

Mandates of the Working Group on the issue of human rights and transnational corporations and other business enterprises; the Special Rapporteur on the right to development; the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; the Special Rapporteur on the rights of indigenous peoples; the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and the Special Rapporteur on the human rights to safe drinking water and sanitation

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12 April 2022

Excellency,

We have the honour to address you in our capacities as Working Group on the issue of human rights and transnational corporations and other business enterprises; Special Rapporteur on the right to development; Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment; Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; Special Rapporteur on the rights of indigenous peoples; Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes and Special Rapporteur on the human rights to safe drinking water and sanitation, pursuant to Human Rights Council resolutions 44/15, 42/23, 46/7, 42/16, 42/20, 45/17 and 42/5.

In this connection, we would like to bring to the attention of your Excellency's Government information that we have received concerning the bill 191/2020 that establishes conditions for mineral, hydrocarbon, and hydropower activities on indigenous lands. In this regard, we express our concern regarding the adverse impact this draft legislation, if adopted, would have on the enjoyment of human rights, including the rights to life; health; safe drinking water and sanitation; housing; a clean, healthy and sustainable environment; and the rights of indigenous peoples. In addition, it would contravene the current measures and commitments your Excellency's Government has taken to set out clear expectations of responsible business conduct, including respect for human rights.

On 9 March 2022, the Chamber of Deputies discussed a Deputy's request to process the bill 191/2020, under an urgent process, citing the conflict in Ukraine and the related difficulties of importing fertilizers made with potassium from Russia and arguing that potassium is available in the Amazonia region. This Parliamentary urgent process would allow the draft to be included directly into the agenda of the plenary session, without prior review by parliamentary commissions. While deputies did not agree on this procedure, a working group was set up to study the draft bill, which is expected to be examined again by the plenary by mid-April.

This bill seeks to further regulate article 176 paragraph 1 and article 231 paragraph 3 of the Brazilian Constitution to establish specific conditions to explore and exploit natural resources (mineral, hydropower and hydrocarbon) on indigenous lands. Article 231 of the Constitution provides that indigenous peoples own the land they have traditionally occupied, and that these lands are intended for their permanent possession regardless of their legal status or demarcation, and those rights can only be

affected based on public interest. They also have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein. Extractive and hydropower business activities may be prospected and mined with the authorization of the National Congress, after consulting the indigenous communities involved. The Constitution protects indigenous peoples against the adverse impacts of these types of businesses by setting out specific conditions to authorize these activities, such as previous consultations with the affected indigenous communities and the authorization of the National Congress.

In the letter that the Government addressed to Congress (EMI No 00012/2020 MME MJSO), it is argued that the non-regulation of the aforementioned articles of the Constitution generates legal uncertainty, and prevents the country from obtaining geological knowledge, identifying potential energy sources, creating additional employment and income opportunities, eradicating illegal mining, collecting taxes, and mitigating risks to life and health.

Impact on the environment.

Should the bill be adopted, mineral, hydrocarbon and hydropower activities could be carried out on indigenous land, in exchange for compensation to indigenous peoples for the restricted use of their land. This could generate major environmental degradation of indigenous lands, potentially affecting more than 863,000 km² of rainforest. The exploitation of the Amazon in indigenous peoples' lands presents a catastrophic risk for indigenous peoples living there, but also for biodiversity and for other billions of people, as the Amazon forest is critical in supporting ecological balance and a stable climate. ¹ In this regard, article 225 para. 4 of the Brazilian Constitution provides that "The Brazilian Amazonian Forest, the Atlantic Forest, the Serra do Mar, the Pantanal Mato-Grossense and the coastal zone are part of the national patrimony, and they shall be used, as provided by law, under conditions which ensure the preservation of the environment, therein included the use of mineral resources".

The extraction of fossil fuels and minerals produces prodigious volumes of pollution and toxic chemicals, including drilling fluids, selenium, arsenic, manganese, lead, iron, hydrogen sulfide, and polycyclic aromatic hydrocarbons among others. The right to live in a non-toxic environment is a substantive element of the right to a clean, healthy, and sustainable environment, which was recognized by the Human Rights Council on 8 October 2021 (Resolution 48/13). This right is protected by article 225 of the Brazilian Constitution, which provides that all have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations. Indigenous peoples are at risk of being exposed to higher levels of pollution and toxic contamination should the bill be adopted, thereby affecting the full enjoyment of their right to a clean, healthy, and sustainable environment.

