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THE ENVIRONMENTAL AND SOCIAL IMPACTS OF DAMS: MAPPING THE ISSUES

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I. INTRODUCTION

In 2011, the *UN Guiding Principles on Business and Human Rights* ("Guiding Principles") for the first time established an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. These were the product of many years' research and extensive consultations by UN Special Representative John Ruggie involving government, companies, business associations and civil society around the world. The Guidelines described how states can better manage business and human rights challenges based on the three pillars "Protect, Respect and Remedy" Framework: 1) the state duty to protect human rights, 2) the corporate responsibility to respect human rights, and 3) the need for greater access to remedy for victims of business related abuse. This common paper analyzes the challenges faced as a result of large-scale infrastructure projects, in particular dams. The experiences of five countries are considered – Turkey, Spain, Brazil, India and South Africa – in light of national and international law and the UN Guiding Principles.

Dams present particular challenges. They are long-term projects, unlike other businesses. Their impact on local communities is more enduring, ranging from environment to social issues, from national development policies to the resolution of the country's energy and resource needs, and they have potential human rights impacts, arising from land expropriation, to forced eviction, and to the displacement and resettlement of local communities, and the compensation of victims. But most importantly, they fall beyond John Ruggie's important UN Guidelines on Business and Human Rights, making this current study especially significant for that reason alone. As we will see, the interests of foreign investors, international treaty obligations, as well as the demands of global institutions such as the World Bank are in addition also further factors that complicate the state's response – political and legislative – to the challenges raised by dams.

The experience of the five countries highlights how legislative, judicial, and executive initiatives have an increasingly important role to play in navigating around these myriad interests. Sections II and III of this paper focus on the legislative experiences of South African and Spain, respectively, while section IV

explores the various challenges faced by Brazil in the protection of the rights of local population during the two phases of dam development: planning and bidding, and construction and outsourcing. Sections V and VI examine the legislative, political and judicial responses to the issues raised by large scale dam development in Turkey and India.

II. MAKING IN-ROADS INTO SOUTH AFRICA'S PROGRESSIVE LEGAL REGIME ON THE DEVELOPMENT OF NEW INFRASTRUCTURE

Much of South Africa's major infrastructure development, including the construction of South Africa's two largest dams, the Gariep and the Van der Kloof dams, occurred during its apartheid past (the period from roughly 1948 to the early 1990's).[1] During apartheid, cruel discriminatory, racist and segregationist treatment of black and coloured South Africans was the order of the day.[2] Forced removals of indigenous South African communities were inhumanely carried out across the country, including to achieve infrastructure development.[3] According to the World Commission on Dams Case Study:[4]

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[1] Construction of the Gariep Dam was completed in 1971, whilst construction of the Van der Kloof dam was completed in 1978. See World Commission on Dams *Orange River Development Project, South Africa* Case Study prepared as an input to the World Commission on Dams, Cape Town, www.dams.org 2000 (accessed on 16 June 2014) (hereafter 'the World Commission on Dams Case Study').

[2] Phia Steyn "The lingering environmental impact of repressive governance: The environmental legacy of the apartheid era for a new South Africa" (2005) 2(3) *Globalizations* 391 at 395. Helen Stacey "Environmental justice and transformative law in South Africa and some cross-jurisdictional notes about Australia, the United States and Canada" (1999) *Acta Juridica* 36 at 60–1.

[3] Steyn (note 2 above). Stacey (note 2 above). See further The World Commission on Dams Case Study (note 1 above) xi & 52 – 55 and Graeme Rogers "Internal displacement and social marginalisation in Southern Africa" *Africanus* 36 (2) 2006 131 at 135 where the author comments on the displacement of "over 400 000 Africans as a result of major dam construction".

[4] The World Commission on Dams Case Study (note 1 above) 54. The World Commission on Dams Case Study goes on to state that:

> In interviews, farmworkers displaced by the Gariep and Van der Kloof dams cited the following losses that they had incurred:
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> - They lost their jobs by being moved off farms en masse.
> - They all had to go "in different directions" in search of work, so that families and other networks were upset.
> - Whether they moved to another farm or into township areas, they were forced to sell their livestock (one of their very few tangible assets and probably their most potent symbolic vestige of independence from the farmer) at low prices.
> - They lost their dignity by having to live in the corridors along the roadside while searching for other employment opportunities.
> - They lost their history when the graves of their ancestors were lost under the water. While the "white" farmers had the opportunity to transfer the graves of their forebearers

> In stark contrast to the white farmers and families stood the black and coloured farmworker families who were also forced to relocate because of the construction of the two dams on the Orange River. They did so without any compensation and were left with the choice of moving to wherever it was that their employer had purchased another farm, or to remain in the area (although not on the expropriated farms) and attempt to find employment in an area and sector that was shedding jobs.

South Africa's Gariep and Van der Kloof dams were thus constructed amidst immense social and environmental injustice.

The Constitution of the post-apartheid Republic of South Africa, enacted in 1996, was intended to be transformative in nature and to bring about a participatory model of democracy. Its Bill of Rights, and the legislation enacted to give effect to it,[5] protect the rights to just administrative action, access to information, not to be arbitrarily deprived of property, and to an environment not harmful to health or well-being.[6] These rights seek to offer protection to local communities from the adverse impacts of new large-scale infrastructure projects.The Promotion of Administrative Justice Act 3 of 2000 (PAJA) requires that the authorisation of approvals, permits, etc. involved in infrastructure projects must be fair in order to be valid.[7] PAJA imposes extensive duties to give notice of decisions affecting the public (including in relation to infrastructure projects) so as to foster accountability and transparency.[8] The Promotion of Access to Information

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(because they knew about the pending move); workers noted that, "this is still a dark cloud hanging over us even now".

