibility, in accordance with Complementary Law 140/2011, which established that "the request for licensing, its renewal and concessions be published in the official journal, as well as in regional or local periodicals of general circulation, or by electronic means of communication maintained by the competent environmental body".

According to CONAMA Resolution 01/86, the agency responsible for environmental licensing has to determine the deadline to receive comments by public agencies and other interested parties in relation to the project and impact studies presented. After reception of comments, the need to submit the EIR to a public hearing is left to the discretion of the environmental agency. Comments may include requests for clarifications to the entrepreneur, by citizens or by the licensing agency. In the latter case, requests may be reiterated when responses are not considered satisfactory.

The public hearings, as established by CONAMA resolution 01/86, aim to give visibility to information about the project and its environmental impacts and to allow for the discussion of the EIR, including mitigation and compensation measures. Its functioning was regulated by CONAMA Resolution 09/87, which has reinforced the dialogue component, by establishing that besides exposing the project content and its impacts to the affected people, its goal is also to "dispel doubts and hear criticism and suggestions". The regulation provides "civil authorities, the Public Prosecutor's Office, or fifty or more

[†] 40 semi-structured interviews were carried out between September 2013 and April 2014.

[‡] 199 questionnaires were answered via an online survey made available to representatives of government agencies, universities, businesses and Report s, NGOs, law firms and environmental consulting firms.

citizens with the possibility to require its realization. The minutes of the public hearing have to be attached to the records of the licensing process, to serve as a basis along with the EIR, for analysis and final opinion of the licensor as to the approval or disapproval of the project.

Besides the requests for clarification and the public hearings, the mechanisms of participation also include consultations, which occur mainly during the social and environmental studies at the discretion of the licensing agency and of the technical team responsible for the EIA preparation. They also include communication strategies, such as the multi-stakeholder monitoring commissions established in the social programs of the Basic Environmental Plans that consist of documents through which environmental agencies communicate compensation and mitigation measures set in the licenses granted by the licensing authority, based on the studies presented by the entrepreneur.

The environmental licensing can be held at the federal or state level, depending on the subject, scope and impact of the project. Thus, authority to legislate on the subject has been transferred to the states in matters of concern to them, as long as the parameters of federal legislation are observed. With regard to the mechanisms of public consultation and participation, some Brazilian states only replicate the content of federal rules, such as the state of Santa Catarina (CONSEMA 001/2006). Other states enclose their own mechanisms, which go beyond what is required by federal law. Regarding public hearings, 83% of states follow their own criteria, distinct from the federal norms (CNI, 2013).

In the instruments established by state law, it is possible to notice a normative effort to prevent the concentration of participation only at the moment of the public hearing, as well as to improve it qualitatively. One example consists of preliminary "public meetings", which happen before public hearings foreseen in the licensing process, as in the licensing process of Fundão and Santa Clara hydroelectric complex by the Environmental Agency of Paraná (IAP) in the Jordão River, State of Paraná.

In Pará, participation is established since the initial stages of planning, including the process of decision making. According to State Law 5887, "community participation in decisions related to the environment will be ensured, among other ways, by (...) the consultation of the people concerned, through public hearing and, when required, plebiscite (...) both held before the preliminary license issuance". Similarly, the norm ensures public meetings regarding the Terms of Reference (TOR), the document that guides the environmental impact studies to be undertaken by the entrepreneur.

In São Paulo, civil society can also manifest their standpoint at the time of preparation of TOR, by providing subsidies to the work plan that will guide the preparation of the environmental impact study by the entrepreneur and his multidisciplinary team. In Rio Grande do Sul, the State Environmental Code does not provide for direct participation, but sets the instrument to summon NGOs and the Federal Prosecutor's Office, when the EIA submission is required, so as to ensure at least their knowledge.

In Espírito Santo and Bahia, there is possibility of participation during the development of the TOR as well. At this stage, the environmental agency of Espírito Santo may request public and technical consultations, which aim to obtain the opinion of representative sectors of society and technical agencies (public or private). In Bahia, there are also public consultations and preliminary hearings to discuss the purpose of the project, presenting its main features and possible geographical locations.