Furthermore, electricity generation from fossil fuels causes air pollution, which impacts the right to breathe clean air, also a substantive element of the right to a clean, healthy, and sustainable environment. Air pollution also has detrimental impacts on ecosystems and biodiversity at various levels, such as contributing to

¹ UN, Global Sustainable Development Report 2019, p 98
https://sustainabledevelopment.un.org/content/documents/24797GSDR_report_2019.pdf.

acidification of lakes, damaging terrestrial ecosystems like forests, and harming wildlife, from birds to amphibians.

Hydropower also entails environmental drawbacks that demand to be carefully addressed such as the deterioration of water quality, water temperature, water availability, biodiversity loss, and greenhouse gas emissions.

All these adverse impacts from mineral, hydrocarbon and hydropower activities are also aggravated where waste is not managed in a sound manner, as this can provoke the collapse of dams. The disasters of the failures of the tailing dams of Marianna and Brumadino show the extent of impacts on the environment and people, as described by the Special Rapporteur on toxics and human rights' country visit report to Brazil (A/HRC/45/12). In addition, the expert warned against 40 to 1,000 tailings dams at risk of collapse in Brazil.

We are further concerned that the bill does not foresee any environmental safeguards, in addition to already existing ones, considering the impact potentially coming from the enforcement of the draft bill for indigenous peoples and the critical importance of the Amazon. The draft bill only mentions that Congress' authorization does not replace technical assessments and administrative acts required by environmental legislation (article 16), such as environmental licences.

We would like to remind your Excellency's Government that, under international law, including the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, ratified by Brazil in 1992, the Stockholm Convention on Persistent Organic Pollutants, ratified by Brazil in 2004, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, ratified by Brazil in 2004, the Minamata Convention on Mercury, ratified by Brazil in 2017 States have obligations regarding the control of certain toxic substances and wastes. Further, under the Paris Agreement on climate change, Brazil has committed to cutting 37% of its carbon emissions by 2025 and 43 percent by 2030.

In addition, the right to live in a non-toxic environment, which entails preventing pollution or exposure to toxic substances, eliminating the use of toxic substances and rehabilitating contaminated sites, is also a component of the right to a clean, healthy, and sustainable environment (Res/A/HRC/48/13). As per the Framework Principles on human rights and the environment (A/HRC/37/59), presented to the Human Rights Council by the Special Rapporteur on the environment in March 2018, States should establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive and otherwise respect, protect and fulfil human rights. States should also protect the above mentioned rights from being violated by businesses, e.g., as laid out by the UN Guiding Principles on Business and Human Rights.

Impact on safe drinking water and sanitation.

The environmental hazards could also severely affect the quality and quantity of indigenous peoples' water resources, as well as their access to sanitation. Indigenous peoples depend on these resources for safe drinking water consumption, sanitation, growing food, household activities, and hygiene. In addition, the contamination of water and soils can directly affect indigenous peoples' livelihoods,

jeopardizing their possibilities to fish in rivers or produce food by affecting the quality of water for irrigation, and contaminating soils. Furthermore, hazardous substances resulting from the operations of mining and hydrocarbon extraction seep and drain into water systems, contaminating not only the water reservoirs of the population living in the immediate area around industrial sites, but also water sources of communities living hundreds of kilometres downstream, thereby affecting the human rights to safe drinking water and sanitation of these communities.

In this regard it is important to highlight the human right to water is enshrined in articles 11 and 12 of the International Covenant on Economic, Social and Cultural rights (ICESCR), ratified by Brazil in 1992. In its General Comment no. 15 in 2002, the Committee on Economic, Social and Cultural Rights established that the States should devote particular attention to communities that usually face difficulties in exercising their right to water, including indigenous peoples, and that States should take steps to protect indigenous peoples' water sources from encroachment and pollution, and promote and allocate resources to design, deliver, and control their access to water ([E/C.12/2002/11](#)).

