

## COUNTRY REPORT: BRAZIL

### **The Current State of Socioenvironmental Law in Brazil: The New Forest Code, Megaprojects and Threats to Traditional Lands**

LIANA AMIN LIMA DA SILVA\* CARLOS FREDERICO MARÉS DE SOUZA FILHO#

#### **Introduction**

Brazil is currently experiencing threats to its Environmental Regulations. We identify in this Country Report two fronts of attack, one concerning *the Forest Code*, and the other the threat to indigenous and traditional community rights.

In 2013 *the Forest Code* was modified by Congress, decreasing the protection of forests. Indigenous and traditional communities - the Forest people,<sup>1</sup> especially - are being threatened with developmental megaprojects and projects to modify the rules affecting their lands, territories and natural resources required for their physical and cultural survival. In this report, we use the term “socio-environmentalism” to reflect the link between the environmentalist movement (civil society) and the indigenous and traditional community organizations struggling for nature and peoples’ rights. “Socio-Environmental Law” in Brazil started with the *1988 Constitution*.

The *1988 Constitution* enshrines in Brazilian law the fundamental right to an ecologically balanced environment, for the common use of the people, and essential to a healthy quality of life, by imposing on the Public Administration and the community the duty to defend it and

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\* PhD Student in Economic and Socioenvironmental Law from Pontifical Catholic University of Paraná, Brazil. E-mail: lianalima@gmail.com.

# Professor of Law at the Pontifical Catholic University of Paraná. Paraná State Prosecutor. carlosmares@terra.com.br.

<sup>1</sup> “Forest People” is an expression created by the environmentalist leader Chico Mendes (Acre-Brazil), in the 1980s, about the people living on the Amazon Forest, especially indigenous peoples, tappers and other traditional communities.

preserve it for present and future generations (*Article 225 et seq.*). The Constitution recognizes the ethnic and cultural diversity existing in the country by protecting the indigenous peoples' territorial and cultural rights and their unique social organization (*Article 231 and 232*), and by recognizing the property rights of the remaining *Quilombo*<sup>2</sup> communities over the land they occupy (*Article 68 of the Temporary Constitutional Provisions Act*).

In the last twenty-five years, Brazil may be considered to have made positive advancements in protecting environmental rights. However, beyond the issue of the effectiveness of environmental norms, it currently faces attacks on and setbacks in legislation to protect the environment and also in relation to the rights of indigenous peoples and traditional communities.

The recent amendment of the *Forest Code (Federal Law 12,651 of May 25, 2012)* represents a setback in forest protection, which threatens essential ecological processes. The last 12 months have seen increased deforestation. This threatens social biodiversity due to projects which disenfranchise protected territorial spaces thus reducing the boundaries of indigenous land areas and conservation units.<sup>3</sup> This is especially so in the Brazilian Amazon, due to the exploitation interests of hydroelectricity megaprojects and the mining industry.

### **The New Forest Code and Increased Amazon Deforestation**

After intense political debate *Law 12,651/2012*, which came into force on May 25 2012, repealed *Law 4,771/1965 (The Brazilian Forestry Code)*, placing significant pressure upon the expansion of agricultural interests in the country. The Legal Reserve (RL) is the

*“area located inside a rural property or possession, delimited as provided by Art. 12, whose function is to assure economic use in a sustainable fashion of natural resources on the rural estate, to aid in the conservation and the rehabilitation of ecological processes and to promote the conservation of biodiversity along with shelter and protection for wild fauna and the native flora.”*

The RL for estates located in the Legal Amazon region is 80% (eighty per cent) in forest areas, 35% (thirty five per cent) in Amazonian savannah areas and 20% (twenty per cent) in

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<sup>2</sup> Rural Afro-Brazilian communities (free slaves).

<sup>3</sup> Law 9,995 of 18 July 2000 establishes the National System of Conservation Units.

grasslands (campos gerais) areas; and for estates located in other regions of the country, 20% (twenty per cent) of the area must be kept as native plant cover (Article 12 of the new Forest Code).

