

Challenges in Integrating Free, Prior and Informed Consent into Environmental Permitting

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Authors

Fernanda A. Tanure

The absence of federal regulation on Free, Prior and Informed Consent (FPIC) allows states to adopt different interpretations, creating challenges for projects in sectors such as infrastructure, mining, agriculture and bioprospecting.

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FPIC is provided for in International Labour Organisation (ILO) Convention No. 169 on Indigenous and Tribal Peoples, which was promulgated in Brazil in 2004 and is currently in effect under Federal Decree 10.088/2009 (Annex LXXII).

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The Convention establishes the right of indigenous and tribal peoples to be consulted on legislative and administrative measures that directly affect them. The absence of specific rules on how this this consultation should be conducted has created gaps in the law, notably:

- a lack of clear criteria for determining which projects are subject to the FPIC requirement;
- a lack of detailed, uniform procedures for the consultation; and
- a lack of mechanisms to verify compliance and penalize non-compliance.

The lack of clear legal definitions has resulted in uncertainty both for entrepreneurs and for the peoples protected by the Convention.

Some states have gone ahead and adopted their own rules. In Maranhão, for example, Directive (Portaria) 76/2019/SEMA and Joint Directive 01/2022/SEDIHPOP/SEMA deal with participation by traditional populations in the environmental permitting process.

In the state of Minas Gerais, State Decree 48.893/2024 addresses FPIC in the context of environmental permitting, but does not establish clear rules on how to conduct consultations, or on the delimitation of land occupied by traditional communities.

In Pará, State Decree 343/2019 created a Working Group to draw up a State Plan for Free, Informed and Prior Consent, but no plan has been published to date, although the Working Group has developed protocols for specific consultations, such as the Protocol for Prior Consultation of the Warao People in 2020, in the city of Belém.

Even so, rules on FPIC in Brazil are recent and limited to two states. A complicating factor is that legislative jurisdiction over indigenous populations is federal, which raises questions as to the constitutionality of

state and municipal legislation and regulations.

Another concern is how FPIC applies to enterprises that are already up and operating. Applying FPIC retroactively seems to contradict the “prior” element of the requirement, and can only increase legal uncertainty, since enterprises that were lawfully established and operate in compliance with regulatory requirements may come into question, even regarding their location.

Brazil's public prosecution service, the Ministério Público, has played a central role in demanding that projects be assessed in light of ILO Convention 169, pressuring companies to reconsider their relationship with their business undertakings, both current and future.

Without regulation, however, uncertainty remains as to the scope of FPIC and how it applies. For example, how close does an enterprise have to be to a protected community before consultation is necessary? And there is no consensus on how the results on the consultation should be taken into account in environmental permitting.

To create greater foreseeability and legal certainty, the Brazilian State needs to establish a procedure for consultation, set out clear technical parameters, allocate responsibilities among the agents involved, and implement mechanisms to monitor compliance and impose penalties for non-compliance. A single set of regulations will not only reduce legal risks, it will minimize additional costs, fostering greater economic efficiency by making projects viable while respecting the rights of indigenous and tribal communities.

Until the long-awaited regulations on FPIC are adopted, it falls to project owners to anticipate potential risks by means of a detailed mapping of the communities around their projects, along with robust internal policies and procedures for resolving any conflicts that may arise in conjunction with government agencies such as Funai, the Palmares Foundation and the Public Prosecution Service. Preventive measures like these help design strategies for compliance with the Convention, ensuring compliance with the law, mitigating potential delays from litigation, and avoiding unforeseen costs that could compromise projects' economic viability.

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Fernanda A. Tanure