Improving the effectiveness of impact assessment pertaining to Indigenous peoples in the Brazilian environmental licensing procedure

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ABSTRACT

The number of environmental licence applications for projects affecting Indigenous peoples in Brazil has increased since the implementation of a major infrastructure program (*Programa de Aceleração do Crescimento*) in 2007. This increase has caused problems for Brazilian agencies involved in environmental licensing procedures (IBAMA, FUNAI and others). We analyze the Brazilian environmental licensing procedure for situations involving Indigenous peoples, Maroons (*Quilombolas*) or other traditional communities in order to identify potential improvements for Brazil and potentially other countries. Although Brazilian procedures are consistent with international best practice in environmental licensing, in practice social impacts are inadequately addressed, mitigation measures are poorly implemented, and there is a lack of enforcement and compliance. The paper is based on document analysis and interviews with key actors in governmental and non-governmental organizations and Indigenous leaders. We suggest that Free, Prior and Informed Consent (FPIC) processes need to be conducted at the earliest stages of project planning, and that Indigenous peoples should actively participate in impact assessment, monitoring and evaluation processes. In order to achieve a social licence to operate, there needs to be full recognition of traditional knowledge and acceptance of Indigenous values and concepts. We also recommend increased involvement of social experts and mediators as well as improved accountability, enforcement and grievance mechanisms in the licensing process.

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1. Introduction

With the rapid development Brazil has experienced as a result of the introduction of a major infrastructure program (*Programa de Aceleração do Crescimento*, PAC) in 2007, and a positive prognosis for the future, the number of environmental licence applications submitted to the relevant institutions has increased considerably. However, the increased workload borne by the environmental licensing agencies has not been matched by an adequate increase in human resources (Borges, 2013). The country has a complicated licensing procedure that requires the involvement of several different institutions. In addition, the quality of the assessment procedure has been further compromised by a recent regulation requiring the speeding-up of agency response (Brasil, 2011a).

Due to the severity of electricity blackouts and a range of other critical infrastructure issues Brazil has faced since 2001, the federal government has stimulated investments in the extractives and energy sectors and other major infrastructure projects as part of PAC. However, the rush to implement such projects has been at odds with appropriate licensing arrangements, especially when Indigenous peoples are affected

(Santilli, 2013). Proponents, various lobby groups and some governmental agencies tend to perceive the licensing procedure as mere formality and consider Indigenous peoples to be obstacles to economic development since they are perceived as delaying the implementation of projects (Goldemberg and Lucon, 2007; Verdum, 2012). Sanson (2013) and IWGIA (2013) argue that such a perception has led to a lack of commitment to proper process and ultimately to breaches of Indigenous rights. As a result, Brazil has been the subject of complaints from international institutions, non-governmental organizations (NGOs) and the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya (Anaya, 2010; ILO, 2012; IWGIA, 2013).

Brazil is a signatory to the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and, more importantly, has ratified the International Labour Organization Convention 169 (ILO C169) and is thus obligated to apply 'Free, Prior and Informed Consent' (FPIC) procedures (Hanna and Vanclay, 2013). These international agreements confer on Indigenous peoples the right to be consulted in any legislative or administrative procedure that may affect them directly, including environmental licensing procedures. In practice, adequate participatory processes consistent with international understandings of FPIC (Hill et al., 2010; Vanclay and Esteves, 2011) are rarely implemented in Brazil (ILO, 2012). Impact assessment, mitigation and enhancement (João et al., 2011) play only a secondary role in the licensing process with proponents (including state bodies and public–private

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partnerships) focusing primarily on obtaining project approval and ensuring rapid implementation (Bronz, 2011; Santilli, 2013).

This paper examines the Brazilian environmental licensing procedure and the concerns and complaints of Indigenous peoples affected by project implementation. Also discussed is how environmental impact assessment (EIA), social impact assessment (SIA), mitigation, compensation and other negotiations involved in managing projects are undertaken. Recommendations are provided for Brazil, and these may also be applicable to other countries with a similar context. Our research, which was undertaken in 2012 and 2013, comprised: (1) a thorough document analysis of relevant documents, including legislation, regulatory procedures, court cases, agency procedures and manuals, international and national governmental and non-governmental organization reports and other documents, a review of agency, corporate and NGO websites, together with an extensive monitoring of the conventional media and social media; (2) participation in various workshops in Brazil and elsewhere that were related to impact assessment and/or Indigenous peoples; (3) eight key informant interviews and many informal discussions with stakeholders from various backgrounds, including representatives of governmental agencies (e.g. the Federal Office of Public Prosecution), NGOs, Indigenous organizations, the private industrial sector, and impact assessment practitioners. The lead author is Brazilian and has previously worked as an anthropologist in the mining sector and with Indigenous peoples in Brazil.