A permanent protection area (APP) is defined by Article 3 of the new Forest Code as: “a protected area, whether or not covered by native vegetation, the environmental function of which is to preserve water resources, landscapes, geological stability and biodiversity, to facilitate the gene flow of fauna and flora, protect the soil and assure the well-being of human populations.”<sup>4</sup>

When referring to the possibility of reducing the protection of *Permanent Protection Areas (APP)* and *Legal Reserves (RL)*, in addition to granting amnesty to offenders for illegal deforestation that occurred prior to 2008,<sup>5</sup> the change to the law represents a setback in forest protection and a threat to essential ecological processes.<sup>6</sup> There is a consensus among researchers that the guarantee to maintain Permanent Preservation Areas along the riverbanks, water bodies, hilltops and slopes, as well as to conserve Legal Reserve areas in the different biomes, is of fundamental importance for the conservation of Brazilian biodiversity.<sup>7</sup>

In this first year of the new forestry law, the 27 states of the Federation still await the approval of the Environmental Regularisation Programme. Approximately 4.5 million rural

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<sup>4</sup> See: Solange Teles da Silva; Márcia Diegues Leuzinger. Biodiversity and Connection conservation in Brazilian Law. In David Farrier and Melissa Harvey, Solange Teles da Silva and Márcia Diegues Leuzinger, Jonathan Verschuuren and Mariya Gromilova, Arie Trouwborst, Alexander Ross Paterson *The Legal Aspects of Connectivity Conservation -- Case Studies*, (IUCN, Gland 2013).

<sup>5</sup> An amnesty from environmental liabilities for about 40 million hectares of savannahs and forests illegally deforested before July 2008 (Source: IPAM, 2013).

<sup>6</sup> Brazil's Higher Court of Justice (STJ) ruled in 2008 (published in 2009) on a special appeal filed by the Federal Prosecutor's Office in a class-action suit, which accused the Joinville city government (in southern Brazil) of having violated environmental law by suppressing vegetation without preserving the strip along a stream on its property (as required by 1965 Forest Code riparian permanent preservation area). Justice Benjamin noted that “The Federal Constitution safeguards essential ecological processes, including ciliary permanent preservation areas. They are essential because of their ecological functions, particularly to conserve soil and water, including (a) protection of water supply and quality, both by facilitating its infiltration and storage in the water table and by safeguarding the physical-chemical integrity of water bodies from mouth to headwaters, as a cover and a filter, above all by blocking erosion and silting, as well as contaminants and waste; and (b) the maintenance of habitats for fauna and the formation of biological corridors, which value grows with the fragmentation of territory caused by human settlements. (...)” (STJ, Resp 199800405950, Resp – Recurso Especial 176753). See more in: Solange Teles da Silva; Márcia Diegues Leuzinger, note 4 .

<sup>7</sup> Brazilian Academy of Sciences and the Brazilian Society for the Advancement of Science, cited in the Direct Action of Unconstitutionality filed by the Attorney General (Federal Prosecutor) before the Supreme Federal Court on January 18, 2013.

properties must be entered in the *Rural Environment Registry (CAR)*.<sup>8</sup> This registry is a mandatory national registry for rural properties, the idea being that all APP and RL must be registered within two years. This information will then be made available to the public. For registration (in the CAR) to be effective, it must fulfil its purpose of ensuring legal certainty, with transparency and social control. In this respect, the participation of civil society in monitoring the implementation and regulation of the new forestry law through the Forest Code Monitoring Centre,<sup>9</sup> has been very important.

The main challenges arising for the successful implementation of the Act, as highlighted by the *Forest Code Monitoring Centre*, include: the technical and legal effectiveness, transparency and social control of the CAR; inter-institutional disjointedness between the three spheres of government (federal, state and municipal); a lack of social participation in the design of environmental regularisation programmes, and absence of official and participatory public spaces to monitor its implementation; a mismatch between agricultural and environmental policy; and overly bureaucratic regulations, which rural farmers find difficult to understand.<sup>10</sup>

*"According to a recent study by the Strategic Affairs Secretariat of the Presidency of the Republic, there are more than 20 million hectares of forests and other native vegetation throughout the country to be recovered in PPAs and Legal Reserves alone. If we add carbon capture, as well as river preservation and direct job creation, we would be removing over 1 billion tons of CO<sub>2</sub> from the global atmosphere in 20 years."*<sup>11</sup>

Deforestation of the *Legal Amazon*<sup>12</sup> increased by 28% in 2013. In the period from August 2012 to July 2013, 5,843 km<sup>2</sup> of forest were cleared, as against 4571 km<sup>2</sup> in the year

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<sup>8</sup> In Portuguese, "Cadastro Ambiental Rural (CAR)".