With regard to public hearings, in the above two states the environmental agency may convene preparatory meetings (called "oficinas" or workshops in Bahia), in order to enhance the quality of participation at the hearing. In Espírito Santo, the law also establishes that representatives of the entrepreneur should compulsorily attend the hearing, as well as the coordinator of the technical team of the environmental licensing agency. Finally, in addition to the federal requirement to register the public hearing in the form of formal minutes ("ata"), the norm adopted in Espírito Santo state is that the environmental agency must express its standpoint on the project, by issuing technical and legal reports.

Subsequently, during the implementation of mitigation and compensation measures, the state law of Bahia expressly states that communication procedures must be adopted to ensure that there is always effective participation of local communities and institutional partners. When there is need for population resettlement, the decision making process - regarding, for example, the area chosen or the assistance programs- should take in conjunction with the affected families.

During all stages, similar to what is carried out by IBAMA (Brazil's Federal Environmental Agency), certain states allow participation through an environmental ombudsman's office ("ouvidorias ambientais"), which receives complaints, arraignments and suggestions about the actions of the environmental agency. The Environmental Ombudsman Agency of the state of Pará is an example of this mechanism.

Finally, it is worth highlighting the procedure established in Minas Gerais by Decree 44.667 / 2007. According to this rule, the concession of an environmental license is decided by the Joint Regional Councils ("Unidades Regionais Colegiadas") composed of equal numbers of State and civil society representatives. Thus the approval of the license is subjected to a participatory body, a procedure that stands out significantly compared to the other state mechanisms, which are often discretionary or have a merely consultative / informative purpose.

3. Mechanisms for Public Consultation and Participation Resulting from International Norms

There are mechanisms for consultation and public participation external to the environmental licensing that may, when applicable, be incorporated into the licensing process of large projects with significant impact. Currently, international and national legal

instruments directed mainly to the protection of indigenous people establish these mechanisms. Some of them are extensible to non-indigenous traditional communities.

These legal instruments relate to preliminary consultation with indigenous peoples, regarding the installation and operation of large infrastructure projects. The consultation process differs from public hearings. While hearings are held to inform the general population about the environmental licensing process and the EIR, in order to solve doubts and embrace the demands of the attendants, public consultations are held specifically with indigenous peoples before the studies are carried out, more specifically during the decision making process for the implementation of activities that may affect them.

Whereas public hearings stand for mechanisms of participation established by CONAMA Resolution 9/87, the preliminary consultations were determined by Convention 169 of the International Labor Organization (ILO), approved by the National Congress through the Legislative Decree 143 of June 20, 2002, and promulgated by the President of the Republic by means of Decree 5051 of April, 2004. Convention 169 establishes State obligations in relation to the participation of indigenous peoples, as well as traditional communities, that should be embodied in the implementation of infrastructure projects. However, although it has been ratified by Brazil and internalized by national laws, the internal regulation of ILO 169 is still pending.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) re-affirmed the principles established in ILO 169. Moreover, the principle of consultation with indigenous peoples was already included in the 1988 Brazilian Federal Constitution (article 231, section 3). It establishes the obligation of Congress to consult indigenous peoples about decisions that may affect them, such as the use of the hydroelectric potential on indigenous land. ILO Convention 169 and UNDRIP reinforce this constitutional obligation.

Certainly, effective consultation and public participation during the environmental licensing procedure should be extended to local communities as a whole. It should also be redesigned to provide effective responses to the demands and expectations that emerge from these contexts. It is important to stress that, unlike the public hearing, the consultation should be prior to any decision that affects indigenous peoples, since it is senseless to perform it after the decision has been taken. In the case of the licensing of dams in the Brazilian Amazon, it has been a common government strategy to confuse the process of public hearing with that of preliminary consultation, so that participation mechanisms are used only after the political decision are made (Justiça Global et al. 2014). In Belo Monte, the lack of consultation during the decision making process was questioned in national and international levels for violating both the content of the Brazilian Constitution and international instruments such as ILO Convention 169. However, the government maintained the refusal to recognize preliminary consultation with local communities as a necessary requirement of the decision-making process, and participation mechanisms were used only to present a project already approved politically.

4. Challenges to the Effectiveness of the Application of Public Consultation and Participation

Legislation determining instruments for consultation and participation has been recognized as positive by relevant stakeholders. However, its effectiveness has been perceived as low by the different participants involved in the environmental licensing of large infrastructure projects. There are several factors related to such inefficiency.