- Some people who were employed on the dam construction sites lost limbs and even died, for which no compensation was ever paid.

There were very few jobs on the sites for the displaced farmworkers, because most of these jobs went to "amajoyini" (temporary work seekers) from the Transkei and to local coloured people.

[5] The Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to the right to administrative justice. The Promotion of Access to Information Act 2 of 2000 (PAIA) gives effect to the right to access to information. South Africa's framework environmental legislation, the National Environmental Management Act 107 of 1998, and a suite of specific environmental legislation gives effect to the environmental right protected in section 24 of the Constitution.

[6] See sections 33, 32, 25 and 24 of the Constitution respectively.

[7] Such conduct would amount to 'administrative action' defined in section 1 of PAJA, and thus subject to the requirements of just administrative action contained in PAJA. See in particular section 6(2)(c) of PAJA which provides that administrative action may be subjected to judicial review when it is performed in a manner that is procedurally unfair, as well as sections 3 and 4 of PAJA, which set out detailed standards of fair procedures when administrative action affects individuals and the public respectively.

[8] See sections 3 and 4 of PAJA.

Act 2 of 2000 (PAIA) enables anyone to gain access to any information held by the State regardless of whether or not the information is required to protect a right.

NEMA supports the PAJA and PAIA in relation to decision-making that affects the environment. When the actions of an organ of state may significantly affect the environment NEMA provides that a number of justice-oriented principles 'apply alongside…other…considerations…and guide the interpretation, administration and implementation of [NEMA] and any other law concerned with the protection of the environment'.[9]

Chapter 5 of NEMA and regulations enacted in terms thereof provide for integrated environmental management,[10] including detailed procedures for obtaining environmental authorisations before listed activities may be undertaken.[11] Large-scale infrastructure projects would fall under the listed activities.[12]

In February 2013 the draft Infrastructure Development Bill was published for comment. Many expressed concern that the Bill, intended to streamline and facilitate the development of new infrastructure, including water related infrastructure such as dams, conflicted with the existing human rights protection

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[9] Section 2(1) of NEMA. See further T Humby 'Environmental justice and human rights on the mining wastelands of the Witwatersrand gold fields' (2013) forthcoming in *Ottawa L Rev*, 4 – 5. These 'justice-oriented' principles entail, among other things, that when infrastructure projects take place:

- Section 2(4)(b) of NEMA provides that '[e]nvironmental management must be integrated, acknowledging that all elements of the environment are linked and interrelated, and it must take into account the effects of decisions on all aspects of the environment and all people in the environment by pursuing the selection of the best practicable environmental option.'
- Section 2(4)(c) of NEMA provides that '[e]nvironmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.'
- Section 2(4)(f) of NEMA provides that '[t]he participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.'
- According to section 2(4)(g) of NEMA '[d]ecisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.'
- In terms of section 2(4)(h) '[c]ommunity well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.'

[10] See the Environmental Impact Assessment Regulations, 2010 GNR. 543 of 18 June 2010 *GG 33306* (EIA Regulations) where, for instance, detailed provisions relating to the timeframes for EIA procedures are set out.

[11] Listed activities are contained in various government notices issued in terms of NEMA.

[12] Section 24 of NEMA and the regulations in terms thereof provide for environmental impact assessments, to ensure that 'the potential consequences for or impacts on the environment of listed activities or specified activities [are] considered, investigated, assessed and reported on to the competent authority'.

afforded to local communities adversely affected by new infrastructure development amidst much controversy and criticism.[13] On 30 May 2014 the Bill was signed into law as the Infrastructure Development Act 23 of 2014 (the IDA). Parliament took on little of the criticism of the Bill, such that the IDA remains problematic. The IDA aims to fast-track strategic infrastructure projects identified by a 'Presidential Infrastructure Coordinating Commission'.[14] The Infrastructure Development Bill (the IDA's predecessor) was widely criticised on the grounds that it did not give due regard to the principles contained in NEMA, conflicts with the procedural protection contained in PAJA and 'short-cuts' the timeframes contained in EIA Regulations.[15] There is a concern that the participative mandates of PAJA, NEMA and PAIA may be undermined by the IDA.[16]

Although new infrastructure remains a priority in South Africa, it is concerning that the South African government seeks to do so in terms of the IDA a manner that could compromise human rights protection of communities. It remains to be seen to what extent the IDA will make in-roads into what is otherwise a progressive legal regime in relation to the regulation of large-scale infrastructure projects in South Africa.

III. DAMS AND HUMAN RIGHTS: A REPORT FROM SPAIN

Unlike the rest of the countries under consideration, Spain is a member of the European Union. This has a major impact on Spanish environmental law. In

[13] Melissa Fourie "Comments on Draft Infrastructure Development Bill, 2013" 27 March 2013 submitted by the Centre for Environmental Rights to the Chief Director: Planning and Coordination, Department of Economic Development at 2. In response to the publication of the Bill, the Centre for Environmental Rights stated that it 'disregards decades of national policy development in relation to environmental management and sustainable development, and existing government commitments to sustainable development and environmental management'. See also Catherine Warburton "Riding roughshod over anything that might get in the way" June 2013 *Without Prejudice* 18.

[14] Section 2 of the IDA.

[15] Fourie (note **Erro! Indicador não definido.** above). .Warburton (note **Erro! Indicador não definido.** above) at 18.