2. The complexity of ethnicity and indigeneity in Brazil

Brazil, the fifth largest country in the world at over 8.5 million km^2 and a population of over 190 million inhabitants (Brasil, 2011b), has a considerable ethnic diversity that defies generalization with respect to its Indigenous peoples. There are 241 Indigenous ethnic groups speaking over 150 different languages, with a total of nearly 900,000 individuals or 0.47% of the Brazilian population who identify as Indigenous (ISA, 2013b). In addition, various kinds of 'traditional communities' are also legally recognized (Brasil, 2007). The *National Policy for the Sustainable Development of Traditional Peoples and Communities* (Decree 6040) defines traditional peoples as:

culturally differentiated groups which recognize themselves as such, have their own forms of social organization, which occupy and use territories and natural resources as a condition for their cultural, social, religious, ancestral and economic reproduction, using knowledge, innovations and practices generated and transmitted by tradition (Brasil, 2007: Article 3, author translation).

In addition to the 241 Indigenous peoples, 27 different 'traditional communities' have been recognized (Ypade, 2013). Decree 6040 provides a differentiated legal status for such groups, requiring the use of culturally appropriate procedures in order to guarantee cultural reproduction in their traditional territory (Brasil, 2007). The word 'territory' has a specific meaning, referring to the land that an Indigenous or traditional group occupies and is dependent upon for its cultural reproduction. There is usually an intense relationship between each group and its territory based on traditional environmental knowledge and place attachment, which is referred to as 'territoriality' (Little, 2003).

The precise identification of which groups and individuals are regarded as 'Indigenous' or 'traditional' is not always clear-cut. As the Brazilian anthropologist, Viveiros de Castro (2006:7, author translation), ironically suggests, "in Brazil everybody is an Indian, except those who are not". He argues that Indigenous identity is a juridical question, not an anthropological one. In many situations, the boundaries and cultural identities between ethnic groups are blurred (Guzmán, 2006; Oliveira, 1998), often making it unrealistic to assign identity, individual or collective, according to specific and mutually exclusive categories, as required by law.

The problems of assigning ethnic identity that are experienced in the Brazilian context are also found at the international level. Defining 'Indigenous' has been incredibly difficult (United Nations, 2004), and most conventions and agreements shy away from providing a definition. For example, the UNDRIP does not provide any definition (UN General Assembly, 2007). The ILO C169 definition also includes the notion of 'tribal peoples', a category that became applied to afro-descendent Maroons in Brazil (descendants of escaped slaves, known as *Quilombolas*). According to Articles 1 and 2 (ILO, 1989):

1. This Convention applies to:
(a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
(b) peoples in independent countries who are regarded as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as Indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Although the ILO C169 does not specifically mention 'traditional peoples', its scope is broad and it can be considered adequate to determine which particular communities in Brazil are considered Indigenous or traditional, although Brazilian law emphasizes the need for attachment to a given territory (Brasil, 2007). Furthermore, it must be stressed that the ILO and other international agencies regard self-identification as a fundamental criterion, giving the possibility for Indigenous peoples themselves to say who is Indigenous (Cobo, 1986; IFC, 2012; United Nations, 2004; World Bank, 2005). The self-identification criterion also avoids the situation where states could deny the ethnic identity claims of Indigenous peoples (Corntassel, 2003).

The principle of self-identification is related to the process of ethnogenesis. As a global phenomenon (Sider, 1976; Weisman, 2007; Whitten, 1976), ethnogenesis can be defined as the historical emergence of a group of people who claim a separate sociocultural heritage differentiated from the broader society in situations in which they were not previously recognized as such. In Brazil, the number of new groups claiming a separate heritage (Indigenous, Maroon or traditional) increased considerably during the 1980s and 1990s due to the revised Constitution of 1988 and related public policies that accorded special status to these groups. The emergence of new groups applying for official state recognition of their culturally distinct status continues today (Arruti, 2000). This has been a complicating factor in the licensing process in Brazil. For example, despite an initial assessment based on desktop research or fieldwork which did not identify any Indigenous or traditional group being present in the region of a proposed project, a group claiming special status may emerge during or after the process of conducting an impact assessment.

Another complication with regard to Indigenous rights and the licensing process is caused by the presence of groups who have not been in contact (or only recently in contact) with the larger society. Further, some groups choose to live in voluntary isolation, usually as a consequence of previous violent interactions with non-Indigenous people. The Brazilian National Indigenous Agency (FUNAI) has identified 28 uncontacted groups and estimates that there may be more than 50 unconfirmed cases. All but one of these groups is in the Amazon region (ISA, 2013c). The development of projects in localities near such peoples is very delicate, since an FPIC process cannot be conducted with an unknown group or one that refuses contact. It could be argued that the