Firstly, the dissemination of information about the project is insufficient. This is related, on one hand, to incompleteness of data and low quality of the impact assessments; and on the other hand, to the technical language used in the documents presented to the population, which is often not clear to all citizens, especially the ones from vulnerable social groups. As pointed out by the World Bank (2008), the communication strategies used in the presentations generate unnecessary conflicts, instead of building convergences.

A report produced by the Brazilian Association of State Entities of Environment (ABEMA 2013) highlights another factor that confirms the low effectiveness of the hearings. According to the report, the hearings constitute an isolated moment in the licensing process, what prevents a positive interaction among entrepreneurs, licensing agency and affected communities. A day or a few hours of presentation and discussion (in which the entrepreneur has an hour to present the project and registered representatives of the community have three to five minutes to present their ideas and demands) cannot be considered an appropriate public consultation process. As a result, the impacted community feels their views are not considered, boosting the judicialization of issues that could be solved by the licensing procedure (ABEMA 2013).

According to a study conducted by the Institute for Applied Economic Research (IPEA 2013), the participation of society in public hearings has been perceived as low (70% of the licensing bodies, 78% of public entrepreneurs and 67% of private entrepreneurs interviewed share this viewpoint). This is associated with the perception that the contribution from participatory mechanisms is limited (for 60% of the licensing bodies, 72% of public entrepreneurs 72% and 70% of private entrepreneurs (IPEA 2013).

One of the factors which could explain these perceptions is related to the moment the public hearings are held, since they occur when the main decisions about the project have already been taken. In fact, the World Bank (2008) report on environmental licensing of hydroelectric dams in Brazil revealed that public hearings have been held, in average, more than two years (852 days) after the beginning of the licensing process, when it is no longer possible to incorporate major changes to the project.

Another factor that could explain the perception of low effectiveness is the lack of infrastructure and technical capacity of environmental agencies. Many of these institutions, especially municipal agencies, are unable to ensure the accessibility to project information or to provide appropriate consultation methods.

Other aspects that could explain the low participation in hearings (as well as the difficulties of those who participate in the elaboration of demands) are: political apathy of citizens; lack of preparation of civil society and the population to deal with highly complex environmental issues; and difficulty to produce evidence and to predict impacts.

From the perspective of the entrepreneur, the lack of clarity between public and private responsibilities persists in the development of large projects— either due to the fact that some mitigation measures imposed on the entrepreneur depend on public policies, or because the State is often a partner or sponsor of these projects. This situation leads the local population to perceive the public hearing as a place to solve all their problems. According to Werner (2012), the fact that entrepreneurs implement measures similar to those attributed to government transforms mitigation and compensation measures in objects of bargain. It also turns the hearing into a place to present the projects as necessary to overcome poor public services.

The monitoring of project implementation could also include the participation of society. However, the way the requirements and compensation measures are written diminishes the possibility for society to react or to follow up their implementation. Many of the requirements are presented in broad terms, without indicators that could measure its success or failure.

5. Suggestions for the Improvement of Mechanisms of Public Consultation and Participation in Environmental Licensing

The realization of interviews and the survey enabled the researches to analyze stakeholder's perception on the challenges to the effectiveness of public consultation and participation within the licensing procedure. Interviewees were encouraged to propose strategies for the improvement of participation mechanisms provided by the licensing procedure. The propositions they made were related to three broader aspects, the first concerning the moments of participation, the second covering training and commitment of society to qualitatively participate in the licensing procedure, and the third dealing with the capacity to incorporate criticism and suggestions from civil society to the licensing procedure.

The suggestions that aim to rethink and improve consultation and social participation propose mainly that there should be meetings and even public hearings before the preparation of the EIA, as well as during the decision making process, the planning of the project and the preparation of the term of reference for the environmental studies. Another aspect mentioned by interviewees is the access to information about the licensing procedures. They consider the possibility of centralizing such information into a federal system, which would depend on the integration and collaboration of the environmental agencies of the three federal entities.

In relation to training and commitment of society to participate in the licensing procedure, public hearings would be improved if participants were previously trained through workshops and seminars. Such measure would not only prepare them for the hearings, but also enhance qualitative participation throughout the licensing process, including monitoring.