[16] For instance, section 17(2) of the IDA provides that restricted time periods for the roll out of strategic infrastructure projects 'may not be exceeded'. These periods, set out in schedule 2 of the IDA, are significantly shorter than the periods envisaged by NEMA. Although section 17(3) provides for the possibility of extended timeframes on application to an executing authority the concern remains according to Claire Barclay 'Infrastructure Development Act signed into law' 4 June 2014 www.lexology.com/library accessed on 12 June 2014, that such a mechanism 'may prove unsatisfactory if the schedule 2 timeframes are severely unrealistic'.

fact, environment and social policy are areas of shared competence between the European Union and member states.[17] The Treaty itself has an entire title devoted to the environment[18] and according to it a large body of European legislation has been approved in the last decades. Spain has implemented, through national law, European Directives in areas relevant for dams, including environmental liability,[19] assessment of the effects of certain public and private projects on the environment,[20] assessment on the effects of certain plans and programmes on the environment,[21] public access to environmental information[22], protection of the environment through criminal law,[23] and conservation of natural habitats and of wild fauna and flora.[24] Moreover, the European Union[25] has approved the U.N. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, (Aarhus Convention)[26] as well as other important conventions.[27] Finally, it has approved in 2012 the Charter of

[17] Treaty on the Functioning of the European Union, article 4.2, (b) and (e). According to the Treaty, *Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development* (article 11, first paragraph).
[18] Title XX, articles 191-193.
[19] Law 26/2007, of 23 October 2007, implementing Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.
[20] Royal Decree-Law 1/2008, of 11 January 2008, implementing Directive 85/337/EEC of 27 June 1985, on the assessment of the effects of certain public and private projects on the environment (now repealed by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011, regulating the same matter).
[21] Law 9/2006, of 28 April 2006, implementing Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.
[22] Law 27/2006, of 18 July 2006, implementing Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.
[23] Organic Law 5/2010, of 22 June 2010, implementing Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law.
[24] Law 42/2007, of 13 December 2007, implementing Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
[25] The European Union has also set up the European Environment Agency to provide independent information on the environment. It was established in 1993. Now it is regulated by the Regulation 401/2009 of the European Parliament and of the Council of 23 April 2009, on the European Environment Agency and the European Environment Information and Observation Network. All European Union states in addition to six other countries (including Turkey) are members of the Agency.
[26] See Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention.
[27] Like the Bern Convention on the Conservation of the European Wildlife and Natural Habitats, see Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention, or the Convention on Biological Diversity signed in June 1992 in Rio de Janeiro, see Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention.

Fundamental Rights of the European Union, which applies when European Union law is implemented (article 51.1).[28]

Another key feature of Spanish law, regarding human rights and infrastructures, is the European Council membership. This is shared with Turkey and entails the ratification of the European Convention on Human Rights.[29] The European Court of Human Rights has adjudicated some cases regarding dams and human rights. Some of them refer to the right to property.[30] There have been cases petitioned to the Court that dealt with delays in payments of the compensation for the expropriation.[31] Some cases added violation of the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by the Law.[32] There has been one case regarding dam construction in Spain, in which the Court did not find any violation of fundamental rights.[33]

Lastly, at the national level, the Spanish Constitution includes fundamental rights to private property and to an adequate environment.[34] Dam construction is addressed by eminent domain legislation,[35] which includes specific provisions for expropriations that require the displacement of local population.[36]

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[28] Article 51.1. It enshrines the right to respect for private and family life (article 7), the right to property (article 17) and to environmental protection (article 37).
[29] Rome, 4 November 1950.
[30] Protected in article 1 of the Protocol number 1 to the Convention.
[31] Such as the judgments on the Altinkaya dam: judgment of 9 July 1997, case Akkus v. Turkey, application 19263/92, and judgment of 23 September 1998, Aka v. Turkey, number 107/1997/891/1103: both held that there had been a violation of the right for the small interest given to the applicants, considering the length of the proceedings. The same was decided by the Court in judgments of 8 April 2004 (final 8 July 2004), Kayihan and Others v. Turkey, application 42124/98 (Atatürk dam); 31 May 2005 (final 12 October 2005), Aslangiray and Others v. Turkey, application 48262/99; 10 August 2006 (final 12 February 2007), Mehmet Ali Gündüz v. Turkey, application 27633/02; 21 September 2006 (final 12 February 2007), Ihsan and Satun Önel v. Turkey, application 9292/02; 26 September 2006 (final 26 December 2006), Mürvet Fidan and Others v. Turkey, application 48983/99; 10 October 2006 (final 10 February 2007), Mutlu v. Turkey, application 8006/02; and 7 December 2010 (final 7 March 2011), Köse v. Turkey, application 37616/02 (Birecik dam).
[32] Article 6.1 of the Convention. For instance, judgment of 8 January 2009 (final 8 April 2009), case Ali Durmaz v. Turkey, application 22261/03. It dealt with expropriations for the construction of the Birecik dam and it was held by the Court that had been violated the right to property, for the lack of payment of the total compensation, as well as the right to a fair trial, for the non-execution of domestic court judgments. In the judgment of 6 October 2009 (final 6 January 2010), Finat and others v. Turkey, application 17597/03, also about expropriation for the construction of the Birecik dam, the Court held that a delayed fulfillment of domestic court decisions involving compensation violated article 6.1 of the Convention.
[33] Gorraiz Lizarraga and Others v. Spain, decided by the European Court of Human Rights on 27 April 2004, application 62543/00.
[34] Articles 33.1 and 45.
[35] Eminent Domain Act of 16 December 1954 and Eminent Domain Administrative Regulation of 26 April 1957.
[36] Articles 86 to 96 of Eminent Domain Act and 104 to 118 of Eminent Domain Administrative Regulation.

