Trench Rossi Watanabe.

Memorandum

Date: 28 April 2023

To: Nathalya Desterro
Cyrus R. Vance Center for International Justice

From: Giovani Tomasoni, Alexandre Jabra, Fernanda Bueloni

Re: **Free, prior and informed consent in Brazil**

Dear Nathalya,

Below is a memorandum containing our assessment and comments on free, prior and informed consent and its applicability in Brazil, given the current legislative environment.

I. INTRODUCTION

Free, prior and informed consultation was introduced in Brazil with the ratification and enactment of Convention No. 169 of the International Labor Organization in 2002 ("**ILO Convention No. 169**" or "**Convention**") by Legislative Decree No. 143/2002. This Convention was approved and promulgated by the president through Federal Decree No. 5051/2004, consolidated by Federal Decree No. 10088/2019.

Nevertheless the Convention was internalized by the country, it is worth mentioning that the matter still lacks regulations in several aspects. So although there is a legal provision for application, its shape and extent have not yet been established.

In other words, the specific application of certain provisions of the Convention, such as the so-called free, prior and informed consent (FPIC), still lacks clear and decisive guidelines.

For this reason, the issue is of tremendous legal uncertainty in the country since the enforcement and supervisory bodies issued different guidelines for applying the Convention's concepts. For example, the Brazilian Institute of

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Environment and Renewable Natural Resources – the Federal Environmental Agency – (IBAMA) and the Federal Public Prosecutor's Office – Ministério Público Federal –(MPF) follow distinct policies concerning the people subject to consultation and the limits to public participation in the scope of the procedures.

At present, especially in view of the political-administrative transition that the Federal Government will undergo over the next four years, the subject of Indigenous rights tends to gain relevance. Additionally, the concepts provided in ILO Convention No. 169 should be more discussed, which may give rise to the issuance of new regulation that provide more detail on Indigenous rights in general. The creation of the Ministry of Indigenous Peoples, with an agenda explicitly focused on the Indigenous peoples' rights and guarantees, undoubtedly shows this administration's priority on the subject. Furthermore, informed consultation is one of the ministry's main flags, reinforcing the idea that there will be initiatives aimed at guaranteeing adequate public participation in the permitting and operation of projects that may generate social and environmental impacts.

I.1. Avenues in which the idea of free, prior and informed consultation is addressed in Brazil

Different avenues will protect public participation and create different forms of FPIC, depending on the instrument of the Brazilian legal system it is featured in.

Although more commonly associated with consultations with Indigenous and tribal peoples regarding the existence of administrative and/or legislative measures that may impact them, such as in the context of environmental permitting (a concept arising from ILO Convention No. 169), Brazilian law also stipulates the need for consultations within the scope of access to genetic heritage and associated traditional knowledge (Biodiversity Law), as well as within the scope of business activities and human rights (Federal Decree on National Guidelines on Business and Human Rights).

Each avenue will provide different types of consultation. When discussing access to genetic heritage and associated traditional knowledge, for example, proper "consent" is also required aside from consultation, different from what occurs on other avenues of administrative and legislative measures and in business activities and matters of human rights that may affect them.

The main points and existing rules on each avenue will be detailed below, with the existing legislative sources for each type of consultation.

II. LEGISLATION

At the current political and legislative moment, Brazil has normative instruments, edited at the international and local levels, that deal with the rules on free, prior and informed consultation.

II.1 International legislation

Under international law, Brazil has only a few specific provisions on free, prior and informed consultation in addition to ILO Convention No. 169. In addition to the aforementioned Convention, the other instrument pertinent to the matter ratified and promulgated by Brazil is the Nagoya Protocol, which provides in Article 6.1 that:

> 6.1. In the exercise of sovereign rights over natural resources, and subject to legislation or national regulatory requirements on access and benefit sharing, access to genetic resources for their use is subject to the **prior informed consent** of the Party providing these resources that is the country of origin of these resources or a Party that has acquired genetic resources following the Convention, unless otherwise provided by that Party. (emphasis added)

The Nagoya Protocol was approved by Brazil through Legislative Decree No. 136/2020 and is currently in force with the Biodiversity Law (2015).

Although Brazil voted to approve the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, the declaration awaits for approval and ratification.

II.2 National legislation

Initially, it should be noted that even before the ratification of ILO Convention No. 169, national legislation already provided for public participation, through public hearings, in decision-making proceedings regarding both the legislative procedures and environmental permitting.

