

# Business & Human Rights - Brazil

Online workshop series

12 and 26 May, 9 and 23 June 2020

## WEBINAR 3

### Engaging stakeholders - indigenous communities, FPIC and grievance mechanisms

26 May 2020, 10:30 – 12:00 BRT

Engaging with stakeholders is key to developing and implementing effective approaches to identify and manage human rights risks and issues.

In the third webinar of our four-part series, participants focused on engaging with indigenous and *quilombola* communities, and explore practical challenges relating to free, prior and informed consent (FPIC). Discussion focused on international and Brazilian legal standards, and practical approaches to engaging with indigenous and other traditional communities, including to obtain FPIC and in relation to grievances.

This document captures key approaches, practices and insights shared during the webinar, as well as links to further resources.

## INTERNATIONAL AND REGIONAL HUMAN RIGHTS FRAMEWORKS

- Key standards at the international level include:
  - [ILO Convention 169 – Indigenous and Tribal Peoples / Convenção n° 169 sobre povos indígenas e tribais](#)
  - [UN Declaration on the Rights of Indigenous Peoples / Declaração das Nações Unidas sobre os Direitos dos Povos Indígenas](#)
  - [American Declaration on the Rights of Indigenous Peoples / Declaração Americana sobre os Direitos dos Povos Indígenas](#)
- These standards establish the right to self-determination for indigenous peoples, as well as rights to information, participation and consultation which enable other rights such as rights to land, resources and culture.
  - **Participation** is understood as an ongoing process that enables indigenous peoples to control their own destinies and chosen paths in economic, cultural and social developmental terms.
    - Indigenous people should be able to participate in a free way through appropriate procedures and through their own representative institutions.
    - Indigenous people should have real ability to influence the decision-making process where their land, resources and culture are impacted.
- The concept of **free, prior and informed consent (FPIC)** is present in all of these international standards.
  - **Free:** Indigenous people should come to the table of their own accord, with no coercion, intimidation or manipulation on the part of the company or other stakeholders.
  - **Prior:** Consultation should occur in advance of the activity, and allow communities enough time to use their own processes.
  - **Informed:** Indigenous people should have access to all relevant information, presented objectively, accurately and in a format understandable by them.
  - **Consent:** The indigenous people concerned have agreed to the activity under discussion.

- There is a long-standing debate as to whether, in practice, FPIC requires *consent* or *consultation*. ILO Convention 169 expressly requires consent where relocation of an indigenous community is envisaged. Practical guidance tends towards consultation, however there is a growing consensus among jurists and in the international legal order that consent is mandatory in the case of large-scale developments.
  - [IFC Performance Standard 7: Indigenous Peoples](#) requires consultation, unless relocation is foreseen, in which case consent is required. However, the need for consent does not mean that indigenous communities have a veto power.
  - The [ICMM Position Statement on Indigenous Peoples and Mining](#) recommends companies obtain consent where a project is likely to have a significant impact on indigenous communities.

## RELEVANT BRAZILIAN LEGAL FRAMEWORKS

- Brazil ratified ILO Convention 169 in 2002, and it entered into force in 2004. The convention applies to indigenous groups and to *quilombolas*.

### Indigenous groups

- The protection of indigenous groups dates back to the enactment of the indigenous statute and the creation of FUNAI in the late 1960s and early 1970s. These protections were substantially enhanced by the 1988 constitution, which is highly protective of access to land, grants permanent collective possession to indigenous communities which cannot be alienated, and guarantees exclusive use of soil, rivers and lakes on such lands to indigenous people. The constitution also protects the culture and patrimony of indigenous peoples.
- Sub-soil, hydrological and mineral resources remain a federal prerogative. Exploration is therefore permissible provided there is express authorisation from both houses of Congress and indigenous communities are 'heard'.
  - Consultation with indigenous people was to be regulated by a complimentary law, but this has never been enacted. The result is that exploration has not occurred on indigenous lands to date.
- Where a project takes place within a radius of 5-40 kilometres of an indigenous group, the group has a right to be consulted as part of the licencing process. FUNAI is the relevant agency, and while it does not hold a veto over such projects, it is highly influential. A 2012 decree guaranteed the right of indigenous people to consultation under the terms of ILO 169.
- A case is currently pending before the Brazilian Supreme Court to clarify the conditions under which land can be claimed as indigenous land under the constitution.

### Quilombolas

- Fundação Cultural Palmares, which can broadly be understood as a government agency for *quilombolas* similar to FUNAI, defines *quilombolas* as “self-designated ethno-racial groups who have their own historical trajectory, specific territorial relations, and a presumed black ancestry related to the historical oppression they have suffered”. Palmares certifies such *quilombola* groups.
- *Quilombolas* were also granted protections by the 1988 constitution, specifically concerning the regularisation of land holdings and the manifestation of their cultural identities. The process of consultation in relation to licencing looks similar to that in place for consultation with indigenous communities.