This legislation intends to reinforce the rights and protection of those communities, assuming that a fair compensation is not just equal to the added market value of the assets subject to expropriation. This of course raises the cost of the expropriation, paid by the business enterprise which is promoting the dam.[37] These special provisions apply when it is expropriated the land (or industry) that is the main resource of the majority of the families in a town or locality.[38] It always happens when the dwellings of the inhabitants are taken, but this is not strictly necessary. To benefit from the added compensation it suffices that the land upon which is based the economy of the majority of the local families is taken (even if the dwellings are not). This "majoritarian" principle, not always easy to ascertain, has been criticized,[39] but such is the legal rule. Therefore, if the land subject to expropriation is the basic economic resource of a lesser percentage of the local population, special provisions are not applicable. It should be noted that it is not required that the affected families actually own the land or have any right on it. It is enough if their economy is based on that land, which include laborers who usually work in that land, as well as all sorts of collective ownership.

Secondly, the application of those special provisions means that all the land located within the limits of the town or locality has to be expropriated (and paid by the business enterprise), even if it is not necessary for the public work and was not originally part of the project.[40]

Thirdly, the extension of the compensation is higher in these special provisions than in the ordinary provisions of the Eminent Domain Act. In fact, ordinary compensations equal the market value of the real property or chattels expropriated increased in a 5 %.[41] Special provisions for expropriations that require the displacement of local population (as defined previously) add some extra compensations which include moving expenses, travel expenses and lost

[37] Article 5.2.5 of Eminent Domain Administrative Regulation (Reglamento de la Ley Expropiación Forzosa) of 26 April 1957.
[38] Article 86 of Eminent Domain Act.
[39] See Mariano Palancar Penella, "Indemnizaciones por traslado de población en las expropiaciones masivas motivadas por embalses", *Revista de Obras Públicas*, 115 (1968), 679.
[40] Article 87 of Eminent Domain Act. Being this the law, this eventuality it is normally foreseen in Spanish projects, although it increases their cost. However, the law include an opt-out clause: if a local inhabitant asks the authorities not to expropriate her land, and it is not needed for the infrastructure, it is excluded from the expropriation and kept by its owner. See Eduardo Chalud Lillo, "La Expropiación que Dé Lugar al Traslado de Poblaciones", *Revista de Administración Pública*, 55 (1968), 315.
[41] Articles 36 and 47 of Eminent Domain Act.

profits during the days spent in the displacement (including lost salaries).[42] As the rest of the expropriation costs, are paid by the business enterprise promoting the public work.

IV. CHALLENGES FOR THE PROTECTION OF COMMUNITY RIGHTS IMPACTED BY DAMS IN BRAZIL

In recent years, Brazil has put great emphasis on environmental protection and created an independent government agency, the Brazilian Institute of Environment and Renewable Natural Resources, known as IBAMA, which acts as the Ministry of Environment's administrative arm to monitor and control the use of natural resources and of environmental licensing in cases of large-scale projects. In the absence of a social and human rights legal framework, IBAMA's environmental licensing has been responsible for ensuring the protection of local communities. The Brazilian National Indian Foundation, known as FUNAI (Fundação Nacional do Índio) is jointly responsible for licensing processes that affect indigenous communities and lands.

Despite these provisions, adverse impacts on the rights of local communities have been pointed out in the case of large-scale projects, such as dams. Based on the analysis of official documents and interviews with relevant players and stakeholders,[43] we present preliminary findings on obstacles and challenges for the prevention and remedy of right abuses in the planning, installation and construction phases of the three large hydroelectric dams: Santo Antônio Hydroelectric Plant, Jirau Hydropower Plant and Belo Monte Dam Complex.

A. Stage 1. Planning and bid requirements

[42] Article 89 of Eminent Domain Act. See Chalud Lillo, *supra* at note 40, 316-337.
[43] The findings presented were based on a set of 40 interviews conducted during the year 2013 with different stakeholders involved in Belo Monte, Santo Antônio and Jirau plants: representatives of civil society, companies and government, including members of the judiciary and prosecutors.

The environmental licensing (*licenciamento ambiental*) in Brazil has an elaborate procedure consisting of three successive phases where the condition for access to the new phase is the fulfilment of requirements foreseen in the previous one; namely, Preliminary License (*licença prévia*), Installation License and Operational License. In the case of hydroelectric power plants, decisions taken at an early stage of planning determine some of the potential human rights impacts of future actions. These include land acquisition, forced eviction and/or displacement of local communities, resettlement policies and compensations.

As the three power plants are part of a Federal Government program known as PAC (Program of Acceleration of Growth), special measures were expected to be taken to commit public and private businesses to prevent adverse effects on local communities and to devise special measures to remedy rights violations. Nevertheless, Brazil did not take effective preventive measures to meet its human rights protection obligations. Several factors contributed to this situation:

- **Public procurement process based exclusively on economic efficiency, without taking into consideration investments for prevention and mitigation of impacts**.
- **Absence of an overall strategic development plan for the country.**
- **Lack of coordination among institutions.** The dialogue between IBAMA and FUNAI, as well as between them and other institutions, is often flawed, because of the lack of an overall picture. The lack of coordination is observable also between the federal government and state or local governments.
- **Poor quality of Environmental Impact Studies.** EIS are done by the same entrepreneurs who are responsible for compensation measures.
- **Prevalence of political arguments in detriment to technical opinions**.
- **'Underestimation' of social aspects of environmental impacts**. IBAMA does not have sufficient technical capacity to monitor fulfilment of conditions imposed by compensation plans. This shortcoming especially affects issues related to indigenous and traditional communities.