Public hearings provide a space for discussion with civil society and were created precisely for public demonstration. The Federal Constitution (Article 58, paragraph 2, II) and the CONAMA Resolution 09/87 specifically laid out this instrument for the participation of civil society, including Indigenous and tribal communities, in the decision-making process of administrative measures that may interfere with their way of life.

Within legislative procedures, public hearings with civil society entities may be held by the permanent and temporary commissions of the respective houses of the National Congress, i.e., the Commissions of the House of Representatives and the Federal Senate. The provisions for holding hearings are established by the houses' internal regulations, approved by Resolution 17/1989 of the House of Representatives and Resolution 93/1970 of the Federal Senate.

Each house established a specific but similar internal procedure for holding hearings that aim to promote the participation of civil society in the legislative process.

The public hearings may be requested by the houses' representatives, as well as by the civil society entity that wishes to contribute to the project of legislative innovation. In this regard, the hearing may be held in order to enable the civil entity to technically instruct the legislative matter in progress in the committees, as well as to allow the exposure of relevant public interest issues related to the project.

Once the public hearing is approved, the commissions will invite authorities, interested persons and specialists related to the participating civil society entity, who will be able to provide clarity on the debated topic. It must be noted that the participation of supporters and opponents of the legislative project will be allowed so that the various ideas and opinions regarding the project can be heard.

At the hearings' end, the commissions must prepare a transcript with the participants' statements and documents accompanying them for the records.

In the context of environmental permitting, the public hearing aims to promote clarifications on the project to be permitted, with the presentation of the Environmental Impact Report produced by the entrepreneur. The rules and procedures for public hearings in environmental permitting are set out in the CONAMA Resolutions 01/86 and 09/87, as well as IBAMA Normative Instruction No. 184/2008 (Articles 22 and 23).

Once the Environmental Impact Report has been presented in the permitting process, the environmental agency must notify the local press of the start of the period to request a public hearing, which may be requested by civil society, the Public Prosecutor's Office, or the permitting agency itself when it deems necessary. The hearing must always take place in a space accessible to the interested parties, including Indigenous and tribal communities, when impacted. Depending on the complexity of the topic, there may be more than one hearing on the same project.

The hearings aim to promote a space open for dialogue between the entrepreneur, the environmental permitting agency, and civil society in order to debate the future project, its environmental impacts, and possible social impacts on the communities. Only with the information gathered during the hearings — including the social perception of the project — will the permitting body be able to analyze the technical environmental studies and, only then, attest to their viability.

Thus, the public hearings established by CONAMA before the ratification of ILO Convention 169 and still in effect in the Brazilian legal system had already defined specific rules that enable the participation of affected communities in certain projects.

Note, however, that the public hearing should not be confused with the specific procedure for consultation with affected Indigenous and tribal communities. The public hearing is a way of guaranteeing the participation of civil society and affected communities, but it is not the consultation procedure described by ILO Convention 169.

However, Brazil has a diverse set of norms that deal with what is called free, prior, free and informed consultation, an idea initially posited by ILO Convention No. 169 and ratified by Brazil.

At this point, the figure of free, prior, and informed consultation provided for in ILO Convention No. 169 does not yet have specific regulations, so the applicability of certain provisions on the hearing is interpreted by public entities in different and often divergent ways.

In addition to having ratified ILO Convention No. 169, which provides in Article 6 for the necessary consultation with interested communities when envisioning legislative or administrative measures likely to affect them directly, Brazil has in its legal system Federal Law No. 13,123/2015, known as the Biodiversity Law, as well as Federal Decree No. 9,751/2018, which establishes national guidelines on business and human rights.

a) ILO Convention No. 169, its applicability in Brazil and related provisions

Concerning the hearing that must be carried out with Indigenous and tribal communities, the Convention is the main rule in Brazil regarding the regulations and procedures to be observed.

It should be noted that the Brazilian Federal Supreme Court (STF) has already established the understanding that, in Brazil, the remaining *quilombola* communities must be treated as tribal peoples to apply ILO Convention No. 169 (ADI No. 3.239).

