

DEVELOPMENT, HUMAN RIGHTS AND ENVIRONMENT (2012-2016)
*joint submission for the third cycle assessment of Brazil in the UN
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**The impacts of the Brazilian development model on
human rights and the environment**

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I. Introduction

1. Brazil is by most means characterized as a developing country. Accordingly, it is critical to make the country develop economically for the benefit of its population. However, growth is being sought through a predatory, human rights violating and socially and environmentally unsustainable development model.
2. The lenience with this aggressive model occurs at two levels: (a) the government (and State) and (b) in the business sector. This is because this economic model generates short-term benefits for these two actors. Companies are profit-driven, while the government - at the federal, state and municipal levels - profits from royalties, foreign exchange inflows and jobs generation. This explains why the current irresponsible, extractive-intensive model gets its support among businesses and public sectors alike.

II. The Brazilian Development Model

3. In this context there are sectors of society which constantly advocate for an economic model based on three main activities: i) implementation of major infrastructure projects; ii) mining and iii) agribusiness. The large infrastructure projects are presented as crucial to overcome our structural bottlenecks; ii) mining should be encouraged at all and at any cost in a world that sees a refashioned “division of labor” between developing and developed countries, and even within the former, where appetite for commodities by countries like China partly explain the increase production of countries like Brazil, and iii) agribusiness is usually portrayed as the historical comparative advantage of the country.
4. The Brazilian model makes it seem utopian any inclusive and sustainable potential. Large infrastructure projects are designed and implemented without meaningful consultation of the local and there does not seem to be any concern for the resulting environmental impacts, as noted by the Working Group on Business and Human Rights in its country-visit to Brazil, presented during its 32nd Session on June 2016. Mining - even when absent major disasters - pollutes and silts rivers, erodes soil, cause health problems for workers and creates conflicts with indigenous peoples [\[1\]](#). Agribusiness led big business to the countryside, dismantling small farmers, expanding slave labor, “normalizing” use of pesticides and reducing diversities of cultures. Deforestation and disrespect to the protection of biomes and ecosystems has become default in all these activities.
5. Human rights violations in infrastructure projects, extractives and agribusiness are recurrent in Brazil, a fact directly related to the development model adopted by the country and the legal and institutional architecture that is put in place to legitimize this developmental path, which saw its heyday in the ascendant cycle of the commodities, occurred between 2003 and 2013. During this period, the global ore imports jumped from US\$ 38 billion to US\$ 277 billion (an increase of 630%) [\[2\]](#). This price change is accompanied by the adjustment in the behavior of the companies of the mining industry, which tend to press the licensing bodies in high-price periods (which seek to seize the good opportunities) and intensify production and reduction of costs in times of falling prices (seeking compensation for the reduction of their profits).

III. State Responsibility

6. Brazilian's State responsibility in this context of violations is crucial both for its actions to roll back in protecting human rights as for its omission on some pressing issues.
7. So it is that, despite having diversified its economic matrix, the extractive and agro-export sectors play a central role in Brazil's twenty-first century. It is from this perspective that it must be interpreted Government support for such sectors through tax subsidies, grants and direct and indirect investments through the Brazilian Development Bank (BNDES).
8. The BNDES, despite having a diversified portfolio of loans and investments, lacks a satisfactory environmental policy. Its Environmental and Social Policy consists only of general guidelines, constituting a true example of an imbalanced model not to be followed, even when compared to some Brazilian private banks. The policy lacks concrete requirements to borrowers in critical issues such as indigenous peoples' rights.
9. The Proposed Amendment to the Constitution (PEC) No 65/2012 is one of the main signs that the Brazilian State is rowing against the protection of the environment and human rights, as it reduces the environmental licensing procedure from three to one single step. By providing that the mere presentation of Preliminary Study of Environmental Impact Assessment (EIA) binds the decision of the environmental agency to authorize the execution of the project, the bill in practice extinguishes the environmental licensing process. This procedure is in true violation of constitutionally recognized fundamental rights, notably the right of everyone to an ecologically balanced environment and a healthy quality of life and the fundamental rights of the people impacted by projects.
10. The Brazilian Congress recently approved a new legal framework for public-private partnerships in the country, the Investment Partnership Program (IPP). The IPP applies to infrastructure and privatization projects elected as "priority" by a Council composed only by government entities. This program unduly creates a regime whereby the environmental licensing is fast-tracked, eschews social participation, even from affected communities, and makes sensitive information about the development projects confidential.
11. The panorama of the Brazilian government position on the consultation and free, prior and informed consent (FPIC) in the international sphere is also concerning. In the first stage of review of the safeguard policies of the World Bank the Ministry of Finance, responsible for Brazil's position in this multilateral organization, suggested that the language referring to FPIC adopted by the Bank was very extensive. The Brazilian government claimed [\[3\]](#) that the three principal international instruments on the rights of indigenous peoples (Convention 169 ILO, the United Nations Declaration on the Rights of Indigenous Peoples and the Final Document of the World Conference Indigenous Peoples) require FPIC only in cases of resettlement of indigenous population or storage and disposal of hazardous materials in indigenous territory. This narrow interpretation is incompatible with the understanding set at the international level, as demonstrated by the Inter-American Court of Human Rights in the Case Saramaka vs. Suriname [\[4\]](#), which ruled that effective participation should always take place in the case of major development projects or investments affecting indigenous peoples, since the projects' early preparatory phases.
12. On the second draft of the Environmental and Social Framework for the World Bank's Investment Project Financing it caused particular surprise the position of the Brazilian