- **Lack of effective dialogue with local population**. Public hearings with affected communities are held only after decisions regarding social development issues have already been taken[4].

All these elements show the failure of the Brazilian State in performing its 'Regulatory and Policy Functions' as provided by Principle 3 of UNGPs and to establish a Coherent Policy, as per principle 8.

B. Stage 2. Construction and outsourcing activities

This is the stage where potential human rights impacts are more likely to affect local population: labor rights violations; insufficient social investments; inadequate housing for resettled populations; grave violations by business partners operating within the sphere of influence, such as child labor and sexual exploitation.

Most of the challenges faced during the second stage of dam projects derive from the shortcomings of the first one:

- **Lack of monitoring and enforcement**. The fact that consecutive licenses are awarded without proof of compliance with previous licensing conditions, make entrepreneurs aware that IBAMA's limited enforcement capacity.
- **Overburden of local infrastructure and services.** Local governments are not equipped to deal with the demand created by the influx of migrant workers on basic public services in health, sanitation, housing and education. In Belo Monte, 20,000 workers migrated to a city of about 70,000 inhabitants.
- **Lack of clarity about the responsibilities of public and private stakeholders** in relation to prevention and mitigation of impacts on local communities.
- **Lack of mechanisms for dispute resolution for settlement of disputes within the licensing process**.
- **Failure to address the needs of Indigenous Groups.** In the case of Belo Monte, various indigenous communities in the Xingu River Basin appealed to the Inter-American Commission on Human Rights (IACHR) to denounce Brazil's domestic legal system incapacity to protect effectively their human rights

[4] World Bank, "Licenciamento Ambiental de Empreendimentos Hidrelétricos no Brasil", 2008.

during the construction phase. (See IACHR's precautionary measures[5], requesting the State of Brazil to stop construction work pending the fulfilment of certain minimum conditions and Brazil's response to IACHR[6]).

- **Lack of liability of companies involved in violations of rights.** As consortia of companies are usually formed during the construction phase, the 'corporate veil' effect acts as an obstacle to accountability of individual companies for rights abuses.

The above findings show some of the main challenges faced by large infrastructure projects in Brazil to comply with national legislation as well as with international human rights obligations. The absence of a human rights legal framework to guide companies' activities leads to a situation of lack of clarity about their responsibilities and low accountability for their impact on local populations, as pointed out by official reports and interviews.

V. DAMS, ENVIRONMENTAL PROTECTION AND TURKISH LAW

The Turkish Constitution contains various guarantees for environmental protection and related rights and freedoms. For instance, the "right to live in a healthy and balanced environment" is explicitly provided as a right (article 56 paragraph 1) under social and economic rights in the bill of fundamental rights. Moreover, the Constitutional Court has emphasized that maintenance and protection of "environmental existence, health and security" is a state duty.[44] Under article 56 of the Constitution the state and citizens have a duty to improve and protect the natural environment and to prevent environmental pollution. Consequently, a citizen's right to live in a healthy and balanced environment should, in principle, have priority in conflict of rights situations.

[5] *PM 382/10 - Indigenous Communities of the Xingu River Basin, Pará, Brazil*. Available in: http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp Accessed in 13.06.2014.
[6] *Brazil's Belo Monte Dam: Sacrificing the Amazon and its Peoples for Dirty Energy*. Available at http://amazonwatch.org/work/belo-monte-dam Accessed in 13.06.2014.
[44] Turkish Constitutional Court, E.2011/110, K. 2012/79, 24 May 2012, Official Journal: 21 July 2012-Nr: 28360

These environmental rights and protections are in line with the Guiding Principles published by the United Nations, which provides that states and businesses have a duty to protect human rights and to provide "appropriate and effective remedies when breached".[45]

The Turkish Constitutional Court has generally refused to dilute environmental protection, such as providing exemptions from conducting environmental impact assessments (EIAs) for state run mining activity, to promote economic efficiency and lessen bureaucratic burdens.[46]

Nevertheless, legislative and administrative exemptions for investments are a recurring motif. For instance, the Act on the Environment ("the Act"), which was adopted in 1983 to provide the framework legislation laying down basic principles and rules for environmental protection, was amended in 2006 to insert a clause holding oil, geothermal resources and mining exploration exempt from conducting EIAs. The Constitutional Court annulled the exemption in 2009, emphasizing that the exempted activities were likely to have longstanding detrimental effects on biological diversity and the environment, and that EIAs are necessary to uphold the state's constitutional duty (article 56) to protect the environment.[47] In 2013 an exemption clause was inserted to permit bypassing EIAs for certain mega projects including hydroelectric dams and nuclear power plants.[48] This exemption has been criticized for lack of transparency, since the bill was hidden in an "omnibus bill package" which was then passed without proper parliamentary scrutiny.[49] The final amendment on such exemptions is currently before the Constitutional Court.[50]

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[45] Guiding Principles on Business and Human Rights, United Nations Human Rights Office of the High Commission (2011) at p. 1

[46] Turkish Constitutional Court, E.2011/110, K. 2012/79.

[47] Turkish Constitutional Court, E. 2006/99, K. 2009/9, 15 January 2009, Official Journal: 8 July 2009-Nr: 27282.