From the perspective of Brazil's legislation, the internalized Convention should be applicable, in theory, to all matters that may, through administrative and legislative measures, impact the Indigenous or tribal communities concerned, even in the absence of specific norms providing for the limits of the application of the rules of the Convention in the Brazilian legal system. In other words, in principle, everyone should, in some way, observe the precepts of the Convention, especially concerning free, prior and informed consultation, be it the government, business companies, associations, etc., that carry out activities that fall within the scope of actions that may directly affect Indigenous and tribal communities, according to Article 6 of the Convention.

The Brazilian legal system provides some related instruments used for guidance regarding the hearing provided by ILO Convention No. 169. This is the case of Interministerial Ordinance No. 60/2015, which establishes the administrative procedures that govern the actions of bodies and entities of the federal public administration in

environmental permitting proceedings under the jurisdiction of IBAMA. Additionally, it defines, in the federal environmental permitting proceeding, the form of action of representative bodies, such as the National Foundation for Indigenous Peoples – former National Foundation for the Indigenous People (FUNAI) –; Palmares Cultural Foundation; and the National Historical and Artistic Heritage Institute (IPHAN).

Thus, in practice, free, prior and informed consultations only occurred when the activities meet the requirements set out in Interministerial Ordinance No. 60/2015, namely: direct interference in areas known to be occupied by Indigenous peoples and quilombolas that meet the distance limits established by Annex I of the Ordinance above.

Therefore, it is necessary that (i) there is a forecast of direct impacts on those communities; (ii) the communities occupy territories recognized by the government; and (iii) these territories are located within the geographic radius determined by the legislation, concerning the distance from the development.

ATTACHMENT I

Typology	Distance (km)	
	Legal Amazon	Other regions
Linear developments (except highways)		
Railways Ducts Transmission lines	10 km 5 km 8 km	5 km 3 km 5 km
Highways	40 km	10 km
Occasional projects (ports, mining and thermoelectric plants)	10 km	8 km
Hydroelectric uses (UHEs and PCHs)	40 km* or reservoir plus 20 km downstream	15 km* or reservoir plus 20 km downstream

* measured from the axis(es) of the busbar(s) and respective central body of the reservoir(s)

Figure 1. Distances determined by Annex I of Interministerial Ordinance No. 60/2015

Thus, in the environmental permitting process, free, prior and informed consultations are only carried out when the requirements listed above are met. This is the current understanding of IBAMA, which has prevailed in the judiciary.

In any case, given the absence of regulations, it is common for the bodies to treat the applicability of ILO Convention No. 169 and free, prior and informed consultations in different ways. As will be seen later, the Federal Public

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Prosecutor's Office disagrees with IBAMA's position and often questions the absence of the mentioned hearings in the judiciary.

Furthermore, IBAMA and the Federal Attorney General's Office – Advocacia Geral da União – (AGU) have already decided that traditional communities, in a broad sense and unlike what happens to quilombolas, are not equated with the Indigenous and tribal communities mentioned by ILO Convention No. 169.

The decision above, therefore, differentiates "traditional communities" defined by Federal Decree No. 6,040/2007 – the National Policy for the Sustainable Development of Traditional Peoples and Communities –, and "Indigenous and Tribal Peoples" defined by ILO Convention No. 169.

In other words, the traditional communities mentioned in Federal Decree No. 6,040/2007 would not be recognized as Indigenous or tribal communities in the context of ILO Convention No. 169.

Thus, in view of IBAMA and AGU's decision, traditional communities not recognized as Indigenous or tribal communities would not have the same rights provided for by ILO Convention No. 169. And so, in the understanding of those bodies, said communities should not be treated as having the right to free, prior and informed consultation.

On the other hand, the MPF has a divergent understanding, as published in its document entitled "Convention No. 169 of the ILO and the National States." The document argues that, in addition to carrying out free, prior and informed consultations being mandatory for traditional communities in a broad sense, the consent of the affected communities would be necessary before implementing the project. A mere discussion, in some instances, would not be enough to endorse the project, requiring the consent or agreement of the communities with the measures that will be adopted.[1]

It should be noted, however, that this is a guiding document, not binding on MPF's prosecutors. It is possible, therefore, that different prosecutors understand the matter differently. In practice, prosecutors widely use the publication in their statements and in conducting administrative procedures.

[1] DUPRAT, Deborah. A Convenção nº 169 da OIT e o direito à consulta prévia, livre e informada. Convenção nº 169 da OIT e os Estados Nacionais/Organizadora: Deborah Duprat - Brasília: ESPMI, 2015, p. 68.