Moreover, water for indigenous peoples has a spiritual and cultural value that should be respected and protected. For indigenous peoples, water is sacred and one of the bases of their survival as collective distinct peoples. Due to indigenous peoples' holistic approach to nature, affecting the balance of one of the elements could have a major impact on their well-being and survival. In this regard, according to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), signed by Brazil in 2007, in its articles 3, 4 and 25, indigenous peoples have the right to self-determination, to autonomy and to maintain and strengthen their distinctive spiritual relationship with their traditionally owned lands, territories, and waters.

Impact on health.

The increased number of mineral, hydrocarbon, and hydropower activities will generate toxic substances and pollution, which may have serious effects on the right to health of indigenous peoples. Due to the generation and disposal of toxic substances and waste from extractive activities resulting in contaminated agricultural soils and contaminated water adverse impacts continue even when extractive activities end.

Toxic substances and pollution cause more than 9 million premature deaths per year worldwide, as highlighted by the Special Rapporteur on environment report on the right to a clean, healthy and sustainable environment: non-toxic environment (HRD/49/53).² Exposure to toxic substances increases the risk of premature death, acute poisoning, cancer, heart disease, stroke, respiratory illnesses, adverse effects on the immune, endocrine, and reproductive systems and on the skins, birth and eye defects and lifelong negative impacts on neurological development and the digestive system. These impacts disproportionately affect children and women.

We wish to remind your Excellency's Government that article 12 of the ICESCR enshrines the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. Similarly, UNDRIP states that indigenous peoples have an equal right to the enjoyment of the highest attainable standard of physical and mental health (Article 24) and have the right, without discrimination, to

² A/HRC/49/53

the improvement of their economic and social conditions, including in the area of health (Article 21).

Impact on indigenous peoples' rights.

Automatic Authorization of Congress: Whilst the Brazilian Constitution prescribes that some business activities (extractive and hydropower) on indigenous peoples' s land should be preceded by a consultation process and authorized by Congress, we are concerned that the draft bill would permit business activities to be carried out on a provisional basis while awaiting Congress' authorization. In addition, if the Congress does not express an opinion with regard to the authorization within four years, the activities will be considered authorized (article 14 and 37). It is also troublesome that, the bill validates all mining licences that have been requested or processed prior to the ratification of the indigenous peoples lands, providing that the Congress should authorize these licences within the four years after the lands have been formally demarcated (article 37). The bill hence establishes two different regimes for demarcated and not demarcated land that were not foreseen by the Constitution. This is even more concerning considering that many indigenous lands are yet to be demarked. Approximately 350 indigenous territories are pending approval, with, in some cases, the process having been initiated over 40 years ago. According to the Special Rapporteur on the rights of indigenous peoples, this is due to the State's prolonged lack of effective action to complete the land demarcation, but also to the constant cycle of administrative delays and judicialization, coupled with Supreme Court delays in granting final decisions on the cases. In addition, in the case of indigenous peoples in isolation, these processes have not been initiated due precisely to the voluntary isolation in which they live, as observed by the Special Rapporteur on the rights on indigenous peoples in her mission to Brazil in 2016 (A/HRC/33/42/Add.1).

Breach of the internationally recognized right to free, prior, and informed consent and the right to self-determination. Even though article 13 of the bill mentions that the system of consultation foreseen does not exempt from other consultation procedures that may be required by legislation, this text sets out that the businesses concerned should carry out the consultation with affected indigenous peoples, with the support of the National Foundation for Indians (FUNAI). The bill also enables the President to submit a request for authorization to carry out the activities even if indigenous peoples did not consent to a project (article 14). Therefore, the bill would contravene the State's obligations to consult concerned indigenous peoples in good faith, through their representative institutions, in order to obtain their consent.

FUNAI's role: Another concern related to the determination of "affected indigenous communities", is that, according to article 10 of the draft bill, the indigenous technical mapping would be conducted by the FUNAI. However, FUNAI may not have the staff nor the expertise to successfully map affected indigenous communities and the impacts they may suffer. As mentioned by the Special Rapporteur on the rights of indigenous peoples in her visit to Brazil, FUNAI is debilitated and understaffed. In addition, FUNAI may not have the specialized expertise to understand who will suffer impacts related to water, climate, and pollution, as the understanding of these impacts requires a high degree of technical knowledge.