<sup>9</sup> Created in May 2012 by seven civilian institutions – the Environmental Research Institute of Amazonia (IPAM), WWF-Brazil, SOS Mata Atlântica, Instituto Centro de Vida (ICV), The Nature Conservancy (TNC), Conservation International (CI) and the Socio-Environmental Institute - the Centre aims to monitor the implementation of the new Forestry Law (Federal Law 12.651/12) throughout the country. Available at: <http://www.observatorioflorestal.org.br>.

<sup>10</sup> Lima, André. Forest Code Monitoring Centre. IPAM, May 22, 2013. Available at: <http://www.ipam.org.br/noticias/Observatorio-do-Codigo-Florestal-e-criado-para-monitorar-implementacao-da-lei-/2723>.

<sup>11</sup> Lima, André and Stella, Osvaldo. Observatório para o Brasil Potência Socioambiental (Valor Econômico, on 13.08.2013). Source: <http://www.sae.gov.br/site/?p=17770#ixzz2mO2Taj3q>.

<sup>12</sup> The Brazilian government instituted the concept of Legal Amazon in 1953 (Law 1.806/1953), bringing together regions of similar economic, political and social problems, in order to better plan the social and economic development of the Brazilian Amazon region,. The current area covered by the Amazon represents all the states of Acre, Amapá, Amazonas, Pará, Rondônia, Roraima and Tocantins and part of the states of Mato Grosso and Maranhão (west of the meridian of 44 ° west longitude).

before.<sup>13</sup> This increase may be directly attributed to the new Forest Code, as it discourages compliance and opens the withdrawal of specially protected territorial spaces with Government Acts.

### **The Threat to Protected Areas from Hydroelectric Construction**

From a territorial point of view, two forms of nature protection are established under Brazilian law. First, there is a general collective duty to preserve nature, whereby public or private property is subordinated to preservation, through permanent preservation areas and legal forest reserves.<sup>14</sup> Second, the protected territorial areas known as protected areas indigenous lands and conservation units are areas demarcated by the Public Administration for the specific reason of protecting them.

With regard to the legal reserves (RL), the general rule in terms of the Forest Code is that legal reserves in forest areas in the Amazon are to be apportioned as follows: 80% for the maintenance of native vegetation on rural property, 35% in the Cerrado areas, and 20% in general countryside areas and other regions of the country, along with the exceptions set out in Article 68. Notable amongst these exceptions is the designation of licenses for hydropower operations, permitting the operation of electric power undertakings or substations, or the installation of electric power transmission lines (Article 12 §7). Furthermore, dam construction ventures are multi-millionaire dollar megaprojects that generate immeasurable environmental impacts, primarily in the Amazon biome, debunking the idea that hydropower, as an energy source, by being renewable, would also be "clean" and "cheap".

The following map shows the areas protected within the South American Amazon region:

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<sup>13</sup> INPE, Deter System (real time deforestation detection). Available at: <http://www.obt.inpe.br/deter/nuvens.php>.

<sup>14</sup> In this sense: Carlos Frederico Marés. Traditional populations and forest protection. In: Código Florestal 45 anos. Curitiba-PR: Letra da Lei, 2010. Protected Environmental Spaces and Conservation Units, p. 20. Curitiba: Publisher: Champagnat University, 1993.



1,050 square kilometres from five Conservation Units were decommissioned in the Tapajós River Basin to construct two Hydroelectric Power Plants (HPPs). In this case, the areas were decommissioned even before environmental licensing.

#### *The Belo Monte HPP on the Xingu River Basin*

The *Belo Monte* HPP on the Xingu River Basin (Pará State) is the largest work of the *Growth Acceleration Programme*. The *Growth Acceleration Programme* (Programa de Aceleração do Crescimento – PAC) is a Development Governmental Programme of Brazil. The objective of the Programme is to “encourage private investment; increased investment in infrastructure; remove obstacles (bureaucratic, administrative, regulatory, legal and legislative) to growth.”<sup>15</sup> The implementation of the programme will, however, be to the detriment of the environment.