[48] See provisional article 3 of Act on Environment as amended of 21 May 2013; for critics and the mega projects that could be protected by this exemption see Cengiz, Pelin, "Kalkınma İçin Hayat Tarzımızı Değiştiriyorlar", *Taraf*, 19 May 2013.

[49] For critics see especially Turkish Parliament, Legislative Period 24 / Legislative Year 3, Order Number: 460, Reports 1/771 and 2/395, Opposition Comments, at pp. 15-24.

[50] "CHP yine Anayasa Mahkemesi'ne başvurdu", *Ihlas Haber Ajansı*, 31 July 2013, at http://www.iha.com.tr/chp-yine-anayasa-mahkemesine-basvurdu-politika-290039 (1.5.2014).

A number of cases at both the domestic level and before the European Court of Human Rights (ECHR)[51] illustrate how the law and judicial decisions providing environmental protections for hydroelectric dams (HPPs) are frequently overridden and undermined in a variety of ways, from direct political intervention to legislative amendments, such as one enacted in 2010, which provided the basis for establishing energy production constructions based on renewable resources in areas of critical environmental concern, such as national parks, natural parks, natural monuments and natural protection zones.[52]

The international component, in the form of free trade agreements and bilateral investment treaties (BITs), which are designed to promote and protect foreign investment, should be included in an analysis of the potential human rights violations of mega projects such as HPPs. Such agreements generally contain an investor-state dispute settlement (ISDS) clause, which provides for potential disputes between a foreign investor and a host state to be resolved through international arbitration instead of local courts.[53]

BITs are incorporated into Turkey's domestic laws by means of article 90 of the Constitution, which provides that international treaties (ratified) have the same effect as domestic laws. Article 125 of the Constitution further provides that only those disputes with a 'foreign' element have the right to apply to international arbitration, while Statute No. 5718 provides that international awards must be enforced in domestic courts.

Despite its popularity with foreign investors, international arbitration as a method for resolving investor-state disputes has been criticized, *inter alia*, for potentially interfering with the host State's sovereignty to enact and enforce domestic laws, particularly in the public policy arena such as public and

[51] *Okyay and others v. Turkey* (no. 36220/97, 12 July 2005) is an example of a case that ended up before the ECHR, after the national authorities failed to comply with the decision of domestic administrative courts to shut down three thermal power plants for polluting the environment in southwest Turkey. The Council of Ministers, citing economic concerns concluded that the thermal-power plants should continue to operate despite the courts' rulings. The ECHR found that the national authorities had unlawfully failed to comply in practice and within a reasonable time with the judgments rendered by domestic courts, and decided to adopt an interim resolution in February 2007 urging the Turkish authorities to enforce the domestic court orders. The case is still pending before the Committee of Ministers.

[52] See article 8 paragraph 5 of the Act on Use of Renewable Energy Resources for Production Electric Energy, Nr. 5346.

[53] See e.g. article VI of United States – Turkey BIT.

environmental health.[54] For instance, recently U.S.-based PSEG brought a claim in international arbitration against Turkey for the elimination, by domestic law, of a key concession in its contract to build an electrical power plant.[55]

The domestic and international factors discussed above have combined in Hasankeyf, located in southeastern Turkey along the Tigris River and home to an ancient archeological site. Hasankeyf, under the threat of being flooded by the construction of the Ilısu dam, was placed on the World Monuments Fund's watch list of 100 Most Endangered Sites in 2008.[56]

The Ilısu dam and HPP are projected to contribute 400 million dollars annually to the Turkish economy. However, the economic benefits of the dam may be exaggerated, as a recent study suggests that the mega hydroelectric dams built around the world are too prone to cost and schedule overruns to deliver economic benefits.[57]

Widespread local and international opposition to the project eventually caused export credit agencies (ECAs) in Austria, Germany and Switzerland to withdraw from the project in July 2009.[58] Nevertheless, Veysel Eroğlu, Minister of Forestry and Environment declared that the government would eliminate obstacles to the completion of the Ilısu dam at any cost, and following the withdrawal of ECAs, the Ilısu dam construction obtained the financial support of

[54] See e.g. Brown, Julia G., (2013) "International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?" 3:1 online: *UWOJ Leg. Stud*. 2 at http://ir.lib.uwo.ca/uwojls/vol3/iss1/3 (23.6.2014); Tienhaara, Kyla, (2006) "What You Don't Know Can Hurt You: Investor-State Disputes and the Protection of the Environment in Developing Countries", *Global Environmental Politics*, Volume 6, Number 4, November 2006, 73-100.

[55] *PSEG Global, Inc., The North American Coal Corporation, and Konya Ilgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, (ICSID Case No. ARB/02/5). Turkey was found in violation by the arbitral tribunal and ordered to pay $9 million in compensation as well as 65% of the costs of the case. *Id*. at p. 90

[56] World Monuments Watch 1996-2014, at http://www.wmf.org/watch/watch-sites-1996?country_name=Turkey&tid_1=26 (6.6.2014).

[57] Ansar, Atif, et al., "Should we build more large dams? The actual costs of hydropower megaproject development", *Energy Policy* (2014), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2406852 (16.6.2014).

[58] Crystal Luxmore, "Turkish dam loses European creditors", *NY Times*, August 7, 2009, at http://green.blogs.nytimes.com/2009/08/07/turkish-dam-loses-europeancreditors/?_php=true&_type=blogs&_r=0 (5.5.2014).