Thus, there is still great uncertainty regarding the applicability of the hearing provided by ILO Convention No. 169, especially given the absence of regulations of the Convention, a fact that generates tensions and different understandings on the part of various supervisory bodies and applicators of its concepts.

b) Veto by interested communities

Despite the Brazilian legislation not being explicit regarding a possible right of veto on the part of the interested communities, especially in the case of the absence of consent, it is worth mentioning that the Brazilian legal system, strictly speaking, would not authorize the veto of interested communities impacted concerning the administrative or legislative activities carried out.

There are control measures, but they should not be confused with an unrestricted and discretionary veto by the interested communities.

The possibility of vetoing under any circumstances — that is, a purely discretionary veto – not only does not have support in the legislation, but it would also conflict with provisions of the Brazilian Federal Constitution, in addition to granting interested communities powers that are exclusive to the competent authorities for authorization or rejection of projects and ventures.

The specialized doctrine is positioned in this way:

> At this point, it is worth asking whether the result of the consultation, as established by the ILO-169 Convention, has a contemplative nature, that is, whether the opinions of the affected communities are binding on the permitting administrative bodies.
>
> There is not. What exists is the duty of the Public Administration to consider what was discussed in the meetings and public hearings, which is far from being translated into binding.[2]

[2] MILARÉ, Édis. Direito do Ambiente. 12. São Paulo Publisher: Thomson Reuters Brasil, 2020, p. 991.

The right to veto, therefore, must be understood in a limited way. From the perspective of projects that may affect interested communities, the unrestricted veto would violate the principle of free initiative inscribed in Article 170, *caput*, of the Federal Constitution.

If a confident entrepreneur is authorized and obtains all permits and technical approvals, observing the protection of the environment and the rights of the affected communities, there would be no reason to halt the execution of the activity.

Likewise, the right to unrestricted veto would allow the interested communities to start defining the criteria and rules of the administrative and legislative activities to be implemented, emptying the prerogatives of the competent body/authority for that purpose, in addition to undermining the interest of the private sector in project development.

However, in case of irregularities or actions not authorized by the competent verification body, such as the lack of communication from interested communities potentially impacted by the project, control measures may be imposed to prevent the execution and implementation of the intended activities.

c) The Biodiversity Law and free, prior and informed consent

In addition to ILO Convention No. 169, Brazilian Law also recognizes free, prior and informed consultation in the Biodiversity Law (Federal Law No. 13,123/2015). Unlike what happens with environmental permitting, the Biodiversity Law brought the need for consent and not just consultation with interested communities.

Thus, the aforementioned law not only brought definitions about free, prior and informed consent but also provided for the obligation of its observance for access to associated traditional knowledge. Article 9 of the rule above established that:

> Art. 9 Access to associated traditional knowledge of identifiable origin is conditioned to obtaining prior informed consent.

Thus, access to associated traditional knowledge requires proof of prior informed consent via a signed contract, an audiovisual record, an opinion of the representative body, or adherence as provided for in a community protocol, all at the discretion of the Indigenous population, traditional community or the traditional farmer who is the original holder of the identifiable traditional knowledge.

Another relevant point of emphasis is that all communities considered traditional, and therefore defined and listed in Federal Decree Nos. 6,040/2007 and 8,750/2016, must be included in the case of consent regarding access to associated traditional knowledge.

d) The consultation provided for by the Federal Decree on National Guidelines on Business and Human Rights

Federal Decree No. 9.751/2018 established in Article 6, VII that businesses must promote free, prior and informed consultation of the communities impacted by the business activity:

> Art. 6th It is the responsibility of companies not to violate the rights of their workforce, their customers, and communities through risk control and the duty to face adverse impacts on human rights with which they have some involvement and, above all,
> [...]
> VII - promote free, prior, and informed consultation of communities impacted by business activity;

It is worth mentioning that business people have a social responsibility for the risks and adverse impacts they may cause to the human rights of local communities, which is why it would be necessary to consult in advance and be informed of the possible groups to be affected by the actions to be carried out.

The above-mentioned legislation does not distinguish which communities should be heard in this process, so the range of possible interested parties, in this case, seems broader to us. In this way, business people should include their workers, customers and the affected community in their consultations, regardless of their traditionality or way of life.