Limited benefits from natural resources: The bill withdraws indigenous peoples' exclusive right to exploit the wealth of the natural resources on their lands, by revoking article 44 of law 16.001/1973 that provided for that right (Art 45). The bill foresees very low percentages of benefits for indigenous peoples (article 18). This possibility of low percentages of benefits for indigenous peoples derived from extractive activities would compromise their right to an equitable distribution of benefits. In addition, the format of the proposed "curator council" would create conflict. There is no mention made that the curator council should be composed by affected indigenous' representative authorities chosen by indigenous peoples according to their governance mechanisms (articles 19, 21, 22 and 23). The possibility of political and economic gains by certain actors through misrepresentation is high, leading to potential discrimination against and conflict with indigenous peoples.

We wish to bring to your attention the rights of indigenous peoples to lands, territories and resources which they have traditionally owned, occupied or used, as enshrined in the ILO Convention 169 on Indigenous and Tribal Peoples Convention, ratified by Brazil in 2002 and the UN Declaration on the Rights of Indigenous Peoples, signed by Brazil in 2007 and the American Declaration on the Rights of Indigenous Peoples, signed by Brazil in 2016. In addition, these international instruments oblige States to consult and cooperate in good faith with indigenous peoples through their own representative institutions in order to obtain their free, prior, and informed consent before adopting and implementing legislative or administrative measures that may affect them; and prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Article 16.2 of the ILO Convention 169 provides that where "the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent".

We further recall that the UN Declaration on the right to development (A/RES/41/128), signed by Brazil in 1986, defines the right to development as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development (article 1.1). The Declaration further states that the human person is the central subject of development and should be the active participant and beneficiary of the right to development (article 2.1) and requires that States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights (article 8.2). In this line, the ILO Convention 169 prescribes that indigenous peoples have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, spiritual well-being, and the lands they occupy.

We also refer to the Guidelines and recommendations on the practical implementation of the right to development³, which urge States to design and implement development projects after holding meaningful consultations to identify the development priorities of the communities in a project area and benefits-sharing arrangements that would be suitable for those affected. The Guidelines further recommend (para. 37) that States should respect the right of indigenous peoples to self-determination to fulfil the right to development.

³ <https://www.ohchr.org/sites/default/files/OHCHR--web--planches.pdf>

Impact on the right to housing.

In practice, should the bill be turned into law, it would cause the involuntary eviction of indigenous peoples from their lands. It should be noted that the Constitution's article 231 paragraph 5 prohibits the removal of indigenous peoples from their lands, except in case of a catastrophe or an epidemic which represents a risk to the population, or in the interest of the sovereignty of the country, after a decision by the National Congress.

We wish to remind your Excellency's Government that under the ICESCR States are required to take appropriate steps to ensure the realization of the right to adequate housing. In its General Comment No 4, the Committee on Economic, Social and Cultural Rights affirmed that the right to adequate housing applies to everyone, and among others contains the elements of habitability, accessibility, location and cultural adequacy. In addition, the Committee stated that forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, in accordance with the relevant principles of international law. As highlighted recently by the Human Rights Committee, in the case of indigenous peoples, the notion of "home" must be understood in the context of the special relationship that they have with their territories and their ways of life, including their subsistence activities such as livestock-raising.⁴

We also wish to draw the attention of your Excellency's Government to the 2019 report (A/74/183) on the right to housing for indigenous peoples of the previous Special Rapporteur on the right to adequate housing, in which she called on States to declare a moratorium on forced evictions affecting indigenous peoples until national legislation governing eviction and resettlement has been adopted that is fully compliant with international human rights standards. Prior to carrying out any evictions, States must ensure that all feasible alternatives are explored in consultation with the indigenous communities affected. Attention is also drawn to the recent reports of the current Special Rapporteur on the right to adequate housing, respectively on discrimination in the context of housing (A/76/408) and spatial segregation and the right to adequate housing (A/HRC/49/48).

Similarly, UN Declaration on the Rights of Indigenous Peoples (article 10) and the ILO Convention 169 (article 16.1) state that indigenous peoples shall not be forcibly removed from their lands or territories.

Limited remedy and compensation

⁴ CCPR/C/132/D/2552/2015, 2021.