government regarding the restatements of the Environmental and Social Standard No. 7 (PAS7): Indigenous Peoples [5]. In addition to being submitted to the World Bank without any meaningful consultation with indigenous peoples, the Brazilian proposal deployed ambiguous expressions which were confusing and inconsistent with the language contained in the main international instruments for the protection of rights of indigenous peoples. The Brazilian government seeks to shift the FPIC only to the projects' implementation phase, not including the design and conception phases.

13. The final text [6] approved by the Bank despite not having fully incorporated the Brazilian suggestions, relativized the right to FPIC, restricting it to cases where it is required and conditioning FPIC to the so-called "collective community support", making a clear setback to what had been previously suggested.
14. The recent loan of \$ 300 million [7] made by the New Development Bank to the BNDES is another step backwards in terms of transparency and social control. In addition to the lack of any consultation process there is no concern with elementary imperatives of public administration - such as transparency. Indeed, so far there is no available information on the destination of the BRICS Bank loan in Brazil, providing the BNDES with a true "blank check."
15. The environmental policy of the New Development Model, to which Brazil is a member, conditions the application of the social and environmental criteria (ESS) to the existence of adverse impact potential, without, however, establish criteria for such [8]. There is a clear step backwards in that sense, since the text of the policy for an open interpretation and leaves to the discretion of the authority to decide when a project will have or no an adverse or potential impact.
16. Even where there is more robust legal protection, there has been great difficulty for enforcement of social and environmental legislation. This is because most of the fiscalization bodies suffer from structural deficiencies. The Federal Indian agency (FUNAI) currently operates with only 36% of its capacity due to the lack of staff and effective restructuring. This situation has worsened in the past four years with the growing budget cuts in areas that specifically affect the demarcation of indigenous lands and care for indigenous peoples in the municipalities. In some units of FUNAI there is a single employee to work with the entire indigenous population of their jurisdiction.
17. The scrapping of the environmental monitoring activity capacity of the State is evident in the reduced number of civil servants in charge of monitoring the environmental licensing of polluting activities, as well as the environmental management of its impacts. So while the environmental federal agency, the Ibama, has only 429 servers; the Funai has only 15 servers to monitor the environmental licensing of 564 projects affecting indigenous peoples. Similarly, the Palmares Cultural Foundation, in charge of monitoring development projects that affect quilombola (afro-descendant) communities, has only 3 servers to monitor the effectiveness of mitigation and compensation measures of 273 property developments.
18. Another good example of the deficiencies with the oversight of these sectors could be seen in the largest environmental waste dam disaster in human history [9]. As will be better developed below, the situation of dams in the southeastern state of Minas Gerais is of absolute lack of supervision. Before the tragedy at Mariana dam disaster the number of agents responsible for overseeing more than 120 dams was only three [10].

19. All these setbacks have been criticized not only from civil society, but also from international organizations. The collapse of Fundão dam, a result of the irresponsible conduct of Samarco and its parent companies, BHP Billiton and Vale, was addressed by the Working Group on Business and the UN Human Rights [\[11\]](#). The WG regretted the magnitude of the disaster and criticized the lack of consultation by government and the companies with the affected population and criticized the limitations of the reparatory and compensatory measures.
20. The UN Special Rapporteur for Indigenous Peoples [\[12\]](#) criticized the current threats on the right of indigenous peoples in Brazil. She highlighted the violence, threats and murder indigenous relating to land disputes. She reaffirmed the need for continuity in the demarcation of land – especially in the most violent areas – as a pre-requisite to the pacification of such conflicts. The Tapajós dam complex and the Belo Monte dam were cited as emblematic cases where the right to the FPIC was denied for the indigenous population.