II.3. Specific rules on indigenous protection in Brazil

Indeed, in addition to the aforementioned rules, the Brazilian legal system also has specific rules related to protecting Indigenous communities.

Even before the ratification and promulgation of ILO Convention No. 169, Brazil already had provisions on the matter in the Statute of the Indian (Federal Law No. 6,001/1973), which has provisions on the protection of communities and preservation of Indigenous rights.

The Constitution has specific articles on protecting Indigenous communities. Article 231 of the constitutional text, for example, established that:

> Art. 231. Indigenous people shall have their social organization, customs, languages, creeds and traditions recognized, as well as their original rights to the lands they traditionally occupy. The Union is responsible for demarcating such lands, protecting and ensuring respect for all of their property.
>
> § 1 . Lands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their wellbeing and for their physical and cultural reproduction, according to their habits, customs and traditions.
>
> § 2 The lands traditionally occupied by indigenous are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the land, the rivers and the lakes existing therein.
>
> § 3 . Water resources, including energetic potentials, may only be exploited, and mineral riches in indigenous land may only be prospected and mined with the authorization of the National Congress, after **hearing the communities involved**, and the participation in the results of such mining shall be ensured to them, as set forth by law. (emphasis added)

Thus, even in terms of the Constitution, the Brazilian legal system has specific rules related to the protection and preservation of the rights of Indigenous communities, with emphasis on conservation and respect for customs and traditions, the use of the land they use for sustenance, and listening to the communities affected by the projects performed.

It is worth mentioning that due to its integrationist nature (a result of the historical context in which it was created), the Statute of the Indian was not fully integrated into the constitution approved in 1998. Therefore, its interpretation must be given according to the provisions of the Federal Constitution.[3]

The creation of the Ministry of Indigenous Peoples by the current Federal Government should afford greater visibility to the claims of the Indigenous peoples and lead to the approval of rules that could include free, prior and informed consultations.

III. JURISPRUDENCE

Brazil still does not have binding jurisprudential understanding regarding the parameters for applying free, prior and informed consultation.

However, it is emphasized again that, due to the legal uncertainty arising from the lack of regulation of the hearings, the matter has been increasingly judicialized and still does not have a majority direction by the courts.

It should be said that until now, the jurisprudence has been applying the understanding that is more in line with what IBAMA and AGU recommend through Order of Approval No. 00219/2022/GABIN/PFE-IBAMA-SEDE/PGF/AGU and Order No. 00034/2017/PGF/AGU, in the sense that free, prior and informed consultation should meet the bounds of Interministerial Ordinance No. 60/2015.

However, in recent years, we have noticed that the judiciary has adopted a more comprehensive and protectionist position regarding the application of currently existing norms, including the need for consultation with people indirectly affected and, eventually, outside the limits determined by the Interministerial Ordinance.

In this regard, most relevant is the previously mentioned decision of the STF, which, when verifying the communities eligible for protection in terms of the provisions of ILO Convention No. 169, defined that the Convention should also apply when there is an interest to affected quilombola communities:

[3] SANTOS FILHO, Roberto Lemos. Apontamentos sobre o direito indigenista. Curitiba: Juruá, 2005, p. 48.

ABSTRACT OF THE DIRECT ACTION OF UNCONSTITUTIONALITY. DECREE No. 4.887/2003. PROCEDURE FOR IDENTIFICATION, RECOGNITION, DELIMITATION, DEMARCATION, AND TITLE OF LANDS OCCUPIED BY REMAINS OF *QUILOMBO* COMMUNITIES. AUTONOMOUS NORMATIVE ACT. ART. 68 OF THE ADCT. FUNDAMENTAL RIGHT. FULL AND IMMEDIATE EFFECTIVENESS. INVASION OF THE SPHERE RESERVED BY LAW. ART. 84, IV AND VI, "A," DA CF. FORMAL UNCONSTITUTIONALITY. NOT OCCURRENCE. IDENTIFICATION CRITERIA. SELF-ASSIGNMENT. OCCUPIED LAND. EXPROPRIATION. ART. 2nd, *CAPUT* AND §§ 1st, 2nd AND 3rd, AND ART. 13, *CAPUT* AND § 2, OF DECREE No. 4.887/2003. MATERIAL UNCONSTITUTIONALITY. INOCORRENCE. DISMISSAL OF ACTION. 1. Autonomous normative act, to withdraw its foundation of validity directly from the Constitution of the Republic, Decree nº 4.887/2003 presents sufficient normative density to accredit it to the abstract control of constitutionality.