Finally, part of the interviewees focused on the incorporation of considerations made by the community into the licensing procedure. Some defend the binding nature of considerations presented to environmental agencies and entrepreneurs during public hearings. Generally, criticisms and suggestions are not incorporated into the licensing processes, and are often disregarded by the requirements established for granting of environmental licenses. Rocha (2012), for example, concluded that public hearings do not ensure that the environmental licensing consider social demands for the reduction of pollution and environmental degradation levels. However, he believes that the environmental agency sometimes is able to establish a set of requirements aimed at mitigating environmental impacts and protecting the population from chronic pollution and accidents involving dangerous substances.

Other reports written by public agencies and the private sector have also presented proposals for the improvement of environmental licensing, including mechanisms for public consultation and participation. The National Confederation of Industry (CNI 2013) recommended the improvement and standardization of norms that guide the public hearings in the communities directly affected by a project. According to the World Bank (2008), Resolution CONAMA 09/87 does not establish sufficient standards for public hearings, leading to the necessity of a reassessment of the rule. It is necessary to establish clear parameters regarding all participants involved – a measure that would undoubtedly contribute to the optimization of environmental licensing in Brazil.

On the other hand, ABEMA (2013) recommended changing the standards of public hearings and the strategy for consulting the community through i) development of an open-access electronic system of environmental information, which would enable social monitoring of all stages of the environmental licensing; ii) establishment of regulation determining the realization of public workshops to present the project, the studies and the measures to compensate, mitigate or avoid the impacts of the project; and iii) regulation of the procedure of public hearings, in order to ensure that they focus on the discussion of specific projects. ABEMA also highlights the necessity of criteria to choose the most skilled and legitimate representatives of the community to monitor all phases of the licensing procedure. The purpose is to institutionalize participatory mechanisms that provide the community with the possibility of effectively monitoring all licensing stages, as well as the enforcement of mitigation and compensation measures (ABEMA 2013).

The Special Committee of the Council for the Defense of Human Rights (within the Presidency Special Secretariat for Human Rights) has also published a report with recommendations for the improvement of public participation in the licensing process. According to the report (CDDPH 2010), the National Council for the Environment should establish procedural rules determining all licensing agencies to adopt mechanisms of democratic participation in all stages of the process licensing, including the preparation of terms of reference and the issuance of installation and operation licenses. It was also recommended that the licensing authority be required to respond to all oral or written interpellations it receives, preferably during the public hearing, or within 15 days. Finally, the

report recommended a minimum period of 15 days between the referral and the issuance of the license, in order to ensure the social participants enough time to act.

6. The Role of Public Consultation and Participation in Judicialization of Environmental Licensing

The environmental licensing challenges named above have originated many judicial claims. They were based on the constitutional guarantee that any injury or threat to a right shall not be excluded from the analysis of judicial authorities.

The principle establishing that right violations cannot be excluded from jurisdictional control is considered by many as an autonomous constitutional right. However, it is also perceived as an obstacle for the efficiency of the environmental licensing. This is the conclusion of the World Bank (2008), which associated litigiousness to a lengthy process.

Regardless of the motivation of each action, judicialization highlights general limitations of the licensing procedure to control environmental impacts. These limitations include flaws on the requirements established by the environmental agency and lack of effective public participation of local communities.

These limitations on the licensing procedure are even greater for large infrastructure projects which directly affect local communities (including indigenous and traditional populations) (Fearnside 1989, 2001; Teixeira et al. 2012). Compliance with obligations related to social impacts is a main challenge for various reasons, including lack of technical capacity of licensing agencies to deal with the human dimension of the procedure and absence of diagnosis able to ensure the protection of the rights of affected populations.

As a result, the discussions involving infrastructure projects and their relation with local development have been taken to the Judiciary, leading it to assess social impacts and mitigation and compensation measures established within the environmental licensing procedure. The Prosecutor's Office has played an active role in these judicial claims, especially the ones that seek to guarantee the rights of local communities. In these cases, the low effectiveness of the mechanisms of participation during the licensing process has been a recurrent motivation for bringing civil lawsuits.

The reform project of Carajás Railroad, located in Maranhão, exemplifies this process. The Human Rights Society of Maranhão, the Indigenous Missionary Council and the Center of Black Culture brought a public-interest civil action questioning several aspects of the licensing procedure. The first-instance judge granted an injunction ordering the suspension of the project until certain measures were taken, including consultations with traditional communities and public hearings in the affected areas (Justiça Global et al. 2014). Nevertheless, this sentence has been reversed by higher courts.