Recommendations:

- A) It is necessary to ensure the right to FPIC in large infrastructure projects, as well as the right to consultation in each and every stage in the remediation process.
- B) The strengthening of the Environmental and Social Policy and a robust and protective framework for the BNDES.
- C) The continuity of the demarcation of indigenous peoples' lands.
- D) That the Brazilian states abstains from rolling back on the rights of vulnerable groups, indigenous peoples rights and the environmental licensing process. These mechanisms and rights should be fully respected, protected and fulfilled.

IV. Business Enterprises

21. State and private actors - specifically business enterprises - are in many occasions allies in this context of widespread violations. National and transnational companies seeking high profit margins at the expense of protecting human rights are helping to put forward an unsustainable growth model. In this sense, the negative impact of companies takes place in two main areas: i) communication strategies and ii) in directly in the form of violations.
22. The communication strategy of mining companies in the regions where they operate has produced a pro-mining speech, restricting the monitoring of potential risks by cutting public contestation. Through the development of "political and socioeconomic diagnostics," "dialogue meetings" and the financing of social projects in the communities close to their enterprises, mining companies act carefully in social stabilization, in order to manage the necessary conditions to continue to explore with lower cost extractive activities in the region. Finally, when risks are converted into actual damages, the passivity of the population is in addition to a modus operandi that is far from deterring companies of acting irresponsibly (and therefore create disincentives), thus perpetuating the prevailing business practices and making human rights violations "business as usual".

23. Environmental management in Brazil requires the reconciliation of economic exploitation of the minerals with environmental conservation, since mining is a source of great potential of environmental impacts, as evidenced in the disaster of the dam collapse of the Doce River.
24. On November 5, 2015 the dam of Fundão, owned and controlled by Samarco Mineração SA (an international joint venture between Vale and BHP Billiton), burst in Mariana (MG), unleashing a wave of destruction with at least 32 billion cubic meters of tons of toxic mud in region, including the North Gualaxo rivers, Caramel and Doce. In the days that followed the tragic event, the mud travelled more than 600 km and reached the mouth of the Rio Doce, in the Atlantic Ocean.
25. After destroying the Bento Rodrigues District, the flood of the tailings mud caused severe damage and forced the displacement of communities in Camargos, Claudio Manuel, Paracatu Up, Paracatu Low, Stones, Barretos, Gesteira and Barra Longa. When it made its way to the Doce River, the mud still went through Santa Cruz do Escalvado, Belo Oriente, Periquito, Pedra Corrida, Alpercata, Governador Valadares, Tumiritinga, Galileia, Resplendor, Quatituba, Itueta, Aimorés, Baixo Guandu, Colatina, Marilândia, Linhares, Regência and Povoação, affecting directly and indirectly a total of 3.2 million people [13]. These are just the affected sites recognized by the companies, because in fact they encompass more than 220 cities, plus several traditional communities, including indigenous peoples, who although not directly affected by the mud as Bento Rodrigues and Barra Longa, were severely affected by the interruption of water supply of the Rio Doce for consumption, agriculture, fishing and the like activities, which remain severely affected due to lack of conclusive information about the quality and safety of water and its possible toxicity [14].
26. Data shows that 80% [15] of the houses of the 2,000 inhabitants of Bento Rodrigues district were destroyed by the flood of mud that reached three meters. The death toll so far is 19 people [16].
27. Among the violations committed by the Brazilian government and private companies are the absence of emergency assistance to victims, the noncompliance with the duty of information and violation of the rights to water, health, housing, life and physical integrity, as well as violations of other social and cultural rights. The tragedy made it clear that both the State and the responsible companies, Samarco, Vale and BHP Billiton are unprepared to deal with an environmental and human disaster situation of large proportions such as these.
28. Regarding the right to access to information and participation prior to the accident, it is important to emphasize that there was no public participation in the preparation of a contingency plan and not even the proper information to affected communities on the procedures in case of emergency. These documents should have been made public and widely distributed before the tragedy. What preliminary investigations show is that even an audible alarm system to warn the communities located around the venture of an accident at the dam was missing, nor were people trained to assist families. Moreover, the environmental impact study for the project underestimated the number of families that could be potentially harmed by a failure of the dam [17].
29. With regard to the post-failure of the dam, the breach of the right to information on social and environmental risks and on the safety of water occurred on several fronts. As the mud was advancing in the Rio Doce, the municipalities had to urgently cut water collection from the river, because of the lack of conclusive reports on the mud toxicity or the drinkability of