(...)

4. Article 68 of the ADCT ensures the right of the remnants of quilombo communities to have their ownership of the lands they historically and traditionally occupy recognized by the State – a fundamental right of ethnic-racial minority groups endowed with full effectiveness and immediate application. It defines the holder (remnants of *quilombo* communities), the object (land occupied by them), the content (property right), the condition (traditional occupation), the taxable person (State), and the specific obligation (issuance of titles), art. 68 of the ADCT to produce all its effects, regardless of legislative integration.

(...)

7. Incorporated into Brazilian domestic Law, Convention 169 of the International Labor Organization – ILO on Indigenous and Tribal Peoples enshrines "awareness of one's own identity" as a criterion for determining the traditional groups to which it is applicable, stating that no State has the right to deny the identity of a people that recognizes itself as such. 8. Constitutionally legitimate, the adoption of self-attribution as a criterion for determining *quilombola* identity, in addition to being a method authorized by contemporary anthropology, adequately fulfills the task of bringing to light the recipients of art. 68 of the ADCT, in no way, lending itself to inventing new recipients or unduly expanding the universe of those to whom the norm is addressed. The concept is expressed in art. 68 of the ADCT does not depart from the objective phenomenon, reaching all communities historically linked to the linguistic use of the word *quilombo*. Adequacy of the use of the term "*quilombo*" carried out by the Public Administration to the linguistic and hermeneutic boundaries imposed by the standard art text. 68 of the ADCT. Dismissal of the request for a declaration of unconstitutionality of art. 2, § 1, of Decree 4.887/2003. 9. In *Moiwana v. Suriname* (2005) and *Saramaka v. Suriname* (2007), the Inter-American Court of Human Rights recognized the property rights of communities formed by descendants of fugitive slaves over the traditional lands with which they maintain territorial relations, emphasizing the commitment of the States parties (Pact of San José da Costa Rica, art. 21) to adopt measures to guarantee its whole exercise.

(...)

The systematic exegesis of arts. 5, XXIV, 215 and 216 of the Political Charter and art. 68 of the ADCT imposes that when a legitimate private property title is incident on lands occupied by *quilombolas*, the process of transferring the property is mediated by a regular expropriation

> procedure. Dismissal of the request for a declaration of material unconstitutionality of art. 13 of Decree 4.887/2003. Direct action of unconstitutionality dismissed.
>
> (ADI 3239, Rapporteur: CEZAR PELUSO, Rapporteur for Judgment: ROSA WEBER, Full Court, judged on 02/08/2018, ELECTRONIC JUDGMENT DJe-019 DISCLOSED 01-31-2019 PUBLIC 02-01-2019)

Still within the scope of the Supreme Court, in a monocratic judgment published on 2 September 2022, on the environmental permitting of a hydroelectric power plant, Justice Alexandre de Moraes decided for the need to hear the affected communities before the publication of a rule by the National Congress that authorized the implementation of the enterprise.

In the judgment of Extraordinary Appeal No. 1,379,751/PA, the justice ruled that the interpretation of the provisions of the Convention should cover, in addition to Indigenous lands overlapping the projects, those directly and even indirectly impacted, in a systematic interpretation of Article 231, §3, of the Federal Constitution.

In his vote, the justice clarified that:

> (…) IBAMA's argument, also supported by the UNION, that the enterprise is not located on Indigenous lands is not supported because, as very well highlighted by the Federal Regional Court of the 1st Region, it is undeniable that, **although the project itself is not entirely located in indigenous areas, its impacts – which cover an area much larger than that of the project itself – arguably covered Indigenous lands.**
> (...)
> In addition, a systematic and finalistic interpretation of art. 231, § 3 of the Federal Constitution does not require that the enterprise be located in Indigenous lands, but only that these lands will be effectively affected by it.

Likewise, in a monocratic judgment published on 23 March 2021, Justice Cármen Lúcia, upon analyzing Extraordinary Appeal No. 1,312,132/RS, also determined the need for prior consultation with the affected Indigenous communities, as well as the effective participation of the communities in the environmental permitting. In the vote, the justice clarified that the installation of the intended grain terminal should observe the provisions of ILO Convention No. 169:

> The need for environmental impact studies and the prior consultation and participation of indigenous peoples in the approval of business projects that may cause environmental impacts in

> their communities must observe the procedures provided for in Convention No. 169, of the International Labor Organization – ILO, which was incorporated into Brazilian Law and has legitimacy in the postulates of protection and guarantee of the rights of the Indians provided for in arts. 231 and 232 of the Constitution of the Republic.