Similar processes are found in the port sector. During the licensing of the Ports of Pecém, Sul Bahia and Maravilha, judicial claims directly questioned the lack of public hearings in

locations affected by the project (actions number 0022638-35.1999.4.05.8100; 3696-50.2012.4.01.3301, and 052698-24.2013.8.19.0001).

Even in cases in which participation mechanisms were used, a constant problem has been the modification of the EIA or of the project after the public hearings, without due participation of the affected population. The Prosecutor's Office is sometimes able to reverse this situation through judicial actions. For example, in the Bujuru Project case (which relates to mining activities in Rio Grande do Sul), the Prosecutor's Office obtained a judicial decision that determined the realization of new public hearings. (Ministério Público Federal 2004).

Given the magnitude of the areas of influence of the projects and the potential social and environmental impacts, the construction of hydroelectric power plants is a significant example of the use of judicial courts to question the lack of participation in the licensing procedures.

In the dams built in the Amazon, which include Santo Antonio, Jirau and Belo Monte, even when participation mechanisms are used, they are implemented at a time when political decisions about the project have already been taken, leading local communities to discredit the results. As a result, the affected populations bring judicial actions seeking to ensure that their rights are not violated. In face of these cases, a frequent strategy of the Government has been to confuse the consultation processes with public hearings, neglecting the need for free, prior and informed consultation with indigenous and traditional peoples. In the case of the hydroelectric power plant Tapajós, located in Pará, such a situation led the Prosecutor's Office to bring public-interest civil actions questioning the planning and licensing of the Plant (Articulação dos Povos Indígenas do Brasil et al. 2014).

The lack of consultation with affected indigenous peoples was also questioned in court in the case of the Teles Pires Hydroelectric Plant, located in Mato Grosso. The Judiciary had recognized several economic, social and cultural impacts that the plant would have on indigenous peoples, as well as the obligation the entrepreneur's obligation to hold consultation. However, after intense legal dispute, higher courts decided that construction should continue (Justiça Global et al. 2014).

In Paraná, the Hydroelectric Plant in Maua is also an example of lack of participation. The Federal Prosecutor's Office, along with other civil society organizations, filed several public-interest civil actions questioning violations of the principles of transparency and participation. These actions exposed many irregularities in the public hearings, as well as lack of consultation in accordance with ILO Convention 169 (Rodrigues 2012). Nevertheless, construction continued and the plant has been operating since 2012.

In a recent study on the judicialization of hydroelectric plants in the Amazon (Scabin; Pedroso-Junior and Cruz, in press), the authors identified a total of forty public-interest civil actions filed during the licensing procedure of the hydroelectric plants Jirau, Santo Antônio and Belo Monte. All of them are directly or indirectly related to the environmental licensing procedure of the plants. Social demands were the most frequent causes of action, (twenty-six of the forty actions), while eleven actions dealt exclusively with environmental impacts and

nine were related mainly to procedural rules. The most common social demand relates to flaws in public hearings and consultations, which occur mainly during the preparation stage for obtaining the preliminary license (before the Term of Reference, during the social and environmental studies and after the completion of the EIA). It is worth mentioning that the three dams affect indigenous populations – a factor that was crucial for sixteen of the forty public interest civil actions, twelve related to Belo Monte and six to the Madeira River Dams.

In this study, the authors registered distinct patterns of judicial decisions about the three plants. In lawsuits relating to Belo Monte, first instance courts have decided in favor of the petitioners when they demonstrate violation of the rights of local communities or noncompliance to licensing procedural rules. However, these decisions are repealed in the court of appeals. In higher courts, the Judiciary abstains from intervening, arguing that the first instance decision presents "serious injury to public order, health and the economy". Regarding the actions of Santo Antônio and Jirau, the Judiciary has dismissed claims related to the environmental licensing procedure of both plants, with the exception of two actions challenging the violation of rights to adequate housing and human dignity of the local communities.