The only impact subject to compensation contemplated in the draft bill is the restriction of the right to use of the land, and only for mineral and hydrocarbon activities, which would be a collective compensation (article 28). However, foreseen adverse impacts are much more varied, such as the impact on health, food, livelihood, culture, environment, housing and water. In addition, impacts may differ between individuals. Such collective compensation may overlook specific impacts on children, the elderly, women, or persons with disabilities. In addition, the draft bill does not contemplate any ways to include the views of the affected groups with regard to the impacts suffered and remedies. The draft bill also foresees that the compensation will be transferred to the curator council (article 19), that will also be entitled to legally represent affected indigenous peoples, including in judicial processes (article 23).

We wish to remind your Excellency's Government that international law, including article 15 of the ILO Convention 169, prescribes that indigenous peoples should receive fair compensation for **any** damages which they may sustain as a result of such activities. Article 10 of the UN Declaration on the Rights of Indigenous Peoples provides that no relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of returning.

Responsible business conduct and human rights due diligence

This bill does not encourage businesses' respect for human rights. On the contrary, it employs ambiguous language which lead businesses to have a free and without any safeguards for environmental protection or respect for human rights.

Indeed, this bill does not incentivize, encourage or require business enterprises to conduct due diligence nor to respect the rights of indigenous peoples, peasants, or local communities in their operations. The draft only states that interested enterprises should conduct a previous technical study to assess the potential impacts on indigenous lands, without any mention on what should be included in such a study, in particular with regard to the identification, prevention and mitigation of any negative impacts on human rights and the environment (article 5). In addition, it exempts from technical study the activities that have been approved before the end of the land demarcation process (article 37). As a result, this initiative contradicts the Ministry of Economy and the Ministry of Women, Family and Human Rights' initiatives to regulate and catalyse State actions towards responsible business conduct that respects human rights and the environment, namely the national action plan on business and human rights and the national action plan on responsible business conduct. It also contravenes the core principle of the Mercosur trade agreement and the conditions to adhere to the OECD. We are encouraged to see that the mining business sector also expressed concerns with regard to this draft bill.⁵

We wish to remind your Excellency's Government that, in line with the UN Guiding Principles on Business and Human Rights, States should set out clearly the expectation that all business enterprises respect human rights across their operations, enforcing laws that are aimed at requiring business enterprises to respect human rights and ensuring that other laws do not constrain but enable business respect for human rights. In addition, they should provide effective guidance to business on how to respect human rights and encourage businesses to communicate how they address their human rights responsibilities. Further, the Guiding Principles highlight that

⁵ See here: <https://ibram.org.br/posicionamento-setorial/posicionamento-ibram-mineracao-em-terras-indigenas-2/>

consultation with potentially affected stakeholders is part of the corporate responsibility to implement human rights due diligence, and that meaningful consultation with potentially affected groups is essential for assessing adverse impacts and to understand the specific impacts on specific people, in a specific context of operations.

Without any further measures to ensure that businesses respect human rights and the environment, abuses would only continue to proliferate if this draft bill is adopted. This bill is likely not only to fail to address these issues, but could aggravate most of them.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned issues.
2. Please explain how your Excellency's Government has undertaken to guarantee the right to adequate housing of indigenous peoples in proposing the draft bill 191/2020, including on how they will be protected from forced evictions.
3. Please explain how your Excellency Government has undertaken to guarantee indigenous peoples' rights to safe drinking water and sanitation, that are culturally appropriate as well as their right to a clean, healthy and sustainable environment and not to be exposed to pollution and toxic substances, in proposing bill 191/2020.
4. Please provide any information with regard to how your Excellency 's Government will ensure that the bill can be widely discussed by Brazilian society and its representatives, in particular please provide information on current or planned measures to ensure the participation of indigenous peoples in decision-making;
5. Please explain how your Excellency's Government will address the serious concerns with regard to the bill set forth in this letter, including with regard to the inconsistencies with the rights of indigenous peoples to free, prior and informed consultation and consent, whenever legislative or administrative measures are planned that may affect them directly; and in line with your Excellency's Government commitments and current initiatives to implement the UN Guiding Principles on Business and Human Rights and Paris Agreement.

This communication, as a comment on the draft bill 191/2020, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

We stand ready to provide your Excellency' Government with any technical advice it may require in ensuring that the Bill is fully compliant with international human rights obligations.

Please accept, Excellency, the assurances of our highest consideration.

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