Although the judgments are still monocratic, they demonstrate the recent position adopted by the STF to endorse the need to follow the Convention when there are impacts on Indigenous communities and indicate a tendency of extensive application of the directions of the Convention and articles 231 and 232 of the Federal Constitution for projects other than the hydroelectric plants provided for in Article 231 of CF.

In addition, within the sphere of competence of local courts, the Regional Federal Court of the 1st Region (TRF-1), for example, also has a particular precedent on the need for free, prior and informed consultation of local communities, under penalty of making the development and activities illegal:

> PROCEDURAL. INTERLOCUTORY APPEAL. EXPROPRIATION. IMPLEMENTATION OF THE NAVAL CENTER IN MANAUS/AM. RIVERSIDE COMMUNITIES. PREVIOUS CONSULTATION. OBLIGATORINESS. FEDERAL CONSTITUTION. INTERNATIONAL CONVENTION. BRAZIL. SIGNATORY COUNTRY. OBSERVANCE. PRODUCTION OF COMPLEX EXPERT EVIDENCE. NEED. 1. The reasons for the appealed decision were not invalidated in this appeal, which gave rise to the determination that both the Union and INCRA should not carry out any transfer of their properties, in any capacity, to the State of Amazonas, in addition to the prohibition to withdraw or remove the riverside communities of their lands during the course of the public civil action in progress in the court of origin. 2. For the implementation of the Naval Pole in the State of Amazonas, it is necessary to comply with supra-legal norms - ILO Convention 169, Convention on Biological Diversity, and Universal Declaration on Cultural Diversity, to which the country is a signatory -; constitutional - articles 215 and its § 1, 216, 231 and 232 -; and infra-constitutional laws regarding the protection of rights inherent to traditional populations. **3. The absence of prior and free consultation and unambiguous consent of the traditional communities involved in the expropriation process makes the implantation illegal and illegitimate.** 4. In the information provided by the court of origin, it appears that the public civil action is concluded for a decision since the State of Amazonas has fought, in the evidence specification phase, for the production of complex expert evidence to carry out examination, inspection by environmental engineers and anthropologists, to establish what impacts would be suffered by the riverside communities supposedly affected by the implementation of the Naval Pole and also, whether there would be a community directly affected by the undertaking. 5. Given the factual situation, it seems necessary to maintain the appealed decision. 6. Interlocutory appeal of the Federal Government not granted.
>
> (AG 0031507-23.2014.4.01.0000 / AM, COURT OF APPEALS JUDGE NEY BELLO, THIRD CHAMBER, e-DJF1 p. 3172 of 06/12/2015)

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Despite judgments on the subject, however, the issue lacks resolution and greater depth on the part of the courts. Because of the lack of regulation of the provisions of ILO Convention No. 169, many questions remain regarding which communities should be consulted, how the consultation should be carried out, and whether the community has the power to veto.

IV. CONCLUSION

In summary, in addition to having ratified and promulgated ILO Convention No. 169, Brazil has internal provisions that deal with forms of free, prior and informed consultation of communities affected and/or interested in potentially damaging projects. There are, strictly speaking, avenues related to the consultation, especially for public participation in administrative and legislative measures that may affect Indigenous or tribal communities and business activities that may impact human rights, and an avenue related to consent for access and use of associated traditional knowledge.

Notwithstanding the above, ILO Convention No. 169, in particular, still lacks regulations, which raises doubts and uncertainties regarding the procedures and rules for applying the hearing to the affected communities. Likewise, the courts have not established binding understandings on the subject and are still moving toward consolidating jurisprudence.

The current Brazilian parameters, therefore, are the understandings and guidelines of IBAMA and the Federal Public Prosecutor's Office, despite being conflicting and generating doubts regarding the hearing of the communities, so that the judicialization on the subject advances gradually.

Due to the political-administrative orientation of the current administration and the creation of the Ministry of Indigenous Peoples, however, the expected trend is that the matter will have greater visibility, with the publication of norms and measures aimed at guaranteeing greater and more active participation in projects that would impact local populations.

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