Even cases which argued the violation or threat of violation of rights of local communities were not analyzed in the merits by the Judiciary. This is due to lack of evidence combined with a presumption of legality of administrative acts. Additionally, judges argue they should not intervene in government policy issues, either because of the Executive's discretion over energy policy matters or because the environmental agency is in a better position to decide over technical issues. Thus, it is possible to observe a movement of self-restraint of the Judiciary.

Therefore, if in the licensing procedure the administrative mechanisms are insufficient to solve conflicts, the Judiciary does not present itself as an adequate mechanism to settle disputes either. "Stay of Preliminary Order" actions prevent decisions from having any effect until the final judgment of the claim - which in most cases does not occur before the construction of the plant. Thus, although the Prosecutor's Office and civil society continually file public interest civil actions, and although the Judiciary utters different decisions about the claims, the Stay of Preliminary Order renders these judicial actions ineffective.

Considering the results of these actions, it is possible to conclude that the Judiciary greatly defers to decisions taken by the Executive - suggesting the need for a rights based approach during the preliminary stages of decision making, project design and its licensing.

7. Conclusion

The national legislation regarding environmental licensing of large infrastructure projects includes participation mechanisms related to the transparency of the processes,

consultations and public hearings. Some states have introduced their own mechanisms that go beyond the ones required by federal law.

On the one hand, the initiative of the states allows some experimentalism, which can be positive for the improvement of environmental licensing. On the other hand, stake holders discuss the relevance of standardization of these rules in national norms, which would promote the applicability of mechanisms of public consultation and participation to all states. It would also enable integration among federal entities in order to create an integrated system of licensing data, which could be available to civil society, public authorities, and private sector.

Besides the mechanisms for consultation and public participation provided by licensing norms, there are others instruments that should or may, when applicable, be incorporated into the licensing procedure of large infrastructure projects. Currently, these mechanisms are provided by international and national legal instruments and are primarily directed to the prior consultation of indigenous peoples – a process which is distinct from public hearings.

Although the right to prior consultation with indigenous peoples is ensured by the Federal Constitution, UNDRIP and ILO 169, only the latter is extendible to traditional non-indigenous populations. The possibility of extending prior consultation and public participation during decision making and project planning to local communities as a whole stands out as a way to reduce judicialization and mitigate risks, functioning as a kind of social license. In order to make this possible, the mechanisms of public consultation and participation must be redesigned to provide effective responses to demands and expectations that emerge from local communities as a whole.

Despite the perception that legal instruments for consultation and participation during license are positive, its effectiveness has been perceived as low by the stakeholders involved in environmental licensing of large infrastructure projects. There are several factors connected to this inefficiency, as the insufficient dissemination of project information, which ranges from the incompleteness and poor quality of the studies and impact assessments to the way this information is presented; the isolation of the hearings in the licensing process; the lack of participation of society in the hearings and the low incorporation of concerns raised in the hearings to the studies; the lack of clarity between public and private responsibilities; and the lack of social control over project implementation and compliance of the licensing requirements.

Some proposals have emerged in order to improve the participation mechanisms within the licensing procedure. In this study, it was possible to identify three propositional fronts. One concerns the increase of the moments of participation, which should include decision making, project planning, and preparation of the term of reference. The second covers training and commitment of society to participate in the licensing procedure in a more qualified way, including the realization of workshops and seminars prior to the public hearings. The third is related to the improvement of instruments within the licensing procedure to ensure the

incorporation of criticism and suggestions made during the public hearings into the licensing process.

Examples from other countries can help to clarify this analysis, since many countries have already adopted measures to improve public consultation and participation. In a comparative study of eight European countries, Barker and Wood (1999) concluded that public consultation and participation influence the changes made in both previous stages and those subsequent to submission of the EIA. Portugal, for example, has increased the number of public hearings before decision making. In Canada, the monitoring of environmental impacts is performed by a chamber composed by different stakeholders, which ensures legitimacy and, at the same time, satisfaction with the decisions taken.

In the Brazilian case, a way to improve the process of consultation and participation in relation to large infrastructure projects would be extending the time of consultation (instead of restricting it to the period of elaboration of the EIA), as well as establishing capacity building mechanisms in preparation to public hearings. Furthermore, normative standards should be redesigned to improve participation and promote the incorporation of social demands into the licensing process. This would increase the effectiveness of the procedure to identify and mitigate impacts and, therefore, reduce judicialization.

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