water, especially with respect to the level of heavy metals. Although there are reports pointing to the presence of heavy metal above the limits established by legislation and its inadequacy for consumption [18], some cities resumed the collection and treatment directly from the Rio Doce, taking advantage of the use of chemical and organic substances to facilitate the decantation of the substances that cause water turbidity and decreased oxygen.

30. On March 2016, a settlement agreement between the three companies and Brazilian authorities was reached under the auspices of a civil lawsuit filed by the public authorities. A "Term Adjustment of Conduct" ("TAC") signed between the parties to the original case was sent to court approval. On May 5, 2016, the Federal Court of the 1st Region ratifies the agreement [19].
31. The agreement provides that Samarco will pay R \$ 4.4 billion by 2018 and a minimum of R\$ 20 billion in the next 15 years to cover and repair damages. The company has undertaken to develop and implement 17 environmental plans and 22 socio-economic programs. In addition, the agreement provides that Samarco will pay R\$ 500 million in compensatory measures to improve sanitation infrastructure of towns along the Rio Doce [20].
32. The ratification of the court settlement has been strongly criticized by civil society organizations and representatives of the affected communities. A coalition of over 100 civil society organizations and social movements condemned the ratification of the agreement by its procedural and substantial shortcomings [21]. The organizations stated that companies should not have the final word on the reparation of the diffuse and collective rights harmed by their actions and omissions, especially the compensation to the families whose lives have been destroyed as a result of the disaster.
33. The fundamental right of the affected individuals and communities to have access to effective administrative and judicial remedies has been violated by the approval of the Agreement (ICCPR [22], Article 3, a, b; DUHC [23], Article 8; UN Guiding Principles on Business and Human Rights, Principles 22, 25, 26; Rio Declaration [24], Principle 10)
34. In its preamble, the agreement creates a "preclusive effect" [25] with respect to any other disaster-related legal actions, in the sense that any legal claim that has the same object or has any "linkage" to the settlement agreement proposed by any "legitimate agent" is, under that provision, automatically terminated. This provision violates the Brazilian Constitution because it strips bodies such as the Public Ministry and the Public Defenders from their constitutional powers to propose class actions on behalf of affected communities and the collective interest. Affected communities have not consented to relinquish their right to an effective judicial remedy, since they were not consulted at any stage of negotiation and ratification of the agreement. This right is actually inalienable because it is enshrined in a constitutional provision. Article 5, XXXV of the Brazilian Constitution establishes that "no law shall exclude any threat or violation of the right of enjoyment of the judiciary." The agreement requires the victims to accept compensation offers and reparations under the agreement, stating that anyone who does not agree to the terms of the negotiations is automatically excluded from socioeconomic remediation programs contemplated therein (Article 36).
35. Currently the agreement is suspended by a ruling of the Superior Court of Justice, dated July 01 2016 [26]. This decision was based in the Brazilian State duty to repair and on the human rights obligations of the involved business enterprises, as well as the illegality and illegitimacy of an agreement that does not involve meaningful participation of communities.

Recommendations:

- A) The Brazilian State should ensure that business enterprises meet the minimum international standards of protection of human rights. Special attention should be given to the right to an effective remedy and to the strict liability for environmental damages.
- B) It is urgent that the Brazilian State requires businesses to build rights-compatible, inclusive, transparent and accessible consultation mechanisms to incorporate the demands of affected communities and civil society during early stages of projects and during reparation processes.
- C) The Brazilian State should hold businesses to account for their violations on fundamental rights, including by requiring that they adopt processes of human rights due diligence and by lifting any impediment to an effective and speedy judicial remedy.