Turkish banks Garanti Bankası and Akbank.[59] A noteworthy development is that in 2010 the Basque bank, BBVA became a shareholder of Garanti Bankası.[60]

The Ilısu dam project was challenged in court on the ground that the region is a protected archeological site, with plaintiffs alleging, *inter alia,* violations of international conventions for the protection of cultural assets.[61] The case was rejected by the Batman Administrative Court in 2012 on the ground that the "overwhelming public interest" is in favor of the dam's construction. [62]

Despite continuing opposition, the Ilısu dam project is proceeding and is expected to result, not only in the destruction of a historic site, but also in the forced resettlement of 37.100 people.[63]

VI. DISPLACEMENT, INDIGENOUS PEOPLE AND THE SARDAR SAROVAR DAM PROJECT IN INDIA

The Sardar Sarovar Dam on the Narmada river is one of the most controversial large infrastructural project in India. It has had to cope with multiple difficulties.[64] First, the Project has involved three states. The greatest benefit, however, has fallen to the state of Gujarat. The resulting conflict has necessitated the creation of a special tribunal, the Narmada Water Disputes Tribunal (NWDT) in

[59] See e.g. warning of Chamber for Electrical Engineers and Nature Association at http://www.emo.org.tr/ekler/5a3d602e3c5e52e_ek.pdf?dergi=610 (20.5.2014) and Ertan Keskinsoydan, "Hasankeyf'in Geleceği ve Bankalarla İmtihanımız", *Express*, 26 February 2011 at http://bianet.org/biamag/cevre/128194-hasankeyf-in-gelecegi-ve-bankalarla-imtihanimiz (21.5.2014).

[60] For information as to shareholders see Turkish version of Garanti Bankası web page http://www.garanti.com.tr/tr/garanti_hakkinda/yatirimci_iliskileri/kurumsal_bilgiler/ortaklik_yapisi (8.6.2014).

[61] Convention Concerning the Protection of the World Cultural and Natural Heritage and European Convention on the Protection of Archeological Heritage.

[62] Batman Administrative Court, E. 2011/4987, K. 2012/4031; see also Özgentürk, Jale, "Hasankeyf'i yutacak Ilısu Barajına tescil", *Radikal*, 6 June 2012, at http://www.radikal.com.tr/yazarlar/jale_ozgenturk/hasankeyfi_yutacak_ilisu_barajina_tescil-1090254 (4.4.2014).

[63] See the web site at http://ilisuprojesi.com and for details in 2014 http://ilisuprojesi.com/is_ilerleme/ILISU%20PROJESİ%20İŞ%20İLERLEME%20DURUM%20RAPORU%20NİSAN%202014.pdf (20.5.2014); the residential units to be resettled include 1 town, 101 villages, and 42 *mezra* – units smaller than villages

[64] The project was launched in 1961 by the then Prime Minister Jawaharlal Nehru and is part of a more complex plan of dams on the Narmada river.The Government argues that the SSDP would provide water for irrigation for more than 1.8 million hectares (mostly in Gujarat) and extinguish the thirst in drought-prone areas of Kutch and Saurashtra in Gujarat, also generating an electrical capacity of 1,450 MW. The dam is located in the state of Gujarat, which would enjoy the greatest benefits of the project, but the flooding concerns also the state of Madhya Pradesh and to a lesser extent of Maharashtra.

1968. Second, the involvement of the World Bank since 1985 saw the engagement of international business actors. In 1991 an independent commission, the Morse Commission, was established. Numerous violations were recorded, culminating in the abandonment of the project in 1993. Third, social protests spread all over India and internationally. Narmada Bachao Andolan (Save the Narmada Movement) aggregated indigenous people and intellectuals against the project. The project was not stopped. Instead, it diversified given the interests of several stakeholders. The emerging issues have been determined by the Courts.

The displacement of the inhabitants of entire villages, resulting from planned flooding, has been a major issue.[65] The Adivasis, indigenous people, who developed a social and economic organisation that is deeply entrenched with the environment where they live, have paid the highest price,[66] and existing legislation and specific regulation has proved to be unsatisfactory.

Another issue has been the individual ownership of land and the community's control over its own natural resources. British colonial legislation, the *Land Acquisition Act* (1894, still allowed the government to expropriate land for reasons of public utility, but monetary compensation was only provided on evidence of ownership of the land. The Adivasis cannot prove ownership of land even though it is incontestable that they have lived there for centuries. The *Land Acquisition Act* has also limited compensation to land owned individually, so that community ownership of land, crucial for survival of tribal groups, has been uncompensated.[67] Finally, where monetary compensation has been given it has underestimated the real value of the land.

In a 1979 decision, the NWDT undertook some significant steps. These resulted in plans for resettlement and rehabilitation for displaced people. Gujarat made provision to compensate for land expropriation, and job opportunities were

[65] The SSDP involves submerging of 297 villages (19 in Gujarat, 33 in Maharashtra and 245 in Madhya Pradesh). Even though the exact number of displaced people is difficult to quantify, a reasonable esteem is about 163.500. The social price of this uprooting seems to have been poorly understood or completely ignored in cost-benefit calculations of infrastructural projects. See C. McDowell (ed.), *Understanding Impoverishment. The Consequences of Development-Induced Displacement*, Berghahn Books, Oxford 1996.

[66] The fathers of the Indian Constitution, which had identified in Adivasis tribes a most vulnerable and disadvantaged group, included explicit protections and safeguards against them in the Constitution of 1949 (1950). Nevertheless, it is a significant fact that tribal communities, although the 8% of India's population, constitute about 40% of the people affected by the project.