## EXPLORATION ON INDIGENOUS LAND: PROPOSED LEGISLATION

- A legislative proposal currently tabled in the Chamber of Deputies defines conditions under which indigenous land can be explored for mineral and hydrological resources. It also provides for artisanal mining on indigenous land, which is forbidden by the constitution.
- Under the proposal indigenous people must be consulted, with a 180-day window to respond. There would be no consent/veto powers for indigenous people, except in the case of artisanal mining. Consultation could be conducted without the requirement for a translator to be present. Congressional authorisation would not be required in the case of lands where an indigenous claim is pending but has not been approved.
- It is currently uncertain whether this legislation will proceed – the head of the Chamber has said he is in no hurry to discuss the proposal.

## INSIGHTS FROM PRACTICE: BRAZIL

- Business practitioners from a large Brazilian public company shared their perspectives on engaging with indigenous groups under the Brazilian legislative regime. They stressed the importance of starting conversations with FUNAI and indigenous groups early in a licencing process.
  - An impact matrix is used to determine the scope of engagement. Anthropologists are engaged to develop this matrix, which must be validated by the indigenous community. If this aspect is approved by FUNAI and the indigenous group, then the company can proceed to develop an environmental plan. Here too, consultation with FUNAI and the indigenous group is vital, and the environmental plan should build on the impact matrix.
  - A typical project might involve 15-20 programs to address the impacts and risks that have been identified. There are a wide variety of matters that can be impacted, from culture, education and health to infrastructure, land protection and monitoring.
- The practitioners also shared an example of engaging with indigenous groups in relation to a grievance process. They noted that the lessons learned apply in all contexts: there is a need to listen, to understand the indigenous community's point of view, and to work together to establish the best path forward. Respect is a cornerstone of such engagement.

## INSIGHTS FROM PRACTICE: CHILE

### When FPIC is obtained

- A company in Chile had a mine site on land which impacted upon nine indigenous communities. As part of the updating of their mine permits, the company engaged in consultation under the terms of ILO Convention 169 for the first time in 2012, having had a looser level of engagement for about 10 years prior to this.
- The company obtained FPIC from all nine indigenous communities, following four years of dialogue and participation. The company learned to understand FPIC as being about both process and outcome: the process itself allowed for FPIC to be obtained. Transparent information, enough time, an environment of respect and cultural sensitivity allowed the company to fully understand the impacts their operations had and would have on the communities concerned. In turn, this minimised risk, built trust and allowed all sides to plot the way forward.
- The FPIC process has profoundly changed the mine site and its relationship to local communities, who continue to be consulted on environmental and other matters.

### When FPIC is not obtained

- The same company has experienced other consultations where it has not been possible to obtain the consent of the local indigenous group. The company concluded it would be impossible to operate in such an environment. It was difficult for those involved in the process not to take the rejection of the project personally. But having strong public commitments to FPIC as a company, employees came to understand it was the right thing to do based on the high standards they had set.

## CONCLUSION

The examples above underscore the need to have adequate consultation with affected groups, even where legislation does not require it. Implementing best practice will ensure your social licence to operate in a given area is preserved, and indigenous peoples' human rights are respected.

## FURTHER READING AND RESOURCES

### Practical guidance and insights: FPIC and stakeholder engagement

- GBI, [Business Practice Portal: Engaging stakeholders](#)
- FAO, [Free, Prior and Informed Consent](#)
- CEBDS, [Contribuições para o Debate Sobre a Melhoria da Gestão do Licenciamento Ambiental Federal](#)
- BSR, [Engaging With Free, Prior, and Informed Consent](#)
- UN-REDD, [Guidelines on Free, Prior and Informed Consent](#)
- Global Witness, [The business case for protecting land and environmental defenders and indigenous communities' rights to land and resources](#)

### Practical guidance and insights: Grievance mechanisms

- IPIECA, [Community grievance mechanisms in the oil and gas industry](#)
- ICMM, [Handling and resolving local-level concerns and grievances](#)
- BankTrack & Oxfam Australia, [Developing Effective Grievance Mechanisms in the Banking Sector](#)
- Global Compact Network Germany, [Worth listening: Understanding and implementing human rights grievance management](#)
- Ceres, [Investor Primer on Grievance Mechanisms](#)

### Example corporate resources

- Fórum de Meio Ambiente do Setor Elétrico, [O Setor elétrico e o meio ambiente](#)
- BHP, [Indigenous Peoples Policy Statement](#)
- Vale, [Indigenous Peoples and Traditional Community / Povos Indígenas e Comunidades Tradicionais](#)
- Rio Tinto, [Why agreements matter](#)
- Rio Tinto, [Why cultural heritage matters](#)