[1] Mining. Available at: <<https://www.socioambiental.org/pt-br/retranca/mineracao>> Accessed on: 28 September 1/

[2] In the case in Brazil, Brazilian mineral production increased by 550% between 2001 and 2011 (IBASE. BNDES and the mining industry. **BNDES No Secrets**, No. 04, February 2015. Available at: <<http://www.ibase.br/bndes/wp-content/plugins/google-document-embedder/load.php?d=http%3A%2F%2Fwww.ibase.br%2Fbndes%2Fwp-content%2Fuploads%2F2015%2F10%2FO-BNDES-and-Industry-Extractive-Mineral.pdf>> Access: September 28.1/

[3] Available at <<http://www.conectas.org/arquivos/editor/files/Posicao%20Gov%20Brasileiro.pdf>>. Access 28 of September 2016.

[4] Available at: <http://www.corteidh.or.cr/docs/casos/articulos/seriec_185_ing.pdf>. Accessed in September 3rd, 2010.

[5] Available at: <http://www.conectas.org/arquivos/editor/files/letter_brazil_-_world_bank_ess_policies_review_-_15mar16.pdf>. Accessed in September 3rd, 2010.

[6] Available at: <http://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf>> . Accessed: September 28, 2016.

[7] BRICS Bank Gives \$ 811 Million in First Round Green Energy Loans. Available at: <<http://www.bloomberg.com/news/articles/2016-04-18/brics-bank-gives-first-china-loan-to-solar-project-daily-says>> Access: September 28th.1/

[8] The text says: "2.Environmental and social standard Applies **if the project is Likely to have potential adverse environmental and / or social risks and impacts.** "

[9] Available at: <[Http://www.valor.com.br/empresas/4394768/desastre-em-mariana-eo-maior-acidente-com-barragens-em-100-anos](http://www.valor.com.br/empresas/4394768/desastre-em-mariana-eo-maior-acidente-com-barragens-em-100-anos)> Access: 28 in September 1/

[10] Experts criticize lack of control dams in MG. Available at: <<http://g1.globo.com/economia/noticia/2016/03/especialistas-criticam-falta-de-fiscalizacao-barragens-em-mg.html>>. Access: 28 September 1/

[11] Available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/096/43/PDF/G1609643.pdf?OpenElement>>. Access: 28 September 1/

[12] Available at: <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/174/05/PDF/G1617405.pdf?OpenElement>>. Access: 28 September 1/

[13] Global Justice. **Vale de Lama: Inspection report Mariana after the breaking of the dam Fundão waste. January Available at:** <http://issuu.com/ju_sticaglobal/docs/vale_de_lama> Access: September 28.1/

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- [15] Dam Breaching External Commission in Mariana region - MG (CEXBARRA).FINAL REPORTBr asil: July 2016, p. 6.
- [16] See list of dead and missing in dambreak in MG. Available at: <[Http://g1.globo.com/minas-gerais/noticia/2015/11/veja-lista-de-desaparecidos-no-rompimento-de-barragens.html](http://g1.globo.com/minas-gerais/noticia/2015/11/veja-lista-de-desaparecidos-no-rompimento-de-barragens.html)> Accessed on: 28 September.1/
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- [18] See Report of GIAIA - Independent Evaluation Group of the Environmental Impact Assessment (Available at: <http://giaia.eco.br/wp-content/uploads/2015/12/Resultados-11_12-Agua-GIAIA.pdf>) and the Group Policy, Economy, Mining, Environment and Society (pOEMS), linked to the Federal University of Juiz de Fora - UFJF (<[http://www.ufjf.br/poemas/files/2014/07/PoEMAS-2015-Before-be-lighter-to-load-vers% C3% A3o-Final.pdf](http://www.ufjf.br/poemas/files/2014/07/PoEMAS-2015-Before-be-lighter-to-load-vers%20C3%A3o-Final.pdf)>) access: September 28.1/
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- [21] Available at: <<http://www.ptnacamara.org.br/index.php/manchetes/item/27470-tragedia-de-mariana-comisao-de-direitoshumanos-repudia-acordo-entre-samarco-e-poder-publico>>.Access: 28 September 1/
- [22] International Covenant on Civil and Political Rights.
- [23] Universal Declaration of Man and the Citizen.
- [24] <http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>
- [25] "**CONSIDERING** that the conclusion of this judicial agreement aims to end the dispute by voluntary act of the parties, recognizing that autocomposição is the most expeditious and effective way to resolve the dispute and does not involve assumption of responsibility for the EVENT."
- [26] Id. In the complaint 31935 - MG (2016 / 0167729-7).Rel. Min. Diva Malerbi, June 30, 2016.