On August 13, 2012, the First Regional Federal Tribunal ordered that the works be stopped because indigenous peoples affected by the *Belo Monte* HPP were not consulted. Then, on August 27, the Supreme Federal Court (STF) granted the Attorney General’s injunction, suspending the decision, and the works were resumed. Environmental NGOs and indigenous organizations contend that the scale of the environmental impact has not been adequately evaluated. The dam construction directly affects the local flora and fauna, affects the course of the riverflow, depleting fish stocks and vilifying the communities to whom that land belongs and who depend on the natural resources of the area for their physical, cultural and spiritual survival and wellbeing. Besides violating the indigenous peoples’ rights, riverside populations have been displaced - to date without reasonable compensation - creating tension, violence, poverty and insecurity over sustenance for the people affected, and infringing their dignity and physical and cultural integrity.

Another aspect to be considered in this context are the social and environmental impacts arising from migration of the displaced people to the Altamira municipality, since the *Norte Energia* company has not fulfilled the conditions of improving the city’s infrastructure, having failed to implement basic sanitation and a new drinking water supply system, or to provide health and educational facilities for the increasing local population. This disregard for legal

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<sup>15</sup> Available at: [http://www.fazenda.gov.br/divulgacao/publicacoes/plano-de-aceleracao-do-crescimento-pac/r220107\\_pac.pdf](http://www.fazenda.gov.br/divulgacao/publicacoes/plano-de-aceleracao-do-crescimento-pac/r220107_pac.pdf).

procedure, required as a condition of the licensing process, led IBAMA<sup>16</sup> to issue an administrative penalty against *Norte Energia (IBAMA Technical Note 5460/2013)*.<sup>17</sup>



Figure 3. Belo Monte HPP. Source: ISA, 2013.

The indisputable advance of the Belo Monte dam construction is only possible because of the ‘*Security Suspension*’ procedural tool, created by *Law 4,348 of June 1964* to allow political control of judicial decisions contrary to the military dictatorial regime. This authoritarian mechanism allows courts to suspend a decision of a lower court on grounds of a risk of "the occurrence of severe damage to public order, health, safety and the economy."<sup>18</sup>

In 2006, the Supreme Court suspended the 1<sup>st</sup> Regional Federal Court’s decision, which determined that the indigenous peoples affected by the plant had indeed not been heard, as required in terms of the *Federal Constitution* (Article 231 §3) and *ILO Convention 169*, ratified by Brazil in 2002, and promulgated by Decree 5,051 in 2004.

*Through the means of the Security Suspension, ignoring illegalities, such as the above, has become a state of "institutional normality". This has led to a situation in which, with the endorsement of the highest courts, the major projects will only need to follow rules if convenient. (...) The repeated and unscrupulous use of the judiciary by government interests,*

<sup>16</sup> Brazilian Institute for the Environment and Renewable Natural Resources.

<sup>17</sup> Socio-Environmental Institute: Analysis of compliance with determinants for the Belo Monte Dam installation license. 2013. Available at: [http://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/quadro\\_condicioanantes\\_2013\\_isa.pdf](http://www.socioambiental.org/sites/blog.socioambiental.org/files/nsa/arquivos/quadro_condicioanantes_2013_isa.pdf).

<sup>18</sup> Biviany Rojas e Raul Telles do Valle, ‘Why the courts cannot decide on the case of Belo Monte’, SIE, November 6, 2013. Available at: <http://www.socioambiental.org/pt-br/blog/blog-do-xingu/porque-a-justica-nao-consegue-decidir-sobre-o-caso-de-belo-monte>.