[67] See Philippe Cullet, *The Sardar Sarovar Dam Project: Selected Documents*, Ashgate, Aldershot, 2007.

also offered, resulting in these measures being more effective than monetary compensation. But they proved difficult to implement. The assigned lands were unsuited to cultivation and basic services were missing. Displacement produced conflicts with other residents in the resettled areas, resulting in impoverishment and indebtedness.

A second critical issue arose from exclusion from the status of Person Affected by the Project (PAP). Some people did not live in the area, but they worked there, or they were dependent on its natural resources, which were now affected by the project.[68] Although the NWDT provided a broader definition of an oustee, the regulation was not consistently respected.

As a consequence, an impressive amount of litigation ensued. In the public interest case of *Narmada Bachao Andolan vs. Union of India and Others* (2000), , the Supreme Court defined how different competing interests should be balanced.[69] The applicants argued for a complete review of the entire project by an independent authority, Social, environmental, and financial costs of the project should be compared with its benefits, with an eye to its alternatives. Only then could it be decided if the project was consistent with the national interest. The applicants emphasised the failure of resettlement and rehabilitation plans. These had worsened the living conditions of hundreds of people. The resettlement of oustees should be monitored by an independent agency and no construction should proceed without the authorisation of this monitoring authority.

The Court held that the applicants could not show that the project was contrary to the public interest. On the contrary, the project benefited the environment by tackling drought. Where resettlement plans worked they improved the quality of life of communities. The programs of rehabilitation and resettlement of the three States were not identical, but the measures had generally improved the conditions of the PAPs. A system for satisfactory rehabilitation and

[68] Even more worrying is the phenomenon of multiple displacement suffered by those who, for the lack of coordination between different development projects or mistakes made in the allocation of new land, and generally in the implementation of resettlement plans, have been forced to move several times, experiencing a progressive impoverishment. See R. Hemadri -V.Nagaraj, *Dams, Displacement, Policy and Law in India*, contributing paper prepared for the World Commission on Dams, Cape Town 2000.

[69] The applicants argue that the forced displacement of tribals from their lands is a violation of their fundamental right to life set out by Article 21 on the right to life of the Indian Constitution, read in conjunction with the Indigenous and Tribal Populations Convention (ILO Convention 107) of which India is a signatory State. In the specific case – it is argued – displacement cannot be deemed as an exceptional measure made necessary by prominent public interest.

resettlement provision for displaced persons existed in all three states, with the institution of initiatives like the Narmada Control Authority, Resettlement and Rehabilitation subgroups and Grievances Redressal Authorities so that no external authority was needed.

In so deciding, the Supreme Court emphasised the constitutional relationship of the judiciary and the government, refusing to enter into the field of political decisions and to review the policy choices of the government, but stating its equally important constitutional role of ensuring that the implementation of the project did not violate the laws and fundamental rights of the people. Instead, the Court provided a series of guidelines, stressing effective implementation of resettlement regulations. Resettlement, the Courts said, should be implemented as a condition for new heightening of the dam, and not postponed to an uncertain future.[70]

In recent years the Indian government has recognized the need to reduce displacement on a large scale and the need to handle with the utmost care issues related to resettlement and rehabilitation of affected families. In 2007 a new policy was announced, aimed at reaching a better balance between the need for land for development activities and interests of all people involved. It recommended that only the minimum required area of land commensurate with the scope of the project should be expropriated, that resources needed to provide a better standard of living to the PAPs should be increased, and that the problems of rehabilitation should be adequately addressed in development planning. In 2013 the *Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act* was passed. This finally set aside the *Land Acquisition Act*. In this new Act a better definition of public interest is provided and several provisions are laid down in order to make rehabilitation effective. Social impacts now have to be assessed and the consent of people has to be procured in a number of cases. Although much has still to be achieved, the experience of the Sardar Sarovar Dam on the Narmada river shows that business interests may yet be reconciled with human rights values on the basis of the principles of Protect, Respect and Remedy.

[70] In a second judgment on *Narmada Bachao Andolan vs Union of India*, in 2005, the Supreme Court confirmed its role but began to pronounce much more critical judgments on this issue, acknowledging that resettlement and rehabilitation of displaced persons had not properly occurred in many cases.

CONCLUSION

As this paper has sought to demonstrate, the construction of large-scale dams has the potential to bring in its wake a host of major challenges, from the threat to the environment and cultural heritage of a country, to human rights abuses arising from socially-upheaving forced evictions and expropriation of land. Having examined the experiences of five such disparate countries as South Africa, Spain, Brazil, Turkey and India, it can be seen that many of the challenges are universal, although the responses may be as varied as the countries themselves.

The work is only just beginning. Now that the challenges have been identified, it is time consider solutions, which are also likely to be as varied as the countries considering them. But it is useful to learn from the experiences of others facing similar problems, and it is the hope of this paper to bring forth collaborative, comparative discussions to address the issues faced by so many around the world living in the shadow of behemoth dams. The following research questions for the future, amongst others, may be adopted for consideration:

(1) What is the potential impact of international arbitration and trade/investment treaties on domestic legislation and how effective is the enforcement of human right norms and environmental protections in this situation?

(2) How effective is the protection of human rights values against corporate-related harm and what evidence is there of the practical and effective implementation of the UN Guiding Principles on Business & Human Rights?

(3) To what extent has there been an adaptation of national laws to international standards of human rights protection, and what are the challenges posed by local impediments, of weak governance structures, land of a lack of enforcement mechanisms to such adaptations?

(4) Is there are realistic role of alternative dispute resolution models to complement the Judiciary in the adjudication and resolution of claims arising from such cases?