*by means of the Security Suspension, suggests that the situation will be repeated in future major projects planned for the Amazon, like the Tapajós River plant complex.*"<sup>19</sup>

In short, even outside the environmental licensing process, such projects are viewed as essential to maintaining "public order and the economy", even where there are no mitigating and compensatory measures. Among current projects with the highest funding, the *Belo Monte* hydroelectric plant, the *Jirau* and *Santo Antônio* plants, the *Madeira* River Complex and the *Carajás* Railway stand out. The various cases of environmental conflicts involving mega-enterprises in the Amazon have been building up, a problem that extends to financiers, especially public institutions, such as the National Bank for Social and Economic Development.<sup>20</sup>

### **Mining Projects in Protected Areas**

*The Draft Mining Law on Indigenous Lands (PL 1610/1996) and the new Mining Code Bill (PL 5807 of 2013) was proposed and is currently being analysed by Congress. The National Committee to Defend Territories, confronted with such mining, has rejected this proposed law. The law proposes that the creation of environmental conservation units, demarcation of indigenous land, rural settlements, and definition of Quilombo communities should require the prior consent of the National Mining Agency. In other words, mining interests would, if this law were adopted, start to take precedence over socio-biodiversity protection, and the traditional use of land belonging to the indigenous and Quilombo peoples, in violation of human rights treaties ratified by Brazil. The National Department of Mineral Production is currently considering 104 cases, constituting 4,116 mining interests in total (including small-scale mining, licensing and research applications, and processes held), relating to 152 Indigenous Lands in Brazil.*<sup>21</sup>

Aiming for short-term gains, the mineral sector has intensified its activities in the country. The mining industry accounted for approximately 4.1% of Brazilian GDP in 2010. The mineral share in exports has also risen from 7.1% in 2006 to 17.3% in 2011. The National Mining Plan, proposed by the Ministry for Mines and Energy, outlines investment of 350

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<sup>19</sup> *Ibid.*

<sup>20</sup> Project to Double the Carajás Railway by the Mining Company Vale do Rio Doce. See: PINTO, Lúcio Flávio. *The Amazon Question: Belo Monte, Valley and other topics*. Sao Paulo: B4 Publishers, 2012; *Public Amazon: Carajás Railway*, available at: <http://www.youtube.com/watch?v=v0F7ERvs-rg&feature=plcp> ; *Justice on Track*: <http://www.justicanostrilhos.org>.

<sup>21</sup> Ricardo, Fanny and Rolla, Alicia. *Mining on indigenous lands in the Brazilian Amazon*, 2013. Socio-Environmental Institute, 2013.

billion Brazilian Reais by 2030, mainly earmarked for the Amazon.<sup>22</sup> The increase in mining activities is linked to mineral processing, a highly energy-intensive process. Arguably, the rapid expansion of mining in the Amazon region relies on a strong relationship with the planned installation of twenty new large and midsize hydroelectric plants by 2020. However, this development strategy by the State is likely to cause conflict over the unequal distribution of the social and environmental costs of exploiting mineral resources in the name of a supposed public interest.

### *Project Belo Sun: Gold Mining*

It is notable that the largest gold exploration project in the country is intended to be built 10 km from the Belo Monte hydroelectric dam. The initiative is that of Belo Sun, of the Canadian Forbes & Manhattan group, and is intended to extract 50 tons of gold in 12 years.

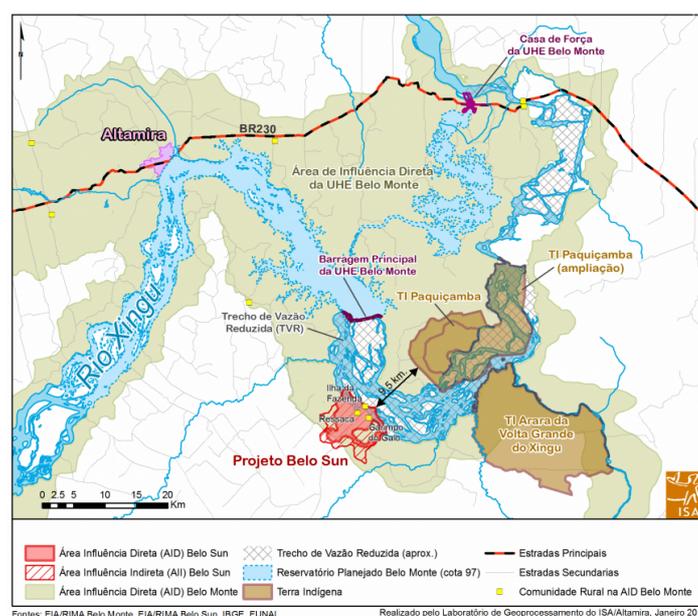


Figure 4. Volta Grande do Xingu – location of the Belo Sun Project. Source: ISA, 2013.

The Federal Public Ministry, in a Public Civil Action, requested the suspension of licensing process pending completion of the Environmental Impact Assessment, because of the absence of the participation of indigenous peoples, in accordance with Convention 169 of the International Labour Organisation (ILO). However, the Altamira Federal Court (PA) recently (in November 2013) ordered a halt to the licensing process for the gold mining

<sup>22</sup> Malerba, Julianna and Milanez, Bruno. A new mineral code for what? *Le Monde diplomatique*, Brazil, Year 6, Number 65, December 2012, p.22-23.

project of the Canadian Belo Sun company. The judge considered the irreversible nature of the project's impacts on indigenous peoples and their territories: "It is an incontrovertible fact that implementing the project in synergy with the *Belo Monte* HPP will be likely to cause direct interference with the existential-ecological minimum of the indigenous communities, with potential negative and irreversible impacts on their quality of life and cultural heritage."<sup>23</sup>

### Human Rights Violations

Recent Supreme Court decisions favourable to the demarcation of the Raposa Serra do Sol Indigenous Land of the *Macuxi, Wapixana, Ingariko, Patamona and Taurepang* of Roraima (2009) and the *Caramuru Catarina Paraguasu* Indigenous Land of the *Pataxó Hã Hãe* people of southern Bahia (2012) confirm the constitutional guarantee of the right to indigenous land.

2013 has been a year of onslaughts and attacks of historic proportions on territorial rights enshrined in the Constitution, particularly on indigenous and the *Quilombo* peoples. This attack, coming mainly from the Legislature, intends to alter the jurisdiction of the Executive Branch to handle demarcation of indigenous lands. Proposals to amend the Constitution (*PEC 215/2000 and 38/1999*) are in progress before the Congress, including making approval of indigenous land demarcation the exclusive power of Congress, thus altering demarcation procedures. In this context of delays and omissions by the State in indigenous land demarcation, the most critical situation is affecting the *Guarani Kaiowá* and *Terena* people, threatened with genocide due to the land conflict in Mato Grosso do Sul state, where indigenous leaders are murdered by members of armed militias sponsored by large farmers who are holders of title deeds that affect land traditionally occupied by the *Guarani Kaiowá* people.

In the case of the Quilombos, the procedure for demarking and titling their lands is regulated by *Decree 4,887 of 2003*. However, the onslaught against their rights is highlighted by the interposition of the Direct Action of Unconstitutionality, number 3297 by the *Democrat* political party, the same parliamentary front that caused the recent change in forest law: the Parliamentary Front for Agrobusiness. These proposals are a step in the opposite direction to constitutional guarantees within an international human rights framework, such as the *United Nations Declaration on the Rights of Indigenous Peoples (2007)*, *ILO Convention 169*

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<sup>23</sup> ISA. Court Orders Suspension of Belo Sun Mining License. November 21, 2013.

*concerning Indigenous and Tribal Peoples* (ratified by Brazil in 2002 and promulgated by Decree 5040 of 2004) and precedents of the Inter-American Court of Human Rights.

### **Final Thoughts**

In a Latin American context, with new Constitutions in Bolivia and Ecuador, we see alternative proposals to the predatory development model. Bolivia recently enacted the Ley Marco de la Madre Tierra (2012); the respective *Sumak Kawsay* and *Buen Vivir* principles show us a way to respect nature (*derechos de Pachamama*) reconciled with a worldview of indigenous peoples. In Brazil, however, it is a time of setbacks in environmental legislation and threats to the human rights of indigenous and traditional peoples. The current state of social and environmental injustice is configured thus. The hope and struggle for enforcement of environmental rights must prevail. Accordingly, participatory democratic processes such as the mechanism of prior consultation of indigenous and tribal peoples, and social control over licensing processes and environmental impact studies, must be respected in policy decisions.